

DETERMINING DAMAGES IN ICSID ARBITRATION: A PROBLEM OF UNCERTAINTY

*Alex Lo**

ABSTRACT

Currently, in investor-state arbitration under the auspices of ICSID, the determination of damages involves far too many variables and uncertainties for arbitrators to consistently reach equitable results (perhaps more importantly — to reach legally correct results). This is especially true under the governing customary international law standard, which vaguely requires that the reparation “wipe out all the consequences of the illegal act.” Arbitrators are often faced with complicated and contradicting theories of valuation while only armed with “case law” that are only persuasive authority and sometimes too few or too erratic to establish a clear trend. It is uncertain whether arbitrators are simply “splitting the baby” when they are overwhelmed by complex financial theories.

This article attempts to dissect all the major variables and potential complications in determining damages, point out possible consequences for uncertainties, and offer a prediction of future trends.

* Juris Doctor, graduated from Hofstra University, Maurice A. Deane School of Law in May 2013. The author would like to thank Professor Curtis Pew of Hofstra University, Maurice A. Deane School of Law, as well as Professor Chang-fa Lo of National Taiwan University for their instruction, guidance and contributions to this paper. The author would also like to thank the International Arbitration team at Gleiss Lutz, Stuttgart office (particularly Dr. Stephan Wilske, Dr. Lars Markert, Todd J. Fox, Dr. Christian Leisinger, and Andreas Heuser) for providing the inspiration. The author can be reached at alex_lo9000@hotmail.com.

KEYWORDS: *ICSID, investor-state arbitration, damages, interests, valuation, customary international law*