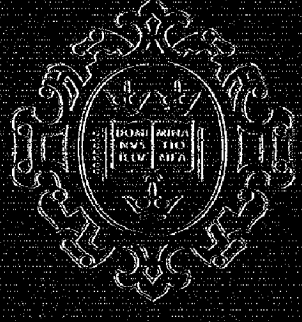
OXFORD INTERNATIONAL ARBITRATION SERIES

CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW

SECOND EDITION

IRMGARD MARBOE



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OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2009
Second Edition published in 2017
Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2017933968

ISBN 978–0–19–874993–6

Printed and bound by

CPI Group (UK) Ltd, Croydon, CR0 4YY

confronted with the same facts as in the present case, did not apply the concept of 'contributory negligence'.[540]

It may be questioned whether the 'wide margin of discretion' applied by several tribunals in the wake of *MTD v Chile* is an appropriate way of assessing the effects of contributory fault. It rather seems to counteract the considerable efforts taken by tribunals in calculating the amount of damages in a comprehensible manner. There should be increased efforts to identify more exactly which acts contributed to the damage incurred. A possibility could be aligning the question of 'contribution' more closely with the concept of 'causation' which not in all cases, but generally could make calculations more reliable. **3.254**

(b) Mitigation of Damages

The duty to mitigate damages is generally recognized as a general principle of law.[541] It is contained in international contract law codifications[542] and frequently appears in international arbitration.[543] The tribunal in *ME Cement v Egypt* stated that, despite the fact that the duty to mitigate damages was not explicitly contained in the BIT, it was potentially applicable because 'this duty can be considered to be part of the General Principles of Law, which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention'.[544] **3.255**

The principle to mitigate damages implies that the injured party must take reasonable steps to reduce its losses.[545] It depends on the facts of the case which steps are reasonable **3.256**

[540] In *Rosinvest v Russia*, Yukos' tax evasion strategies were not the focus of the tribunal's attention in the damages phase, but rather the timing of the acquisition of the Yukos shares by the claimant. The tribunal stated that it would consider Yukos' contribution to its own demise, including 'ill-advised' actions, such as the bankruptcy proceedings in Houston, in the damages phase. See *Rosinvest v Russia*, Award of 21 September 2010, paras 634–5. However, it eventually put more emphasis on the 'speculative nature' of the investment and took it into account in its choice of the valuation date. The tribunal in *Quasar de Valores*, due to its jurisdictional constraints, did not address issues of state responsibility but assessed the amount of compensation for the claimants' investment under the premise of the lawfulness of the expropriation.

[541] See Crawford, Commentary, Article 31, above, n. 160, 201, 205; B Sabahi, K Duggal, and N Birch, above, n. 503, 1121; *Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, Judgment of 25 September 1997 (1997) ICJ Reports, 7; *ME Cement Shipping and Holding v Egypt*, Award of 12 April 2002, para. 167; *AIG Capital Partners et al v Kazakhstan*, Award of 2 October 2003, ICISD Case No. ARB/99/6, para. 10.6.4(1); *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Final Award on Damages of 14 March 2003, para. 482.

[542] See, e.g., Article 77 CISG; Article 13 UNIDROIT Convention on International Financial Leasing; Article 7.5.8 UNIDROIT Principles on International Commercial Contracts; Article 9:504 PECL.

[543] Lord Mustill observes that '[t]his rule appears on all the lists. Various awards are cited in support, including ICC No 2478, Clunet (1975) 925; No 2103, Clunet (1974) 902; No 3344, Clunet (1982) 978; No 2412, Clunet (1974) 892. The awards on mitigation rarely call up the lex mercatoria in so many words; they merely treat the principle as obvious.' M Mustill, 'The New Lex Mercatoria: The First Twenty-five Years' (1988) 4 *Arbitration International* 86, 113.

[544] Ibid.

[545] See also B Sabahi, K Duggal, and N Birch, above, n. 503, 1122.

in a given situation.[546] They may include selling products, stopping the delivery of services, trying to renegotiate contracts, or even giving up unprofitable projects.[547]

3.257 However, commentators have also warned not to apply this principle too strictly,[548] as this could favour the wrongdoer in an unjust manner.[549] The duty to mitigate should not exceed the standard of a 'reasonable family father' at the time of the breach:

> Le devoir d'une partie de minimiser son préjudice est bien établi dans le droit international et dans la plupart des droits internes, ainsi que dans celui de l'Etat. En examinant le comportement de la partie concernée, un tribunal n'impose pourtant pas à cette partie un test de résultat final effectué a posteriori. Le test est plus celui de la gestion, en bon père de famille, ou de savoir si la partie concernée a agi raisonnablement et équitablement d'un point de vue commercial et financier.[550]

3.258 In international practice, the duty to mitigate damages has primarily been applied in breaches of contract cases. The practice of the Iran–US Claims Tribunal may serve as an example. In *Economy Forms v Iran* it turned out that a number of custom-built concrete forms were unmarketable. Nevertheless, the tribunal determined that they had a 'residual value' which was deducted from the amount of damages.[551] In *Endo Laboratories v Iran*, the tribunal considered the obligation to find buyers for custom-made products less strictly and applied criteria of economic reasonableness.[552]

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[546] In an early international case, *Costa Rica Packet*, the captain was blamed for not having returned immediately to the ship after his release, and the owner of the ship for not installing a new commander. *Costa Rica Packet* (*Great Britain v Netherlands*), Award of February 1897 in J Moore (ed.), *History and Digest of the International Arbitrations of which the United States has been a Party* (Washington: GPO, 1898), vol. 5, 4948, 4953.

[547] T Wälde and B Sabahi, 'Compensation, Damages, and Valuation' in P Muchlinski, F Ortino, Federico, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 1049, 1096; B Sabahi, K Duggal, and N Birch, above, n. 503, 1122, referring to *Bridas v Turkmenistan*, Third Partial Award and Dissent of 6 September 2000, ICC Case No. 9058/FMS/KGA, paras 45–53, where the tribunal reduced the award by US$ 50 million due to the claimant's failure to abandon an unprofitable oilfield.

[548] See Salvioli, who asks for 'diligence moyenne' in order to avoid favouring the injuring party: '[U]ne conduite exclusivement passive de sa part ne l'exempte pas d'une certaine responsabilité mais on ne peut pas être plus exigeant à son égard, sans favoriser outre mesure l'auteur de l'acte illicite'. G Salvioli, 'La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux' (1929) 28 *RdC* 231, 267–8; also A Roth, *Schadensersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (Berlin: Carl Heymanns, 1934) 88–9; R Laïs, *Die Rechtsfolgen völkerrechtlicher Delikte* (Berlin: Stilke, 1932) 93.

[549] See Schwarzenberger who was sceptical about the extent of the obligation of the injured party. He emphasized that the wrongdoer had committed an unlawful act and that it was difficult to see why the injured party should have the obligation to act. According to him, the principles of good faith and reasonableness, or generally the *ius aequum*, are the only measure available. G Schwarzenberger, *International Law as Applied by International Tribunals* (London: Stevens and Sons Ltd, 1957) 663.

[550] ICC Award No. 5514, Clunet 1992, 1022, 1024 et seq.

[551] *Economy Forms Corporation v Iran*, 3 Iran–US CTR (1983) 42, 51–3; this was however criticized by Judge Holtzmann, see his Concurring Opinion, 3 Iran–US CTR (1983) 55–6.

[552] *Endo Laboratories Inc v Iran*, 17 Iran–US CTR (1987) 114, para. 50. See further J Westberg, *International Transactions and Claims Involving Government Parties. Case Law of the Iran–United States Claims Tribunal* (Washington: International Law Institute, 1991) 195–6.

the same result, if it had relied on the duty to mitigate damages. It could have argued that this general principle of law demands that a party keeps the damage as low as possible and prevents its increase. This could also serve as an explanation why lost profits are not to be awarded on investments not yet undertaken.

3.262 More generally, it can be argued that, based on the duty to mitigate damages, in case of long-term contracts profits should only be awarded for a limited period. For example, in ICC Award No. 7006, the tribunal only awarded lost profits for one year. After this time, it was assumed that the damage could be mitigated.[562]

3.263 In cases concerning violations of international law, the duty to mitigate damages has rarely been referred to.[563] Some cases can be found in the practice of the UNCC.[564] Recent investment arbitration appears to be rather reluctant. While the ICSID Tribunal in *Middle East Cement v Egypt* emphasized that the duty to mitigate was a general principle of law,[565] it did not consider it in its calculation of damages. The tribunal emphasized that the burden of proof for the violation of the duty to mitigate was upon the respondent who had failed to submit sufficient evidence to convince the tribunal that there had been reasonable or economically feasible alternative actions available.[566]

3.264 Similarly, the ICSID Tribunal in *Amco Asia v Indonesia (Amco II)* was of the opinion that the principle of mitigation of damages would be applicable, but that, in the case before it, the claimant had not violated the respective duty:

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pour le créancier d'une obligation inexécutée de minimiser ses pertes est l'un des principes les mieux établis des usages du commerce international et de la lex mercatoria'. Y Derains, 'Note to ICC Award No 5910' (1988) *Clunet* 1220, 1222 with further references; Y Derains, 'L'obligation de minimiser le dommage dans la jurisprudence arbitrale' (1987) *RDAI* 375 et seq.

[562] Reprinted in pertinent part in (1993) 18 *YCA* 58. See J Paulsson, 'The Expectation Model' in Y Derains and R Kreindler (eds), *Evaluation of Damages in International Arbitration* (Paris: International Chamber of Commerce, 2006) 57, 75. See more examples in Y Taniguchi, 'The Obligation to Mitigate Damages' in ibid, at 79 et seq.

[563] See, e.g., the *Case of the SS Wimbledon* before the PCIJ, where Germany submitted that the ship could have continued the journey after only two days, but interrupted it by eleven days. The PCIJ did not agree that the loss could have been mitigated in this way and found that the eleven days of interruption were justified. *Case of the SS Wimbledon*, PCIJ 1923 Ser A, No. 1, 15, 31; see also G Salvioli, above, n. 548, 266; A Roth, *Schadensersatz für Verletzungen Privater bei völker-rechtlichen Delikten* (Berlin: Carl Heymanns, 1934) 89.

[564] The UNCC has accepted it as a general principle for calculating damages after the unlawful invasion of Iraq into Kuwait. See Decision No. 9, para. 6: 'The total amount of compensable losses will be reduced to the extent that those losses could reasonably have been avoided'. *Decision taken by the Governing Council of the United Nations Compensation Commission on 6 March 1992*, UN Doc. S/AC.26/1992/9. In its practice, the UNCC has e.g. reduced the amount of damages in a case where the injured party had not offered custom-built products back to the producer by 40%. *Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of 'E3' Claims*, 17 December 1998, para. 111.

[565] *Middle East Cement v Egypt*, Award of 12 April 2002 , para. 167.

[566] Ibid, paras 168 et seq. This included the export of the cement to other countries or the resumption of the business after the subsequent reinstatement of the permit. This was, however, according to the tribunal, not reasonable. Ibid, para. 169.