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CERTAINTY IN RECOVERY OF DAMAGES FOR LOSSES TO NEW OR INCOMPLETE BUSINESSES —THREE PARADIGMS: *BILOUNE V. GHANA, GEMPLUS V. MEXICO, AND SIAG V. EGYPT*

Borzu Sabahi and Lukáš Hoder[*]

> *When you are studying any matter, or considering any philosophy, ask yourself only: What are the facts, and what is the truth that the facts bear out. Never let yourself be diverted, either by what you wish to believe, or what you think could have beneficent social effects if it were believed; but look only and solely at what are the facts.*
>
> —Bertrand Russell

I. INTRODUCTION

Quantification of damages is one of the most complex areas of international investment arbitration. A recurring issue in that context is compensating an aggrieved investor for *loss of a business with little or no track record of profitability*. Three paradigms have emerged on this issue in the practice of arbitral tribunals.

The prevalent paradigm employed by international tribunals is to reimburse the aggrieved party the amounts that he actually invested in a project (also known as sunk costs and out-of-pocket expenses). In such situations, arbitral tribunals generally refuse to quantify damages using valuation methods that take into account the ability of a business to generate cash into the future (forward-looking damages), including lost profits and or fair market value of investment. The main basis for such refusal is that, in international law, damages cannot be awarded for losses that are speculative and uncertain. A leading case in the modern jurisprudence of

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international arbitral tribunals applying this approach is *Biloune v. Ghana*.[1] *Biloune*, together with the great majority of decisions dealing with similarly situated businesses, refused to award speculative forward-looking damages.

The second paradigm is one exemplified by the decision of the tribunal in *Gemplus v. Mexico*,[2] whereby the tribunal invoking the concept of "loss of opportunity" awarded damages beyond the amounts actually invested, even though the lost business had little operational track record.

Finally, the third paradigm, exemplified by *Siag v. Egypt*,[3] is one where the tribunal applied a forward-looking quantification methodology, a comparable sales method, to determine the fair market value of an expropriated hotel project, even though the project was incomplete and had not generated any revenue.

All fact patterns, to the extent that they involve investments in incomplete or new businesses, appear to be similar and presumably should be subject to the application of the principle applied by *Biloune*. Nevertheless, *Gemplus* and *Siag* suggest that some arbitral tribunals are moving beyond the *Biloune* approach and are prepared, when the facts so indicate, to take an additional step to award something more than sunk costs. This note examines each paradigm through the lens of these cases.

II. *BILOUNE V. GHANA*: SUNK COSTS ARE AWARDED WHERE ASSESSING LOST PROFITS OR FUTURE INCOME IS SPECULATIVE AND UNCERTAIN

Principle. Marjorie Whiteman in her classic treatise on the law of damages explained the principle as:

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[1] *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Ad hoc tribunal (UNCITRAL rules), Award on Jurisdiction and Liability (October 27, 1989), 95 ILR 184; Award on Damages and Costs (June 30, 1990), 95 ILR 211.

[2] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v. The United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4, Award (June 16, 2010), IIC 488 (2010).

[3] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15; Award (June 1, 2009), IIC 374 (2009).

> In order to be allowable, prospective profits *must not be too speculative, contingent, uncertain*, and the like. There must be proof that they were reasonably anticipated; and that *the profits anticipated were probable and not merely possible*.[4]

A related principle to the one prohibiting the recovery of damages for speculative losses is the principle requiring lost profits to be ascertained with a "reasonable degree of certainty."[5] Together, they set forth a *standard of proof* for assessing the quantum of forward-looking damages.[6] The level of proof necessary to discharge this burden, however, is not entirely clear. It seems to be higher than a mere "possibility,"[7] but less than "certainty." Ultimately, tribunals seem to have assumed wide discretion in assessing the evidence substantiating the quantum of such forward-looking profits.[8]

To quantify forward-looking damages by assessing lost profits and or fair market value of an investment, valuers use market-based approaches to valuation,[9] which essentially measure what

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[4] 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1837 (1943) (emphasis added). The Permanent Court of International Justice in the *Chorzów Factory* case also held that damages must restore the aggrieved party to the economic position that it "**in all probability**" would have possessed but for an illegal act.

[5] The standard has been variably described as certainty, reasonable certainty, and probability. *See* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 164 (2008).

[6] Forward-looking BIICL damages refers to all assessments that aim at determining fair market value of a business or net present value of a stream of income based on various assumptions relating to its hypothetical future operations.

[7] Webster English Dictionary defines "possible" as: "being within the limits of ability, capacity, or realization". It defines "probable" as: "supported by evidence strong enough to establish presumption but not proof".

[8] *See, e.g., Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal*, ICSID Case No. ARB/82/1, Award (February 25, 1988), 2 ICSID Rep. 114 (1994); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (August 20, 2007), IIC 307 (2007) and *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), 4 ICSID Rep. 246 (1997).

[9] On various market-based approaches see generally MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND

an asset (including contractual rights) is worth to the market using different methodologies. Commonly used methods include examining arms-length transactions or offers for the purchase of the same property, comparison of the asset with similar assets recently sold on open market, and the DCF (Discounted Cash Flows). All of these methods measure the ability of a business to generate income into the future.

The conventional practice of arbitral tribunals, as discussed in connection with the *Biloune* case, is to examine a business' history of profitability and operation and, depending on that history, to determine whether or to what extent it is prudent to project the business' earning potential into the future. Accordingly, in most cases, businesses with less than two to three years of operational/profitability history are considered not suitable for the application of a market-based approach.[10] This is also known as "new business rule."[11]

In the *Biloune* case, Mr. Biloune, a national of Syria and the principal shareholder in Marine Drive Complex Ltd. ("MDC"), a corporation incorporated in Ghana, and the Ghana Tourist Development Company (GTDC; a corporation owned and formed by the Ghanaian Government) formed a joint venture for the

EXPERT EVIDENCE 7 *et seq.* (2008); RIPINSKY & WILLIAMS, *supra* note 5, at 212-218; IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 185 *et seq.* (2009); BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION PRINCIPLES AND PRACTICE 91 *et seq.* (2011).

[10] *See, e.g., Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award 124 (December 8, 2000), 6 ICSID Rep. 89 (2004), (The tribunal held that less than eighteen months of operation of hotels was insufficiently solid base on which to found calculation of the market value of the investment.); *Metalclad Corporation (US) v. Mexico,* ICSID Case No. ARB (AF)/97/1, Award dated August 30, 2000 (hereinafter "*Metalclad*"); *Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela,* ICSID Case no. ARB/00/5, Award dated September 23, 2003; *Asian Agricultural Products Limited v. Sri Lanka,* ICSID case No. ARB/87/3, Final Award dated June 27, 1990; *Vivendi Universal S.A. v. Argentine Republic, supra* note 8, at 249, 250. *Cf. Railroad Development Corporation v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Award (June 29, 2012), where even eight years of operation was not sufficient to apply a market-based approach.

[11] *See* John Y. Gotanda, *Recovering Lost Profits in International Disputes,* 36 GEO. J. INT'L L. 61, 71-72 (2004).

construction of a hotel resort complex in Accra, Ghana. The Ghana Investments Centre ("GIC") approved the investment, granted the requested investment concessions and on November 18, 1986 signed an agreement with MDC. Based on negotiations with GIC, MDC began construction before applying for a building permit. Mr. Biloune's architects later submitted an application for a building permit; however, the Accra Town Planning Committee refused to issue one. In August 1987, the Accra City Council issued a Stop Work notice on the basis that MDC had not obtained a building permit. Later, the City Council ordered demolition of the project, and Mr. Biloune was asked to declare his assets and report himself to the authorities. At the end of 1987, Mr. Biloune was arrested and held in custody for 13 days without charge, and was subsequently deported from Ghana to Togo. The tribunal held that Ghana's actions constituted an indirect expropriation.[12]

As to damages, Mr. Biloune and MDC submitted two alternative claims for compensation.[13] First, they sought US$689,961 as the value of Mr. Biloune's expropriated investment consisting of expenditures made for the project. Secondly, they sought 569,128,000 cedis (or US$3,156,330) for the loss of future profits based on expected returns during the minimum ten years term of the joint venture with GTDC.[14] The tribunal, however, rejected the claim for lost profits and instead found that restitution was the proper remedy under the circumstances, requiring Ghana to restore Biloune to the *status quo ante* by giving him back the amounts that Mr. Biloune had actually invested in the project:

> The Claimants have made a compensation claim based on the future lost profits. . . . While the Tribunal accepts the validity of the principle that lost profits should be compensated, it is not possible to make an award on that basis in this case. *The Claimants have*

[12] *Biloune v. Ghana*, Award on Jurisdiction and Liability, *supra* note 1, at 209-210.

[13] *Biloune v. Ghana*, Award on Damages and Costs, *supra* note 1, at 218-219.

[14] Dividing the amount of this profit with GTDC as the joint venture partner, MDC claimed lost profits for its share of 49% or 278,872,720 cedis. Of this amount, Mr. Biloune claimed the right to 276,641,730 cedis (US$ 1,571,828) representing his 99.2% investment in Marine Drive Complex. *Id.* at 218-219.

> *not provided any realistic proof of the future profits of the company. The Lambrisi Report purports to project profits, but the Tribunal agrees with the Respondents that this report was not an economic forecast of profits, but a projection intended to encourage potential investors. Moreover, at the time of the project's suspension and effective expropriation, the project remained uncompleted and inoperative. It was generating no revenue, still less profits.* Thus, with no basis on which to calculate future profits, the Tribunal is required to consider an alternative methodology. The Claimants have also requested that Mr. Biloune be awarded the historical investment value for the project... The Tribunal has concluded that the most appropriate method for valuing the damages to be paid will be to return to M. Biloune the amounts he invested (i.e. restitution).[15]

Accordingly, the tribunal awarded Mr. Biloune the amounts shown to have been invested by him, *i.e.*, US$ 334, 637.49, sterling £61,811.67, DM 430.55 for the foreign currency investment, and 46,790,982.85 cedis (*i.e.* US$ 266,721.67), for the historical investment value of the project.

III. *GEMPLUS V. MEXICO*: DAMAGES APPROXIMATING A LOSS OF OPPORTUNITY

Principle. Some legal systems allow recovery of damages for "loss of opportunity" or "loss of chance."[16] Article 7.4.3(2) of the

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[15] *Id.* at 228-229 (emphasis added). The investment at issue here was not covered by a bilateral investment treaty. Ghanaian law governed, but the tribunal did not refer to any specific provisions concerning the method of determining damages.

[16] *See, e.g., Chaplin v. Hicks*, [1911] 2 KB 786; *see also* HARVEY MCGREGOR, MCGREGOR ON DAMAGES 342 *et seq.* (18th ed. 2009); *see also* ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS § 1.6 at 17 (6th ed. 1998); G. H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 82 (Oxford 1988); similarly in Civil Law countries, such as the Czech Republic, *see* JOSEF ŠILHÁN, NÁHRADA ŠKODY V OBCHODNÍCH VZTAZÍCH A MOŽNOST JEJÍ SMLUVNÍ LIMITACE 26 (2d ed. 2007).

UNIDROIT Principles of International Commercial Contracts,[17] which draws upon the domestic legal systems, for example, provides that:

> Article 7.4.3 - Certainty of Harm
>
> (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
>
> (2) *Compensation may be due for the loss of a chance in proportion to the stability of its occurrence.*
>
> (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court (emphasis added).

Ripinsky & Williams in this connection note that:

> Where a tribunal cannot accept a claim for lost profits as not sufficiently certain, it may choose to award, instead, a compensation for the loss of business (commercial) opportunity, or for the loss of a chance. This head of damage appears to be a sub-species of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits ... It is suggested that a chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss in fact occurred.[18]

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[17] UNIDROIT Principles of International Commercial Contracts 2010, Rome, May 2011, *available at* http://www.unidroit.org/english/principles/contracts/main.htm.

[18] RIPINSKY & WILLIAMS, *supra* note 5, at 291, citing Djakhongir Saidov, *Damages: The Need for Uniformity*, 25 J.L. & Com. 393, 402 (2005).

> Loss of a chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of a chance to make a profit. In theory, the loss of a chance is assessed by reference to the degree of probability of the chance turning out in the plaintiff's favour, although in practice the amount awarded on this account is often discretionary.[19]

In the practice of international arbitral tribunals, one of the earlier examples of the application of this principle is *Sapphire v. National Iranian Oil Company* ("NIOC").[20] The dispute concerned repudiation of an agreement to produce and export Iranian oil. Sapphire commenced its exploration activities in Iran. NIOC, however, refused to reimburse its expenses arguing, that Sapphire was supposed to consult with NIOC before carrying out any operations. As a result, Sapphire did not start drilling, and NIOC subsequently repudiated the contract. In 1960, Sapphire initiated arbitration. The sole arbitrator found that NIOC breached the contract and was liable to pay damages to Sapphire. The arbitrator held that the object of damages was to put the party to whom they were awarded in the position they would have been if the contract had been performed. He ordered compensation for the expenses incurred by the plaintiff after the conclusion of the contract, the refund of the indemnity paid by Sapphire, costs, and an award for a loss of opportunity to make profit (all with compound interest at the rate of 5 percent). The arbitrator held that showing "a sufficient probability" of making a profit was enough to show entitlement to compensation.[21]

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[19] RIPINSKY & WILLIAMS, *supra* note 5, at 291.

[20] *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, Ad hoc Tribunal (General principles of law), Award (March 15, 1963), 35 ILR. 136 (1967).

[21] *Id.* at 189. *See also Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3; Award and Dissenting Opinion (May 20, 1992), 3 ICSID Rep. 189 (1995) (tribunal found Egypt had lawfully expropriated claimants investment to develop a tourist project in Egypt; as to compensation, the tribunal awarded claimant's out of pocket expenses as well as a sum for loss of opportunity to make success of the project. The tribunal based the damages on the basis of sales of villas and multifamily sites by ETDC before project cancellation. The tribunal used those sales to determine the "minimum measure of the value of the loss of commercial opportunity." *Id.* ¶¶ 216-218;

In modern investment treaty arbitration practice, the tribunal in *Gemplus v. Mexico* seems to be the first to apply this principle relying on the above precedent. The *Gemplus* case arose out of Mexico's attempt to create a national vehicle registry to combat car theft and organized crime. In 1999 the Secretariat of Commerce and Industrial Development ("SECOFI" or the "Secretariat") conducted a tender and awarded a concession to a consortium comprising of Talsud (an Argentine company), Gemplus (a French company), and Mr. Henry Davis Signoret, in order to create and operate the registry. The consortium created Renave SA de CV, which entered into a ten-year concession agreement to run the registry. In early 2000, however, the Director of the Renave was arrested for alleged past war crimes in Argentina, and the then under-secretary of SECOFI was mysteriously murdered. Subsequently, on 15 September 2000, SECOFI issued an order suspending registration of used-vehicles (but not new ones), which had raised criticism. By mid-August 2000, the company faced growing political challenges and public criticism of the registry. On 25 June2001, the registry was finally requisitioned by SECOFI on grounds of breach of national security, and in December 2002 SECOFI issued a decree revoking the concession. Claimants Gemplus and Talsud later commenced ICSID arbitration against Mexico under the France and Argentina BITs, respectively, seeking US$37 million or, alternatively US$24 million.[22]

Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal, ICSID Case No. ARB/82/1, Award (February 25, 1988), 2 ICSID Rep. 180 (1994) (in connection with damages for loss of a housing project, the tribunal awarded out of pocket expenses as well as damages for loss of opportunity under Senegal and French law. In connection with the latter component the tribunal exercised discretion. *Id.* ¶ 5-67). More recently, tribunal in *Himpurna v. Indonesia* seems to have taken that principle into account when awarding substantial profits. *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara*, Ad hoc tribunal (UNCITRAL rules), Final award (4 May 1999), 15-2 Mealey's Int'l Arb Rep A-1, A-50 (December 1999). The chairman of that tribunal, Jan Paulsson, took this position in relation to *lucrum cessans*: "A loss of opportunity (or chance) is a subcategory of lost profits where not only the magnitude but even the existence of monetary prejudice is doubtful. ... What distinguishes this category of damages, and rescues the claimant's prospects for recovery, is that the possibility of profits itself has a value." Jan Paulsson, *The expectation model*, in EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION (Yves Derains & Richard H Kreindler eds., 2006) (emphasis in the original).

[22] *Gemplus SA and Talsud SA v. Mexico*, *supra* note 2, ¶1-12.

The tribunal held that Mexico's actions were expropriatory and in addition, violated fair and equitable treatment.[23]

The tribunal set the valuation date at June 24, 2001, immediately before the requisition.[24] The tribunal noted that at the date of valuation the registry was not a going concern,[25] and hence it refused to award damages calculated using the DCF, because among other things: "the Claimants' use of the DCF method, with its expert (LECG), produces figures for the Concessionaire's future lost profits which are manifestly too high on the facts found by the Tribunal."[26]

The tribunal also rejected the respondent's proposed book value based methods, stating that these methods ignored the value of the registry's future income and "produce[d] figures for the valuation of the Claimants' shares which are manifestly too low."[27] The tribunal therefore sought "an appropriate middle course, between Scylla and Charybdis,"[28] and stated its preference for "a modified form of the income-based approach: based on the future income forecast, but not using DCF methodology."[29]

The tribunal then shifted its focus to the quality of the evidential proof necessary to award loss of future income. In this connection, it focused on the notion that *lost future profits are*

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[23] *Id.* ¶¶ 7-72 to 7-76, 8-21 to 8-26.

[24] *Id.* ¶ 12-43.

[25] The tribunal provided the following reasons for this conclusion: "(i) the registration of used vehicles had been suspended from 15 September 2000 and (ii) the Concessionaire was not operating as an independent concern given the Secretariat's First and Second Administrative Interventions of 15 September 2000 and 18 April 2001. Moreover, as a business, the Concessionaire had barely progressed beyond start-up operations by 15 September 2000, at which time it began its suspended half-life until 24 June 2001. The Concessionaire had therefore no significant or reliable track-record as a business, or 'going concern' by 24 June 2001, as that business was originally conceived under the Concession Agreement." *Id.* ¶ 13-70.

[26] *Id.* ¶ 13-72 (emphasis added).

[27] *Id.* ¶ 13-73.

[28] *Id.* ¶ 13-75.

[29] *Id.* ¶ 13-75.

only awarded when they can be proved with "sufficient certainty."[30] It further noted that "the concept of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case."[31] In support of the certainty principle, the tribunal relied on *SPP v. Egypt, Sapphire v. Iran,* UNIDROIT Principles on International Contract Law, the commentary by Ripinsky and Williams quoted earlier, and the English law (*Chaplin v. Hicks*), which supported the idea that when a project is in its infancy, but clearly has the potential to generate more than a claimant's sunk costs or out-of-pocket expenses, then the measure of damages should be the claimants' loss of opportunity to make the project commercially successful. The tribunal effectively concluded that this was a general principle of law and "no doubt similar principles form part of international law," as expressed in the ILC Articles.[32]

Taking into account the above mentioned principle and the fact that the respondent had caused the evidentiary difficulties that claimants faced, and reviewing key facts, the tribunal concluded that on June 24, 2001 while there was no certainty of the project's profitability as originally envisaged, there was nonetheless a reasonable opportunity.[33] The tribunal itself found it "extremely difficult ... to assess the value of this lost opportunity in money terms."[34] Therefore, rather than presenting a calculation of value, the tribunal, "in the exercise of its arbitral discretion,"[35] announced the value of the claimants' shares to be US$14,340,872 million.[36]

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[30] *Id.* ¶ 13-82 (emphasis added) *citing* ILC's Commentary on Article 36(2).

[31] *Id.* ¶ 13-83.

[32] *Id.* ¶ 13-90.

[33] *Id.* ¶ 13-98.

[34] *Id.* ¶ 13-99.

[35] *Id.* ¶ 13-100.

[36] *Id.* ¶ 13-100.

IV. *SIAG V. EGYPT*: AWARDING FAIR MARKET VALUE OF INVESTMENT WITH LITTLE OR NO HISTORY OF OPERATION

Despite the fact that the great majority of arbitral tribunals have adhered to the rule set forth in *Biloune, i.e.*, the so-called "new business rule," modern U.S. scholarship, derived from American jurisprudence and business practices, is attempting to carve out an exception to the new business rule, which is beginning to find its way into international arbitral decisions. In 2004, Prof. John Gotanda, relying on the American jurisprudence, proposed that the new business rule needs to be discarded:

> Denying lost profits simply because the injured business is new would leave the injured claimant less than whole and would fail to achieve the goal of full compensation.[37]

Similar proposals have followed Prof. Gotanda's proposal, including by Mark Kantor who stated that:

> In the author's experience, those impediments have not prevented an admittedly illiquid market from developing for the buying and selling of equity interests in projects under development. ... It is therefore apparent that market valuations for companies at early stages in development may indeed exist.[38]

Siag seems to be a case that falls within this proposed exception. Mr. Waguih Elie George Siag and his mother, Clorinda Vecchi ("Claimants"), were the principal investors in Touristic Investments and Hotels Management Company (SIAG) S.A.E and Siag Taba Company (together "Siag"), both Egyptian companies. In 1989, the Ministry of Tourism of Egypt sold a large parcel of oceanfront land on the Gulf of Aqaba on the Red Sea to SIAG for the purpose of developing a tourist resort. SIAG subsequently transferred a portion of the property to Siag Taba Company. The project that claimants planned to implement on the property consisted of a resort with

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[37] John Y. Gotanda, *supra* note 11, at 101.

[38] MARK KANTOR, *supra* note 9, at 78.

certain related infrastructure, which was to be built in three phases following the grant of the necessary governmental approvals.

From 1990-1994 Siag commenced basic construction work on the property, and entered into an agreement (the "Lumir Agreement") with an Israeli Company, Lumir Holdings Ltd., to secure financing for the first phase of the projects. Due to Egypt's opposition to Siag's business relationship with Lumir, the Lumir Agreement was terminated in June 1995. Siag began construction of the buildings for phase one in late spring of 1995 and continued for one year. However, after numerous decrees by the Government to cancel the contract and various seizures, as well as court orders that interfered with the project, on July 2002, the President of Egypt issued a decree to expropriate the property. Later, the Egyptian Prime Minister issued an expropriation decree, and ultimately the site with all the buildings constructed as of then was transferred to a gas company.

Claimants initiated an ICSID arbitration in 2005 for alleged breaches of the Italy-Egypt BIT, including the expropriation of their investment. The tribunal held that Egypt had illegally expropriated the property and that Egypt had a duty to make "full reparation" as understood in customary international law. As to the value of the investment, claimants sought US$200 million for the loss of the Property, as well as US$30 million for actual expenses incurred in connection with the project such as construction costs, costs associated with cancellation of the Lumir Agreement, financing costs, legal expenses, and various other sundry costs.[39] The tribunal held that the value of the plot of land far exceeded the sums actually invested by Siag. The tribunal also rejected the claim that the 1995 sale of shares in Siag Touristic between the members of the Siag family provided useful guidance as to the value of the property and project, or that the Lumir Agreement provided reliable evidence of the value of the investment. The tribunal was not also satisfied that the investment lent itself to a robust DCF analysis due to the lack of a track record of profitability:

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[39] *Siag*, *supra* note 3, ¶¶ 504 and 520. Siag's counsel in a conference mentioned that claimants had invested probably less than US$15 million. Remarks of Craig Miles, Second Annual Damages in International Arbitration Conference organized by Juris Conferences, Washington, D.C., November 18, 2013.

567. At the end of his evidence, Mr. Abdala of LECG was asked by the Tribunal a question concerning the differences in valuing the future profits of a business which has been operating for several years, as compared to a "business opportunity" which is still in the development phase. Mr. Abdala very candidly acknowledged that there is one particular difference and this is that "... in the [case] that you have a track record of profitability you could say that you have a higher degree of certainty as to what to expect of the performance of the business in the future." He further offered that "... in both cases, whether you're valuing new business or [existing] business, you will still have a certain degree of uncertainty as to projecting revenues moving forward, and profits moving forward."

...

570. Points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for "young" businesses lacking a long track record of established trading. In all probability that reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all. The Tribunal accepts Egypt's submission that the authorities are generally against the use of a DCF analysis in circumstances such as the present, and further that the DCF analysis presented by LECG is an insufficiently certain basis upon which to calculate damages in the present case.

While the tribunal paid lip service to these principles by refusing to use DCF, ultimately it chose another market-based method, which, similar to the DCF, measures the ability of a business to generate profits into the future, *i.e.*, a comparable sales valuation, noting that the property was comparable to the best properties in that region:

> The quality of the Property compares with the best resort sites in Sharm El Sheik, Hurghada and elsewhere in the Sinai and Red Sea areas and this, coupled with the unique character of the Property close to Eilat in Israel and Aqaba in Jordan would have ensured that had resort development been permitted, the Property would have become a central feature of a major coastal resort.'[40]

Applying a margin of error of 20 percent to discount the value of the property, the final value, half of which belonged to Siag, was US$150 million,[41] significantly higher than the US$30 million actually invested in the project,[42] effectively giving him a windfall. Prof. Vicuna submitted a dissenting opinion, noting that the amounts actually invested, *i.e.*, the US$30 million, should have served as a cap, and emphasized the fact that the claimant's capital contribution was, in any event, minimal.[43]

Table 1: Key Facts about the Projects and the Tribunal's Quantification of Damages

Facts	*Biloune* (1989/1990)	*Gemplus* (2010)	*Siag* (2009)
Nature of the Project	Land sold to construct a hotel resort in Accra, Ghana	10-year concession agreement to create and operate a database / registry of cars in Mexico	Land sold to construct an oceanfront touristic resort close to the Red Sea, Egypt
Degree of completion	"uncompleted and inoperative"	"No Complete Business: The Concession was operative, as regards the registration of new and used vehicles under the Concession Agreement, for no more than five weeks in July-August 2000."	construction of buildings for the first phase (out of the three phases) of the project begins and reaches near completion, but does not become operational

40 *Id.* ¶ 574.

41 *Siag v. Egypt, supra* note 3, ¶ 631.

42 Dissenting Opinion of Prof. Vicuna, ¶ 22.

43 *Id.*

Facts	***Biloune* (1989/1990)**	***Gemplus* (2010)**	***Siag* (2009)**
Profitability	The Tribunal found no basis on which it could calculate lost profits in the circumstances of the case.	"no certainty or realistic expectation of this project's profitability as originally envisaged, but there was nonetheless a reasonable opportunity.	"The Tribunal is persuaded that the opportunity ... was a very promising one and that the Project appeared to be moving forward successfully, albeit that it was still at an early stage."
Risks	-	"high risk project" "the commercial, legal, political and other risks confronting the Concessionaire were considerable"	"There were undoubtedly considerable risks associated with the further investment required to bring the Project to fruition..." "The Tribunal bears these risks in mind in reaching the final level of compensation..."
Valuation approaches/ Criteria	Amounts actually invested	"A modified form of the income-based approach: based on the future income forecast, but not using DCF methodology." "Loss of opportunity"	Comparable Sales Method
Evidence	The contemporaneous books and records of a company regularly kept in the normal course of business should be accorded substantial evidentiary weight and accepted to be presumptively accurate.	The Claimants' shares valued by reference to reasonably anticipated loss of future profits using much of the expert's underlying data.	Expert's report
Amount Invested	US$267 thousand	US$3.3 million	US$30 million

Facts	*Biloune* (1989/1990)	*Gemplus* (2010)	*Siag* (2009)
Amount awarded	US$267 thousand	US$14 million (+ interest, costs)	US$145 million (The tribunal reduced this amount by 50% due to limited beneficiary interest of the claimants in the property.) (+ interest, costs)

V. CONCLUDING REMARKS

The three cases of *Biloune, Gemplus,* and *Siag* represent three legal paradigms on awarding damages for projects that have little or no track record of profitability. The diverging results, based on the proportion of the amounts invested to the amounts awarded, are somewhat troubling, and obviously do not provide much predictability if one were to attempt to justify the outcomes only by reference to the classic rule applied by international tribunals, including *Biloune,* which required compensation for such projects not to exceed the amounts actually invested in the project. The project in *Gemplus* was not dissimilar to that in *Biloune*; although the *Gemplus* project seems to have been at a more advanced stage than Biloune's (it had operated for some months), it had no history of profitability. Yet the tribunal awarded three times the amounts invested, applying "the loss of opportunity" or "loss of chance" doctrine. In *Siag,* which was more similar to *Biloune,* inasmuch as it was an unfinished project, the tribunal, nonetheless, rather than assessing damages based on the amounts actually invested in the project, used a fair market value methodology, yielding a value for the project five times the amounts actually invested (only half of which belonged to claimant).[44]

Given the similarity among the three cases—all of them lacked a true history of profitability to build upon—it is difficult to

[44] Or using claimant's counsel's estimate (*see* n. 39 *supra*) ten times the amounts actually invested. Given the disparity between the amounts actually invested and the amounts awarded, the award may even seem punitive, even though the tribunal denied awarding any punitive damages. *Siag v. Egypt, supra* note 3, ¶¶ 545-547.

explain why different legal principles should apply to each. Ultimately, it appears that the tribunals' assessment of evidence of profitability had dictated which rule to apply; that assessment is to some extent subjective and driven by wide exercise of discretion in making sense of evidence and by, among others, the individual tribunal members' background and experience. The parties' counsel methods of pleading and presentation of evidence may have played a role in this context too.

As of now, the majority of investment treaty cases involving new or incomplete businesses still follow the classic rule. It remains to be seen to what extent the new paradigms set forth in *Gemplus* and *Siag* will find a following. In this process, the harmonization instruments, such as the UNIDROIT Principles on International Commercial Contracts, in whose preparation Prof. Wallace was involved, will likely play an important role. While traditionally these instruments at best were considered as soft law, the *Gemplus* tribunal relied on Art. 7 of the UNIDROIT principles to award damages on the basis of "loss of opportunity," effectively validating the principles as an enunciation of general principles of law within the meaning of Article 38 of the ICJ statute. In addition to such instruments, domestic law systems and commentaries will influence the legal developments in this field. More specifically, commentaries based upon the American jurisprudence and scholars, such as John Gotanda and Mark Kantor, seem to be transplanting the already existing American exception to the new business rule into the corpus of international arbitral decisions, thereby allowing the drawing of fine distinctions between largely similar cases. A key issue to tackle in the years to come will be developing more concrete criteria for measuring the real ability of new and incomplete businesses to generate income in order to justify application of different legal principles discussed above.