Schweizerische Eidgenossenschaft
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Federal Department of Economic Affairs
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Comments submitted by Switzerland on UNCITRAL's Initial Draft on Assessment of Damages and Compensation

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I. General comment

1. Switzerland took note of the proposals made in section III.D of the Note regarding possible future work which the WGIII could undertake in the area of damages. Switzerland does not see any pressing need for the WGIII to undertake further work in this area at this juncture, in particular because the agenda of WGIII is already heavily charged with a multitude of topics and most of the matters discussed in the Note concern substantive, rather than procedural, issues. That said, Switzerland wishes to provide a few preliminary comments for the event that WGIII nonetheless decides to undertake work in this area.

II. Existing Legal Framework

A. Lawful Expropriation

2. With respect to the standard of compensation for "lawful" expropriation, the Note correctly emphasizes that many investment treaties envisage the requirement of compensation "as a condition for lawful expropriation".[1] Given the importance of coherent criteria for the qualification of the States' measures as expropriatory, the Note may want to further elaborate on criteria to distinguish compensable regulatory expropriation from non-compensable exercise of the States' police and regulatory powers.[2]

[1] Note, para. 14.

[2] See OECD Working Paper on Indirect Expropriation and Right to Regulate (2004); "Restatement of the Law Third, the Foreign Relations of the United States," American Law Institute, Volume 1, 1987; *Crompton (Chemtura) Corp. v. Government of Canada*, Award, 2 August 2010; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), 26 June 2009; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

B. Unlawful Expropriation

3. With respect to the standard of compensation for unlawful expropriation, the Note refers to differing opinions as to whether the full reparation standard is superseded by the treaty standard of compensation.[3] It may be opportune to note that, according to some commentators, the full reparation standard applies to both "lawful" and "unlawful" expropriations, however, it yields different results depending on whether the unlawfulness stems from the mere lack of compensation or other types of shortcomings, such as the lack of a legitimate public objective, or violations of due process.[4]

4. The Note could cover the possible differences in compensation arising from different categories of unlawful expropriations. The differences may concern valuation dates,[5] the value of the expropriated property interest, and compensability of consequential loss, including loss of the value of non-property interests (e.g. goodwill, business opportunities).

5. With respect to compensation for indirect expropriation, it can also be noted that the case law of investment treaty tribunals is divergent as to the date on which a creeping expropriation should be considered to have taken place for the purposes of valuation.

C. Breaches of Other Treaty Standards

6. With respect to compensation for non-expropriatory breaches, the Note could explore the relationship between the characterization of investors' legal interests allegedly affected by the State's measures and the standard of compensation. For instance, should frustration of legitimate expectations entail compensation for costs incurred in reliance on the State's assurances (so called "sunk costs") or should the private party be put into the situation in which it would have been in had the State complied with the assurances? Is compensation different depending on which sub-elements of FET are found to have been violated?

III. General Issues

A. Valuation Methodology

7. The Note provides a comprehensive high-level overview of the valuation methodologies that investment treaty tribunals apply. It may be worth noting that from the economic standpoint, different valuation methodologies should in principle yield the same result, provided that the object of the valuation is properly selected. In addition, while it is true that a DCF methodology often yields higher figures, there are instances where other

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[3] Note, para. 16.

[4] See Ratner, "Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction", 111 American Journal of International Law 1 (2017); Khachvani, "Compensation for Unlawful Expropriation: Targeting the Illegality", 32 ICSID Review - Foreign Investment Law Journal 2 (2017), 385–403.

[5] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 497; *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 352; *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, paras. 1765, 1766.

valuation methodologies, such as the asset-based valuation, may result in a higher amount of compensation.[6]

8. With respect to the valuation date, the Note may also address whether, in cases of unlawful expropriations, the investor has a choice between the *ex post* and *ex ante* valuation dates.

B. Evidentiary Requirements

9. The Note may provide guidance on evidentiary standards in cases where investment tribunals find partial liability, but the experts have only valued the damages on the assumption of full liability. It may be opportune to clarify to what extent a tribunal may make its own adjustments to the valuation models offered by the experts, or go back to the experts without creating the impression of aiding the claimant in discharging its burden of proof.

C. Interest

10. The Note may consider addressing the connection between the interest rate and risk. In particular, some tribunals have highlighted that, in circumstances where investors no longer control their investment, applying the WACC-based interest rate is inappropriate, given that it would compensate the investor for the equity risk that it no longer bears.[7]

11. Additionally, as the Note emphasizes, tribunals often award pre-award interest at rates based on LIBOR.[8] Given the announced phase-out of LIBOR, there is currently no clear guidance as to the substitute reference rate that arbitral tribunals could use to properly account for the time value of money for major currencies and different maturity periods.[9] The Note could further elaborate on this aspect.

D. Factors Limiting the Amount of Compensation

12. With respect to mitigation, it may be worth noting that, absent compelling evidence, investment tribunals are usually reluctant to find a failure to mitigate the damage, as a claimant investor is considered to have the incentive to have mitigated its loss.[10]

13. It is also important to highlight that tribunals usually consider that they enjoy a wide discretion when reducing compensation due to limiting factors, such as mitigation and contributory fault, and may determine the amount of such reductions without an apparent basis in quantum expert evidence. This is an area on which there may be need for clearer criteria on the applicability and impact of mitigation and contributory fault on the amount of compensation.

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6 See, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, paras. 342 *et seq*.

7 *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, paras. 537-539;

8 Note, para. 50.

9 Sacco, Khachvani, "LIBOR Phase-Out: Questions of Interest to Arbitrators", Kluwer Arbitration Blog (2019).

10 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019, para. 427.

14. Apart from mitigation and contributory fault, the Note may also consider other factors that may limit the recoverable compensation, such as necessity and *force majeure*.[11] Another area that the Note may concentrate on is the harmonization of the currently divergent approaches to double recovery, especially in cases where parallel international or domestic proceedings create multiple prospects of recovery for the claimant investor.[12]

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[11] ILC ARSIWA, Chapter V; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets*, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, paras. 376-377.

[12] *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, March 30, 2010, para. 557; *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, May 22, 2014, para. 175 ; *British Caribbean Bank Ltd. v. Government of Belize*, UNCITRAL, PCA Case No. 2010-18/BCB-BZ, Award, December 19, 2014, para. 190; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, April 9, 2015, paras. 38-40.