

INFLUENCES ON THE QUANTUM OF DAMAGES AWARDED AT ICSID

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Abstract: *The present paper is part of a larger study that aims to identify some of the factors that have a great impact on the quantum of the damages awarded in ICSID cases. The driver of this study is the high level of the damages awarded in this sort of disputes between foreign investors and the host state. In 2012 the ICSID tribunal awarded more than 1.77 billion USD for a breach of Fair and Equitable Treatment standard and indirect expropriation by Ecuador. Another reason for choosing this subject is the increasing number of the cases judged at this Centre. The analytical method used for analysing the determination relation between the identified factors and the quantum of the damages is the linear regression analysis. For the data collection were used as many cases' awards as could be found published on the official site, from which were selected the cases where damages were awarded, in number of 30. For all the analysis made the statistical significance was followed and additional statistics trimming methods used, were necessary. The first factor that had been chosen was the value of damages requested, the calculations showing the impact assumed for it. The reasons beside this selection are pretty obvious: it is the most obvious factor on which the arbitrator can rely, it has the same nature of value, and it's based on an expert's report of damages' valuation. There is plenty room for further analysis, this only representing the starting point, but is very important step in configuring the data base on which the following analysis will be set. For each case studied there are other characteristics, beside the value of damages requested, that were extracted and presented in order to determinate their impact or the lack of impact. For these factors is needed a preparation operation of pondering because of their nature, non-numerical, so that these will be the subject of a further analysis. The importance of this paper is also given by the definitions of the elements used in the factors' impact analysis.*

Keywords: damages awarded, valuation, damages requested, ICSID, arbitration

JEL classification: F510, F370, K220

1. Introduction

The foreign investments represent an important part of the economy for many developing countries. The governments of these countries are directly interested in attracting foreign investments in order to grow their Gross Domestic Product – GDP. There are some factors that directly influence the attraction of foreign investments, and one of these factors is the protection offered for these investments. Many Bilateral Investment Treaties (BIT's) include a protection clause and also the reference that the disputes that might arise between the foreign investor and the host state can be solved by arbitration.

In 14 October 1966 had entered in force the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention), establishing the ICSID. At that date the Convention was ratified by 20 states, but until 2006 there were 143 countries that had signed it, becoming Contracting States. Between these countries was also Romania. The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development.

The increasing number of the states ratifying the Convention is determinate, exactly by the wish of the governments to attract foreign investments. In the last years, the factor influencing these investments had changed substantially: in the early years the foreign investors were looking for cheap work force and were not necessary looking at aspects like protection, bureaucracy or technical development. As time passed, the governments became more interested in the factors second mentioned. In this way appearing the increase desire of countries to become Contracting States of the ICSID Convention.

There are special rules for the organisation and functioning of ICSID, setting the way of submitting an arbitration request, electing the Arbitrators, establishing the proceedings, and all the aspects that can be implied.

As there were more and more countries implied, in time the number of cases judged at ICSID has also increased.

There are many studies on this subject, the high level of the amounts requested, and sometimes awarded, as damages attracting the attention of many scholars and specialists. The analysis of the determination link between some factors and the level of damages awarded came in our attention and became the subject of this paper.

2. Material and method

In order to analyse the factors impact on the damages amount, is needed to extract these information from the award rendered by ICSID, more exactly from the cases where damages were awarded.

The present paper is based on the study of 30 cases that are presented in the following paragraph, together with their characteristics such as: the dispute parties: the claimant and the respondent, the date of the award, the subject of the dispute, the applicable Bilateral Investment Treaty, the damage valuation made by the claimant's experts and the method used for valuation, the findings of the tribunal in matter of: the standards' breach and the amount of damages awarded.

These information were extract from the awards rendered by the ICSID Tribunal an fond published on an official internet site.

After collecting the data needed, the analysis was made by using the linear regression for determinate the relation between the value of damages measured by the experts and the method used for measurement and the total damage amount awarded. In order to be able to measure the impact of the method used it was necessary to transform it in a numerical item, and this was made by pondering the methods in function of the percent of the damages awarded in each case that used that specific method.

2.1. Database for analysis

No.	Case Title	Date of award	Subject	Breach	BIT	Damages calculation's method	Damages Sum	
							Request	Receive
1.	AMCO v Indonesia	31 May 1990	hotel license revocation	violation of international law	SUA - Indonesia	DCF Hybrid 2 periods before and after award	15,000,000 USD	2,696,330 USD
2.	Enron v Argentina	22 May 2007	fiscal valuation imposed by the Argentinean authorities and a gas tax	violation of BIT, FET and umbrella clause	SUA - Argentina	DFC	129,000,000 USD	106,200,000 USD
3.	Metalclad v Mexico	30 Aug. 2000	municipality did not grant a construction permit landfills	violation of the fair and equitable treatment, indirect expropriation	NAFTA	actual investment in the project	45,474,528 USD	8,819,467 USD
4.	Wena Hotels v Egypt	8 Dec. 2000	hotel license revocation	violation of the fair and equitable treatment, indirect expropriation	UK-Egypt	actual investment in the project	16,685,000 USD	8,061,897 USD
5.	Siemens v Argentina	6 Feb. 2007	Contract renegotiation and termination of providing IT services to government	expropriation and violation of fair and equitable treatment and full protection and security	Germany - Argentina	Fair market value - book value	444,000,000 USD	217,838,439 USD
6.	LG&E v Argentina	25 July 2007	pesification into account price and cancellation price adjustment	violation of the fair and equitable treatment and the BIT umbrella clause, discrimination treatment	SUA - Argentina	dividends that could be received if there wasn't any breach	not specified	57,400,000 USD

7.	Feldman_v_Mexico	16 Dec. 2002	refusal to rebate excise for cigarettes exported from Mexico	violation of NAFTA, international law and Mexican Law, discrimination	NAFTA	lost profits rejected	30,381,938 USD	9,464,627 Mexican pesos
8.	Pope&Talbot_v_Canada	31 May 2002	imposing additional charges for export of timber	violation of FET	NAFTA	expenditure incurred	not specified	407,646 USD
9.	Lemire_v_Ukraine	28 Mar. 2011	not receiving radio frequency for each requested	discrimination	SUA - Ukraine	DFC	38,000,000 USD	8,720,000 USD
10.	Myers_v_Canada	21 Oct. 2002	chemical waste export ban, for promoting domestic operators	violation of FET	NAFTA	income estimated without history	70-80,000,000 \$ CAD	6,050,000 \$ CAD
11.	Sistem_v_Kyrgyz	9 Sept 2009	Kyrgyz forcibly take hotel owned by System	expropriation	TURCIA - Kyrgyz	DFC in 1999	0	8,500,000 USD
12.	Thunderbird_v_Mexico	26 Jan. 2006	applicant claim that gaming machines would actually be ability machines	claims rejected	NAFTA	-	not less than 100,000,000 USD	0
13.	Poushok_v_Mongolia	28 April 2011	impose fees for foreign employees and limit price for gold	claims rejected	RUSSIA - Mongolia	-	0	-
14.	AMD_v_Mexico	-	tax charge of Mexico for corn sweeteners	violation of FET and performance requirements	NAFTA	lost profit	not less than 100,000,000 USD	33,510,091 USD

15.	National Grid _v_ Argentina	3 Nov. 2008	pesification into account price and cancellation price adjustment	violation FET and full protection and security	SUA - Argentina	comparative DCF with market approach	112,400,000 USD	3,458,813 USD
16.	Link_v_ Moldova	18 Ap 2002	are not granted tax exemption for consumers who buy from the free zone	Moldova did not violate any provision	SUA - Moldova	-	53,592,439 USD	0
17.	Chevron_v_ Ecuador	31 Aug. 2011	Ecuador violated contractual agreements with the plaintiff	violation of BIT, denial of justice	SUA - Ecuador	damages calculated in internal processes, unspecified methods	1,484,000,000 USD	96,355,369 USD
18.	Fuchs_v_ Georgia	3 Mar. 2010	Georgia gave a decree that annulled all rights previously granted to the applicant	expropriation	Greece - Georgia	market approach/incom e approach	36,517,031 USD	30,024,736 USD
19.	Railroad_v_ Guatemala	29 June 2012	Guatemala has made a press statement that it would be withdrawn defendant rights	violation of FET	CAFTA	DCF rejected - too speculative, amount invested accept	63,778,212 USD	3,379,450 USD
20.	OEPC_v_ Ecuador	5 Oct. 2012	termination of the contract between the claimant and the state	violation of FET and indirect expropriation	SUA - Ecuador	DFC	2,359,500,000 USD	1,769,625,000 USD

21.	Swisslion_v_Macedonia	6 July 2012	abuse against investor denial auction result	Violation of FET	Swiss Macedonia	proposed DCF or Amount Invested rejected, lump sum awarded	19,000,000 euro	350,000 euro
22.	Unglabe_v_Costa Rica	16 May 2012	Costa Rica wanted to make a national park on land claimants	expropriation	Germany - Costa Rica	market approach - land in the sale price	5,190,000 USD	3,100,000 USD
23.	Rumeli Telekom_v_Kazakhstan	29 July 2008	Rumeli were forced to sell shares of KAR-TEL for 3000 USD	indirect expropriation + violation of FET	Turkey - Kazakhstan	lump sum starting from DCF- rejected for lack of history	458,000,000 USD	125,000,000 USD
24.	Cargill_v_Mexico	18 Sep 2009	tax charge of Mexico for corn sweeteners	violation of FET	NAFTA	cash flow	123,810,000 USD	77,329,240 USD
25.	CSOB_v_Republic of Slovakia	29 Dec. 2004	Slovakia did not respect his engagements from CSOB privatization	violation of FET	Czech - Slovakia	lump sum	40 billion SKK from which: 10,647,236,411.30SKK - principal amount	24,797,381,842 SKK from which: 8,686,280,324 SKK - principal amount
26.	Europe Cement Investment_Turkey	13 Aug. 2009	concession revocation handed down generation electricity distribution and marketing	-	Poland - Turkey	-	-	-

27.	Waguih Elie George Siag and Clorinda Vecchi_v_Egypt	1 June 2009	land expropriation	illegal expropriation, breach of FET, security and protection, non-impairment	Italia - Egypt	market approach	195,800,000 USD	74,550,794,75 USD
28.	Quasar_v_Russia	12 July 2012	imposing high taxes illegitimate	unlawful expropriation	Spain - Russia	market approach	2,600,000 USD	2,000,000 USD
29.	Rosinvest_v_Russia	12 Sept. 2010	imposing high taxes illegitimate	unlawful expropriation	Denmark - Russia	market approach	232,700,000 USD	3,500,000 USD
30.	El Paso _v_ Argentina	31 Oct. 2011	pesification into account price and cancellation price adjustment	creeping violation of FET	SUA - Argentina	DFC	228,200,000 USD	43,030,000 USD

Table 1. Cases' characteristics

Source: made by author from awards rendered by arbitration tribunals

3. Results and discussion

As previous mentioned, the information extracted for each case were analysed in linear regression in order to determinate their influence. The value of damages requested, having the same numerical nature were used in the form presented. As regarded the method used by the experts to value the damages, these were first prepared to convert them into numerical values in order to be used in regression analysis. Their conversion was made starting with the percent of the damages awarded compared with the damages valued by the experts and then pondered depending on the number of cases in which the tribunal decided to relay or to reject the method used.

The first analyse ruled was the one reflecting the direct link between the amount requested and the amount received. On the results we must first look at the Significance F, it is important to be as closer to zero as possible and in any circumstances to be less than 0.05, in order to have statistical significance. In our case the value is very close to zero, and this makes it significant.

The second value we must look on is the R Square value which is the value measuring the impact of the analyzed factor on the dependent item analyzed. In our example the R Square is 0.99866, a very high dependency being shown.

In order to obtain the formula for the influence we must look at the coefficients for intercept and for the Damages Requested. Even if the value for intercept looks very high, this is acceptable taking in consideration the large discrepancy between the damages awarded, on one hand amounts like 300,000 USD and on the other hand amounts like 175,000,000,000 USD. Anyway, the coefficient for the damages requested still show that more than 62% will be determinate by the value of the damages presented in the claimants' report.

The results for the first analyse are presented below:

<i>Regression Statistics</i>		<i>Significance F</i>		
Multiple R	0.999333317	0.0001		
R Square	0.998667079	<i>Coefficients</i> <i>Standard Error</i>		
Adjusted R Square	0.998593028	Intercept	-64,141,540	47,981,569
Standard Error	207,339,457	Damages Requested	0.62132804	0.005350281

The second analyse was studying the impact of the method used by the experts in valuing the damages, after making the conversion before described. The results show a Significance F higher than 0.05 and this means that there is no statistical significance for the impact of the factor that was analyzed.

<i>Regression Statistics</i>		<i>Significance F</i>	
Multiple R	0.320118462	0.157159464	
R Square	0.10247583	<i>Coefficients</i>	
Adjusted R Square	0.055237716	Intercept	(1,010,483,433.51)
Standard Error	5,244,820,092.55	coef method	1,821,476,355.74

4. Conclusion

From the two analyses made the first conclusion is that the most important factor on determination of the amount that will be awarded as damage in an ICSID arbitration case is the value of the damages requested by the claimant. Of course that there are other factors that have significant influence, but these will be the subject of a further study. And, yes, there are also factors that do not exercise significant influence, such the method used in valuation, but they have to be take in the model in order to see their impact.

In order to maximize the value of damages that can be received in an international arbitration, the claimants should ensure that they use the method that evaluates all their losses, and that the valuation report sustained by facts and proves. The higher the report's value, the higher the prospective damages that can be awarded.

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