FACTORS' IMPACT ON DAMAGES PAID IN ICSID CASES, EVALUATED ON MARKET VALUE PREMISES

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Abstract: *The present paper intends to present the impact of different factors, such as - the legal standard breached by the host state, the method used in calculating the damages and the requested amount, on the damages awarded in ICSID - International Centre for Settlement of Investment Disputes – concluded cases in which the Tribunal ordered the Respondent to pay damages to the Claimant, and that damages had been calculated based on the market value. Usually, the Company Valuation process is driven by economists following the frame settled by the International Standards, which recommends three main categories of valuation bases: asset approach, income approach or market approach. The damages valuation in ICSID Cases are made primary following the same rules, and in the present paper will be presented the ones using the market value approach. We will present three regression analysis based on the 7 cases that are meeting these conditions, cases that were started against countries such as: Russia, Costa Rica, Egypt, Slovak Republic, Georgia or Macedonia. The industries from which these cases aroused are different, we are talking about petroleum industry, tourism, bank and finance. Going further in analysis in order to see which was the breach identified by the Tribunal, we can see that there is not any direct link between the valuation approach and the legal standard breached by the Respondent but we can find a direct link between the standard breached and the amount awarded. In the cases presented in the following pages we will see that in some cases we were taking about expropriation and in other about breaching the fair and equitable treatment that the host state must insure to the foreign investor. Anyway, these cases had a common aspect, and that is the fact that were other valuations approaches were presented by the claimants, those had higher values. The present paper is an analysing study, using the statistical instrument of regression, based on a previous paper published by the authors in which was presented a briefly description of those cases in which the ICSID Tribunal decided the amount of damages to be paid by the Respondent, using the market approach.*

Keywords: *ICSID; damages; foreign direct investment; international disputes.*

JEL Classification: *F51; F37; K22.*

1. Generally Introduction

The international flow of investments encounters the need of an organism specialized in dealing with the legal problems that might arose between the foreign investor and the host state. Under these circumstances, The International Centre for Settlement of Investment Disputes Convention entered in force in October 1966. The scope of this Convention was to assure protection for the foreign investors and their properties in the host state. After the recognition of ICSID by the states, the foreign investment flow grew and the number of disputes start growing as well. The ICSID Tribunals faced the new challenges of calculating the damages to be awarded in case of finding that the Respondent had breached a legal obligation or standard. There were many studies undertaken on this subject, the authors, them selves had published other works on this matter, and the present paper is a complementary analysis derived from one of the previous works in which the cases that are now in analyse were briefly presented.

Table 1: ICSID Cases in which the damages awarded were calculated using market approach

No.	ICSID Case participants	Amount Awarded	Amount Requested	Method Coef	Standard Coef
1	Československá Obchodní Banka A.S. _v_ Slovak Republic	24.800.000,00	40.000.000,00	2,48	6,82
2	Swisslion DOO Skopje_v_Macedonia	350.000,00	19.000.000,00	0,07	0,20
3	Unglabe_v_Costa Rica	3.100.000,00	5.200.000,00	1,79	1,79
4	Waguih Elie George Siag and Clorinda Vecchi_v_Egypt	74.550.795,00	195.800.000,00	2,50	6,87
5	Rosinvest_v_Russia	3.500.000,00	232.700.000,00	0,61	1,68
6	Quasar_v_Russia	2.000.000,00	26.000.000,00	2,31	2,31
7	Ioannis Kardassopoulos and Ron Fuchs_v_Georgia	30.000.000,00	36.500.000,00	2,47	2,47

Source: http://anale.steconomiceuoradea.ro/volume/2018/AUOES-1-2018.pdf pag 279

The idea of this analyse was to determine if any of these variables can be found to have a direct and significant impact in the value of the damages awarded, and then to compare these results with the results obtained by the authors in other works where they analysed the same factors impact in relation with all the ICSID cases in which damages had been awarded until 2014, no matter what method was used.

2. Analysis findings on each factor

As mentioned above, the information extracted for each case was analysed in linear regression to determine their influence. The amount of damages claimed, of the same numerical character, was used in the form presented.

The analysis itself was carried out using Microsoft Excel, and more specifically the linear regression function made available by the Microsoft package. The Amount Awarded was considered to be the dependent variable a regression analyse was proceed for each of the other factors that were considered the independent variables.

2.1. Analysing the factor: Amount requested

The first analysis was the one that reflected the direct link between the amount requested and the amount received.

SUMMARY
OUTPUT

Regression Statistics	
Multiple R	*0,43639885*
R Square	*0,190443957*
Adjusted R Square	*0,028532748*
Standard Error	*26588888,33*
Observations	*7*

ANOVA

	df	SS	MS	F	Significance F
Regression	*1*	*8,31554E+1*	*8,31554E+1*	*1,17622466*	*0,32762816*
Residual	*5*	*3,53484E+1*	*7,06969E+1*		
Total	*6*	*4,3664E+15*			

	Coefficients	Standard Error	t Stat	P-value	Lower 95%
Intercept	*9770313,50*	*13630534,4*	*0,71679607*	*0,50557791*	*-25268090*
Requested Amount	*0,12591606*	*0,11610101*	*1,0845389*	*0,3276281*	*-0,1725310*

Figure 1: Results of regression analysis of the required amount
Source: Own Calculation

On the results we must first look at the Meaning Factor F, it is important to be as close to zero as possible and in any case to be less than 0.05, in order to have a high statistical significance. For values between 0.05 and 0.1, we can still talk about statistical significance, but not so strong, while for values greater than 0.1 we cannot say that we have a proven statistical significance. The second value we need to look at is the r square value, which is the value that measures the impact of the analysed factor on the analysed dependent element.

In our case, the value for Significance F is 0.3276, higher than 0.1, so we will say that no statistical significance had been found by analysing this factor. But if we extend the analyse to all the cases until 2014, as we did in other works undertaken, we will see that the Significance F for this factor is very close to zero, which makes it a very powerful factor in relation with the amount awarded as damages. The coefficient being positive in both analysis, this shows a direct link between these amounts, the higher the amount requested the higher the amount received.

The second value, R square value, in our example is 0.19, showing a probable impact of 19%, but again without statistical significance as we previously have seen. When analysing the all cases mentioned before, R Square is 0.99866, with a very high dependency displayed.

These results are not a surprise, because we just showed by calculations that the amount requested is in general the main factor in calculating the amount awarded, but this is not applicable in case that Tribunals decides to use market approach, because in all the ICSID cases were the claimants presented other approaches for calculating the damages, their calculations were a lot higher than the ones based on market approach.

2.2. Analysing the factor: method coefficient

The methods used by experts to assess damage are different, which are in accordance with the international company assessment plans. Since the evaluation methods themselves are not expressed in a numerical form, compatible with their use in regression analysis, they were first prepared and converted into numerical values for use in regression analysis. Their conversion was made on the basis of the percentage of damages awarded compared to the damages assessed by the experts and then analysed on the basis of the number of cases in which the court decided to transmit or reject the method used.

The results show an F significance greater than 0.1 and this means that there is no proven statistical significance for the impact of the factor analysed. This translates into the fact that the arbitrators who tried the ICSID cases in which damages were awarded did not present any preference for one method of assessment or another, not as regards the amount they decided to award as compensation for the damage suffered by the complainant. Instead, a preference of the evaluators for the discount cash flow method is obsessed, this being determined by the fact that this method produces significantly higher values compared to the method based on the amount invested and the fact that there is no specific market for each asset valued.

This was also the case when making the analyse based on all the cases in which damages were awarded until 2014.

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SUMMARY OUTPUT

Regression Statistics	
Multiple R	0,570170227
R Square	0,325094088
Adjusted R Square	0,190112906
Standard Error	24277185,49
Observations	7

ANOVA

	df	SS	MS	F	Significance F
Regression	1	1,42E+15	1,42E+15	2,40844	0,18138454
Residual	5	2,95E+15	5,89E+14		
Total	6	4,37E+15			

	Coefficients	Standard Error	t Stat	P-value	Lower 95%
Intercept	-7002561,216	19532581	-0,35851	0,734604	-57212659
Method Coef	15316330,62	9869310	1,551915	0,181385	-10053539

Figure 2: Results of regression analysis of the Method Coefficient
Source: Own Calculation

2.3. Analysing the factor: standard coefficient

The standards and provisions of bilateral contracts concluded between countries, even if they are largely the same under international law, are not expressed in a numerical form, compatible with their use in regressive analysis. So, they were first prepared and converted into numerical values for use in regression analysis. Their conversion was made on the basis of the percentage of damages awarded compared to the damages assessed by the experts and then analysed on the basis of the number of cases in which the tribunal decided to accept or reject the violation of that legal standard.

In our example, the Significance F has a value of 0.0353, between 0.05 and 0.1, so we can still talk about statistical significance, even if not so strong. This translates into the fact that the arbitrators who tried the ICSID cases in which damages were awarded found it easier to determine a breach of the fair and equitable standard, followed by illegal expropriation. This result is in accordance with the previous

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analyse made be the authors, based on all the ICSID cases in which damages were awarded until 2014.

SUMMARY OUTPUT

Regression Statistics	
Multiple R	0,787817
R Square	0,620655
Adjusted R Square	0,544786
Standard Error	18200938
Observations	7

ANOVA

	df	SS	MS	F	Significance F
Regression	1	2,71E+15	2,71E+15	8,180623	0,035399065
Residual	5	1,66E+15	3,31E+14		
Total	6	4,37E+15			

	Coefficients	Standard Error	t Stat	P-value	Lower 95%
Intercept	-5898551	11304238	-0,5218	0,624092	-34957019,7
Standard Coef	8111592	2836044	2,860179	0,035399	821309,5787

Figure 3: Results of regression analysis of the Standard Coefficient
Source: Own Calculation

3. In conclusion

From the analyses carried out in this paper we can draw the following conclusions: an ICSID case in which the fair and equitable standard has been breached or was illegal expropriation is most likely to end with the award of significant damages. While, if the method for which the Tribunal will opt will be that based on market values, the applicants can expect the amount received to be less than the required amount calculated by the cash flow method.
Making a parallel with the other studies undertaken on this subject by the authors, we can say that the results are consistent, and that the specific analyse of amount requested on the cases in which the damages were calculated under the market

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value approach, is reflecting the fact that this method will give results under the level that might be obtained using other methods.

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