ISSN : 1875-4120
Issue : (Provisional)
Published : September 2019

This article will be published in a future issue of TDM (2019). Check website for final publication date for correct reference.

Dr. José Alberro
Cornerstone Research
View author profile

Transnational Dispute Management
www.transnational-dispute-management.com

Liability Yes; Damages No. Consolation without Monetary Compensation: When Tribunals Rule for Claimant on the Merits and Award No Damages

by J. Alberro

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Liability Yes; Damages No. Consolation without Monetary Compensation: When Tribunals Rule for Claimant on the Merits and Award No Damages

José Alberro[*]

I. Introduction

Sometimes Tribunals rule in favor of Claimants on the merits and award no damages. After a contentious process that may have lasted years and cost millions, Claimant gets the consolation that the actions of a sovereign were judged to be in violation of international law but receives no monetary compensation.

This raises the question whether damage is an essential element of the breach of an international obligation, which is to say, "whether it is possible to conceive, even hypothetically, of a breach (of international obligations) … which occasions no damage".[1]

Article 2 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ILC)[2] does not list damages as a constituent element of an international wrong giving rise to State responsibility:

> Article 2. Elements of an internationally wrongful act of a State
>
> *There is an internationally wrongful act of a State when conduct consisting of an action or omission:*
>
> *(a) is attributable to the State under international law; and*
>
> *(b) constitutes a breach of an international obligation of the State.*

Commentary 9 to Article 2 postulates that there is no exception to the principle that there are two necessary conditions for an internationally wrongful act (a conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State), but it is silent on whether those two necessary conditions are sufficient. In fact, there is no rule of customary law requiring an additional element such as material damage as a precondition for State responsibility; whether material harm is a precondition of responsibility

[*] José Alberro is co-head of Cornerstone Research's International Arbitration and Litigation Practice. I thank an anonymous referee for numerous, useful, on point comments. All errors, mistakes and weaknesses are my entire responsibility. The opinions expressed in this article are my own and do not necessarily reflect those of Cornerstone Research.

[1] The Rompetrol Group N.V. v Romania, ICSID ARB/06/3 ¶187

[2] Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act.

depends on the content and interpretation of the primary obligation[3] and it cannot be determined in the abstract.[4]

Numerous investment treaty tribunals have recognized this principle requiring Claimant to prove the existence of damages caused by the actions of the sovereign found to be in breach of its international obligations, in addition to proving facts that underlie the sovereign's liability under international law for those same acts. As will be seen below, a number of Tribunals have not granted damages, despite finding State responsibility, because the standard of causation to justify the awarding of compensation for damages was not met. While the reasons why the standard of causation may vary from case to case, as will be shown *infra*, a close relationship needs to be established between the actions of the government found to be in breach of its international obligations (only those) and the causation of damage.

Next section argues that damages estimation requires the construction of a proper "*but for*" scenario that complies with causation and burden of proof principles. The third explores variations on "not meeting the standard of causation" by studying 11 cases where tribunals found respondent States liable but did not award damages. I classify them in four types: alleged damages resulting from State actions other than the ones found to be in breach of its international obligations; aborted tenders (cold feet); losses attributable to claimant's actions (contributory fault); and the choice of a counterfactual that did not correspond to the decision on the merits. The last section presents a few conclusions.

II. Conceptual Framework: A Proper "But For" Scenario in Light of Causation and Burden of Proof Principles

International tribunals in investor/State disputes have identified a number of general principles of law which may limit recovery of damages, among which:

- "The damages in cases of breaches of contractual obligations should cover only the *direct* and *foreseeable* prejudice;
- The claimant carries the burden of proof in respect of the claimed losses; and
  …
- Compensation is payable only in respect of harm that is proved to have a sufficient causal link with the provision alleged to have been breached."[5]

The standard approach to calculating damages consists of comparing the actual value of the aggrieved investor's investments with what it would have been but for the actions of the sovereign (often called the "*but for*" scenario or the counterfactual scenario). In developing a proper *but for* scenario, the consequences of the State's illegal actions on value need to be excluded, but changes in value attributable to other factors have to be taken into account. This

[3] A primary obligation is a substantive rule requiring that a party subject to it act or refrain from acting in a specified way. A secondary obligation is an obligation to make reparation where a breach of a substantive rule can be attributed to a particular actor. Thomas D. Grant, *International Responsibility and the Admission of States to the United Nations*, 30 Mich. J. Int'l L. 1095 (2009).

[4] Commentaries 6 and 7 to Article 31 (Reparation) further elaborate that damage is not a necessary element of an internationally wrongful act, but rather a matter determined by the relevant primary rule. In some cases, the wrong is the actual harm; in others, "what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs".

[5] Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law,* British Institute of International and Comparative Law, 2008, p. 44-45.

will ensure that the Claimant is compensated exclusively for the damages caused by the act(s) found to be illegal.

As of August 2019, in 11[6] of the 548 concluded cases listed in UNCTAD's Investment Policy Hub[7], tribunals found respondent States liable but did not award damages. In 9 of those cases, the Tribunal found that the State had violated the Fair and Equitable obligations (FET) of the relevant treaty[8]; in the case of *Lauder* it considered that the Respondent had committed a breach of its obligation to refrain from arbitrary and discriminatory measures;[9] and in the case of *MNSS*, it considered that the standard of "most constant protection and security" had been breached.[10]

In six of the 11 cases tribunals did not award damages because Claimant did not establish a causal link between the respondents' illegal actions and the alleged damages. In two other cases involving privatizations, the tribunals, while finding State's conduct during the tender unlawful, held that the investors had not acquired the company being privatized and hence could not recover damages in that respect. In two more cases, the tribunals considered that the State had breached its international obligations but that the damages were attributable to Claimants' actions. I review them in next section.

III. Case Studies

A. No Causal Nexus between Breach and Damages

In *Cervin Investissements S.A. and Rhone Investissements v Costa Rica*, Claimants[11] were Swiss holding companies which had acquired two Costa Rican companies that held concessions for the bottling, distribution and sale of Liquid Petroleum Gas (LPG): Tropigás de Costa Rica S.A. (Tropigás) and Gas Nacional Zeta S.A. (GNZ).[12] The former acquired the latter in 2011.[13]

In Costa Rica, the importation, bottling, distribution and sale of LPG is subject to tariff determinations made by the regulator, called ARESEP. The tariffs are set on a cost plus basis

[6] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/10/16); Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan (AISCC Case No. V 064/2008); Hesham Talaat M. Al Warraq v. The Republic of Indonesia; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID CASE NO. ARB/05/22); Luigiterzo Bosca v. The Republic of Lithuania (PCA CASE NO. 2011-05); Cervin Investissements S.A. y Rhone Investissements S.A. v. República de Costa Rica (ICSID Case No. ARB/13/2); Ronald S. Lauder v. The Czech Republic; MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro (ICSID Case No. ARB (AF)/12/8); Nordzucker AG v. The Republic of Poland; The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3); and Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26). While Agility v. Pakistan ICSID Case No. ARB/11/8 is included in the list, Agility discontinued the claim after the Tribunal affirmed jurisdiction. I have excluded Swissbourgh and others v. Lesotho from consideration because of the lack of publically available information, the reliance on a previously little known multilateral investment treaty (the Finance and Investment Protocol of the Southern African Development Community) and the fact that the damages issue was not directly addressed.

[7] http://investmentpolicyhub.unctad.org/ISDS

[8] AES, Al-Bahloul, Al Warraq, Biwater, Bosca, Cervin, Nordzucker, Rompetrol, and Urbaser.

[9] Lauder v Czech Republic ¶320

[10] MNSS and RCA v Montenegro ¶356.

[11] Cervin Investissements S.A. y Rhone Investissements v República de Costa Rica.

[12] Cervin Investissements S.A. y Rhone Investissements v República de Costa Rica ¶1, 5.

[13] Ibid. ¶ 98.

to theoretically guarantee the proper development of the activity by insuring a competitive return on the costs necessary to provide an appropriate service.[14]

The claims rose out of two objections about ARESEP's handling of Tropigás and GNZ's tariff requests between 2010 and 2015.[15] The Claimants

- Protested the ARESEP's 2010 and 2014 tariff determinations on the grounds that the approved margins were inadequate to cover authorized operating costs;[16] and
- Alleged that the ARESEP deliberately delayed the resolution of the Claimants' appeal to revoke the 2011 Tariff Resolution: it took two years and four months, when the statutory period is eight days.[17]

The Tribunal dismissed the first claim as the Claimants were cognizant of the existing regulatory framework when they invested in 2010 and they did not question it as part of the arbitration.

As to the second claim, the Tribunal deemed Costa Rica's long delay to be a gross and flagrant failure of the administrative authority to comply with one of its fundamental obligations, that of processing with reasonable diligence a recourse concerning the setting of tariffs. It found such a delay shocking to the point of constituting a violation to the FET obligations.[18]

The Tribunal declared that, in order to claim damages, the Claimants had to prove, not only the existence of a violation, but also the existence of a causal link between the violation and the alleged damages, including its amount. The Tribunal noted that the reports offered by the Claimants' damages expert did not offer any explanation in that regard and that it failed to prove that the delay had caused them any damage.[19]

In five other cases, the claimants' failure to prove a causal nexus between the breach and the alleged damage led the Tribunals to award no compensation:

> *Biwater Gauff v Tanzania.*[20] This case concerned a comprehensive program of repairs and upgrades to, including the expansion of, the Dar es Salaam Water and Sewerage Infrastructure (DAWASA). Claimant took over operations in August 2003, and two years later, representatives of Tanzania seized the company's assets, installed a new management, took over the business and deported senior management. The Tribunal concluded that the actions of the Republic constituted violations of the FET standard, unreasonable and discriminatory conduct and, on a cumulative basis, an expropriation of Biwater Gauff's investment in violation the Bilateral Investment Treaty between the United Kingdom and Tanzania.[21] Albeit, the majority of the Tribunal considered that there was "a lack of linkage between each of the wrongful acts of the Republic, and each of the actual, specific heads of loss and damage for which Biwater Gauff

[14] Autoridad Reguladora de los Servicios Públicos, Public Services Regulatory Authority. Ibidem. ¶101, 106, 107
[15] Cervin Investissements S.A. y Rhone Investissements v República de Costa Rica ¶127.
[16] Ibid. ¶475.
[17] Ibid. ¶664.
[18] Ibid. ¶658-664.
[19] Ibid. ¶699-703.
[20] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID CASE NO. ARB/05/22).
[21] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID CASE NO. ARB/05/22) ¶814.

articulated a claim for compensation. In other words, the actual loss and damage for which Biwater Gauff claimed … is attributable to other factors".[22]

Lauder v Czech Republic.[23] In October 1991, two years after the overthrow of the communist regime, Czechoslovakia passed legislation allowing private investment in radio and television. On 30 January 1993, the Media Council[24] granted CET21, a company founded by Czech citizens, a license to operate a television station. CEDC, a company owned by Mr. Ron Lauder, an American citizen, had announced beforehand it would acquire 49% of CET21's preferred stock. The Media Council's decision raised strong political opposition. To appease the complaints, it reversed course within days, granting the license to the Czech partners only (CET21) and not conjointly with CEDC.[25] Disagreements between CET21 and CEDC surfaced in early 1999 which led CET21 to terminate its contractual relationship with CEDC on 5 August 1999. On 19 August 1999, Mr. Lauder commenced arbitration proceedings against the Czech Republic, claiming that it had breached five different obligations under the US Czech and Slovak Republic BIT.[26] The Arbitral Tribunal held that the Media Council had taken a discriminatory and arbitrary measure against Mr. Lauder in 1993 when, after having accepted the idea of a direct investment in CET 21, it subsequently did not allow it. Moving from a direct participation by CEDC to a contractual relationship providing for the creation of a third company was a breach of the Respondent's Treaty obligations.[27] When addressing the issue of damages, the Tribunal considered that it was probable that if in 1993 Mr. Lauder's investment in the Czech television had been made directly in CET 21, the License holder, the possible breach of any exclusive agreements in 1999 could not have occurred in the way it did.

> "Even if the (1993) breach therefore constituted one of several "*sine qua non*" acts, this alone was not sufficient. In order to come to a finding of a compensable damage it was also necessary that there existed no intervening cause for the damage… The Claimant had to show that the last, direct act, the immediate cause, namely the termination by CET21 on 5 August 1999 … did not become a superseding cause and thereby the proximate cause of the ultimate harm... The Claimant had to show that the acts of CET21 were not so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm".[28]

The Tribunal found that Claimant did not prove this causal link and determined that the alleged harm was caused in 1999 by the acts of a private party, CET21.[29] In the sister

[22] Ibid. ¶805. Arbitrator Gary Born dissented on several grounds. On the issue of causation and valuation he considered that the Tribunal's analysis confused issues of causation, on the one hand, and quantification or quantum of damages, on the other. He also opined that this analytical confusion was ultimately not decisive to the specific outcome. He considered that although the Republic caused Claimant injury, including by expropriating its property and prematurely terminating the contractual relations between City Water and DAWASA, the property that the Republic wrongfully seized had no quantifiable monetary value. See Biwater v. Tanzania Concurring and Dissenting Opinion ¶21.
[23] Ronald S. Lauder v. The Czech Republic.
[24] The body responsible for the regulation of broadcasting in the Czech Republic.
[25] Ronald S. Lauder v. The Czech Republic ¶64
[26] Ibid. ¶192
[27] Ibid. ¶230
[28] Lauder v The Czech Republic ¶234
[29] Lauder v The Czech Republic ¶235

case of *CME Czech Republic B.V. (The Netherlands) v The Czech Republic* the Tribunal ruled in favor of Claimant on the merits as well but awarded US $257.7 million.

MNSS and RCA v. Montenegro.[30] In February 2008, a Dutch investor made investments in the form of equity and loans in the only electric arc furnace steel mill in Montenegro ("*ZN*"). ZN's workers occupied its management building from 27 September to 4 October 2010 and again on 13 December 2010 when they physically assaulted the Chief Executive.[31] On 1 March 2011 ZN's workers went on strike and within weeks ZN was placed in bankruptcy. The Tribunal found that Montenegro "failed to ensure the protection of persons and property but without granting any compensation, as the Claimants failed to show that they suffered damage as a result" of the behavior of the police during two strikes".[32]

Rompetrol v. Romania.[33] Following the downfall of the Ceausescu regime in 1989, Romania privatized companies formerly owned by the State. In October 2000, the Rompetrol Group N.V. acquired from the Romanian privatization authority a controlling stake in S.C. Petromidia Rafinare S.A. (Petromidia), a petroleum company that owned one of the largest oil refineries in Romania. The dispute in the arbitration arose out of investigations commenced in May 2004 by the National Anti-Corruption Office of Romania relating to the privatization of Petromidia. The Tribunal found that certain conducts by Romania lead to a breach of its FET obligations and ruled that "on the evidence presented to the Tribunal, the Claimant had not however met the onus on it of proving that it suffered economic loss or damage resulting from the breach specified".[34]

Al-Bahloul v. Tajikistan.[35] During a meeting in Austria in 1997, the commercial representative of Tajikistan presented Claimant with a catalogue of investment projects, including in the oil and gas sector. In December 2000, Claimant and Tajikistan signed four agreements on exploration and production and, in June 2001, joint venture agreements[36] that contemplated the founding of two companies.[37] Continuing management and technical problems and the fact that no licenses had actually been issued led Claimant to cease operations the following year.[38] On 10 May 2008, Claimant brought an arbitration with the Stockholm Chamber of Commerce Institute on the basis of the Energy Charter Treaty (ECT).[39] The essence of the claim was that the non-issuance of licenses for exploration and production and the non-issuance of licenses for the two joint venture companies frustrated the projects in which Claimant had invested and deprived him of his investment and of his reasonable expectation of profit.[40] The Tribunal found that Defendant had breached its obligations under the ECT

[30] MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro (ICSID Case No. ARB (AF)/12/8)
[31] MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro (ICSID Case No. ARB (AF)/12/8) ¶ 67
[32] Ibid. ¶356
[33] The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3)
[34] The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3), page 163 ¶d
[35] Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan (AISCC Case No. V 064/2008)
[36] Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan (AISCC Case No. V 064/2008), Partial Award on Jurisdiction and Liability ¶64
[37] Ibid. ¶68
[38] Ibid. ¶72
[39] Ibid. ¶23
[40] Ibid. ¶18

by failing to issue four exploration licenses as promised in December 2000.[41] The Claimant submitted that he was entitled to an order compelling Tajikistan to issue him exclusive licenses for the four areas under dispute and a compensation for the delay in issuing them for an amount of $228.5 million plus compound interest in the amount of $240.0 million.[42] The Tribunal considered that restitution was materially impossible.[43] As for the Claim for compensatory damages, the Tribunal stated that compensation was due to cover any financially assessable damages and lost profits.[44] However, it found that the unsubstantiated assumptions the Claimant relied upon destroyed the causality between the breach committed by the State and the loss of the alleged future cash flows.[45]

> *"The Tribunal thus had to conclude that it had no substantiated basis upon which to make an assessment of damages despite the Respondent's established liability and on-going breach of the BIT (sic). Since Claimant has not proved that he has suffered damages on account of Respondent's breach of the BIT (sic), his claims for compensation are necessarily denied".*[46]

B. Aborted Tenders During Which the Winner Ended up Not Acquiring the Company

Luigi Bosca v Lithuania.[47] In that case, Mr. Bosca won a tender organized by Lithuania's State Property Fund (SPF) to privatize Alita, the leader in the market for sparkling wines. The SPF approved the selection on 30 June 2003 and started the negotiation of a Share Purchase Agreement (SPA) with the Claimant. The process took several months and by letter dated 30 September 2003, the SPF notified Mr. Bosca that if he did not initial the SPA by 10 October 2003, it would annul the results of the tender. Claimant replied it could not yet sign the SPA for various reasons including that he was travelling on business. On 10 October 2003, the SPF annulled the results of the tender.[48]

Mr. Bosca filed a civil claim against the SPF in the Vilnius District Court in November 2003, alleging that the SPF had "illegally terminated the negotiations for his purchase of the company under Lithuanian law, and requesting payment of the losses he had sustained in connection with the tender process." In April 2005, the District Court found that the SPF's actions in its negotiations had been "ungrounded and unfair," and awarded the Claimant his out-of-pocket expenses in connection with the tender process. The SPF appealed the decision of the District Court to the Court of Appeals, which reversed the District Court's holding. The Claimant requested the Supreme Court to review the Court of Appeals' decision which reinstated the decision of the District Court in October 2006.[49]

The Claimant commenced arbitral proceedings against Lithuania on 19 March 2010 under the Lithuania-Italy Bilateral Investment Treaty. The Tribunal concluded that the Claimant had made an investment in the form of the SPA and that his participation in the negotiations after

---

[41] Ibid. XI DECISIONS
[42] Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan (AISCC Case No. V 064/2008), Final Award ¶31
[43] Ibid. ¶63
[44] Ibid. ¶65
[45] Ibid. ¶96
[46] Ibid. ¶98, 99
[47] Luigiterzo Bosca v. The Republic of Lithuania (PCA CASE NO. 2011-05)
[48] Luigiterzo Bosca v. The Republic of Lithuania (PCA CASE NO. 2011-05) ¶81-88
[49] Ibid. ¶90-93

winning the Alita bidding process constituted an associated activity under the BIT.[50] It also found that the legitimate and reasonable expectations of the Claimant resulting from his selection as the winning bidder were illegally frustrated by the Respondent's authorities. Thus, it found that the actions of the Respondent constituted a breach of the just and fair treatment standard in the BIT and that the Respondent was liable for damages.[51]

The Tribunal considered that the Claimant was entitled to compensation for lost opportunity resulting from the failure of the SPF to respect the legal rules which governed it in the negotiations of the SPA and not for lost profits because the Claimant was only in pre-contractual negotiations and loss profits based on the assumption of an agreed SPA were too remote and speculative.[52] The Tribunal ruled that the Respondent had to indemnify the Claimant but limited the damages to those resulting from the annulment of the Claimant's successful bid and disallowed those resulting from the denial of the Claimant's right to receive the benefits associated with the ownership of Alita. The Claimant had already been reimbursed by the Respondent for the amounts paid to the Respondent on his behalf as well as the direct costs incurred, following the decision of the Supreme Court of Lithuania in 2006, so no damages were awarded.

Nordzucker v Poland[53] is a similar case. In June 1994, Poland started privatizing its sugar industry. Nordzucker, won a tender to acquire four sugar plants and quickly negotiated and signed a SPA for two of them (the Gdansk and Szczecin Groups). Then, on 21 June 2001, Poland created a new national Polish Sugar Company and, two months later, informed Nordzucker that the general shareholders' meetings of both companies had refused to approve the sale of the plants. While the Tribunal noted that the BIT did not create for Nordzucker an absolute right to invest nor for Poland an absolute obligation to sell, it did find that Poland had breached its duty to grant Nordzucker's investment FET by failing to finalize the sale of two sugar groups within a reasonable time and by its failure to communicate transparently during the last period of pre-contractual negotiations. In its submission on damages, the Claimant argued that its damages were greater than what the Tribunal had mentioned in the merits phase because Poland's lack of transparency was the direct cause of the negative outcome of the privatization process which had resulted not only in a set-back of at least half a year for alternative investment plans and in costs for the useless follow-ups, but also in Nordzucker's loss of the opportunity to obtain the sugar groups it planned to purchase in Poland.[54] Nordzucker's damages calculation consisted of the loss of the earnings it would have realized if it had acquired the Gdansk and Szczecin Groups. It assumed that Nordzucker would have acquired the two Groups but for Poland's infringement of the BIT and that no event, other than the breach of the BIT, could have caused the sale to Nordzucker to fail. The Tribunal reiterated that Poland's breach of the BIT did not consist in its not finalizing the sales procedure but in not doing so within a reasonable time. Moreover, it noted that to "finalize" the sales procedure did not necessarily mean to "close the sale" but could also mean to "terminate the sales procedure" in any other way, e.g. by deciding not to sell and informing the candidate buyer thereof, or by allowing the candidate buyer to withdraw its offer.[55] Thus, it held that the alleged damages had no causal relation with the breach, i.e., the failure to finalize the sale in a

[50] Ibid. ¶178
[51] Ibid. ¶235
[52] Ibid. ¶300
[53] Nordzucker AG v. The Republic of Poland
[54] Nordzucker AG v. The Republic of Poland, Third Partial and Final Award ¶39
[55] Ibid. ¶63

reasonable time.[56] Nordzucker, in an attempt to prove that it suffered more damages than those linked to the temporal setback had neglected to prove the alleged damages were the result of the delay in an alternative investment and of the fruitless costs made for the monitoring of the sales procedures in Poland during an additional half year.[57]

C. Losses Attributable to Claimant's Actions (Contributory Fault)

In *Urbaser S.A. and CABB v. Argentina*[58], the dispute related to a concession for water and sewage services for the Province of Greater Buenos Aires, granted in early 2000 to AGBA[59], a company established by foreign investors, including Claimants. Claimants asserted that they had faced numerous obstructions on the part of the Province's authorities, which rendered the efficient and profitable operation of the Concession extremely difficult. The Concession was running into deadlock when Argentina suffered an economic crisis beginning in mid-2001, culminating in emergency measures taken in January 2002. Claimant argued that its numerous requests for new tariffs and for a complete review of the Concession failed because of the Province's lack of commitment to bring the required renegotiations to a successful end. Political reasons related to the fate of other concessions finally caused the Province to terminate AGBA's Concession in July 2006.[60]

The Tribunal dismissed all of Claimants' claims except for violations of the FET obligations, finding that Argentina failed to provide investors with a transparent treatment that could reasonably be expected from the host State during the concession's renegotiation between 2003 and 2005.[61]

The Tribunal dismissed Claimants' demands to order Argentina to pay compensatory damages because AGBA had not kept its obligation laid out in the first Five-Year Service Optimization and Expansion Program (POES). In particular, it had not invested sufficiently to maintain and expand the distribution network. Under those circumstances, the Tribunal found that the Concession had no future and that the actual minimal service provided by AGBA implied that a new concessionaire had to take over. Therefore, the fate of the Concession was the consequence of AGBA's and its shareholders' failure to comply with their commitments and had not been caused by the Province's handling of the renegotiation. The Tribunal held that the breach of the BIT was not the cause of any prejudice to AGBA's shareholders who were operating at a loss as a result of their handling of the Concession. Consequently, the Tribunal dismissed Claimants' requests for payment of damages in this respect.[62]

In *Al Warraq v Indonesia*,[63] Mr. Al Warraq, a Saudi Arabian national, had invested in Bank Century, a private bank in Indonesia. Later, Indonesian authorities commenced criminal investigations against him due to various irregularities in the operation of Bank Century. He brought a claim against Indonesia under the Organization of Islamic Conference Investment Agreement (OIC Agreement). He sought damages because of the alleged mistreatment of his

[56] Ibid. ¶64
[57] Ibid. ¶65
[58] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26)
[59] Aguas Del Gran Buenos Aires S.A.
[60] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Partzuergoa v. The Argentine Republic ¶34
[61] Ibid. ¶845
[62] Ibid. ¶846-847
[63] Hesham Talaat M. Al Warraq v. The Republic of Indonesia

investments. In turn, Indonesia characterized Mr. Al Warraq as a "fugitive" who embezzled funds from Bank Century,[64] presided over its near-collapse[65], chose not to appear for a trial[66] and was convicted of money laundering and corruption –all of which are criminal offenses.[67] The Tribunal concluded that the Claimant was not properly notified of the criminal charges against him; that he was not able to appoint legal counsel; that he was tried and convicted *in absentia*; that the sentence was not properly notified; and that he was not able to appeal it. Thus, the Tribunal upheld the Claimant's FET claim[68] but considered that the doctrine of *"clean hands"* rendered Claimant's damage claim inadmissible.[69] The Tribunal found that the Claimant failed to abide by the Indonesian laws and regulations and his action, whether criminal or not, caused a liquidity issue to Bank Century, and were prejudicial to the public interest. Having breached the local laws and put the public interest at risk, Claimant deprived himself of the protection afforded by the OIC Agreement.[70]

D. AES v. Kazakhstan[71]: Wrong Counterfactual[72]

AES acquired the newly privatized the Ekibastuz coal fired power plant in Kazakhstan in July 1996 and a year later, it was announced the winner of a tender relating to the concession of two hydroelectric plants and the sale of four combined heat and power plants.[73] AES filed a request for arbitration against Kazakhstan before the ICSID in June 2010, arguing that Kazakhstan's changes to its competition legislation and to the regulation of the electricity sector, after it had invested in the country, breached the Energy Charter Treaty (ECT) and the US-Kazakh bilateral investment treaty (BIT)[74], causing $1.29 billion of damages.[75]

The Tribunal dismissed all of Claimant's allegations, except one, which related to Kazakhstan's 2009 "*tariff in exchange for investment scheme*" which was introduced to avoid a shortfall in the availability of electricity.[76] This measure required all profits to be reinvested and prevented electricity generators from realizing, distributing and repatriating their profits.[77] The 2009 Amendment was revised in July 2012.[78] The Tribunal considered that, while the goal of the 2009 "*tariff in exchange for investment*" policy was *per se* legitimate, the specific measures designed to achieve it were not reasonable and proportionate[79] because they obliged power generators to re-invest all operating cash for seven years and in, some cases, denied them the right to account for depreciation as a cost, forcing them to operate at a loss.

While the Tribunal accepted that the risks of a collapse in the electricity sector appeared real and imminent, it considered that Respondent failed to establish that it could not have prevented such collapse through other, less intrusive, measures. Moreover, it considered that Claimants

[64] Hesham Talaat M. Al Warraq v. The Republic of Indonesia ¶149 and 457
[65] Ibid. ¶378
[66] Ibid. ¶260
[67] Ibid. ¶452
[68] Ibid. ¶621
[69] Ibid. ¶646
[70] Ibid. ¶645
[71] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/10/16)
[72] The "wrong counter-factual" refers to the failure to take into account local law in the assessment of damages.
[73] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/10/16) ¶27,28
[74] Ibid ¶139
[75] http://www.adilet.gov.kz/en/node/50623
[76] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/10/16) ¶349
[77] Ibid. ¶354
[78] Ibid. ¶56
[79] Ibid. ¶361

did have a legitimate expectation that they would have had the opportunity to earn a reasonable return on their investment and have the right to dispose of it and repatriate it. Thus, the Tribunal found Kazakhstan in breach of the FET provisions of the ECT and of the BIT for the post 2009 period because it considered that such a restriction was drastic and radical.[80]

The Tribunal did not award damages with regard to those claims because it disagreed with Claimant's counterfactual scenario which assumed that Claimant could have sold its electricity at "competitive market prices" *but-for* the 2009 changes in the competition law because it had already ruled that those changes did not constitute a breach of Kazakhstan's international obligations, thereby making the entire basis for Claimants' damage calculation inappropriate. The Tribunal gave Claimant an opportunity to revise its calculation, but Claimant failed to do so. Therefore, the Tribunal considered Claimant had to bear the consequences of having based their damage claim on the erroneous counterfactual world in which it could sell electricity at "competitive market prices".[81]

IV. Conclusion

Winning on the merits and losing on the damages has to be frustrating for investors. The vexation must be even greater when cases brought forward by other investors in the same investment but in different arbitrations resulted in the Tribunal ruling in favor of Claimants and awarding damages as in the cases of *Lauder v the Czech Republic* (the Tribunal in the *CME v the Czech Republi*c granted the Claimant USD269.8 million) and *URBASER v Argentina* (the Tribunal in the *Impregilo v Argentina* granted the Claimant USD21.3 million).

One of the lessons to be drawn from the examination of these cases is that it may be wise not to oppose bifurcation when the merits and causality are ambiguous and/or when there are multiple intersecting claims that may lead to different basis for damages theory and/or different counterfactual worlds.

It is also essential to keep in mind that under *Actori incumbit onus probandi*, the Claimant bears the burden of proving the facts relied on to support its claim or defense. In this context, it is imperative for the Claimant to prove that the material harm or damage it has suffered were caused by the specific actions of the sovereign that the Tribunal has found in violation of its international obligations.

Privatizations were a source of two of the cases considered. In both, Claimant requested that the Tribunal award expectation damages, which is to say an amount sufficient to give Claimant the same economic value it would have received if the Defendant had fulfilled its promises and Claimant owned the businesses being privatized. In both cases, the Tribunal affirmed the right of the Respondent States to change, modify and amend the tender process but considered that the sovereign had obligations of transparency and expediency that had not been fulfilled. The violation of the FET obligations lead the Tribunal to grant reliance damages in the case of Bosca[82] and nothing in the case of Nordzucker.

[80] Ibid. ¶433
[81] Ibid. ¶467- 469
[82] Monies paid to the Respondent in the privatization process of Alita and costs incurred in the case. Since the Claimant had already been reimbursed by the Respondent for the amounts paid during the privatization of Alita, Respondent only had to bear 100% of the costs of the arbitration and 80% of the costs of legal representation and assistance incurred by Claimant.