King & Spalding

Quantum Quarterly

The Damages Newsletter

A publication of King & Spalding's International Arbitration Group Issue 08 | 1Q 2016

We are pleased to present the latest edition of *Quantum Quarterly*, a publication of King & Spalding's International Arbitration Group. This edition features an interview with Suzana M. Blades and Alberto F. Ravell, Managing Counsel – Arbitrations and Senior Legal Counsel – Arbitrations, respectively, at ConocoPhillips Company in Houston. Prior to joining ConocoPhillips, Suzana was a Senior International Negotiator at Hess Corporation in Houston, an Associate at Arnold & Porter in Washington, D.C., and an In-House Counsel at Repsol YPF Brasil in Rio de Janeiro, while Alberto was a Senior Associate at King & Spalding in Houston and an Associate at Macleod Dixon (now Norton Rose Fulbright) in Caracas. During their time at ConocoPhillips, Suzana and Alberto have worked together on some of the most high-profile arbitrations in history, including ConocoPhillips' disputes with Venezuela and Ecuador. Their comments on quantum issues will be of great interest to arbitrators, counsel and experts alike. This edition also features summaries of an unusually large number of recent damages awards. We hope you will enjoy this edition. As always, we welcome any feedback you may have.

All the best.

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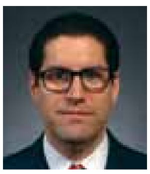

1. Please describe your role in connection with the damages aspects of your cases. More specifically, do you treat quantum the same as any other element of the case, or is it different in some respects, and if so, how?

We manage our cases very closely and work with outside counsel to ensure a strong and effective presentation of our case. In that sense, we also work with experts, including damages experts, to understand their position while respecting their independence. Quantum is certainly one of the main aspects of the case. This is particularly true in

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the investor-State arbitration world, where investors are looking for full compensation for their losses.

2. Does damages experience/success play a role in your selection of outside counsel, and if so, how does it compare with the other elements at play in the selection of outside counsel?

Absolutely. We always look for the best lawyers in the field and pay particular attention to the firm's track record of victories in similar cases. In each case, we also try to identify attorneys with issue-specific expertise for each phase of a case. We also bring in the expertise of other firms when necessary.

3. What considerations drive your decision-making with respect to the retention of independent damages experts?

Experience in the field, in the industry and with the Tribunal, as well as credibility, working relationship with outside counsel, previous decisions where he/she acted as an expert, availability and capacity to handle the case.

4. Have you had experience with Tribunal-appointed experts, and if so, what is your view on their relative value given the additional time and cost?

Situations where a Tribunal decides to appoint its own expert after the parties' experts have presented their reports and testified are far from ideal in terms of timing and costs. This process can create serious delays to the proceedings. An alternative that is most efficient and cost-effective is for a Tribunal to work with the parties' damages experts and ask them to produce a joint model to the extent possible. We have had this situation in one of our cases, and it was successful. The two damages experts collaborated to a large degree and were able to produce a joint model in less than two months that was very helpful and user-friendly.

5. It is often said that Tribunals "split the baby" on damages, but more recently, particularly in investor-State disputes, there have been several high-dollar awards containing sophisticated quantum analysis. What are your own experiences and views on this?

We agree that Tribunals, especially in investor-State cases, are paying more attention to quantum issues, and the quality of the decisions is improving. We have seen also more publications regarding damages in the last few years, which helps develop the concepts. It is important for Tribunals to decide each case on its merit without the urge to compromise or "split the baby." Although progress has been made recently in the investor-State arbitration world, there is still room for improvement, for example in the area of interest rates. Investors need to be properly compensated for the time they spend litigating a case, and host States should not be entitled to quasi-free loans during a pending arbitration.

This process can create serious delays to the proceedings. An alternative that is most efficient and cost-effective is for a Tribunal to work with the parties' damages experts and ask them to produce a joint model to the extent possible.

Recent Damages Awards

***Flughafen Zürich A.G. et al. v. Venezuela* (ICSID Case No. ARB/10/19)**

Date of Award:
November 18, 2014

Parties:
Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. (Claimants), Bolivarian Republic of Venezuela (Respondent)

Sector:
Airport concession

Applicable Treaties:
Treaty between the Republic of Venezuela and the Republic of Chile for the Promotion and Protection of Investments, which entered into force on May 25, 1995 (Chile-Venezuela BIT); Treaty between the Swiss Confederation and the Republic of Venezuela for the Promotion and Protection of Investments, which entered into force on November 30, 1994 (Switzerland-Venezuela BIT)

Members of the Tribunal:
Juan Fernández-Armesto (President), Henri Alvarez, QC (Claimant's appointee) and Raúl E. Vinuesa (Respondent's appointee)

Background:
Claimants formed a consortium to bid for a concession to administer, manage and operate the Isla Margarita Airport in the State of Nueva Esparta (the State) and started discussions with the State in October 2001. In August 2002, the State Governor filed an application to obtain approval from the National Assembly to enter into a Strategic Alliance Contract (the Contract) with Claimants for the operation, management and administration of the airport. Pending the Contract's approval, the State granted the concession to Claimants by Decree 1.188 in February 2004 and entered into the Contract shortly thereafter. In March 2004, the State Legislative Board filed a claim before the Supreme Court to set aside the Contract, and in May 2005, the State commenced an administrative procedure to verify the legality of the Contract and to revoke Decree 1.188. On June 10, 2005, Claimants secured a provisional measure from Venezuela's Supreme Court ordering the State to maintain Claimants' contractual rights. That same day, the State issued Resolution No. 0001-5 revoking Decree 1.188 and annulling the Contract. The State took over the airport three days later. Claimants regained control of the airport a month later, as a result of an Administrative Court order. But on December 29, 2005, the State ordered an official inspection of the airport and seized it the next day with the assistance of police forces, and on July 17, 2006, the State issued Decree 806, allowing it to take control of the airport for "duly reasoned, public interest reasons" but acknowledging Claimants' right to compensation for the unrecovered value of the investment and 50% of the value of lost benefits.

In August 2006, Venezuela's Supreme Court consolidated all pending cases related to the airport into its own docket and appointed an oversight board, controlled by the Venezuelan Government, for the management of the airport. In March 2009, the Supreme Court remanded the cases to the Administrative Court, extinguished the oversight board and entirely entrusted the management of the airport to the Venezuelan Government.

Claimants initiated an ICSID arbitration against Venezuela in June 2010, arguing that Venezuela's conduct and actions (including through the State) regarding their investments had breached a number of provisions of the Chile-Venezuela and Switzerland-Venezuela BITs (BITs).

The Tribunal found that Venezuela had breached the BITs on the grounds of expropriation and denial of justice. The Tribunal awarded Claimants approximately US$19.43 million in total damages with pre- and post-Award interest compounded annually at the LIBOR interest rate for one-year deposits in US$ +4%. Venezuela was ordered to pay Claimants' arbitration costs consisting of US$525,000 and part of the reasonable legal costs as determined by the Tribunal, in an amount of US$1.874 million.

Damages:
Claimants first requested compensation for costs in the amount of US$652,000 incurred in the preparation of the strategic plans associated with the development of the airport. The Tribunal rejected this claim because it considered that such expenses were not attributable to Venezuela's breach, and because they were not part of

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Recent Damages Awards

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the market value of the investment, which the Tribunal determined was the only concept for which Venezuela had an obligation to compensate.

The Tribunal next rejected all of Venezuela's preliminary objections to the granting of compensation. First, Venezuela argued that Claimants' expert valuated the wrong investment by assigning value to the shares of the Venezuelan operating and services companies that Claimants incorporated to operate the airport, instead of assigning a value to contractual rights held by Claimants to operate the airport. The Tribunal rejected this objection. It concluded that the only asset possessed by these local companies was the Contract and that in order to evaluate the discounted cash flow (DCF), it was necessary to have an accounting basis, and accounts were maintained at the company level. Venezuela also argued that the lack of economic contribution by Claimants prevented them from claiming any loss. The Tribunal rejected this objection on the same basis upon which it rejected Venezuela's analogous jurisdictional objection (i.e., Claimants' contributions in kind and industry amounted to an economic contribution). Finally, Venezuela argued that a hypothetical purchaser would not give any value to Claimants' investment, given the contractual irregularities and deficiencies that existed at the date of valuation. The Tribunal held that Venezuela could not benefit from its own actions to reduce the market value of the investment (since those alleged irregularities were created by the State itself).

Claimants sought damages resulting from the fair market value of both their operating and services companies in Venezuela. The Tribunal declined to consider the value of the services company, for which Claimants sought damages in the amount of US$325,743. The services company's only source of income was from a 5% fee from the operating company's income, meant to compensate for certain management functions conducted by Flughafen and IDC. Therefore, the Tribunal considered that the services company did not have a market value of its own in isolation from the market value of the operating company.

For the calculation of damages, both parties concurred that a DCF analysis was the appropriate method to calculate the market value of the investment and that December 30, 2005, was the appropriate valuation date. The Claimants' valuation of the fair market value of the operating company as of December 30, 2005, amounted to approximately US$40.06 million.

The Tribunal identified the following key elements that had a significant impact on the DCF valuation: (i) passenger traffic, (ii) operating costs and (iii) discount rate. The Tribunal requested that the experts attempt to agree on variations of these key elements and that they submit a joint model showing the impact that every potential outcome could have on the valuation. The experts, however, could not reach agreement and submitted separate models. The methodology that the Tribunal used to calculate the final damages for the operating company considered, first, making a decision with respect to each of the three key factors, then, choosing one of the mathematical models submitted by the experts, and finally, coming up with the value of compensation by applying the resulting variation to the model.

With respect to *passenger traffic*, the Tribunal favored Claimants' position that it should be determined based on reasonable expectations at the time of the expropriation, over Venezuela's proposal to use actual numbers from 2006 to 2011, because passenger traffic had to be determined based on the value that a potential buyer would assign with information available before the expropriation. The Tribunal also agreed with Claimants' approach with respect to operating costs to forecast future costs by taking into account the actual operative costs for the years 2004 and 2005, instead of using Venezuela's proposed 46.5% expenses-to-total-income ratio of Zurich's airport, the most efficient airport operated by Claimants. For the *discount rate* to be applied to future cash flows, the Tribunal concluded that Venezuela's 14.4% was more accurate than Claimants' 4.6% rate for a 20-year investment in Venezuela. The Tribunal observed that the difference in the discount rates resulted from (i) the cost of capital and (ii) the country-risk premium. With respect to the cost of capital, the Tribunal rejected Claimants' use of the weighted average cost of capital (WACC) to calculate the applicable discount rate, reasoning that Claimants had not financed their investment with debt and that the cost of equity suggested by Venezuela was the indicated factor for calculating the applicable discount rate. Regarding the country-risk premium, the Tribunal concluded that at the time

Claimants made the investment in 2004, the country risk already existed and the investors were well aware of the existence of political and legal uncertainties.

After making a decision with respect to each of the three key parameters, the Tribunal identified that the models showed that the parties' respective experts would reach very similar estimated valuations using the resulting variables. Those valuations would be approximately US$20.02 million per Claimants' expert, and approximately US$18.84 million per Venezuela's expert. The Tribunal considered that, despite the difference between the two, both estimates were equally correct. It therefore decided to split the difference between the two to come up with a final fair market value for the operating company of approximately US$19.43 million.

Currency:
Claimants requested to be compensated in their respective currencies, Swiss francs (CHF) and Chilean pesos (CLP), with the conversion to be carried out based on the exchange rate on the date of expropriation. The Tribunal observed that the BITs provide for compensation only in a "freely convertible" currency, a requirement that is met by the USD, the CHF and the CLP. The Tribunal identified a number of reasons that made it impracticable to award compensation in CHF and CLP and concluded that the amounts due to both investors should be expressed in USD.

Interest:
Claimants requested interest to be paid at (i) the LIBOR rate +4% compounded annually for compensation in CHF and (ii) the 90-365-day average annual interest rate for bank loans for compensation in CLP, beginning from the date of the expropriation. Venezuela rejected the use of CHF and CLP as currency and argued that the appropriate interest rate should be a risk-free interest rate, and submitted that the six-month US Treasury bill rate or alternatively the six-month US Certificate of Deposit rate should be used. Moreover, Venezuela argued that simple, not compound, interest should be awarded as this was customary under international law.

Based on its previous decision regarding the currency of compensation, the Tribunal rejected Claimants' different rates for each currency. The Tribunal considered as an appropriate rate one sufficient to compensate for the financial cost suffered by Claimants as a result of the unavailability of the compensation to which they were entitled as a result of the expropriation. The Tribunal held that the compound interest is the only way to fully compensate for the actual damage suffered by the investor. Accordingly, the Tribunal ordered that Claimants were entitled to pre- and post-Award interest, compounded annually, from December 30, 2005, to the date of payment, at the LIBOR rate for one-year deposits in USD +4%.

Costs:
The Tribunal held that it was appropriate to follow the recent trend in investment arbitration to distribute costs to reflect, to a certain extent, the "loser pays" principle. The Tribunal ordered Venezuela to bear the arbitration costs (i.e., ICSID costs) entirely, consisting of US$525,000. With respect to the legal costs (i.e., attorneys, experts and witnesses fees), the Tribunal decided to take a "conservative approach" and ordered Venezuela to pay part of the reasonable legal costs, estimated by the Tribunal at US$2.9 million. In determining the reasonable amount of the legal costs that Venezuela should pay, the Tribunal distributed the value of those costs across each of the main stages of the arbitration (i.e., jurisdiction, liability and damages) and ordered Venezuela to pay an amount for each stage proportional to the degree to which its arguments had been defeated. As such, the Tribunal ordered Venezuela to compensate Claimants for part of the reasonable defense costs in the amount of US$1.874 million.

Hrvatska Elektroprivreda D.D. v. Republic of Slovenia **(ICSID Case No. ARB/05/24)**

Date of Award:
December 17, 2015

Parties:
Hrvatska Elektroprivreda (Claimant), the Republic of Slovenia (Respondent)

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Sector:
Power generation

Applicable Treaties:
Energy Charter Treaty (ECT) and the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on Regulation of the Status and Other Legal Relations Regarding the Investment, Use and Dismantling of Nuclear Power Plant Krško (the 2001 Agreement)

Members of the Tribunal:
David A.R. Williams QC (President), Charles N. Brower (Claimant's appointee) and Jan Paulsson (Respondent's appointee)

Background:
In 1974, the national electricity companies of Croatia and Slovenia established Nuklearna Elektrana Krško (NEK), a limited liability company, to build and operate the Krško Nuclear Power Plant (the Krško NPP). The Krško NPP was constructed in Slovenian territory in the 1970s with funds contributed in equal parts by Slovenia and Croatia when both were part of the former Yugoslavia. Hrvatska Elektroprivreda (HEP or the Claimant) is the national electric company of Croatia, which the Government of Croatia owns in full. The dispute between HEP and the Republic of Slovenia (Slovenia or the Respondent) concerned the ownership and operation of the Krško NPP.

Between 1970 and 1984, the Governments of Croatia and Slovenia entered into four agreements regulating the financing, construction, operation, management and use of Krško NPP (the Governing Agreements). According to the Governing Agreements, each co-investor was a 50:50 partner in all aspects of the Krško NPP, having a right to 50% of the output and a liability for 50% of the plant's debts (the parity principle).

Slovenia adopted a number of measures that HEP viewed as inconsistent with the parity principle. In 1998, Slovenia discontinued delivering electricity produced at Krško NPP to Croatia, following which the Governments of Slovenia and Croatia entered into negotiations with a view to restoring the parity principle.

In June 2001, Croatia and Slovenia reached an agreement that electricity deliveries to HEP would resume on June 30, 2002, and that all financial claims between the parties would be waived up until this date. Slovenia and Croatia recorded this concord in the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on Regulation of the Status and Other Legal Relations Regarding the Investment, Use and Dismantling of Nuclear Power Plant Krško (the 2001 Agreement).

Slovenia did not ratify the 2001 Agreement until February 2003 and did not resume deliveries of electricity from the Krško NPP to HEP until April 19, 2003. However, between June 2002 and April 2003, NEK made two offers to HEP to sell to it electricity from Krško NPP, both of which HEP rejected (the 2002 Offers). HEP commenced arbitral proceedings against Slovenia in 2005, seeking compensation for the financial loss it allegedly incurred due to Slovenia's failure to resume delivery of HEP's 50% of the electricity produced at Krško NPP to HEP by June 30, 2002, as required by the 2001 Agreement. Slovenia, in return, argued that the 2001 Agreement did not expressly define a starting date for the supply of power to HEP, and that HEP had no right to receive electricity as of June 30, 2002, and had acted unreasonably in rejecting NEK's offers for the sale of electricity. HEP filed its claim against Slovenia under both the ECT and the 2001 Agreement.

By majority decision, on June 12, 2009, the Tribunal held that it had jurisdiction over HEP's claim and that Slovenia was liable to HEP under the 2001 Agreement.

Damages:
To aid in its determination on the quantum of damages, the Tribunal requested, and the parties agreed to, the appointment of an independent expert. The parties' preferred candidate to serve as independent expert was Mr. Wynne Jones, of Frontier Economics, Ltd., London, England.

In his expert reports, Mr. Jones introduced two "new issues" for consideration in the quantum phase of the arbitration, which the parties had not previously raised: (i) the "pass-on" theory and (ii) the "benefit-to-HEP" theory. The pass-on defense posits that HEP passed on any loss it suffered by having to obtain electricity from alternative sources to its consumers and therefore did not suffer any loss. The benefit-to-HEP theory posits that through its failure to deliver electricity to HEP, Krško NPP increased in value, thereby increasing the value of HEP's ownership interest as well, i.e., benefiting HEP. Over the Claimant's objections, the Tribunal determined that it was entitled, indeed required, to consider these new issues Mr. Jones raised in determining the quantum to which HEP was entitled.

In its Award of December 17, 2015, the Tribunal issued its unanimous decision on the seven items outlined above, finding as follows.

The Tribunal found that the 2002 Offers differed materially from the deal agreed to in the 2001 Agreements, and the Tribunal thus found that HEP was reasonable in rejecting NEK's 2002 Offers. In consequence, the Tribunal held that Slovenia had not satisfied its 2001 Agreement obligations by offering to sell electricity to HEP between June 2002 and April 2003, and Slovenia therefore remained liable to HEP for any losses it suffered as a result.

With respect to mitigation, the Tribunal stated that "general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses." The Tribunal considered HEP's actions in light of not merely economic considerations, but also noneconomic considerations, such as the security of the electricity supply and HEP's fear that accepting NEK's 2002 Offers would incentivize NEK to continue breaching the 2001 Agreement. The Tribunal held that "HEP generally acted reasonably in its dispatch decisions, and the Tribunal will not, therefore, second guess those decisions."

With respect to the methodology for calculating what loss, if any, HEP suffered, the Tribunal noted that both parties approached the compensation question with the same basic calculation: "X minus Y. In this equation, the 'X' figure represents the factual scenario: the cost HEP incurred replacing the electricity it would have received from the Krško NPP. The 'Y' figure represents the counterfactual scenario: the cost that HEP would have incurred had it received 50% of the electricity produced by the Krško NPP."

With respect to the counterfactual (Y) scenario, the Claimant's experts calculated damages using a "replacement cost" model, and the Respondent's experts calculated damages using the "financial value" model. The Tribunal's expert commented on both models and offered revised calculations, but did not recommend one approach over the other. The Tribunal adopted Mr. Jones' calculations and determined that in the counterfactual scenario (Y), the cost of Krško electricity to HEP would have been €55,647,000.

With regard to the factual scenario (X), the Claimant's experts adopted the "replacement cost" approach while the Respondent's experts applied the "market value" model, leading to a difference in valuation of almost €29 million. Looking to the *Chorzów Factory* principle and Article 31(1) of the Articles on State Responsibility for guidance, the Tribunal determined that it should adopt the method of valuation that would place HEP in the same situation "which would, in all probability, have existed had it received electricity from Krško NPP from July, while also providing damages for loss sustained." The Tribunal held that the replacement cost model was the preferable approach to calculate the X factor, because its focus was on the loss suffered by the innocent party, HEP. The market value approach, by contrast, would shift the focus away from HEP and onto the market.

Following an analysis and weighing of the evidence before it, the Tribunal determined that HEP sought replacement electricity through a mix of use of its thermal power plants (TPPs) and import contracts, which was reasonable in light of financial and nonfinancial considerations, such as security of supply. The Tribunal adopted Mr. Jones' method for calculating the replacement value and held that the value of the X factor was €36,241,000 for TPP generation and €40,964,000 for import contracts.

Inserting these figures into the X – Y calculation, the Tribunal determined that the measure of damages to which HEP was entitled amounted to €21,558,000.

The Tribunal next considered the benefit-to-HEP question. Mr. Jones suggested that, in the counterfactual (Y) scenario, Slovenian purchasers of Krško NPP-produced power would have paid the same tariff as HEP, i.e., the tariff calculated in accordance with the 2001 Agreement. This price would have been lower than the price paid in the factual (X) scenario. As a result, in the counterfactual scenario, NEK would have received a reduced income for the Krško NPP power, and therefore, it would have been in a worse financial situation than it was in the factual scenario. "As a result, NEK was worth more by April 2003 in the factual scenario than it would have been worth in the counterfactual scenario."

HEP, as a 50% owner of Krško NPP under the 2001 Agreements, owned 50% of the increased value of Krško NPP caused by NEK's noncompliance with the 2001 Agreement, and consequently, any compensation to which HEP was entitled should be reduced accordingly. Both parties agreed to this general proposition.

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Adopting for the most part Mr. Jones' calculations, the Tribunal determined that the benefit to HEP to be deducted from its loss of €21.56 million was €1.571 million. In conclusion, the Tribunal held that the Claimant suffered damages in the amount of approximately €19.98 million.

Interest:
Having determined the amount of HEP's loss, the Tribunal considered how to calculate interest on that amount.

The Tribunal began its analysis by "recalling that the purpose of interest is to ensure full reparation." With a view to achieving this aim, the Tribunal agreed with Mr. Jones' economic view on the matter to the effect that interest should be applied from the date on which the damage to the innocent party occurred and should be calculated up until the date on which the debt is satisfied in full. The Tribunal adopted the Claimant's submission that interest should be calculated from July 1, 2002. The Tribunal also found that interest should continue to run until the Respondent satisfied the Award.

Regarding the rate of interest, the Tribunal said that the appropriate rate of interest should represent "a reasonable and fair rate that approximates the return the injured party might have earned if it had the use of its money over the full period of time." The Tribunal acknowledged that it is common in investment treaty cases to tie the interest rate to LIBOR, but, since the relevant currency in *Hrvatska* was the euro, the Tribunal determined it more appropriate to use EURIBOR, finding that this represented an objective, market-oriented rate. It added 2% to EURIBOR to reflect the commercial interest rate and relative risk considerations. Finally, the Tribunal also decided that interest should be compounded at six-month intervals, reflecting simple economic sense and a general trend in international practice.

Costs
Finally, the Tribunal considered the issue of costs. It cited ICSID Convention Article 61(2) and Rule 28 of the ICSID Arbitration Rules, which afford the Tribunal wide discretion to award costs and noted a general trend in investment arbitration to award costs to the prevailing party. The Claimant claimed costs of approximately US$3.3 million for the entire arbitration; the Respondent claimed around US$9 million.

Because the Tribunal considered that neither party had succeeded entirely on its claims, but on balance, the Claimant succeeded on more claims, the Claimant was entitled to recover costs in the amount of US$10 million.

Ultimately, the Tribunal awarded HEP €19,987,000 plus interest at a rate of EURIBOR +2%, compounded semiannually, from July 1, 2002, until the date the Respondent pays the Award, and US$10 million in costs.

Khan Resources Inc. et al. v. Mongolia (UNCITRAL)

Date of Award:
March 2, 2015

Parties:
Khan Resources Inc. (Canada), Khan Resources B.V. (Netherlands) and CAUC Holding Company Ltd. (BVI) (Claimants or Khan), Mongolia and MonAtom LLC (Respondents)

Sector:
Mining concessions, mining rights

Applicable Treaties:
Energy Charter Treaty (ECT), Foreign Investment Law of Mongolia (FIL)

Members of the Tribunal:
Prof. David A.R. Williams QC (President), The Hon. L. Yves Fortier PC CC OC QC (Claimant's appointee) and Prof. Bernard Hanotiau (Respondent's appointee)

Background:
The *Khan v. Mongolia* dispute arose out of Mongolia's invalidation and subsequent refusal to re-register mining and exploration licenses for a uranium deposit in the country's Dornod region. Between 1988 and 1995, Priargunsky, a Russian State-owned company, extracted uranium in Dornod. The mine closed in 1995 due to a combination of insufficient funds and a falling demand for uranium following the breakup of the USSR. The same year, certain Russian and Mongolian State-owned entities and a US private company, WM Mining, formed the joint venture CAUC to develop uranium exploration and extraction in the region. Khan obtained an interest in CAUC and the Dornod Project following a series of transactions and corporate restructurings. The Claimants obtained various exploration and mining licenses over the Dornod area between 1998 and 2005, with Khan purportedly investing around US$50 million in exploration work in the Dornod region.

In 2009, the Mongolian Government suspended Claimants' exploration and mining licenses, allegedly on the basis of violations of Mongolian law and breaches of the agreements entered into between Claimants and Mongolia. The government was not forthcoming in reregistering the licenses. The Claimants alleged that this was in furtherance of a planned joint venture between Russia and Mongolia, aiming to oust Khan from Mongolia once the Dornod Project's economic viability had been established.

Khan alleged various breaches by Mongolia of the FIL and the ECT, and sought damages of US$326 million plus interest and costs. The Tribunal found that the Respondents had breached Article 8.2 of the FIL by unlawfully expropriating Claimants' licenses. In turn, the Tribunal found that this constituted a breach of the ECT by operation of the so-called "umbrella" clause of Article 10(1). The Tribunal ultimately awarded damages of US$80 million plus interest and costs, reflecting the true value of Claimants' investment.

The Parties' Submissions on Quantum:
The parties did not contest the applicability, in principle, of the customary international law rules set out in the *Chorzów Factory* case – that is, that the Tribunal should put Claimants in the position they would have been in had their investment not been expropriated. As regards the quantum methodology, Claimants proposed taking an average of: (i) an income-based, discounted cash flow (DCF) method of projected future earnings; and (ii) a market-based, "comparable companies/transactions" analysis, valuing the company by comparing its valuation multiples to those of its peers.

Noting the significant disparity between Claimants' actual investment and the result arrived at by applying the DCF analysis, Mongolia argued that the DCF method should not be applied where, as in this case, there was no record of profitability and calculations of future profitability were unduly speculative. Mongolia argued that Claimants' damages claim was speculative since: (i) Claimants did not possess title under Mongolian law to any interest capable of exploitation; (ii) Claimants would likely be unable to obtain required financing; (iii) Claimants lacked experience in mine development; and (iv) Claimants ostensibly expected to sell their participation in the joint venture once they had concluded feasibility studies. The Respondents also argued that Claimants' application of the DCF method was flawed since, *inter alia*, Claimants had: (i) relied on tax incentive calculations based on long-abolished Mongolian foreign investment laws; (ii) used a 19-year forecast despite the difficulty and uncertainty in predicting uranium prices beyond three years; and (iii) relied on assumptions as to the joint operation of the Dornod Project with a rival prospector, when that prospector had rejected Claimants' previous merger offer.

Mongolia also rejected the "comparable companies/ transactions" approach, on the basis that each interest in natural resources presents "a unique set of value parameters," as stated by the *Occidental v. Ecuador* Tribunal. The Respondents argued that: (i) the companies used in Claimants' comparison had projects that were already in production, were located in more stable regions, possessed the necessary permits, and had full or partial funding; (ii) the allegedly comparable transactions used in Claimants' analysis took place under significantly different market conditions; and (iii) Claimants' calculations did not take account of different climatic, geographic and regulatory conditions.

According to Mongolia, even if the Tribunal were to find in Claimants' favor on liability, Claimants would not be entitled to damages because, in all probability, they would not have brought the Dornod Project into production. If damages were due, they should be limited to the amount of Claimants' actual investment. Alternatively, damages should be calculated according to Khan's share price. Mongolia argued that the claim could not exceed the value of this company, and the best evidence of the fair value of a publicly traded company is its quoted share price in an active market.

The Claimants argued against awarding damages on the basis of Khan's share value because by the date

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of valuation, the Mongolian Government had already depressed Khan's share value to the point of illiquidity. Market price methodology was also inappropriate in this case, they argued, since it was difficult to separate the impact of Mongolia's unlawful actions from the impact of general market conditions.

Further, Claimants argued against a damages calculation tied to their actual costs. While the Dornod Project had numerous characteristics making it an attractive proposition to investors, it had not yet progressed past the exploration stage. The Claimants argued that many of the obstacles they faced in putting the mine into production were due to Mongolia's unlawful conduct, and that but for such conduct, they would have obtained financing as a result of their discovery of substantial uranium reserves. The value of Khan's interest in the Dornod Project was evidenced by: (i) the history of Soviet mining in the area; (ii) Mongolia's designation of the reserves in 2007 as of "strategic importance"; and (iii) the fact that Claimants had been subjected to a number of attempted takeover bids in 2009 and 2010.

The Tribunal's Findings:
The Tribunal noted that while damages could not be "speculative or uncertain" and that the burden of proof lay with Claimants to demonstrate their losses on the balance of probabilities, "scientific certainty is not required" and that "the assessment of damages … will usually involve some degree of estimation." The Tribunal found that while the mine was not yet in production, the Dornod Project had considerable inherent value, primarily because Claimants could have realized value from selling their interest in the Dornod Project to a willing buyer.

The Tribunal found that the amount of any potential sale provided a better reflection of the true value of the mine than the more "traditional" methods of DCF, market comparables and market capitalization. It considered the DCF approach to be unduly speculative, especially given that it was far from certain whether the mine would have achieved production. Even if it were to have done so, it was not clear on what terms the parties would have participated in the venture, or whether Claimants would have been involved at all. With respect to the market comparables approach, the Tribunal found the chosen companies were of a different nature than Claimants, and the chosen transactions concerned projects in different locations, subject to different conditions and at different stages of development. The Tribunal also rejected Mongolia's "market capitalization" method. Despite the approach being superficially attractive, the "illiquid" nature of the market and the possibility that investors were deterred by Mongolia's prior actions meant that this method produced a valuation for the Dornod Project that bore little or no relation to its inherent value.

The Tribunal found the most persuasive indication of the real value of Claimants' investment, and indeed "the only remaining material on the basis of which the Tribunal might estimate fair market value," was the fact that three offers had been made to acquire Khan's shares in the Dornod Project in 2005, 2009 and 2010. The Tribunal considered the 2010 offer to most closely approximate the fair value of Claimants' investment since: (i) the offer was made sufficiently close to the agreed valuation date of July 1, 2009 (which was uncontested by the parties), so that market conditions would not have significantly altered; (ii) unlike the 2009 offer, it was not a hostile takeover bid; (iii) the offer was ostensibly acceptable to Khan's shareholders; (iv) at the time the offer was made, the investment was "less distressed" than at the time of the previous offers, owing to the recent execution of a memorandum of understanding between Claimants and the Mongolian Government; (v) at the time of the offer, steps were being taken to register the Dornod Project's proven reserves; and (vi) the offer was made by a foreign investor with no prior interest in the Dornod Project, who must therefore have been satisfied that it could persuade the Mongolian Government to reregister the licenses.

Nonetheless, the Tribunal considered that the notional buyer would have acquired the investment at a significant discount, since market conditions meant that Claimants' investment remained in a distressed state. Having applied a 100% adjustment factor to eliminate the effects of the Respondents' actions following the valuation date, the Tribunal arrived at a valuation of US$80 million. This figure, stated the Tribunal, took into account the considerable challenges and uncertainties that would face a new investor in realizing the value of the proven reserves at Dornod, as well as Claimants' prior investment in the Dornod Project and the subsequent investment that would have been needed.

Interest:
Khan argued for a 7.5% rate of compound interest. Citing Article 38 of the ILC Articles on State Responsibility and Article 13 of the ECT, as well as the *Occidental* award, it asserted that interest should be assessed at a commercial rate established on a market basis and that "the most recent awards provide for compound interest." Khan argued that the applicable rate should reflect the risk that Mongolia would default, and that in effect, Khan was forced to make an "involuntary loan" to Mongolia until satisfaction of the award. Mongolia argued that, if awarded, interest should be calculated at a rate "no higher than LIBOR, or at the very most, LIBOR +1% or 2%." It argued that the prevalent approach of investment arbitration Tribunals was against the award of compound interest and in favor of simple interest, citing *MTD v. Chile*. Moreover, Khan's 7.5% rate was based on Mongolia's foreign debt, which was irrelevant to the present case, and the "coerced loan theory" should be rejected, as it has been adopted only in exceptional circumstances.

The Tribunal awarded interest at a rate of LIBOR +2%, compounded annually from the valuation date to the date of the award's satisfaction. The Tribunal determined that an interest rate based on "LIBOR plus a small percentage" was commercially reasonable, and that such a view was consistent with the recent practice among ICSID Tribunals and the prevailing scholarly view. For the same reason, it awarded compound rather than simple interest.

Costs:
The parties each claimed their full costs from the other side. Mongolia contested the reasonableness of Claimants' costs, particularly with respect to the nature and amount of the success fee claimed by Khan. It argued that the success fee had not been "incurred" within the meaning of Article 40(2)(e) of the UNCITRAL Rules, because although the legal obligation to pay the success fee had been incurred, the fee had not yet been paid. The Tribunal determined that there were no extraordinary factors that would cause it to depart from the presumption, under Article 42 of the UNCITRAL Rules, that costs follow the event. Accordingly, it found Claimants entitled to recover their costs. The Tribunal also dismissed the Respondents' objections in respect of the success fee, finding that the distinction between "incurred and paid" fees was artificial.

***Hassan Awdi et al. v. Romania* (ICSID Case No. ARB/10/13)**

Date of Award:
March 2, 2015

Parties:
Hassan Awdi, Enterprise Business Consultants, Inc., and Alfa El Corporation (Claimants), Romania (Respondent)

Sector:
Press distribution, real estate, leisure, hospitality

Applicable Treaty:
Treaty of 28 May 1992 between the United States of America and Romania Concerning the Reciprocal Encouragement and Protection of Investment, which entered into force on May 28, 1992 (the BIT or Treaty)

Members of the Tribunal:
Professor Piero Bernardini (President), Dr. Hamid G. Gharavi (Claimant's appointee) and Professor Rudolf Dolzer (Respondent's appointee)

Background:
Hassan Awdi went to Romania in 1992 to pursue opportunities presented by the liberalization of the Romanian economy after the fall of Communism. Mr. Awdi and his co-Claimants, two US companies controlled by Mr. Awdi, acquired Rodipet, a privatized press distribution company previously owned by the Romanian State. Claimants also acquired a historic estate called Casa Bucur from a company owned by the Romanian State agency, which they turned into a luxury boutique hotel and restaurant.

Regarding Rodipet, Claimants and the Romanian Authority for State Assets Recovery (AVAS) signed a Privatization Contract for the sale-purchase of Rodipet shares. Among other commitments, AVAS undertook that Romania would make all reasonable efforts to grant to Rodipet a maximum of a 49-year concession over land,

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housing and press distribution points. The dispute arose when Romania allegedly revoked Law 442, which granted the land concession to Rodipet, and took control over Claimants' indirect shareholding in the company.
With respect to Casa Bucur, the dispute arose when the Romanian Supreme Court held that Claimants' acquired property should be returned to the people who had owned it originally before the property was seized by Romania under its Communist regime.

Claimants initiated an ICSID arbitration against Romania in June 2010, arguing that the Respondent's actions in revoking Law 442 and taking Casa Bucur breached various provisions of the BIT, including the requirement of fair and equitable treatment and full protection and security, the prohibition against unreasonable and discriminatory measures, and the provisions on expropriation guarantees.

The Tribunal ultimately held, with regard to Rodipet, that Romania had breached the fair and equitable treatment standard in connection with the repeal of Law 442, and, regarding Casa Bucur, Romania had breached the fair and equitable treatment standard regarding failure to compensate for the price paid for the taking of the property. It dismissed Claimants' expropriation claims of more than €400 million. The Tribunal awarded Claimants approximately €7.69 million in damages, plus interest compounded semiannually to accrue at the rate of EURIBOR +2%. Each side was ordered to bear its own legal costs, except that the Respondent was ordered to pay US$1 million to Claimants as part of the latter's legal costs and expenses. The costs of the arbitration, i.e., the fees and costs of the Tribunal and ICSID, were split equally between the parties.

Damages:
In two different reports by separate quantum experts (one submitted with their Memorial and the other with their Reply), Claimants submitted damages calculations for four claims: principal claim, alternative claim, additional claim and Casa Bucur. Claimants also submitted claims based on two alternative dates: September 6, 2008 (when Law 442 was revoked), and June 30, 2009 (when AVAS became the majority shareholder of Rodipet). Claimants also requested moral damages and interest. The Respondent disputed these claims, but its quantum expert did not provide any alternative valuations.

Under their principal claim, Claimants presented valuations of Rodipet and other companies of the so-called Rodipet Group that allegedly relied on Rodipet for cash flow, administration, office space, personnel and supplies of press-related products. Claimants presented four different figures for their principal claim, ranging from approximately €147 million to €300 million, depending on the expert and the alternative dates. Among other arguments, the Respondent disputed Claimants' valuations, arguing that Rodipet had historically been loss-making.

Claimants also presented alternative claims. Under these claims, Claimants' experts calculated the fair market value (FMV) of the concession as of September 6, 2008, under both rent-free and non-rent-free assumptions. The alternative claims also included damages for alleged substantial investments.

In addition, Claimants presented additional damages for lost properties and moral damages. According to Claimants, Rodipet owned commercial properties as well as residential properties. The commercial properties were used in Rodipet's activities and taken into account in the discounted cash flow (DCF) valuation; however, the residential properties were not taken into account in the DCF valuation and, according to Claimants, had to be compensated under the principle of full compensation to wipe out all the consequences of the wrongful act. Claimants claimed €23.9 million for lost properties.

With regard to moral damages, Claimants contended that, in order for reparation to be "full" under the *Chorzów Factory* standard, they were entitled to such damages. According to Claimants, moral damages are fact-driven and depend on the circumstances of the case. Claimants argued that they had suffered moral damages through: (i) the stress and anxiety of being harassed, arrested and held in Romania unlawfully; (ii) prolonged unlawful penal claims; and (iii) injury to their credit, reputation and lost prestige. Claimants claimed 5% of awarded damages and no less than €10 million in moral damages.

The Tribunal referred to its analysis regarding Law 442 and reaffirmed that only the breach of the fair and equitable treatment standard regarding Law 442 entailed liability for Romania to compensate Claimants. Therefore, the Tribunal disregarded Claimants' damages analysis based on expropriation.

The Tribunal found that the Claimants' DCF method was not justified in these circumstances because of Rodipet's history of losses. The Tribunal also cited to uncertainties regarding future income and costs of an investment in this industry in the Romanian market as additional reasons to reject Claimants' DCF methodology. The Tribunal decided instead to base compensation on sunk costs, specifically, the amount Claimants invested in Rodipet under the expectation that such amount would have been earned back had Law 442 remained in force.

Ultimately, the Tribunal referred to its previous determination of the amount of Claimants' investment accepted by the Tribunal on the date of the repeal of Law 442: €7,543,176.59. The Tribunal awarded this amount as overall compensation regarding claims for Rodipet. It did not grant compensation with regard to other companies of the Rodipet Group, finding no evidence that their involvement had profited Rodipet and had been accepted by AVAS as falling within the scope of the Privatization Contract. The Tribunal likewise dismissed Claimants' claim for moral damages and their claim for lost property, finding as to the latter that there was no evidence regarding the basis of the claim, including causation between breach and damages and the ownership of the alleged lost properties.

Regarding Casa Bucur, Claimants contended that they were entitled to be compensated for the entire value of the estate under international law and Romanian law. Claimants' experts presented several different valuations of the Casa Bucur estate. Ultimately, however, the Tribunal rejected Claimants' contention that Claimants lost their investment in Casa Bucur because of Romania's BIT breaches. The Tribunal reiterated that the only claim it accepted was the claim for reimbursement of the price paid for acquiring Casa Bucur, based on an arm's-length transaction, i.e., €147,352. The Tribunal awarded this amount as overall compensation for breach of the fair and equitable treatment standard regarding Casa Bucur.

Interest:
Claimants requested interest at a rate of 12%–13% based on the weighted average cost of capital (WACC). Claimants argued that the WACC rate is appropriate because it compensates them for their lost opportunity to reinvest the funds of which they have been deprived as a consequence of the Treaty breaches. As an alternative to the WACC, Claimants requested that the Tribunal apply the rate of three-month EURIBOR +4.25%. Finally, Claimants requested that interest be compounded annually, arguing that compounding is standard practice. Romania, on the other hand, argued that Claimants' request to use the WACC was inappropriate, novel and unsupported by legal authority. Instead of the WACC, Romania proposed using a risk-free rate such as those in US Treasury bonds. Further, Romania contended that awarding compound interest has been inconsistent in the jurisprudence and that most Tribunals award simple interest.

The Tribunal found that, even though this was not an expropriation case, the commercially reasonable rate is a criterion of general application. The Tribunal adopted a rate of EURIBOR +2%, finding it to be commercially reasonable. The Tribunal also held that interest should be compounded semiannually, finding that compound interest is increasingly recognized in the field of investment protection as better reflecting current business and economic reality, and thus the actual damages suffered by a party. The Tribunal specified that interest should run from September 6, 2008, on compensation for Rodipet and from March 20, 2008, on compensation for Casa Bucur, in both cases until full payment.

Costs:
The Tribunal held that the application of the "loser pays" principle was to some extent appropriate in this particular arbitration. The Tribunal noted in this respect that the outcome of the case had been to some extent in Claimants' favor on both jurisdiction and the merits. As such, the Tribunal considered it appropriate for each party to bear its own costs, except that Romania would reimburse Claimants for part of their legal costs in the amount of US$1 million. The Tribunal further ordered that the fees and costs of the Tribunal and of ICSID would be split equally between the parties. Finally, the Tribunal ordered Romania to reimburse Claimants €482,336.65, representing 50% of their costs incurred for gaining access to documents seized in the course of criminal investigations.

***Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada* (ICSID Case No. ARB(AF)/07/4)**

Date of Award:
February 20, 2015

Parties:
Mobil Investments Canada Inc. and Murphy Oil Corp. (Claimants), Canada (Respondent)

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Recent Damages Awards

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Sector:
Petroleum project development

Applicable Treaty:
North American Free Trade Agreement (NAFTA)

Members of the Tribunal:
Professor Hans van Houtte (President), Professor Merit E. Janow (Claimant's appointee) and Professor Philippe Sands QC (Respondent's appointee)

Background:
Claimants Mobil Investments Canada Inc. (Mobil Canada) and Murphy Oil Corporation (Murphy Oil), both US-based companies, invested together with other investors in projects Hibernia and Terra Nova, two large-scale offshore oil projects off the coast of the Province of Newfoundland and Labrador (the Province). In the Province, offshore petroleum projects are governed by the parallel provincial and federal law. The Canada-Newfoundland Atlantic Accord Implementation Act and the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act (together, the Accord Acts) established the Canada-Newfoundland Offshore Petroleum Board (the Board) to regulate the sector and required investors to submit proposals for the Board's approval. Each proposal had to contain a development plan describing how the project would be implemented and include a benefits plan proposing corporate research and development (R&D) and education and training expenditures that would benefit the Province and Canada. In 1986, 1987 and 1988, the Board adopted a series of specific guidelines, none of which contained specific expenditure requirements for investors.

In 2001, the Board began to develop a new series of guidelines, citing investors' declining expenditures. In mid-2003, the Board entered into regular discussions with operators regarding the proposed guidelines, in which it advanced specific expenditure targets and notified investors that the guidelines would be effective as from April 1, 2004, regardless of their eventual date of enactment. Operators repeatedly objected to the proposal, referring to the fact that none of the earlier guidelines contained specific expenditure requirements. After an agreed proposal could not be reached, the Board enacted the new guidelines (the 2004 Guidelines) in November 2004, notifying the Hibernia and Terra Nova operators of their expenditure requirements under the regime. The project companies unsuccessfully attempted to overturn the 2004 Guidelines in Canadian courts, while on November 1, 2007, the Claimants filed an arbitration with ICSID.

On the merits, the Tribunal dismissed the Claimants' fair and equitable treatment claim. After finding that the fair and equitable treatment standard under NAFTA was the minimum standard of treatment under customary international law, the Tribunal stated that there was no evidence suggesting the Respondent had made clear and explicit representations regarding future changes to the regulatory framework upon which the Claimants could have relied, and thus the Respondent had not breached the standard because it had not denied due process in a manner that offended judicial propriety.

The Tribunal next considered whether the 2004 Guidelines constituted a performance requirement forbidden under NAFTA Article 1106, and if so, whether Canada's reservation under Article 1108 covered the new guidelines. The Tribunal concluded that the expenditure requirements did fall under Article 1106, interpreting the term "services" nonrestrictively and finding that the 2004 Guidelines did indeed compel the Claimants to purchase certain local goods and services.

The Tribunal next considered whether Canada's Article 1108 reservation covered the 2004 Guidelines. The majority of the Tribunal concluded that the new guidelines constituted a new subordinate measure that was adopted "under the authority" of the Federal Accord Act. In considering whether the 2004 Guidelines were "consistent with the measure," the majority considered "subsequent measures" that predated the 2004 Guidelines, which it found necessary due to the fact that the legal framework was continuously developing, thus demanding that the Tribunal consider the specific facts of the case in light of that framework to determine the consistency of a new measure. In his Partial Dissent, Professor Philippe Sands QC disagreed, stating instead that for the purposes of determining consistency of a new subordinate measure, only the underlying listed measure should be considered, rather than the complete legal framework. Ultimately, the Tribunal majority found that the new burdens imposed by the 2004 Guidelines were inconsistent with the underlying framework, and thus held that they did not fall under the Respondent's Article 1108 reservation.

Damages:
Because the 2004 Guidelines mandated expenditures and imposed regulatory requirements on an ongoing basis, the Claimants had not incurred the full extent of their damages at the time of the Tribunal's 2012 Decision on Liability and Principles of Quantum. Canada made a jurisdictional objection to the Tribunal's ability to award future or prospective damages on the basis that NAFTA Article 1116(1) allowed claims to cover only "incurred" damages. The Claimants countered that the compensable damage was incurred at the enactment of the 2004 Guidelines, that the obligation to make future expenditures constituted an "incurred" damage under Article 1116(1) and that full reparation was a universally acknowledged principle under international law, requiring future damages to be compensated.

The Tribunal majority held that "[a] breach giving rise to future and prospective damage may, in general terms, fall within Article 1116." It characterized the Respondent's actions as a continuing breach resulting in damages that would be quantifiable at some future date. Thus, as a jurisdictional matter, the majority found the Tribunal was not precluded from determining appropriate compensation for future damages. Therefore, the outstanding issues to address were how to assess compensation for future damages, and whether it was appropriate for the Tribunal to consider damages or make an award of compensation for future damages in this particular case.

The Tribunal majority noted that in order to be awarded damages, the Claimants did not need to prove the quantum of damages with absolute certainty, but instead had to do so with "'a sufficient degree' of certainty or probability." Referring to *S.D. Myers v. Canada* and A*moco International Finance Corp. v. Iran*, the majority stated that the quantum "must be neither too speculative nor too remote" in order to be reasonably certain.

In order to evaluate the quantum of damages, the majority divided the damages into three distinct time periods: 1) losses incurred for the 2004–2008 time period; 2) losses incurred in 2009; and 3) losses to be incurred during the 2010–2036 time period. With respect to the 2004–2008 time period, the majority referred to the Board's decision regarding the shortfall for Hibernia and Terra Nova. Accounting for the Claimants' ownership share in the projects, the shortfall was CDN$12,964,597 for Hibernia and CDN$3,050,522.80 or CDN$2,915,940 for Terra Nova, depending on Murphy Oil's exact ownership share in that project. However, because the Claimants had yet to submit evidence of actual damage prior to the 2012 Decision, the majority found the issue was not ripe for the Tribunal's consideration.

The Tribunal majority also determined the issue of the Claimants' 2009 damages was not yet ripe for consideration because expenses for both projects still needed to be approved by the Board. Similarly, the majority also held that on the facts before it, the Tribunal was not yet able to properly determine several crucial outstanding issues regarding the Claimants' damages from 2010–2036. The majority pointed out that the Claimants' future expenditures were subject to two variables: objective, market-based factors, and the Board's regulatory decisions. The market-based variables, such as oil production forecasts and future oil prices, routinely experienced considerable fluctuations, while the Board had not yet made decisions that would heavily influence the Claimants' expenditures in the future.

The majority noted the relevance of *LG&E v. Argentina*, in which the Tribunal had awarded only damages actually suffered and declined to compensate the Claimant for decreased future dividends, and *Merrill & Ring v. Canada*, where the Tribunal had declined to grant damages for future losses for six years. Together with these cases, the facts of the present case contrasted with other case law in that the investment had been encumbered on an ongoing basis, but not destroyed. In the latter situation, the majority noted that tribunals have "no choice but to project future damages in the form of lost future profits." The distinguishing factor in the Claimants' case was that at a future date, the damages would become actual. Because the majority was unable to evaluate these future losses with reasonable certainty, the Tribunal had no

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grounds upon which to award future damages. Thus, to recover damages for future losses, the Claimants would have to initiate a new NAFTA arbitration once the damages had become actual.

The Tribunal majority noted three additional issues at the end of its 2012 Decision. First, the Tribunal had requested that the parties consider whether there was a formula whereby the Claimants' future damages could be monitored, in which the Respondent had declined to participate. Second, the Claimants had requested that the Tribunal attempt to establish a baseline for ordinary future expenditures to evaluate incremental spending. The majority noted that under NAFTA Article 1135, the Tribunal was empowered only to grant monetary damages, and thus did not have jurisdiction to establish such criteria. Third, the majority rejected the Claimants' request to "gross up" damages to compensate taxes. It declined to award the "gross up" on the basis of several factors, including that the Claimants had not established why these funds could not remain in Canada and would necessarily be subject to taxation in the United States. Further, the Tribunal majority noted that it was not aware of any previous award in which a Tribunal had awarded the Claimant "gross up" compensation as a result of tax considerations.

In the Award issued by the Tribunal majority on February 20, 2015, for actual damages incurred to date, the Claimants claimed damages for losses in two distinct categories: losses for "incremental spending," i.e., the amounts the Claimants had already spent on R&D or E&T under the 2004 Guidelines, and "shortfall losses," which comprised the difference between spending actually undertaken and that required by the 2004 Guidelines.

With respect to incremental spending, the parties disagreed regarding whether these expenditures were motivated solely by the 2004 Guidelines and that "but for" the 2004 Guidelines, the Claimants would not have engaged in such spending. Canada argued that a large fraction of the losses claimed by Claimants for incremental spending originated from expenditures that would have occurred in any event in the ordinary course of business, while the Claimants asserted they had already deducted these "ordinary course" expenditures from their calculation. In order to determine whether an expense was "ordinary course" spending or was motivated by the 2004 Guidelines, the majority engaged in an expenditure-by-expenditure analysis, under which the Claimants bore the burden of proof to establish with reasonable certainty that the incremental expenditures would not have been made in the ordinary course of business in the absence of the 2004 Guidelines. In the Award, the specific expenditure amounts at issue were heavily redacted.

Where the expenditure seemed to be eligible for tax credits for R&D spending, the majority deducted 32% from the amount of incremental spending to account for a benefit accruing to the Claimants under the 2004 Guidelines. The majority declined, however, to reduce the Claimants' damages for incremental expenditures on the basis of the royalty regime applicable to the projects. Similar to the tax credit regime, the royalty program allowed the Claimants to reduce their royalty payments to the Province on the basis of their R&D expenses. In contrast to the tax credit regime, however, there was no reliable historical data demonstrating the acceptance rates of royalty deductions, so the majority was unable to determine whether the deductions would ultimately be confirmed. Further, there was a chance that the royalty deductions, which (like the tax credits) were self-assessed by the Claimants, would be clawed back by the Province, raising the possibility of the Claimants being undercompensated if the damages award were reduced on this basis and the Province later revoked the benefit. Regarding Claimants' alleged shortfall, the Tribunal majority found the claimed amounts only partially compensable. In evaluating the difference between spending required and that actually undertaken under the 2004 Guidelines, the majority noted that while the amount is in principle compensable, it could not determine on the basis of evidence presented whether the Claimants had in fact received a call for payment and whether current shortfalls might be mitigated by future ordinary course expenditures. Regarding the latter issue, the majority was concerned that if it were to compensate the entire shortfall, the damages award might result in the pre-financing of Claimants' future ordinary course expenditures.

The majority then considered shortfall for the respective projects. It found that on the evidence presented, there was a reasonable certainty the Terra Nova shortfall would cease to exist in the foreseeable future, and thus declined to award shortfall damages. However, the majority did

state that at a future date, Mobil Canada and Murphy Oil "may claim whatever portion of the … spending they believe is incremental, in later proceedings." In contrast, the majority held that on the basis of the evidence before it, shortfall losses for Hibernia were partially compensable, and after noting the parties' agreement on the initial compensability of the shortfall, it applied a modified version of the Respondent's proposed historical ratio between incremental and ordinary course spending in order to evaluate future shortfall.

Interest:
The Tribunal majority awarded the Claimants interest for their incremental spending compensation, on an annual basis, at the rate of 12-month Canadian Dollar LIBOR +4%, compounded monthly.

Costs:
Due to the novel legal issues presented and the meritorious arguments of both parties that ultimately led to a partial dissenting opinion, the majority ordered the parties to bear their own legal and other costs and split the costs of the arbitration equally.

OI European Group B.V. v. Bolivarian Republic of Venezuela **(ICSID Case No. ARB/11/25)**

Date of Award:
March 10, 2015 (Spanish)[1]

Parties:
OI European Group B.V. (Claimant), Bolivarian Republic of Venezuela (Respondent)

Sector:
Glass packaging, industrial production and distribution

Applicable Treaty:
Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, concluded on October 22, 1991, and entered into force on November 1, 1993, and Protocol (Netherlands-Venezuela BIT or BIT)[2]

Members of the Tribunal:
Professor Juan Fernández-Armesto (President), Professor Francisco Orrego Vicuña (Claimant's appointee) and Mr. Alexis Mourre (Respondent's appointee)

Background:
The Claimant held since 2002 a majority interest in two Venezuelan companies (Companies) which owned the Los Guayos and Valera glass-packaging production, processing and distribution plants in Venezuela. The plants had been operated for over 50 years by the OI Group and were equipped with the Group's last-generation, high-efficiency technology. Polar, the largest food business group in Venezuela, held a minority interest in the Companies and was their main client.

On October 25, 2010, Venezuela announced the imminent expropriation of OI's glass business. On October 26, 2010, it issued the Expropriation Decree and placed the plants under custody of the National Bolivarian Guard (NBG). Venezuela then instituted a transitional period during which OI was to transfer management and operation experience to a newly established Board and management team. Venezuela implemented measures of temporary occupation of the plants and, in April 2011, placed the plants under the full supervision of Venvidrio, the State-owned company. Only by mid-November 2010, Venezuela initiated the formal expropriation procedure under domestic law and ordered judicial, provisional measures against the Companies (i.e., preventive occupation, appointment of an *ad hoc* board).

As of March 2015, the formal transfer of property of the expropriated assets was still pending before Venezuelan courts, without any compensation having been paid to the Companies. In the course of 2011–2012, in parallel with the plants' expropriation, Venezuela investigated and imposed a substantial fine on the Companies for alleged violations of domestic law, allowed access by third parties to the plants in spite of the Claimant's opposition, and dismissed the Companies' application

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[1] Venezuela filed a request for annulment of the Award on July 17, 2015. Enforcement of the award has been provisionally stayed and the *ad hoc* Committee has yet to be constituted.

[2] The BIT was terminated on November 1, 2008, following Venezuela's notice of termination pursuant to Article 14 of the BIT. Claimant initiated the present arbitration under the "sunset clause" in BIT's Article 14.3.

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for repatriation of 2008 and 2009 dividends at the lower, official exchange rate.

On September 7, 2011, the Claimant initiated an ICSID arbitration against Venezuela, arguing that Venezuela's misconduct had breached a number of investment protections under the Netherlands-Venezuela BIT. The Tribunal unanimously held that Venezuela had unlawfully expropriated OI's pair of glass production plants, and had breached its obligation to accord fair and equitable treatment to Claimant's investments. As a result, the Tribunal awarded the Claimant US$372.46 million in damages, plus pre- and post-award compounded interest, accruing at the US LIBOR rate +4%. In addition, Venezuela was ordered to bear all arbitration costs and to contribute US$5.75 million to Claimant's legal costs, fees and expenses.

Damages:
Claimant requested an award of approximately US$729.82 million (73% of the Companies' market value) in damages for Venezuela's expropriation of the plants, plus approximately US$16.83 million in excess cash flow. Claimant further requested payment of "additional damages" in order to achieve full reparation of harm incurred because of Venezuela's treaty-breaching conduct subsequent to the expropriation (including approximately US$54.29 million for losses arising out of the repatriation of dividends, approximately US$50.56 million for harm caused to its business activities in Brazil, approximately US$68.03 million for damages arising out of misuse of OI's intellectual property rights and confidential information, and US$10 million in moral damages). Venezuela in turn contended that the market value of the expropriated assets was approximately US$113.8 million and the cash flow excess was approximately US$10.56 million.

The parties agreed that the appropriate measure of damages was the Companies' market value (in VEB) and further concurred that the correct valuation date was October 26, 2010 (Expropriation Date). The Tribunal indicated that payment of compensation would be in US dollars converted at the official rate in force at the expropriation date.

While both parties based their calculation on the discounted cash flow (DCF) method over the 2010–2020 period, they disagreed as to whether the DCF results should be "weighted" with, or merely compared with, alternative valuation methods of comparable companies and comparable transactions. The Tribunal sided with the Respondent and used alternative valuations as a "sanity check" of the results obtained with the DCF method. The Tribunal argued that the DCF method was most reliable in the instant case, where future cash flow was reasonably foreseeable, as projections relied on historical data over a period of 50 years, on sophisticated quadrennial business plans, and on the Companies' unique technology and leadership position in the Venezuelan market and "captive customer" base. The Tribunal also endorsed the Respondent's allegation that the Venezuelan market was too unique to make meaningful comparisons with business enterprises operating abroad.

The Tribunal then stressed that the substantial gap between Claimant's (US$1.004 billion) and the Respondent's (US$195 million) valuations of the Companies' market value arose from divergent calibration of parameters, rather than different calculation methodologies. It thus opted for reviewing in detail the financial parameters used by each expert and combining assumptions afterward in order to run its own DCF valuation. Relevant financial inputs included production costs, sales prices, exports, capital expenditures (capex) and the discount rate.

The Tribunal approved Claimant's method, which based financial estimates on the Companies' 2010–2013 Business Plan, by stating that it contained reliable and sophisticated forecasts and, importantly, had been drafted prior to, and without knowledge of, the upcoming expropriation. Accordingly, the Tribunal accepted Claimant's (lower) estimates of production costs and (higher, above the 14% inflation rate) estimates of sales prices. Conversely, the Tribunal disregarded the Claimant's (and Business Plan's) low capex projections in order to better reflect a potential buyer's view given the historical levels of investments and refurbishment cycles of the equipment. By contrast, the Tribunal endorsed Claimant's inclusion of export projections in the DCF model, despite exports having stopped in 2006 and not been considered in the Business Plan. In the Tribunal's view, Claimant's explanation – which took argument with a significant increase in demand in Venezuela's domestic market in 2006 and administrative restrictions since 2008 – was reasonable and was supported by the fact that exports had resumed immediately after Venvidrio's takeover.

Also, although the parties agreed that the weighted average cost of capital (WACC) was the appropriate discount rate, their proposed rates ranged from Claimant's 20.39% to the Respondent's 25.78%. A major difference between the parties' valuations was their divergent estimates of country risk. The Tribunal ultimately rejected Claimant's lower 2% rate – intended to deduct legal, regulatory and political risks – and accepted the 6% rate provided in Prof. Damodaran's table as proposed by the Respondent. The Tribunal, however, refused to take account of an additional, specific risk premium of 2%, by noting that, contrary to the Respondent's finding, the Companies' and Polar's mutual dependence mitigated, rather than intensified, risks. As a result of the above, the Tribunal employed a discount rate of 23%.

By applying these adjustments to the parties' set of variables, the Tribunal found that the Companies' market value was approximately US$487.27 million. It then added to the resulting value a "cash flow excess" in order to take full account of the amount stocked in the Companies' corporate and bank accounts at the time of the expropriation. While the portion of cash needed for the Companies' normal operation was already reflected in the DCF valuation, cash reserves above that portion were not. In order to estimate the portion of cash needed for normal operation, the Tribunal considered financial data of a sample of comparable companies and determined that the Companies' cash flow excess amounted to approximately US$23.06 million.

Lastly, the Tribunal refused to further deduct a 20% additional "discount for specific reasons" in order to take account of the Companies' alleged lack of marketability because of restrictions on transfers of shares and specific rights granted to minority shareholder Polar, as suggested by the Respondent.

Accordingly, the Tribunal obtained a total value for 100% of the Companies of approximately US$510.34 million and concluded that Claimant, which owned a 72.983% direct and indirect participation in the Companies, was entitled to approximately US$372.46 million. The Tribunal contrasted those results with the findings of the parties' experts, with comparable companies, and with OI Group's financial information and considered divergences between its own valuation and those alternative estimates to be reasonable. For example, it was satisfied that its results matched OI's valuation of its share-ownership in the Companies (US$490 million by reference to the Companies' share in OI's total EBITDA; US$344 million by reference to their share in OI's total assets value).

The Tribunal dismissed all of Claimant's additional damages claims. First, it held that Venezuela's refusal to allow repatriation of Claimant's dividends at the lower, official rate had not breached the provisions of the BIT, since Claimant had voluntarily resorted to the free market, and transferred the sums, before it could reach a decision. Second, the Tribunal found that Claimant's quantification of damages relating to the Brazilian market and misuse of OI's intellectual property was too speculative and unsubstantiated. It further noted that the DCF methodology already took into account export projections and reasserted that Claimant was not the rightful holder of the intellectual property rights at stake. Third, in the Tribunal's view, the Respondent's supposedly "atrocious" conduct during the transitory period did not meet the test required in order to award such an "exceptional measure" as moral damages.

Interest:
The Tribunal granted Claimant interest at the 12-month US LIBOR rate +4%, accruing as from October 26, 2010, until actual payment of the award. Following modern arbitral practice, and given that the interest rate was indexed to LIBOR, the Tribunal decided that the interest would be compounded annually in order to achieve full compensation.

Costs:
As Claimant prevailed in most of its claims, the Tribunal held that the Respondent should bear all the arbitration costs and reimburse Claimant US$500,000. The Tribunal then apportioned legal fees and expenses by reference to so-called "reasonable defense costs" (i.e., "costs actually incurred by the [party], that are indispensable to an adequate defense of its interests"). Here, it estimated those costs to amount to US$6 million in legal fees and US$1.5 million in expert fees and allocated the Respondent's share in Claimant's costs per phase of the arbitration, and per degree of success by claim (US$2 million for the jurisdictional phase, US$1.5 million for the merits phase – where Claimant had prevailed in 75% of its claims – and US$1 million, plus US$750,000 in expert fees, for the quantum phase – where Claimant had been awarded 40% of its damages claim). Thus, the Respondent was ordered to pay total US$5.25 million toward Claimant's legal costs, plus compound interest accruing at the same interest rate as damages.

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Recent Damages Awards

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Tidewater et al. v. Venezuela (ICSID Case No. ARB/10/5)

Date of Award:
March 13, 2015

The Parties:
Tidewater Investment SRL, Tidewater Caribe C.A. (Claimants), Venezuela (Respondents)

Sector:
Oil & gas

Applicable Treaty:
Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments

Members of the Tribunal:
Professor Campbell McLachlan QC (President), Dr. Andrés Rigo Sureda (Claimant's appointee) and Professor Brigitte Stern (Respondent's appointee)

Background:
The above Tribunal issued its award on the merits in an ICSID arbitration brought under the Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (the BIT), *Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela* (the Award). The Tribunal found that Venezuela had expropriated Claimants' investment, albeit lawfully, and awarded Claimants damages of US$46.4 million plus interest at the rate of 4.5% per annum, compounded quarterly. The Tribunal ordered that each party bear in equal shares the fees and expenses of the Tribunal and ICSID, bear their own costs in relation to the jurisdictional phase, and that Venezuela should partially reimburse Claimants' costs in relation to the merits phase in the sum of US$2.5 million.

Claimants were both part of the Tidewater Group, the First Claimant being the Barbados-incorporated parent of the Venezuela-incorporated Second Claimant. The Second Claimant, in turn, owned SEMARCA, a Venezuela-incorporated company which supplied maritime support services to subsidiaries of Venezuela's national oil company, PDVSA and PetroSucre. When global oil prices fell in 2008–2009, PDVSA and PetroSucre struggled to meet their payment obligations, which had accounts receivable of approximately US$40 million. In 2009, the Venezuelan Government enacted a so-called "Reserve Law," affecting Claimants and 38 other service providers. Subsequently, the Government nationalized some of the investors' assets.

The Tribunal found that without nationalization of Claimants' assets and facilities, the objects of the Reserve Law could not have been fulfilled. The enactment of the Reserve Law, taken together with the accompanying ministerial statement and seizure of Claimants' assets, in effect "removed Claimants from control of the seat of their operations at La Cañada," and made it so that a local subsidiary as a whole had been effectively nationalized and expropriated.

Having considered the treatment by Venezuela of the other companies cited by Claimants, the Tribunal found that the expropriation had not been discriminatory. The Tribunal also concluded that the expropriation as a whole was not, as Claimants argued, rendered unlawful by virtue of the limitation on valuation of compensation imposed by the Reserve Law.

Most significantly, the Tribunal considered at some length the relevance of the nonpayment of compensation by Venezuela to the lawfulness of the expropriation. In doing so, it referred to the judgment of the PCIJ in the *Chorzów Factory* case, the award of the Iran-US Claims Tribunal in the *Amoco* case, as well as various examples of more recent investment arbitration practice, scholarly works, and the World Bank Guidelines on the Treatment of Foreign Direct Investment (World Bank Guidelines). The Tribunal concluded that an expropriation wanting only a determination of compensation by an international Tribunal is not to be treated as an illegal expropriation, but should be considered as a "provisionally lawful expropriation," precisely because the Tribunal dealing with the case will determine and award such compensation.

Secondarily, Claimants also argued that Venezuela breached the BIT's provisions on fair and equitable treatment, arbitrary and discriminatory measures, and national and most-favored-nation treatment. Venezuela argued, in essence, that these secondary causes of action added nothing to, and merely recycled, the primary claim of expropriation. The Tribunal preferred Venezuela's approach. In light of its finding that the expropriation was nondiscriminatory, it did not need to consider the causes of action for either arbitrary and discriminatory measures or national and most-favored-nation treatment. It also agreed with Venezuela that considering the case "*through the prism of a claim of fair and equitable treatment*" would add nothing to its assessment of either liability or quantum.

Damages:
In determining the amount of compensation due, the Tribunal noted that the BIT's standard of "market value" did not denote any particular method of valuation. The Tribunal also did not consider that it was restricted in its valuation by the limits on valuation contained in the Reserve Law. It held that the World Bank Guidelines provide reasonable guidance, consistent with customary international law and arbitral practice, as to the content of the standard chosen by the States Parties to the BIT as the standard of compensation to be applied in cases of lawful compensation, where the investment constituted a going concern at the time of the taking.

The Tribunal noted that the World Bank Guidelines define "market value" as:

> *"[A]n amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case."*

The Tribunal further noted that where an enterprise is a going concern with a record of profitability, the compensation payable will be reasonable if determined "on the basis of the discounted cash flow value." Having cited the definitions contained in the World Bank Guidelines of both a "going concern" and "discounted cash flow," the Tribunal determined that the appropriate date of valuation was the market value "immediately before the expropriation," also in accordance with the World Bank Guidelines. Although this did not mean that the valuation was unconcerned with future prospects, the Tribunal stated that it would disregard future business prospects that it considered to be too remote or speculative to justify inclusion in its calculation of compensation. The Tribunal considered that certain claims in respect of Claimants' future business were indeed too remote from SEMARCA's established business to be reasonably capable of inclusion. Since the present case was not one of illegal expropriation, the Tribunal was not required to determine the content of the requisite standard of compensation required by

international law by way of restitution. The Tribunal concluded that a DCF analysis was appropriate since SEMARCA, immediately prior to the date of the taking, was a going concern with a proven track record of profitability, had been operating successfully in Venezuela for 50 years and had recorded substantial operating income in the five years prior to the expropriation. The Tribunal found that it was not appropriate to determine the fair market value by reference to either the liquidation value of SEMARCA or the book value of its assets. The Tribunal then went on to consider in turn the six variables adopted in the parties' submissions with respect to the DCF valuation.

First, the Tribunal considered the operation of various vessels used by Claimants, excluded two certain vessels from the scope of Claimants' operations which Claimants had sought to include in their analysis, and concluded that SEMARCA should be treated as having an assumed scope, based on its historical operations, represented by the cash flow generated by some 15 vessels.

Second, the Tribunal found that since Venezuela had expropriated SEMARCA as a whole, the investment lost by Claimants must include all unpaid accounts receivable, which would be regarded as a valuable asset of the business by a willing buyer.

Third, with respect to the dispute between the parties as to whether to include the cash flow of SEMARCA for FY2009, the Tribunal considered it appropriate to include the results of all four years for which historical cash flow data was presented. Such data would be taken into account by a willing buyer, and the Tribunal determined that an average of all four years most fairly reflected the available information.

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Fourth, with respect to the "equity risk" premium, the Tribunal adopted Venezuela's proposed value of 6.5%, on the basis that Venezuela's proposed approach most accurately reflected a long-term market risk premium.

Fifth, the Tribunal considered the parties' respective positions on the applicable "country risk" premium. The Tribunal rejected Claimants' argument that the BIT protected against such risks, stating that the BIT was *"not an insurance policy or guarantee against all political or other risks associated with [the] investment."* Determination of the market value of an investment, the Tribunal concluded, depended not on the likely risk of Venezuela being liable under the BIT, but rather on the value that the market would attribute to the investment – i.e., the amount that a willing buyer would pay for SEMARCA. This, the Tribunal pointed out, is *"not a matter of permitting a respondent State to profit from its own wrong."* The Tribunal noted that the "country risk" premium quantifies *"the general risks, including political risks, of doing business in the particular country, as they applied on that date and as they might then reasonably have been expected to affect the prospects."* Accordingly, the Tribunal adopted Venezuela's proposed "country risk" premium of 14.75%.

Sixth, with respect to the "business risk" premium proposed by Venezuela, the Tribunal did not consider that a willing buyer would have applied a discount for the risk of the loss of business due either to PDVSA taking its business "in-house" or to the fact that SEMARCA did business with a single customer on the basis of short-term contracts.

In conclusion, taking into account its conclusions with respect to the six variables above, the Tribunal found that a willing buyer would have valued SEMARCA at approximately US$30 million, but that it would also have been prepared to pay an additional amount of US$16.4 million for the nonrecurring accounts receivable. While noting that the determination of an appropriate level of compensation was not an exact science, but "a matter of informed estimation," the Tribunal arrived at a valuation (excluding pre-award interest) for the purposes of compensation of US$46.4 million.

Interest:
Claimants sought both pre-award and post-award interest, in each case calculated on a compound basis. They proposed that the rate should be calculated by reference to Venezuela's sovereign debt rate, because otherwise Claimants would have been forced to serve as compulsory creditors to the Respondent. Alternatively, they proposed a "normal commercial rate" as required by the BIT. Claimants proposed the US Prime Rate +2% or LIBOR +4% as alternatives to Venezuela's sovereign bond rate. Venezuela, meanwhile, submitted that pre-award interest should be based on a short-term and risk-free rate, such as the three-month US Treasury bond +1.33%. Otherwise, Venezuela argued, Claimants would be compensated for risks they did not bear. Venezuela maintained that simple interest was appropriate as a matter of both Venezuelan and international law.

The Tribunal found that the applicable starting point in determining the amount of interest payable was to look at the terms of the BIT, which provided for a "normal commercial rate." The appropriate reference point, the Tribunal stated, was thus the cost of borrowing available to the Claimants, not the amount that Venezuela would have had to pay. Considering the commercial rates available to Claimants over the relevant period, the Tribunal found that an interest rate of 4.5% most closely met the standard contained in the BIT. Since a commercial bank would typically apply compound interest on a quarterly basis, the Tribunal considered that its award of interest should be so compounded.

Costs:
The parties each claimed their costs and expenses from the other side. During the jurisdictional phase of proceedings, each side prevailed on one of the two issues in dispute. The Tribunal therefore held that, as regards the jurisdictional phase of the proceedings, each party should bear equally its share of the administrative fees and expenses of the members of the Tribunal and of the Centre and bear its own costs. With respect to the merits phase, although Claimants succeeded overall, the resultant award was very much less than the US$234 million that Claimants sought in their written pleadings. The Tribunal held that this resulted in wasted costs during the evidentiary phase, and allowed claimants to recover only a portion of their costs of the merits phase from Venezuela, totaling US$2.5 million.

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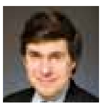
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