

# Damages in International Investment Law



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law/civil-law divide, preponderance of evidence can also serve as a basis for an arbitrator's 'personal conviction', thereby bringing about the convergence of the standards found in these two legal systems.

### 5.5.2(b) Damages claims: the requirement of reasonable certainty

In the context of damages, the standard of proof becomes a serious hurdle when the compensation claimed includes lost future gains. As discussed elsewhere in this study, one of the attributes of legally relevant damage is its *certainty*.<sup>206</sup> Dictionary definitions of the word 'certain' are: 'free from doubt or reservation', 'sure to happen' and 'inevitable'.<sup>207</sup> Interpretation of the 'certainty' requirement in line with these meanings would entail a very high standard of proof akin to 'beyond a reasonable doubt'. Such a strict interpretation would deprive aggrieved parties of adequate protection. Consequently, international law has followed the lead of most legal systems, which 'relax the standards of proof and are satisfied if the profits would have been *probable* in light of the circumstances'.<sup>208</sup>

In different cases, arbitral tribunals have held that future losses must be proved with 'sufficient (degree of) certainty',<sup>209</sup> 'sufficient degree of probability',<sup>210</sup> 'some level of certainty'<sup>211</sup> or 'comparative likelihood'<sup>212</sup> and that they must be 'probable and not merely possible'.<sup>213</sup> Tribunals have disallowed claims for lost profits when they were 'wholly uncertain',<sup>214</sup> 'too uncertain and speculative',<sup>215</sup> contained 'a great deal of uncertainty'<sup>216</sup> and were 'not probably realizable'.<sup>217</sup> The ILC Commentaries to the ILC Articles refer to 'sufficient certainty' as a requirement for the anticipated income stream to become a legally protected interest.<sup>218</sup> UNIDROIT Principles of International Commercial Contracts require 'reasonable degree of certainty' when establishing future harm.<sup>219</sup> In the context of the

(1994) 28 *International Lawyer* 49; R von Mehren, 'Burden of Proof in International Arbitration' (1996) 7 *ICCA Congress Series* 127.

<sup>206</sup> See 5.1.2 above and 7.3.2 below.

<sup>207</sup> Dictionary.com Unabridged (v 1.1). Retrieved from Dictionary.com website: <<http://dictionary.reference.com/browse/certain>>, 10 September 2007.

<sup>208</sup> Stoll (n 3) s 34 at p 35 (emphasis added).

<sup>209</sup> For example, *Levitt v Iran*, Award of 22 April 1987, 14 Iran-US CTR 191, 209-10; *Autopista v Venezuela*, Final Award of 23 September 2003, para 351.

<sup>210</sup> *Sapphire v NIOC*, Award of 15 March 1963, 35 ILR 136, 188.

<sup>211</sup> *Vivendi v Argentina*, Award of 20 August 2007, para 8.3.4.

<sup>212</sup> *Delagoa Bay* arbitration, reprinted in MM Whiteman, *Damages in International Law* Vol 3 (US Govt, Washington, 1943) 1699.

<sup>213</sup> *AAPL v Sri Lanka*, Award of 27 June 1990, para 104.

<sup>214</sup> *PSEG v Turkey*, Award of 19 January 2007, para 313.

<sup>215</sup> *Nykomb v Latvia*, Award of 16 December 2003, p 41.

<sup>216</sup> *Petrobart v Kyrgyz Republic*, Award of 29 March 2005, p 86.

<sup>217</sup> *LIAMCO v Libya*, Award of 12 April 1977, 62 ILR 140, 162.

<sup>218</sup> ILC Articles on State Responsibility, Commentary to Article 36, para 27.

<sup>219</sup> Art 7.4.3(1).

*Unlawful expropriations*

A different position on the issue of *ex-post* information has emerged in cases of *unlawful* expropriation. As discussed above, tribunals—basing themselves on customary international law and the *Chorzów Factory* dictum<sup>301</sup>—have taken into account the *ex-post* information if it benefited the claimant, and assessed the value of the investment at the date of award, rather than at the date of expropriation. This approach has been characterized by tribunals as a consequence of the illegality of expropriation.<sup>302</sup> It results in more beneficial treatment of investors, or rather, more severe treatment of States engaging in illegal conduct.<sup>303</sup>

As mentioned above, compensation for unlawful expropriation must not fall below compensation for lawful expropriation. Consequently, *ex post* information has only been taken into account if it generated a higher value of the investment.

*Non-expropriatory breaches*

Under the non-expropriatory-case analysis, where the aim of compensation is to 're-establish the situation which *would, in all probability, have existed* if that act had not been committed', information changes should logically be taken into account, both if they are compensation-increasing and compensation-decreasing (compared to the assessment at the time of breach on the basis of *ex-ante* information). This is because the *ex-post* information is used with a sole aim of increasing the precision of the analysis, and there is no floor-figure, below which compensation cannot fall, as in expropriation cases. There have been several arbitral decisions where the tribunals took account of events subsequent to the valuation date, including compensation-reducing factors.<sup>304</sup> They did that without shifting the valuation date forward but by correcting the cash flow projections and other value-affecting factors in light of information available at the time of award.

<sup>301</sup> 'Reparation must ... re-establish the situation which would, *in all probability, have existed* if that act had not been committed' (*The Factory at Chorzów (Claim for Indemnity) (The Merits)* [1928] PCIJ, Ser A, No 17, 47 (emphasis added). Reliance on the *ex-post* information allows re-establishing the would-be situation with more precision.

<sup>302</sup> See section 4.1.3. For the relevant discussion, see also R Deutsch, 'An ICSID Tribunal Values Illegal Expropriation Damages from Date of the Award: What Does This Mean for Upcoming Expropriation Claims? A Case Note and Commentary of *ADC v. Hungary*' (2007) 4(3) *Transnational Dispute Management*.

<sup>303</sup> As Abdala et al note, 'under the asymmetric *Chorzów Factory's* standard, a state will never benefit, economically, from [unlawful] expropriation' (Abdala, Spiller and Zuccon (n 294) 5). Importantly, however, when an increase in value is due to the increased earnings of the business, arbitrators would have to ascertain that the increase in profitability is not due to factors attributable to a new owner, such as changes in management or business strategies.

<sup>304</sup> For example, *CMS v Argentina*, Final Award of 12 May 2005, *Enron v Argentina*, Award of 22 May 2007, and *Sempra Energy v Argentina*, Award of 28 September 2007, discussed in detail in section 8.4.

