

REVIEWS:

DAMAGES IN INTERNATIONAL INVESTMENT LAW

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The importance of foreign investments in global economy cannot be overestimated. Their legal protection is increasingly important due to both the proliferation of international investment treaties and contracts, and the exponential growth of international investment arbitration. International investment law is also intellectually stimulating since it concerns essentially the legal relationship between a sovereign State and a foreign investor. The most striking feature of international investment law, however, remains, the direct access to international investment arbitration normally given to the foreign investor on the basis of treaties, legislation or contracts.

The book deals with one of most complex and crucial issues of foreign investment law, namely compensation foreign investors may claim against the host State. Indeed, compensation is *the* remedy available to foreign investors for violations by the host State of international law or contracts. It is often the only appropriate, feasible and effective remedy available to the foreign investor. Its effectiveness is further enhanced by the rules governing the recognition and enforcement of the arbitral award, and especially those contained in the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

On the basis of the analysis of the relevant international awards, the book aims at providing a comprehensive analysis of the main legal questions related to compensation, including the identification of the legal basis for such a claim, the head of damages, and the quantification of compensation for a successful claim.

The first strength of the book is the clear structure, even if the book may have benefitted from some concluding remarks at the end of each Chapter and, perhaps more importantly, of the whole study.

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The reader also enjoys the pragmatic approach of the book which is based – and it could not be otherwise – on the analysis of international awards. The authors do not neglect the theoretical questions underlying compensation and its quantification, but avoid any sort of dogmatism. Moreover, throughout the book the authors show a balanced understanding of the special legal relationship between the host State and the foreign investor as well as their respective needs and interests. This is demonstrated, *inter alia*, by the frequent references to equitable considerations, fairness, reasonableness, and legitimate expectations.

The third strength of the book concerns the wealth of awards considered and their careful reading which allow the reader to appreciate not only the legal reasoning of the arbitral tribunals but also the significant degree of discretion these tribunals enjoy.

The first two chapters are particularly useful as they provide the reader a general framework and make the book accessible also to non public international lawyers. In Chapter 2, in particular, the author discusses in a concise and rigorous manner the sources of international law on damages. Chapter 3 positions compensation in the system of remedies and explains its clear preponderance in foreign investment law in general and in specific agreement, such as North American Free Trade Agreement or the European Charter Treaty in particular.

Chapter 4 is a key chapter as it introduces three categories of cause of action: (1) expropriation; (2) violation of international law other than expropriation; and (3) breach of contract. In respect to expropriation, the authors briefly discuss the distinction between lawful and unlawful expropriation, emphasising the special nature of compensation as one of the conditions for lawful expropriation and bearing in mind that not all international tribunals have made such a distinction. They then focus on the practical consequences of such a distinction and convincingly identify three differences. In case of unlawful expropriation (1) when feasible, the remedy would be restitution rather compensation; (2) compensation takes into account the possible increase in value of the property after the date of the taking; and (3) compensation may include incidental expenses or other consequential damages.

The authors seem excessively prudent when they argue that customary international law is not fully settled on the issue of compensation for lawful expropriation (p. 83). With the possible exception of large scale-nationalisations, a virtually universal acceptance seems to exist today amongst governments and investment tribunals that in case of lawful expropriation the foreign investor must be fully compensated.¹

¹ See, in particular: *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para 497; T. Wälde & B. Sabahi, *Compensation and Damages in International*

Chapter 5 groups several cross-cutting issues. In particular, it clarifies the questions related to the legal relevance and the financial assessability of the loss, as well as the burden and standard of proof. It also paves the way to Chapters 6 and 7, dealing, respectively, with how compensation is quantified and what damages the foreign investor can claim.

Chapter 6 contains a thorough analysis on the valuation of the damages suffered by the investor. The assessment is aimed at establishing the fair market value which may be defined as the price a putative buyer may be willing to pay for the investment. The assessment of damages is neither an exact science² nor a mechanical process. It is rather a careful and balanced assessment of all circumstances.

Given the variety of investments and of circumstances (compare, for instance, a newly established investment with one with a long record of profitable business), the exercise is complex and leaves a certain degree of flexibility to arbitrators. The authors describe the three main methods used in investment arbitration, namely (1) income-based approach (discounted cash flow method); (2) market-based approach (value of similar assets sold in open market); and (3) asset-based approach. They then discuss the advantages and the problems of each of them.

Chapter 7 identifies the heads of damages for which the investor may seek compensation. The eligibility of the expenses incurred by the investor depends on relatively clear criteria, such as the relation to the investment and to the investor, the reasonableness of the claim and the appropriateness of the evidence. Much more problematic is the question of lost profits. If there is general agreement on the necessity to take into account lost profit in order to ensure full compensation, the valuation of lost profits remains a thorny issue. The authors examine how lost profits may be incorporated in the compensation related to expropriation, breaches of international law other than expropriation and breaches of contract. In respect of the last category, they also compare the discounted cash flow method with *lucrum cessans*. The analysis highlights the complexity of the valuation, the delicate task performed by the arbitrators and the paramount importance of the evidence submitted by the parties to the dispute and the claimant in particular.

Chapter 8 addresses the limitations on compensation. Two questions deserve to be pointed out. First, the duty to mitigate damages is well known in many domestic legal systems and is a strong candidate for being a general principle of law in the sense of Article 38 (1) of the Statute of the International Court of Justice. Second, in the context of a necessity plea, it may be appropriate to

Investment Law, Report to the ILA Committee on International Law on Foreign Investment, p. 21.

² See *ADC and ADC & ADMC v. Hungary*, ICSID/ARB/03/16, Award, 2 October 2006, para 521.

introduce some flexibility in the allocation of the costs related to the adoption of measure on grounds of necessity. Thus, the authors do not exclude, on the one hand, that some form of compensation could be given to the foreign investor even in case of successful pleas; on the other hand – and perhaps more importantly – that the situation of necessity could be taken into account when quantifying compensation in case of unsuccessful pleas.

Chapter 9 and 10 conclude the book by providing, respectively, a throughout treatment of the issue of interest and their calculation; and an overview of the main currency and taxation issues.

Based on a comprehensive and meticulous analysis of international award on compensation, the book is certainly a valuable contribution to the understanding of a complex and crucial issue in the field of foreign investment law. The authors offer a balanced assessment of the main legal questions and problems underlying compensation and careful take into account the rights and prerogatives of the two main – yet remarkably different – actors involved. The book is going to provide guidance to practitioners and to inspire scholars and students alike.