

OXFORD INTERNATIONAL
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CALCULATION OF
COMPENSATION
AND DAMAGES IN
INTERNATIONAL
INVESTMENT LAW

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- 3.285** Reisman and Sloane correctly consider such creeping or disguised expropriations as unlawful and reason their proposal, amongst others, by the principle that 'a delictor may not benefit from its own delict'.⁵⁵⁵
- 3.286** Furthermore, it has to be noted that creeping expropriations which are considered unlawful⁵⁵⁶ entail the international responsibility of the State. Article 15 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts contains a solution as to the problem of the date in case of 'Breach consisting of a composite act'. It distinguishes between the occurrence of the unlawful act (paragraph 1) and the duration of the breach (paragraph 2):
1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.⁵⁵⁷
- 3.287** The breach of an international obligation, therefore, can be assumed to take place at the time of the first action or omission which, in combination with the others, constitutes the breach.⁵⁵⁸ This applies also to creeping expropriations. In this way, the divergence of expropriation date and valuation date would not be necessary. However, it has to be noted that this date represents only the lower limit in expropriation cases. As has been discussed above, in case of unlawful expropriations, a possible subsequent increase in value must be taken into consideration.

(2) The Valuation Date in Other Cases

- 3.288** In the event of an unlawful act, the damage caused consists in difference between the financial situation of the injured person and the financial situation he or she would be in, if the unlawful act had not been committed. The question which has to be addressed now concerns the valuation date in cases other than expropriations. What does the principle of full reparation mean for the choice of valuation date?

⁵⁵⁵ Ibid.

⁵⁵⁶ See above, Chapter 3, Section A(3).

⁵⁵⁷ Article 15 of the Articles of the Responsibility of States for Internationally Wrongful Acts, Resolution of the GA of the United Nations of 21 December 2001, A/Res/56/83, Annex.

⁵⁵⁸ Crawford, *The International Law Commission's Articles on State Responsibility*, above, n 132, 143-4.

We will now analyse this question with regard to breaches of international law and contract breaches.

(a) *Violations of International Law*

According to the law of State responsibility, the amount of compensation payable after a violation of international law should reflect all financially assessable damage caused by the breach. In order to assess this damage it is necessary to compare the actual financial situation of the victim with the hypothetical financial situation under the assumption that the breach had not occurred. It follows that, as a matter of principle, the valuation date should be the date of the award, as Schwarzenberger pointed out already many years ago.⁵⁵⁹ The choice of a valuation date as late as possible ensures that all information available until that date may and can be used in order to arrive as closely as possible at full reparation. **3.289**

One important consequence of this choice is that the time of the unlawful act itself or of the occurrence of damage is not important. It only represents the starting point for the valuation which must continue to include subsequent and consequential damage. **3.290**

Some investment tribunals have dealt with this issue in detail. For example, in *Amco Asia v Indonesia*, the respondent had breached a number of different duties vis-à-vis the foreign investor which had led to a total destruction of the investment project, the construction and operation of a hotel and office complex.⁵⁶⁰ In order to assess the damage incurred, the tribunals did not see any reason why they should do this from the perspective of a businessman at the time of the wrongful acts. Instead, the second tribunal in *Amco Asia v Indonesia (Amco II)* held: **3.291**

If the purpose of compensation is to put Amco in the position it would have been in had it received the benefits of the Profit-Sharing Agreement, then there is no reason of logic that requires that to be done by reference only to data that would have been known to a prudent businessman in 1980.⁵⁶¹

The calculation was divided into two phases, the first phase from the date of the unlawful act until the valuation date (the date of the award), and the second phase from the valuation date into the future.⁵⁶² As for the first phase, actual economic developments and dates, such as inflation, exchange rates, and taxes, were taken **3.292**

⁵⁵⁹ G Schwarzenberger, see above, n 520.

⁵⁶⁰ *Amco Asia Corporation v Indonesia*, Award of 20 November 1984 (*Amco I*), (1993) 1 ICSID Reports 413, para 163 *et seq*; *Amco Asia Corporation v Indonesia*, Award of 5 June 1990 (*Amco II*), (1993) 1 ICSID Reports 569, para 137 *et seq*.

⁵⁶¹ *Amco II*, *ibid*, para 186.

⁵⁶² *Ibid*, para 196.

into consideration.⁵⁶³ The division of the valuation period was applied by both the first and the second tribunal in order to approximate restitution as closely as possible:⁵⁶⁴

It may, on one view, be the case that in a lawful taking, Amco would have been entitled to the *fair market value* value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique [. . .].⁵⁶⁵

3.293 This confirmed, once again, the distinction between the fair market value and the principle of full reparation which, amongst others, is also reflected in the valuation date. The tribunal emphasized that later developments have to be taken into account. Only the consequences following from the unlawful act itself must be disregarded:

Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to *restitutio in integrum*. The only subsequent factors relevant to value which are not to be relied on are those attributable to the illegality itself.⁵⁶⁶

3.294 Also, the tribunal in *S D Myers v Canada* explicitly included subsequent developments in its damages valuation.⁵⁶⁷ It did not assess the damage incurred during the Canadian export ban but made an assumption about the hypothetical development of the claimant's business operation up until the date of the award.⁵⁶⁸

3.295 The fact that subsequent events and developments are included in the valuation may also reduce the amount of damages. This is simply the consequence of the principle of full reparation on the basis of the restitution approach. If subsequent events led to a diminution of value, the injured party would have suffered this also in the absence of the unlawful act. This part of the damage is, therefore, not causally linked to the violation. Only in expropriation cases, the objective value at the time of the expropriation is the guaranteed minimum to be received. In other cases of State responsibility, such as violations of BIT standards, like fair and equitable treatment or full protection and security, there is no such lower limit. The only measure of damages is the comparison of the financial situations with and without the breach.

⁵⁶³ Ibid, para 201 *et seq.*

⁵⁶⁴ Ibid, paras 186 and 197.

⁵⁶⁵ Ibid, para 186.

⁵⁶⁶ Ibid.

⁵⁶⁷ *S D Myers Inc v Government of Canada*, Second Partial Award of 21 October 2002, (2005) 8 ICSID Reports 124, para 98.

⁵⁶⁸ Ibid, para 222 *et seq.*

The consideration of developments and events after the unlawful act is not in contradiction with the principle of foreseeability. According to this principle, only damage that was foreseeable at the time of the unlawful act should be compensated. This should exclude the obligation to compensate extraordinary damages. The principle is thus meant as a limitation of the principle of full reparation. It does not mean that the damage that was foreseeable at the time of the breach has to be compensated in any case. **3.296**

(b) Breaches of Contract

The principle of full reparation also requires the consideration of subsequent events in cases of breach of contract. This is particularly relevant for the calculation of lost profits. It is not enough that the profits were foreseeable at the time of the conclusion of the contract or at the time of its breach. It does not matter that a 'reasonable businessman' in the past has foreseen certain profits. In order to calculate the amount of lost profits to be compensated in a damages award, a comparison has to be made between the profits that could have been earned with and without the breach. The valuation, therefore, has to be made as of the date of the award. **3.297**

Damages, however, should only be awarded for the loss of profits actually caused by the breach. In case of long-term investment contracts, profits may not only depend on the performance of the other party but also on other factors. It is necessary to distinguish between the different causes. Only the negative consequences connected to the breach have to be included in the calculation of damages. By contrast, other factors not related to the breach, such as economic, social, or political developments which would have reduced the amount of profits anyway must be excluded. Their detrimental effect on the profits cannot be blamed on the breaching party. The aim is to arrive as closely as possible at the situation the injured party would be in absent the breach. This means that all subsequent factors have to be taken into account for the calculation but only those connected to the breach are relevant for the measurement of lost profits. One must recognize that the other events would have reduced—or increased—the profits also in absence of the breach. **3.298**

The proceedings in *Delagoa Bay* were an early example of such a determination of lost profits.⁵⁶⁹ At the time of the unlawful termination of the railway concession in 1889, the railroad had not yet been completed. The damage incurred at this time, therefore, consisted only in the expenses made for the construction work **3.299**

⁵⁶⁹ *Delagoa Bay and East African Railway*, Award of 30 May 1900, reprinted in pertinent parts in M Whiteman, *Damages in International Law*, vol 3 (Washington: Government Printing Office, 1943) 1694.

undertaken so far.⁵⁷⁰ The tribunal calculated lost profits on the basis of the profits actually earned by the Portuguese government after the completion of the railroad in 1895.⁵⁷¹

- 3.300** The tribunal in *Lighthouses Arbitration* took a different approach which explicitly excluded the influences of the Second World War from the calculation which would have diminished the profits from the concession considerably. The reason was that, in the concession the government had retained the right to take over the lighthouse administration upon the payment of compensation. Such compensation was determined as follows:

[A]ll compensation which may be determined by the parties or by arbitration in case of failure to agree. In any case the Imperial Government is to pay such compensation before the lighthouse administration passes into its hands, or at least guarantee the payment thereof.⁵⁷²

- 3.301** This provision explicitly mentioned the date of the taking as the valuation date. The rationale behind this is similar to that of an expropriation, as the tribunal explained:

That condition is, indeed, absolutely essential and is the sole effective safeguard of the rights of the concessionaire against possible abuse by the grantor State of its public power, as the history of concessions everywhere has abundantly shown. By its seizure of the lighthouse administration of Collas & Michel from January 1, 1929, without payment—or guarantee of payment [...] the Greek Government [...] committed an act which was contrary to one of the essential provisions of the contract.⁵⁷³

- 3.302** The tribunal thus assessed the damage incurred from the perspective of the concessionaire at the time of the unilateral termination of the concession.⁵⁷⁴

- 3.303** Later arbitral practice has considered subsequent development and data after breaches of concessions in various cases. In *LETCO v Liberia*,⁵⁷⁵ after a unilaterally changed lumber concession,⁵⁷⁶ the ICSID Tribunal in its valuation of lost profits considered the development of the business until the date of the award.⁵⁷⁷ For profits that would be expected for the period after the award, the tribunal estimated them on the basis of the development of the prices until that date.⁵⁷⁸

⁵⁷⁰ Ibid, 1699.

⁵⁷¹ Ibid, 1702.

⁵⁷² *Lighthouses Arbitration (France v Greece)* Award of 24 July 1956, (1956) 23 ILR 299, 300.

⁵⁷³ Ibid, at 300.

⁵⁷⁴ Ibid, at 301 *et seq.*

⁵⁷⁵ *LETCO v Liberia*, Award of 31 March 1986, (1994) 2 ICSID Reports 343 *et seq.*

⁵⁷⁶ The tribunal referred to the unilateral reduction of the concession area by the government, rather inconsistently, also as 'expropriation'. Ibid, 375.

⁵⁷⁷ Ibid, at 374.

⁵⁷⁸ 'The Tribunal has extrapolated from historical figures an estimate for future prices for each type of tree, assuming that such prices would have evolved similarly to those prices that existed from 1973 to 1985.' Ibid, at 375.