

JSCOT Inquiry into Australia's Ratification of CPTPP ("C3PO")

Response to Questions on Notice from the 15 June 2018 hearing in Sydney

Prof Luke Nottage
(assisted by **Ana Ubilava**)

Below I provide some statistics related to the (average and median) **costs of ISDS arbitrations**. I also add some statistics kindly compiled by my PhD student at Sydney Law School, Mrs Ana Ubilava, based on her dataset of treaty-based ISDS arbitrations concluded by end-2017 compiled from UNCTAD and ICSID websites,¹ concerning related matters mentioned:

- **amounts claimed versus awarded;**
- **transparency of ISDS arbitrations.**

1. Usual costs of ISDS arbitrations

The 2012 OECD scoping study on ISDS had indeed noted that average total costs of their review of ISDS arbitrations found **average total costs of US\$8m** (underlining added):²

High costs were identified as one of the two greatest disadvantages of international arbitration in a recent survey of in-house counsel at leading corporations.²¹ This section reviews the broad issue of ISDS costs and finds that: (i) costs are high and some reform efforts are underway to try to reduce them; and (ii) rules for allocating these costs among the parties are very flexible and are a source of uncertainty for both claimants and respondents.²²

For FOI Roundtable 15, the OECD has surveyed publicly-available information about ISDS costs. This survey shows that legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases. ²³ In the recent *Abaclat* decision (which addresses jurisdiction but not the merits), the tribunal noted that the claimants had spent some USD 27 million on their case to date, and that Argentina had spent about USD 12 million.²⁴

The largest cost component is the fees and expenses incurred by each party for its legal counsel and experts. They are estimated to average about 82% of the total costs of a case. Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat services – such as ICSID, the Permanent Court of Arbitration (PCA), or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) – are low in relative terms, generally amounting to about 2% of costs.²⁵

However, footnote 23 indicates that this was based on a small subset of the then known ISDS case outcomes.

The OECD Secretariat survey of 143 available ISDS arbitration awards listed on the [www.italaw.com](http://ita.law.uvic.ca) website (which collects and reproduces ISDS awards (formerly <http://ita.law.uvic.ca>)), revealed that only 28 provide information about the arbitral fees and the parties' legal expenses. Eighty-one cases provide some information about costs while 62 provide no information. Survey of the 143 awards (addressing jurisdiction, the merits and other issues) listed as of August 2011.

¹ <http://investmentpolicyhub.unctad.org/ISDS>;
<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>

² http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf

A more comprehensive analysis was conducted by Matthew Hodgson and Alistair Campbell, reviewing average costs until end-2012, recently updated until end-2017 (to give a sample of 324 cases for which costs data was available). Their summary is below, finding **average party costs of around US\$5-6 plus tribunal costs of another US\$1m: underlining added**):³

The key findings of the study are (with the results of the 2012 study in **bold**) are:

Average Time (from Request / Notice of Arbitration through to final Award)

- 4 years (**3 years, 8 months**)

Success Rate

- Claimant wins: 43% (**41%**)
- Respondent wins: 56% (**59%**) (with 26% (**26%**) dismissed on jurisdiction) (an additional 1% of cases were terminated with an award that yielded sufficient data to be included in the study)

Amounts claimed/recovered

- Average claim: USD 1,204,183,000 (USD 719,334,000 excluding the *Yukos v. Russia* arbitrations) (**USD 491,656,000**)
- Average award (where claimant succeeds): USD 486,135,000 (USD 110,872,000 excluding *Yukos*) (**USD 76,331,000**)

Party Costs (i.e. fees and expenses of counsel, experts and witnesses)

- Average claimant costs: USD 6,019,000 (**USD 4,437,000**)
- Average respondent costs: USD 4,855,000 (**USD 4,559,000**)

Tribunal Costs (i.e. arbitrators' fees/expenses and institutional charges)

- Average costs: USD 933,000 (**USD 746,000**)
- Average ICSID costs: USD 920,000 (**USD 769,000**)
- Average UNCITRAL costs: USD 1,089,000 (**USD 853,000**)

Recovering costs

- The successful party recovers some portion of its costs in 51% (**44%**) of cases (though the number has increased significantly since the 2012 survey, with the successful party in awards issued since 31 December 2012 recovering some of its costs in 64% of cases)
- Successful investors are more likely to recover costs (58%) (**53%**), than successful States (47%) (**38%**) (however, successful States have recently had more success in this regard, recovering costs in 63% of cases since the end of 2012)
- In contrast to the previous survey's findings, successful parties are no longer significantly more likely to recover costs in UNCITRAL claims (72% since 31 December 2012 (**69%**)) compared with ICSID claims (61% since 31 December 2012 (**36%**))

However, this study also talks about *average* costs, which become skewed if there are a few very high cost awards (eg cases that are especially large or complex, especially for the lawyers and expert witnesses involved – such as the unusually huge *Yukos v Russia* case, mentioned above in calculating average claim and award amounts). **Median** party costs are significantly less (**US\$3-3.6m**) in the (subset of) ISDS arbitrations concluded through ICSID over 2011-15, although median tribunal costs are similar (around **US\$0.9m**), according to Jefferey Commission in 2016 (underlining added):⁴

Average Claimant and Respondent Costs

The average claimant costs in the 55 ICSID arbitrations concluded between FY2011 and FY2015 (where claimant costs data was available) was US\$5,619,261.74. In sixty-four percent of the arbitrations claimant costs were below US\$5 million, and above US\$5 million in thirty-six percent:

³ <http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx>

⁴ <http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/>

Claimant Costs in Concluded ICSID Arbitrations FY2011-FY2015	Number of arbitrations
US\$1 million and less	9
US\$1-2 million	10
US\$2-3 million	9
US\$3-4 million	4
US\$4-5 million	3
US\$5 million and above	20
TOTAL	55

In 56 ICSID arbitrations concluded between FY2011 and FY2015 where respondent costs data was available, average respondent costs were US\$4,954,461.27. In sixty-eight percent of the arbitrations, respondent costs were below US\$5 million, and above US\$5 million in thirty-two percent:

Respondent Costs in Concluded ICSID Arbitrations FY2011-FY2015	Number of arbitrations
US\$1 million and less	13
US\$1-2 million	9
US\$2-3 million	2
US\$3-4 million	6
US\$4-5 million	8
US\$5 million and above	18
TOTAL	56

As with previous studies, the median figures for both claimant and respondent costs are significantly lower than the averages: US\$2,913,786.50 is the median for claimant costs, and US\$3,650,252.62 is the median for respondent costs.

ICSID Tribunal Costs

In 40 of the 93 arbitrations, awards or decisions included data about ICSID tribunal costs incurred. The average ICSID tribunal costs were US\$882,668.19, with a median of US\$875,907.97. These figures represent an increase in the US\$769,000 average and US\$544,000 median for ICSID tribunal costs arrived at in the Allen & Overy study of awards (available as of 31 December 2012).

In the majority of the 40 ICSID arbitrations concluded between FY2011 and FY2015 where tribunal costs information was available, such costs were US\$1 million or less:

ICSID/Tribunal Costs in Concluded ICSID Arbitrations FY2011-FY2015	Number of arbitrations
US\$1 million and less	27
US\$1-2 million	12
US\$2-3 million	0
US\$3-4 million	1
TOTAL	40

As mentioned therefore by Nottage et al in an extended case note on the *Philip Morris Asia v Australia* case:⁵

“... Uruguay expended USD 10 million (and was awarded USD 7 million by the tribunal) in successfully defending on the merits its own ISDS case against the Philip Morris group. By contrast, from mid-2015, local news sources began asserting (without quoting a source) that Australia had incurred over AUD 50 million (USD 37 million) to defend the PMA claim. Given [such] empirical studies, this amount would represent a glaring outlier in investment treaty arbitration. It appears large even taking into account costs relating to the parallel WTO proceedings and the 2012 constitutional challenge in the Australian High Court.”

2. Amounts claimed versus awarded in treaty-based ISDS Arbitrations

In total, 541 known, concluded, treaty-based ISDS arbitration cases have been incorporated into Ubilava’s database.⁶ There are six outcomes: investor-won, state-won, discontinued, settled, neither party won or lost, unknown. For the purpose of examining the ratio between the claimed and awarded amounts, we can only study the investor-won cases as it is the only outcome of a concluded case that provides both claimed amounts and awarded amounts. (Amicably settled investor-state arbitration cases, which are many, also provide information on claimed amounts and settled amounts. However, because such agreements are reached outside the arbitral tribunal, those settlement amounts are not awarded by ISDS tribunals and hence falls out of the scope of this study.)

The information provided by the following two tables is two-fold. The first table illustrates the median and average amounts of all the cases from the 541-case database regardless of their outcomes (regardless if they were awarded these amounts or not). What needs to be taken into consideration is that not all 541 cases provide publicly available information about the claimed amounts. Out of these 541 cases, 429 provided information on the claimed amounts. The **median claim is for \$123 million**.

Claimed amounts of all known concluded ISDS arbitration cases	
Number of cases analysed	429
Median claimed amount (million USD)	123.8
Average claimed amount (million USD)	899.4

The second table provides more comprehensive information. In particular, the table below illustrates the median and average of claimed versus awarded amounts in the investor-won cases. **In total, out of 541 cases, 147 were won by the foreign investors.** Out of these investor-won cases, only **132 provided both claimed and awarded amounts**.

Claimed and awarded amounts of investor-won cases	
Claimed amounts	Awarded Amounts

⁵ Manuscript at: Hepburn, Jarrod and Nottage, Luke R., Case Note: Philip Morris Asia v Australia (September 29, 2016). The Journal of World Investment and Trade, Vol. 18, No. 2, pp. 307-319, 2017; Sydney Law School Research Paper No. 16/86. Available at SSRN: <https://ssrn.com/abstract=2842065>

⁶ Data collected from UNCTAD and ICSID websites as of December 2017, which including only treaty-based, concluded ISA cases – totaling 541.

Number of cases analysed	132	132
Median Amount (million USD)	\$ 113.1 Million	\$ 19 Million
Average Amount (million USD)	\$ 1287.2 Million	\$ 490.5 Million

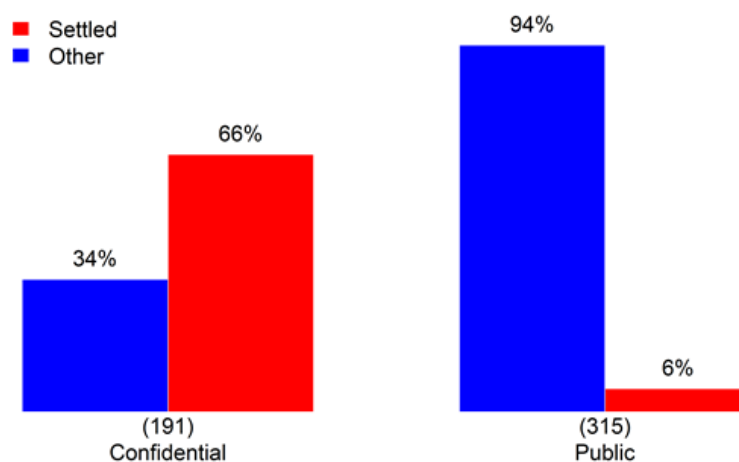
If we simply compare average amounts awarded versus claimed (the bottom line – unsurprisingly similar to the figures calculated by Hodgson and Campbell cited in Part 1 above), the ratio is 38%. Likewise, the **ratio of median claimed versus awarded amounts is 17%** (the bolded line above).

Alternatively, for each respondent country we can also calculate the ratio of the awarded amounts over the claimed amounts, and then calculate the average or median of those ratios. On this basis, the average of the awarded amounts works out at 35% of the claimed amounts. **The median awarded-to-claimed amounts ratio is 25%.** The latter means that in half of the cases where foreign investors won, the awarded amounts were 25% or less of the claimed amounts and, likewise, in half of the cases, awarded amounts were at least 25% of the claimed amounts.⁷

3. Transparency in treaty-based ISDS arbitration outcomes

Out of 506 known concluded ISDS arbitration cases (excluding 35 discontinued cases) **315 (62%) are Public and 191 (38%) are Confidential.** The figure below further analyses these two categories:

- 66% of the 191 confidential cases involve early settlements;
- 94% of the public cases have other outcomes, such as Investor-Won, State-Won or where neither party has won.



⁷ In other words, the average value of the awarded-to-claimed amounts ratios is calculated by first obtaining these ratios for each case, and then by averaging these individual ratios across all cases. Similarly, the median value of the awarded-to-claimed amounts ratio represents the middle point of the ascendingly ordered awarded-to-claimed amounts ratios of the cases in consideration. Thus, the median of the awarded-to-claimed amounts ratios represents the value with 50% of the cases having ratios that are less than that value and 50% of the cases having ratios that are greater than that value.

However, to address the issue of transparency, we need to determine first the meaning of “confidentiality” in ISDS arbitrations. After closer observation, it becomes apparent that there are several levels of confidentiality:

- A. Strictly Confidential - A case where the confidentiality is so high that basic information on which party had won the case is unknown;
- B. Confidential - A case where its merits and the award (including the amount) are confidential, but the information on which party had won the case is known;
- C. Partly Confidential - A case where the merits and the final award are confidential but the information on who won the case is known and, despite the award being confidential, the awarded amount is publicly known (or in the case of a settlement, the settlement amount is publicly known).
- D. Public - A case that is fully public.

The results are more informative when we start to differentiate the levels of confidentiality. As indicated in the Table, in bold, **around 85% of cases where either the investor or the state have won are fully Public, and almost all the rest are only Partly Confidential**. For settled cases, as *italicised*, 41% are Public or Partly Confidential.

How many awards were confidential or public per outcome						
	Unknown	Strictly Confidential	Confidential	Partly Confidential	Public	Total number
Investor-Won	0	0	3 (2%)	20 (14%)	124 (84%)	147
Settled	3 (2%)	0	82 (57%)	<i>42 (29%)</i>	<i>18 (12%)</i>	145
State-Won	0	0	4 (2%)	26 (13%)	164 (85%)	194
Unknown	0	9 (100%)	0	0	0	9
Neither party	0	0	0	2 (18%)	9 (82%)	11

This suggests that minimising costs and delays through early settlement may often be facilitated by keeping the outcome at least partly private, but not necessarily in all situations.