

UNCITRAL A/CN.9/WG.III/WP.231

Draft provision 23: Assessment of damages and compensation

The Institute for Transnational Arbitration (ITA) submits to the distinguished Member States the following version of Draft Provision 23 on the Assessment of damages and compensation in WP 231. The version builds upon the fruitful discussion organized by the ITA at the 47th session of the WG III, bringing together leading experts in the field, as well as representatives of States and investors.

This suggested version of Draft provision 23 reflects the following critical considerations:

- arbitral tribunals should not be limited to monetary damages and restitution of property: declaratory or injunctive relief is common and, in fact, needed in investor-State arbitration;
- arbitral tribunal should not be limited to awarding 'simple' interest: compound interest is in line with the purpose of investment;
- when assessing factors limiting monetary damages, arbitral tribunals shall consider all relevant factors. The ITA recommends that distinguished Member States do not include in this provision language limiting monetary damages because of "any non-compliance by the claimant with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises", as this would give rise to concerns with - or even a need for – arbitral tribunal to assess, as a preliminary issue, the breach of these instruments, without having the mandate to do so;
- speculative calculation of monetary damages should be avoided and tribunals may use the costs allocation tool in preventing this behaviour;
- discounted cashflow continues to be the most reliable method if relevant circumstances warrant it;
- the role of experts will continue to be important, and this should be reflected in the provision.

1. When the Tribunal makes a final decision, it may ~~only~~ award:

(a) Declaratory or injunctive relief, where appropriate;

(b) Monetary damages and any applicable interest; ~~and/or~~

(~~b~~c) Restitution of property, in which case the decision shall provide that the respondent may pay monetary damages representing the fair market value of the property ~~at the time immediately before the expropriation or impending expropriation became known, whichever is earlier,~~ and any applicable interest in lieu of restitution.

2. The Tribunal may award ~~simple~~ pre-award and post-award interest at a reasonable rate.

3. In assessing or calculating monetary damages, the Tribunal shall only reflect loss or damage incurred by reason of, or arising out of, a breach of the Agreement.

The Tribunal shall consider all relevant factors, including, as applicable:

- (a) Contributory fault of the claimant, whether deliberate or negligent;
- (b) Failure by the disputing parties to mitigate loss or damage;
- (c) Prior monetary damages received by the claimant for the same loss or damage;
- (d) Restitution of property;
- (e) Repeal or modification of the measure alleged to constitute a breach of the Agreement;~~and~~
- ~~(f) Any non-compliance by the claimant with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.~~

4. The Tribunal shall ~~only~~ award monetary damages that are established in accordance with Draft Provision 13 ~~on the basis of satisfactory evidence and~~ that are not inherently speculative. The Tribunal may award monetary damages on the basis of expected future ~~cash flows~~ ~~loss of profits~~ only insofar as they are based on a case -by-case, fact-based inquiry ~~that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time to establish a performance record of profitability.~~

5. The Tribunal may, at the request of a disputing party or on its own initiative, appoint one or more experts to report to it in writing on issues related to the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.

6. The Tribunal may require that experts appointed by the parties, if any, on issues related to the assessment or calculation of damages work on the basis of a harmonized, clearly defined set of instructions based on similar assumptions. The Tribunal may also require:

- (a) A joint statement by the experts to explain any difference in their opinions;
- (b) Alternative calculations in case the experts disagree on facts and legal approaches; and
- (c) Joint report by those experts.

7. The Tribunal shall not award punitive damages.

~~8. The Tribunal shall not award monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment.~~

98. If the amount of monetary damages claimed by the claimant significantly exceeds the amount awarded by the Tribunal, the Tribunal may take this fact into account when allocating costs in accordance with Draft Provision 25.