



International Arbitrations and Damages Newsletter

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THE QUANTUM SIGNAL

Winning Is Not Recovering

Three awards published this month found a State liable. Between them they paid a fraction of what was claimed, or nothing at all — and each failed for a different, identifiable reason.

A claimant who wins on liability has not yet won anything measurable. Three awards became public this month in which tribunals found that a State breached its obligations, then awarded only a small fraction of what was claimed. The reasons differ in each case, and those differences matter, because they can be diagnosed long before an award.

In *Legacy Vulcan v. Mexico* the disagreement was about what was being valued. The claimant valued an integrated business — a limestone quarry together with the shipping and the US distribution yards it fed. The tribunal valued the quarry alone. The method was never really in issue; both sides ran a discounted cash flow. The disagreement was about where the business being valued began and ended.

In *EP Wind v. Romania* the disagreement was about the counterfactual. Romania was found to have breached the Energy Charter Treaty through three changes to its renewable support scheme. The claimant argued the but-for world should include the other, lawful adjustments Romania would probably have made anyway. The tribunal disagreed: a State that had simply not taken the unlawful measures would still have been acting lawfully. Damages were fixed at zero.

In *Veolia v. Italy* the disagreement was about proof. The tribunal accepted the claimant's method and nearly all of its assumptions and still awarded nothing on the forward-looking half of the claim, because one assumption rested on a contractual obligation the tribunal had already found did not exist.

Set the last case beside the first. In *Vulcan* the tribunal took the respondent's model and corrected a single input. In *Veolia* it had one model, found one assumption unusable, and nothing behind it. The difference between a real award and nothing at all was whether the record contained a model the tribunal could correct rather than discard. *EP Wind* is the third variant: there the models were sound and the quantum experts largely agreed, and what the claimant lacked was evidence for the but-for world it needed — the State's own record of what it would have done instead. A counterfactual is an exhibit, built from what the State decided at the time, not reconstructed afterwards from what would have been reasonable. None of this is visible from the liability case. It is settled months earlier, when the model is built.

LEAD STORY

Legacy Vulcan v. Mexico: The Tribunal Kept Mexico's Model and Changed One Number

North America · Limestone Extraction & Export · ICSID Case No. ARB/19/1 (NAFTA)

ICSID published the redacted award in early September; the award itself is dated 27 July 2026. The tribunal found that Mexico breached the NAFTA minimum standard of treatment at two properties in Quintana Roo, and awarded US\$15,884,117, plus compound interest at the six-month US Treasury bill rate plus 2% running from 24 January

2018. Mexico was refused leave to file an environmental counterclaim as inadmissible. Arbitrator Guido Tawil dissented, on jurisdiction over an ancillary claim rather than on quantum. The amount originally claimed is redacted throughout the published text; press reporting has placed it between roughly US\$1.5 billion and US\$1.7 billion.

Where the Real Analysis Starts

The tribunal accepted a discounted cash flow in principle, because the quarry was a profitable going concern. It rejected the claimant's version of it on scope. The claimant valued what it called the CALICA Network — the quarry together with the shipping and the US distribution yards. The tribunal held that the network was neither a legal entity nor a protected investment, and, separately, that losses in the shipping and distribution arms were downstream of the breach and legally too remote. The second ground is the wider one, because it turns on legal proximity rather than corporate form: restructuring the business would not obviously have cured it.

The tribunal then took the respondent's valuation and corrected it, accepting Mexico's proposed discount rate subject to removal of a size risk premium it found unjustified on the evidence. That moved the rate from 11.55% to 7.97%. Three and a half points across a long-lived asset is not a detail. It cross-checked against comparable-company trading multiples, observing a range of 2.06 to 6.27 times EBITDA and noting that the corrected model implied 2.58.

The claim on the second property failed differently again. Quarrying there was barred by the municipal ecological land-use plan, and the claimant needed that plan amended — a four-stage public process of which two stages had been completed. Mexico was held liable for abandoning the process, but the tribunal found the claimant had not proved on the balance of probabilities that the amendment would have succeeded: public consultation remained, environmental groups had already objected, and the outcome of a participatory process cannot be assumed. That was a failure of proof, not a matter for probability weighting.

(ICSID Case No. ARB/19/1, redacted award of 27 July 2026, published September 2026. The claimed amount is from press reporting; it does not appear in the award text.)

ALSO THIS MONTH

EP Wind v. Romania: Three Breaches, and Nothing to Pay

Southeast Europe · Wind Generation & Renewable Support · ICSID Case No. ARB/20/15 (ECT)

A tribunal chaired by Maxi Scherer rendered its award on 14 September 2026 in a claim over Romania's green certificate scheme. At the liability stage, it had found three measures unlawful: deferral of one of the two certificates due, a change in the basis on which certificates were granted, and reduction of the statutory maximum trading price from €55 to €33. It then fixed damages at zero, split the costs, and left each side to bear its own legal fees.

Where the Real Analysis Starts

Everything depends on how much the counterfactual keeps the State's freedom unchanged. The claimant argued that, absent the unlawful measures, Romania would have adjusted the scheme in other lawful ways, and that the but-for world should include those consequential changes. The tribunal refused, on a ground that travels well beyond this case. The default counterfactual removes the unlawful measure and

holds everything else constant; a substitute State measure is written in only where one is needed to avoid over- or under-compensation, or to make the State's conduct lawful. Neither applied, because a Romania that had simply not taken the unlawful measures would still have been acting lawfully. And the test is what the State would have done, not what it could have done, with the burden on the party asking for the substitute — here, the claimant.

A second finding did comparable work: the claimant said certificates would have traded at the statutory maximum, and the tribunal held the scheme carried no commitment to maintain prices at any level, taking the midpoint between floor and cap. What makes this more than a one-off is that the tribunal also ran the alternative scenarios, the ones that do assume policy changes, and found they too produce zero or negative loss. Note too where the disagreement actually sat: the quantum experts were largely aligned and built a joint model. The fight was between the regulatory economists.

(ICSID Case No. ARB/20/15, Award of 14 September 2026; Decision on Jurisdiction, Liability and Select Issues of Quantum of 17 March 2025.)

Veolia v. Italy: The Method Was Accepted and the Claim Still Failed

Southern Europe · Waste-to-Energy Concessions · ICSID Case No. ARB/18/20 (ECT)

The tribunal found Italy in breach of the Energy Charter Treaty on five counts, including two gate-fee obligations, guaranteed waste quantities, and fair and equitable treatment for frustrating the completion of two plants. Veolia claimed about €300.7 million: €199.7 million of historical losses before the valuation date and €101 million of prospective losses after it. It was awarded €85,832,011, all of it historical, later supplemented by €9,279,749 the tribunal had omitted to decide.

Where the Real Analysis Starts

The forward-looking half recovered nothing, and not because the tribunal disliked the method. It said it was satisfied with a discounted-cash-flow model for the plants operating at termination, and generally satisfied with the claimant's assumptions on duration, taxes, working capital, capital expenditure, debt, costs, tariffs and prices. The claim failed twice over instead. The tribunal excluded plants unfinished at termination outright: their early stage created uncertainty as to whether they would ever operate, let alone profitably, and that lack of certainty barred any award of future profits. Those were the same plants whose completion Italy had been held liable for frustrating. The remainder then failed because the model assumed the State would deliver waste volumes and ratios as contractually agreed, when the tribunal had already decided on the merits that no such obligation existed. No alternative model had been offered.

Set that beside Legacy Vulcan. There the tribunal took the respondent's model and repaired one input. Here it had a single model, found one assumption unusable against its own liability findings, and had nothing to fall back on. A model built only for the liability case a party hopes to win is a model with no second answer.

(ICSID Case No. ARB/18/20, Final Award of 26 September 2025; Decision on the Request for Supplementary Decision of 11 May 2026.)

WORTH WATCHING

Shorter items from this month's docket that carry a real damages question:

Enka v. Georgia — A US federal court confirmed an ICC award of about US\$350 million for the fair market value of a hydroelectric complex transferred to Georgia on termination, putting a rare public number on what one discount-rate input is worth. The construction risk premium — the element of the rate covering rising construction costs and schedule delay — was argued at 0% by the claimant and 1% by the State, a difference Georgia itself put at more than US\$100 million. The tribunal took 0%. Georgia then objected that the tribunal had confined itself to a binary choice; the court answered that Georgia had never urged an intermediate figure and could not complain of a range it had itself drawn.

Perimetral Oriental de Bogotá v. ANI — A US federal court let enforcement of an ICDR award of 1.33 trillion Colombian pesos —

about US\$425 million — proceed against Colombia's road agency, holding it a juridically separate instrumentality rather than an organ of the State. The economics sit in a detail the court recorded while deciding something else: Colombia funds 97% of ANI's capital investment budget, yet Colombian law permits the State to recognize as public debt only judgments against ANI of up to 500 billion pesos, roughly a third of this award. A debtor almost wholly capitalized by its sovereign, against a statutory ceiling on how much of it that sovereign may absorb, is precisely the structure an award-monetization discount has to price.

TV Azteca v. Peru — A merits hearing ran late in September over Peru's termination of the Red Dorsal fiber-optic concession, taken expressly on public-interest grounds rather than for default. The transport ministry justified it on the footing that, as of December 2020, only 3.2% of the network's installed capacity was in use and its revenue covered 7.7% of its costs. Those are the terminating ministry's own figures, and they now form part of what the tribunal must weigh: how much of the loss the termination caused, and how much the project was losing anyway.

Paiz Andrade v. Honduras — Honduras argued the claimants no longer owned the Nacaome solar plant, having placed the shares and the project assets in trust to secure project finance from the German and Dutch development banks. The majority held that ownership is a bundle split between lenders and settlers, and that both sides own within the meaning of CAFTA-DR Article 10.28 — then divided the claim. Reparation on the claimants' own behalf was cut to symbolic, because their second- and third-ranking beneficiary rights, against loans they are struggling to repay, carry little present-day economic value. Reparation on behalf of the local company survived, on a claim put at about US\$160 million in the request for arbitration and left to be quantified later. Brigitte Stern dissented and would have dismissed both. Same breach, same asset, two measures of loss an order of magnitude apart, settled by how the claim was pleaded.

ATOME v. Paraguay — Paraguay revoked in June the decrees fixing dollar-denominated electricity tariffs for accredited industries for up to fifteen years — the regime on which ATOME had taken a final investment decision for a US\$665 million green hydrogen and fertilizer project. A notice of dispute followed in September. The hard part: the long-term power purchase agreement relied on to close the financing was agreed in form but never signed.

Befesa / Cox v. Ghana — Two awards granted about US\$235 million on termination of a desalination water purchase agreement, stated net of taxes, and dismissed a US\$144.5 million counterclaim. The claimant's own disclosure cautions that this is a gross project-company sum, not cash attributable to the parent — project debt, insurer rights, tax and a minority stand between the two. The awards also direct that Ghana satisfy the sums under its state guarantee without double recovery, a relationship most awards leave unstated.

Siamgas v. Malaysia — A new claim over a refused gas distribution license renewal forces an early choice: was what was taken a terminable license worth little beyond its term, or a going concern whose renewal was a settled expectation? The license reportedly passed to a state-owned successor, whose realized tariffs and volumes offer a rare check on the claimant's assumptions — a check only, since valuation is normally done on what was known at the valuation date.

Petersen v. Argentina — ICSID registered a treaty claim against Argentina in September, after the US Second Circuit reversed the US\$16.1 billion contract judgment arising from the same 2012 events. The loss has not changed; the measure has. A contract claim anchored to a formula in YPF's bylaws becomes a treaty claim for fair market value at a valuation date the tribunal fixes, and the bylaw price becomes evidence of value rather than the measure of it.

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