ICSID CASES in which damages were awarded BASED ON MARKET APPROACH

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Abstract: *The foreign direct investments had encountered the need of a special organism to protect the investors and their rights. This organism was founded by the World Bank and it is called The International Centre for Settlement of Investment Disputes – ICSID. After the recognition of ICSID by the states, the foreign investment flow grew and the number of disputes start growing as well. If the host state is in breach of the Bilateral Investment Treaty, it will have to pay damages to the investor. In order to determine the quantum of the damages, a business valuation is needed. Enterprise valuation has become particularly important with business development, especially as a result of the development of stock market transactions. Business development has, among other things, led to the diversification of funding sources, so stock listing has become essential for many firms that require capital for their underlying investment projects. Besides the role of attracting capital for business development, the stock exchange is also the place for the creation, development and diversification of the investment portfolio of the various investors and, at the same time, the "playground" of the speculators. None of these roles could be successfully accomplished in the absence of documented business reviews. Around these assessments, three main approaches were outlined: asset, revenue and market approach. Each of these approaches is based on a fundamental concept from which it proposes a mathematical computation method that results in an informative sum representing the estimated value of the evaluated business. These three methods are also the methods accepted by ICSID in establishing the damages that will be awarded in the judged cases. There are some conditions that have to be met in order to use one method instead of other. Usually the selection of the method it is dome by the evaluator, but the arbitrators that are judging the case can reject one method and select another one, based on their professional judgement.*

Keywords: *ICSID; damages; foreign direct investment; international disputes.*

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1. General Introduction

After the recognition of ICSID by the states, the foreign investment flow grew and the number of disputes start growing as well. If the host state is in breach of the Bilateral Investment Treaty, it will have to pay damages to the investor. In order to determine the quantum of the damages, a business valuation is needed. Three main approaches were outlined: asset, revenue and market approach.

The market approach is a straight forward method: the evaluator should search on the free market, other similar intangible asset and use his price.
For example, a company developing a new software, in order to evaluate this intangible, they will search on the market a similar featured software and calculate the cost that the company will incurred with the acquisition and use of that specific software: acquisition cost, implementation cost and training. The value of the internal developed software will equal the amount obtain

2. Cases presentation

2.1 Ioannis Kardassopoulos and Ron Fuchs_v_Georgia

On March 3, 1992, Tramex and SakNavtobi signed a GTI joint venture: 50-50%, with a 25-year license for petroleum exploitation, with the extension clause of 25 years. The export license owned by GTI was for 5 years and was issued only to their benefit as sole oil exporters in Georgia.
On April 28, 1993, Transneft signed the concession for Georgia's pipeline to GTI for 30 years.
On November 11, 1995, GIOC, a state oil company, was set up.
On February 20, 1996, Georgia issued a decree cancelling all rights granted to other parties. The President told Tramex in May 1996 that he would look for a possibility to include them in the new project, and if not, he would pay them compensation.
On August 26, 1996, Tramex sent a letter to the President of Georgia requesting to resolve the legal issue and compensation. On 5 November 2000 Mr Fuchs requested compensation in the amount of 24.040.904 USD. Georgia accepts that it has to pay a certain amount and appoints a commission to deal with the investigation of the amounts. Meanwhile, Georgian presidents and the government have changed and the issue has been postponed.
Deloitte submitted a report to the Ministry of Fuel and Energy on February 5, 2004, setting Tramex shares in GTI at $ 64 million, spending $ 12.1 million and $ 30.2 million interest. In total a loss of 106.3 million at December 31, 2013. By a letter to the Prime Minister dated July 22, 2004, Tramex asked for this amount to be paid.
On October 9, 2004, the Georgian government set up a new commission to deal with Tramex's requests. On November 15, 2004, the commission announced that there is no legal reason why Georgia should pay compensation to Tramex.
Tramex requests arbitration. The Tribunal decides that the government of Georgia expropriated Tramex by the decree of February 20, 1996, and furthermore decides that Georgia's intention to expropriate it has been clear since the founding of the state-owned GIOC. Thus, Georgia is
As to how Tramex was treated for compensation, the tribunal decides that the standard of fair and equitable treatment has been breached.
Tramex presented the calculation of damages by two alternative options:

- 25% of the GTI on 10 December 1995 plus profits lost from that date to the date of the judgment
- 25% of the value of the rights held by GTI through the signed agreement and concession

For determining the current value of money on 10 November 1995, the complainant proposes to use the discounted cash flow method and compare it with the market value method. The value of these valuations was USD 30.2 million.

According to the complainant's expert, this assessment should take into account the construction and operating costs of the GIOC. In this way it was determined that 50% of the GTI would be worth 36,517,031 USD.
Georgie rejects both the market value method and the revenue-based method, considering them to be too speculative.
The calculation made by them on the basis of the expenses starts from GTI's financial statements, which show that they spent between 5.5 million USD and 6.2 million USD, of which 3.2 million USD directly related to the pipeline project. But of this amount they found payment documents for just $ 981,425.
The Court considers that the approach to determining the value of money on 10 November 1995 is appropriate and also considers that the condition for repaying the investor as far as possible in the same financial position as if he had not been expropriated is to be met.
The Court considers that the market-based method is appropriate. Maintains the discount rate used and thus decides that each of the two claimants receive $ 15.1 million.
The Court decides to grant interest at a rate equal to LIBOR + 4%, composed twice a year, from 20 February 1996 until the date of the judgment.
Also, after the award date, the interest will be calculated at the same level until the full payment of the established amounts.
All costs of arbitrariness of the claimant will be borne by Georgia, amounting to US $ 6,235,429, and will also be refunded by Georgia and Arbitration payments related to $ 1,706,868.

2.2 Quasar_Russia

The complainants were passive shareholders in Yukos, they claim they have been the victims of political measures whereby Yukos's assets were confiscated and transferred to a state-owned company by imposing very large illegal charges and then by opening bankruptcy proceedings against Yukos.
Since December 2003, 6 weeks after Mikhail Khodorovsky's arrest, the Ministry has audited and re-audited Yukos for the period 2000-2001. There was another audit eight months ago that found no irregularity for the same years.
Yukos obtained concessions from taxation in the Republic of Moldova and registered companies in Moldova. Russia claims that by doing so, they have escaped tax evasion by tax evasion.
There is a tension between state and regional authority over regulation and legislation. Poorer regions did not impose a profit tax to attract investment. This relocates the investments in regions with high taxes in tax free regions, with the central budget being affected.
Exports were eligible for VAT reimbursement, amounting to more than $ 13.5 billion. The Russian authorities disavowed the deliveries and thus refused the reimbursement.
Unpaid charges have seized assets of Yukos, worth more than $ 15 billion, for $ 3.5 billion in fees. Although Yukos proposed other methods to pay their taxes, they were refused to confiscate their assets and sell to a state-owned company. Three days after winning the tender for the purchase of Yukos assets by an unknown company for $ 9.3 billion, this company was bought by Rosneft, a state-owned company.

After the auction, Yukos could still produce oil, but the Russian state has started bankruptcy. Another 17 auctions were organized, of which 9 were won by Rosneft. In the end, Rosneft remained with 84% of Yukos's assets.
The value of Yukos on November 23, 2007, before the expropriation, was $ 83 billion and had 2.2 billion shares. The applicants had 73000 shares valued at USD 2,625,810, value determined using the market value method, comparing the price per share with four other Russian gas and oil companies.
The Court considers that an adjustment of value is necessary by reducing it by 23% without explaining this coefficient by means of economic calculations. This amounts to $ 2,026,480 in damages.
As regards costs, for the costs of representation, the applicants claimed USD 14,572,671.57 and the State requested USD 9,412,260.73, the court ruled that each of them would have to bear on its own. As far as administrative expenses are concerned, USD 977,529, of which USD 837,665 were paid by the applicants and USD 139,874 by the State.
The Court grants interest of 6.43%.

2.3 Rosinvest_v_Russia

Rosinvest had 7 million shares in Yukos, but the difference between the two cases is mainly due to the acquisition of shares. Rosinvest bought the shares in November-deception 2007, after the problems had begun and paid for $ 0.5. Although they claimed damages of $ 232.7 million, they were granted $ 3.5 million, an amount that the tribunal considered as the price paid for shares. The Tribunal sets the interest rate at the LIBOR level.

2.4 Waguih Elie George Siag and Clorinda Vecchi_v_Egypt

Waguih Elie George Siag and his mother Clorinda Vecchi, Italian citizens, have invested in tourism in Egypt through SIAG. In 1989 they bought land from the tourism ministry.
The applicants claim that, through several acts and omissions, the Egyptian government after 1995 expropriated them.
The applicants wanted to build a resort with a capacity of 1560 people. Between 1990 and 1994 construction began. On August 23, 1994, they signed an agreement with an Israeli company for financing. Also, in 1994, an Egyptian authority, the Tourism Development Agency, the TDA issued a resolution to stop the project.
On May 29, 1995, the TDA sent a letter to Siag asking for the property to be returned to the government.
On May 23, 1996, the tourism ministry revoked the contract. Mr. Siag was announced on June 2, 1996 that the police would take over the property, opposed and arrested.
Egypt has asked the court to reject the case first on the grounds that Mr Siag was in bankruptcy, which could not be substantiated, and later challenging the Lebanese nationality of Mr Siag. The tribunal rejects all Egyptian objections.
Currently, a gas company in Egypt has built some pipelines on the ground. The applicants argue that this is not in the public interest, especially as these pipelines could be located on the neighbouring land owned by the gas company and only passed on a small portion of the land belonging to the applicants. The expropriation took place in 1996 and the first use of the land in 2003, for this reason, the tribunal

considers that there was no public interest or compensation, so it is illegal expropriation.
The applicants claimed damages worth 230 million USD plus compound interest and all costs incurred by Egypt.
Estimation of damages was done by three methods:
- Comparable sales value - $ 181,350,000
- The residual value of the land - 191,357,357 USD
- Lost opportunity - discounted cash flow - 195,800,000 USD - in the end it was requested.
The complainants presented two reports made by LECG and CB Richard Ellis (CBRE).
LECG included a projection of the discounted cash flow between 1996-2008, discounted by 12.8%, the weighted average cost of capital. The initial report was $ 204.7 million. Later it increased to US $ 223.8 million and at hearings it reduced to 195.8 million USD. The causes are not specified. The court rejected this approach.
Richard Ellis presented two models:
- Comparable sales value - based on the prices of land sold in close periods,
- The residual value of the land - which is based both on the LECG's calculation data from which it deducted the development and construction costs and then added the residual value of the land, calculated by the other method.
The calculations for the comparable sales value were made by Mr Fleetwood Bird, who is considered to be a senior figure in the field, the amount obtained was $ 181,350,000. The expert said the margin of error for his calculations could be 10%, the court modified the margin to 20%, reducing the amount calculated to 145,080,000 USD. The applicants did not own 100% of the property but only 95.27%, the amount was adjusted by that percentage and then, according to the sales contract, the applicants were to retain 50% of the final value, so the court granted them: 69.108.858 USD for the land value.
Mr. Fleetwood Bird estimated total construction costs at $ 9,325,000, the court applied the same adjustments to $ 4,441,936.75 for construction.
The claimants also claimed salaries, other benefits and travel expenses that the court rejected because they had no conclusive evidence. With regard to financing costs, interest and penalty payments for the project, the court ruled that in the case of the sale of the property, this credit would have been reimbursed from the price received, therefore did not consider that it had to pay damages for these requests, to bear from the amount already granted as property and construction damage.
In total, the tribunal grants $ 74.55 million in damages, 6-month interest rate LIBOR and Egypt have to pay $ 6 million in costs to the complainant.

2.5 Unglabe_v_Costa Rica

The applicants have several properties in Costa Rica near the beach. In 1991, Costa Rica issued a decree establishing a National Park for the protection of Leatherback turtles in the area. This project included a 75-meter façade of property complainants, but the state has not taken any action. After 4 years, he reiterates that he will go further with building the Park by giving in 1995 the Law of the National Park that includes the controversial term: from the sea. Again, no action is taken until 2003.
In 2003, owners oppose expropriation, especially as the Costa Rican law provides that expropriated property for the public interest can only be used for that purpose for 10 years, and after that period, the old owners may request it back.

The Tribunal observes that the expropriation started on 22 July 2003 and that Costa Rica did not take any steps to compensate the applicants.
The complainant considers the most appropriate valuation method to be the capitalized income method.
The best use of this land, from the complainant's point of view, would be the realization of 32 lots for one family (5 facing the beach and 27 in the interior). This property is estimated to have a property value of $ 8.8 million, of which $ 5.19 million for the 75-meter facade and $ 3.69 million for the land difference.
Costa Rica says it did not violate the law and the amount it should pay to the complainant is the value of the land it estimates at USD 300,000 plus the interest of USD 63,118 until 1992 or USD 1,021,562 until 1988.
The Court considers it more appropriate to relate to the prices at which land was sold in that area on 1 January 2006, reaching a value of USD 3.1 million.
Interest calculated by the court is based on the rate of government securities issued for five years, compiled on a half-yearly basis. The total amount of interest is USD 950,900.33. The same rate will also apply after the date of the notice until the full payment of the damages.
Following receipt of the damages, the complainant will surrender 75 meters to Costa Rica.
Each party must bear its own costs.

2.6 Swisslion DOO Skopje_v_Macedonia

On 30 March 2006, Swisslion bought 4180 shares from Agroplod and on April 13, 2006, it bought 820 shares.
On May 7, 2006, it bought 788 shares, holding over 25%.
More than 25% of Agroplod shares were auctioned on June 1, 2006. On June 7, 2006 a favourable opinion was given on Swisslion's bid (it was the only bidder). On June 23, 2006, the shares were paid and transferred to Swisslion.
Mr Kitinov challenged the acquisition of shares by Swisslion without effect. On March 2, 2007 he sent a letter to the Ministry of Economy asking him to inspect the investment made in Agroplod. On 12 March 2007 the Ministry of Economy asked the Finance Ministry to do this inspection.
On October 30, 2007, the finance ministry wrote to the public prosecutor that he had completed the audit but did not have the competence to assess whether or not the engagement was respected.
On 5 November 2007, the General Prosecutor asked the SEC for a statement of the Agroplod capital structure before the June 2006 auction. On 26 May 2006, Swisslion held 24,901% of the shares, and 588 shares were added to 27,834%. On 20-22 February 2008 the ministry concludes that Swisslion was not entitled to bid.
While the auction process is still being judged, the SEC has forbidden Swisslion to exercise its rights from previously purchased shares.
In the first instance, the lawsuit filed by the SEC is dismissed, they go to the Supreme Court, which decides in favour of SEG.
Mr Kitinov continues the pressures against Swisslion, on December 20, 2010, calls on the Prosecutor General to prosecute Swisslion representatives at Agroplod.
Given that the tribunal did not consider expropriation to be a violation of the fair and just principle of fairness, it decided that it was sufficient to pay damages of EUR 350,000 as compensation for the reduction in sales and another EUR 350,000

equivalent in part of the arbitration costs, at which interest is compounded half-yearly at the LIBOR rate.

2.7 Československá obchodní banka A.S. v. Slovak Republic (ICSID Case No. ARB / 97/4)

On December 17, 1993, an agreement was signed between the Czech Finance Ministry, the Slovak Finance Ministry and the CSOB. According to the agreement, CSOB claims that Slovakia had to pay the losses registered by the Slovak Collection Company. Slovakia did not cover these losses and CSOB initiated arbitration in order to recover the damages suffered.

Privatization was to take place in three stages. By the end of 1993, CSOB had to achieve a return on capital of 6.25%. To do so, uncertainties were to be transferred to the Collection Company, which would transfer the money to CSOB. Greater claims have been transferred, so at the end of 1993, the return on equity was 6.49%.

Total claims transferred by ČSOB amounted to SKK 6,521,108,081.91 by the end of 1993, decreased by SKK 51,668,195 on 16 August 1994 and increased by SKK 86,948,277.04 on 31 May 1995.

The Sovlaka Republic considers that it should only pay SKK 1,011,426,185 as principal damages and SKK 2,057,071,675 interest.

CSOB claimed 10,647,236,411.30 SKK, after the court's adjustments it reached SKK 8,686,280,324 to which it applied interest to SKK 13,364,616,692.

The Court of First Instance rejected the method of calculation based on lost profits, even though it considered it appropriate to report on the profitability of banks in the Slovak market. Instead, the court calculates the three-month BRIBOR interest in the amount of SKK 11,618,154,309, then the full payment of the damages, the interest was set at the rate of 5%.

CSOB asked Slovakia to pay all costs in the amount of 16,351,846 USD. Slovakia has asked for CSOB to bear all costs in the amount of 14,314,236.17 USD. The Tribunal decides that Slovakia will bear its own costs and $ 10,000,000 of CSOB costs.

3. In conclusion

The development of international arbitration is based on the development of economic relations between different states. Investors in some countries are attracted by different opportunities to invest their capital available in other states. To protect the investments of these foreign investors it was necessary to sign bilateral investment agreements. Most of these agreements provide for a clause to resolve any disputes that may arise between the foreign investor and the host state through international arbitration, in particular within the International Centre for the Settlement of Investment Disputes.

By making an easy transition to the damages awarded in the international conflicts between foreign investors and host states, we presented some cases where the damages awarded were calculated by using the market value method.

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