Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes

John Y. Gotanda
Villanova University School of Law
Overview

- Assessing Damages - Level of Proof
- Awarding of Interest
- Awarding of Costs and Fees
Assessing Damages - Level of Proof

- Standards under National Laws
  - Proof of loss that would enable a rational basis for calculation of damages
  - Reasonable certainty
  - Evidence showing concrete loss

- Certainty Only as to Fact of Loss

- UNIDROIT
  - Reasonable degree of certainty

- CISG

- Tribunal Discretion to Fix Amount
Article 36, ILC Draft Articles:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.
Level of Proof cont.

Investment Treaty Disputes:

“ICISD tribunals are ‘reluctant to award lost profits for a beginning industry and unperformed work.’”

• “This measure is normally reserved for the compensation of investment that have been substantially made and have a record of profits and have been refused when such profits offer no certainty....”

Breach of Contract Arbitrations

Tribunals more willing to award a new business lost profits.

• “It is not necessary to prove exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damages, it is enough for the judge to be able to admit sufficient probability of the existence and extent of the damage.”
Claimant must establish with reasonable certainty that profits would have been made absent the Respondent’s actions.

If Claimant is able to do so, then it should be entitled to some amount of lost profit if there is a rational basis for its calculation.
Awarding of Interest

**Purpose of Interest**
- Compensation for loss of use of money

**Approaches in Breach of Contract Cases**
- Contractual Provision
- Applicable Law
  - Statutory rates may not reflect market rates
  - Simple interest is the norm
- General Principles of Law
- Fair and Reasonable
Investment Treaty Disputes

- Tribunals Exercise Greater Discretion
  - BITs providing for compensation to be “adequate, prompt and effective”
  - NAFTA art 1135: A tribunal may award “monetary damages and any applicable interest.”
  - ILC Draft Articles on Responsibilities of States art. 38: “Interest on any principal sum payable...shall be payable when necessary in order to ensure full reparation.”

- Greater Use of Market Rates
  - LIBOR + 2%: PSEG Global Inc. v. Republic of Turkey (2007)
Awarding of Interest cont.

Investment Treaty Disputes cont.

Compound v. Simple Interest

• Traditional Position: “There are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable.” M. Whiteman

• Modern view: Award Compound Interest
  – “reflects the reality of financial transactions [today] and best approximates the value lost by an investor”
Conclusions re: Interest

- Market Rates
- Compound Interest
Costs and Fees

Breach of Contract Cases

Prevailing View: Costs Follow the Event
- Arbitration Costs
- Parties’ Legal Costs (incl. Attorneys’ Fees)

1998 Study of ICC Awards
- Respondent ordered to pay most or all of arbitration costs in 81% of the cases where claimant prevailed
- Respondent ordered to pay some or all of the claimant’s legal costs in 50% of those cases
Investment Treaty Disputes


- Study of 52 Final Awards (1990-May 2006)
  - 17 shifted arbitration costs
  - 11 awarded parties’ legal costs
    - 6 cases the claimant contributed to legal costs of the government
    - 5 cases respondents contributed to the claimant’s legal costs
<table>
<thead>
<tr>
<th>Case</th>
<th>Arbitration Costs</th>
<th>Parties Legal Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ADC Affiliate Ltd. v. Republic of Hungary (2006)</strong></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>PSEG Global Inc. v. Republic of Turkey (2007)</strong></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Siemens AG v. Argentine Republic (2007)</strong></td>
<td>Yes</td>
<td>No; parties bear own costs</td>
</tr>
<tr>
<td><strong>Arzurix Corp. v. Argentine Republic (2006)</strong></td>
<td>Yes</td>
<td>No; parties bear own costs</td>
</tr>
<tr>
<td><strong>World Duty Free Co. Ltd. v. Republic of Kenya (2006)</strong></td>
<td>Divided Equally</td>
<td>No; Parties bear own costs</td>
</tr>
<tr>
<td><strong>Telenor Mobile Commun. v. Republic of Hungary (2006)</strong></td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Claimant awarded US$7.6 million

Respondent to pay 65% (US$13.6 million)

Claimant to pay 35% (US$7.3 million)

Respondent awarded US$1.4 million

Respondent to pay majority

No; Parties bear own costs
<table>
<thead>
<tr>
<th>Case</th>
<th>Arbitration Costs</th>
<th>Parties Legal Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADC Affiliate Ltd. v. Republic of Hungary (2006)</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>PSEG Global Inc. v. Republic of Turkey (2007)</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Siemens AG v. Argentine Republic (2007)</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Arzurix Corp. v. Argentine Republic (2006)</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>
Conclusions re: Costs and Fees

- Arbitration Costs
- Parties’ Legal Costs