Expropriation Damages in Cases Involving Investment Treaties

Skadden

January 2016

This article is from Skadden's *2016 Insights* and is available at skadden.com/insights/2016-insights.

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Most investment treaties assure investors that, in the event of expropriation, they will receive compensation based on the market value of the enterprise at the time of seizure (excluding the negative valuation effects of any prior announcement or threat of expropriation). Should the state fail to honor that commitment, investors typically have to recover their losses through arbitration. One method for quantifying compensation in investment treaty disputes is the discounted cash flow (DCF) analysis. This method uses available data to project a cash flow for the business that was expropriated, then discounts the projected cash flow back to the date on which value is being reckoned (*e.g.*, the date of seizure or the date of the award). The inputs in the DCF model can be vigorously contested, however. For example, in *Quiborax S.A. v. Bolivia* (ICSID 2015), a tribunal awarded $49 million for expropriation of a boron mine, a substantial sum, but one that was lower than what was claimed (owing, in part, to the tribunal imposing a higher discount rate in the DCF model than the investor had urged).

In *Khan Resources N.V v. Mongolia* (UNCITRAL 2015), which involved expropriation of a uranium mine, the tribunal opted not to rely on DCF at all, rejecting it and other methods proposed by the parties. Instead, the tribunal awarded $80 million in damages, plus interest from the time of seizure, based on evidence of three prior offers by third parties for the assets in question.

Where DCF is used, one contentious issue is how to account for "country risk," a component of the discount rate that plays a factor when the host state has a track record of seizing assets. In *Gold Reserve Inc. v. Venezuela* (ICSID AF 2014), a tribunal awarded over $700 million for expropriation of a gold mining license. In calculating the discount rate, the tribunal held that "it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations." This approach has some support in previous cases: In 1981, a tribunal held that "there should be no reduction in the value placed on the venture on account of" threats of wrongdoing by a host state. *Phillips Petroleum Co. v. Iran*, Award ¶ 111 (Iran-U.S. Cl. Trib. 1989). The issue of country risk for a "repeat seizure host state" should be monitored, as it is likely to arise again.

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