

ASA Conference
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ICSID awards annulled only re. quantum

| | MINE v Guinea (award partially annulled in 1989, new tribunal but discontinued as a result of settlement) | Victor Pey Casado v Chile (award partially annulled in 2012, new tribunal issued new award on quantum in 2016) | TECO v Guatemala (award partially annulled in 2016) | Tidewater v. Venezuela (award partially annulled in 2016) |
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| 52(1)(d) serious departure from fundamental rule of procedure: -right to be heard | | ✓ Tribunal considered and rejected the option of naming an independent expert to assess the damages because of the additional delay and the further costs that such a process could entail. However, the Tribunal could not consider the evidence and reach such a conclusion without having afforded both parties an opportunity to make submissions on the applicable standard of compensation and evaluation of damages for the breach of Article 4 of the BIT (para. 267) | ✓ In applying the legal concept of “unjust enrichment” without giving the parties an opportunity to comment, the Tribunal seriously departed from a fundamental rule of procedure (para. 198) | |
| 52(1)(e) failure to state reasons: -absence of reasons -insufficient reasons -contradictory reasons -failure to deal with questions | ✓ Tribunal correctly applied the law but failed to deal with questions by Guinea, the answer of which might have affected the damages awarded + contradiction in adopting its damages theory (paras. 6.99 and 6.107) MINE resubmitted damages question for decision by a new tribunal. However, the parties subsequently reached a settlement and proceedings were discontinued. | ✓ While the Committee recognizes that arbitral tribunals are generally allowed a considerable measure of discretion in determining quantum of damages, the issue in the present case is not <i>per se</i> the quantum of damages determined by the Tribunal. Nor does the problem lie <i>per se</i> in the Tribunal’s chosen method of calculating the damages suffered by the Claimants. The issue lies precisely in the reasoning followed by the Tribunal to determine the appropriate method of calculation, which, as demonstrated above, is plainly contradictory (para. 286) | ✓ Tribunal failed to address in any way the Parties’ expert reports on the loss of value claim despite the Parties’ strong emphasis on expert evidence, and ignored the existence in the record of evidence which at least appeared to be relevant to its analysis. This resulted in the Tribunal’s reasoning on the loss of value claim being difficult to understand (para. 138) | ✓ Tribunal is entitled to use its discretion and may estimate the correct compensation as long as it explains the process leading to the estimation. The Tribunal in the present case did so with remarkable clarity and force. But after having done so, the Tribunal contradicted its own analysis and reasoning by quantifying its estimation using one concrete criterion (a country risk premium of 1.5 per cent) which it had rejected as unreasonable. The contradiction cannot be argued away or cured. It is evident and decisive for the outcome (paras. 192-193) |