Investment Treaty Forum, 2 March 2011 –
Standards of Compensation and Measures of Value in International Investment Arbitration

Issues in investment treaty damages quantification

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Two issues

1. Damages and market power in investment treaty arbitration
2. Implementing the concept of market value in investment treaty arbitration
1. Damages and market power

Scenario:
1. A business has a high market share – it can exercise market power, boosting its profits by withholding volumes and lifting prices.
2. This situation is likely to persist due to the structure of the industry.
3. The host state has the right to regulate the business so that it makes an adequate return on capital in the long run, but no more.
4. However, historically regulation has been loose, and the expropriated business has made (very) high profits.
5. Third party and investor expectations were that this would continue.
6. The host state has expropriated the business.

2. Damages and market power continued – the award of a licence

Scenario (continuing from above):
6. The government, after the date of expropriation, will award licences for extended time periods/new services.
7. The government is likely to award the licence on the basis of some kind of auction/beauty parade – as is increasingly typical.
8. The expropriated business is well-placed to win such a licence.
9. Expectations were that the business would win a licence.
10. The government would maximise its immediate objectives by making such an award (licence fee paid, quality of service or other dimensions).
2. Market value – a typical transaction

Minimum the investor would (really) accept

Maximum the hypothetical buyer will pay

Mutually acceptable prices lie in this zone

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2. What if the owner wouldn’t have wanted to sell at any price it was likely to be offered?

Minimum the investor will accept

Maximum the highest-paying hypothetical buyer will pay

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2. Market value – another typical transaction

- Minimum the investor will (really) accept
- Maximum Hypothetical Buyer 1 will pay
- Maximum Hypothetical Buyer 2 will pay
- Zone of possible agreement
- Likely range of outcomes
- Investor can play Buyer 1 and Buyer 2 off to get a price in this range

2. What if one buyer has a much higher valuation of the investment than others?

- Minimum the investor will accept
- Maximum Hypothetical Buyer 1 will pay
- Maximum Hypothetical Buyer 2 will pay
- Zone of possible agreement
- Likely range of outcomes
James Nicholson is a managing director in FTI’s Paris office and leader of FTI’s Economic Consulting practice in France. James specialises in the assessment of damages and related issues in the context of international arbitration, and has more than 15 years experience in finding practical solutions and providing independent expertise in relation to complex unstructured business, valuation, economic, and financial problems, in contentious and non-contentious contexts. James joined FTI in 2009, having moved to Paris from London in 2007 with LECG.

James’ work primarily involves issues of the identification and valuation of lost profits, and the valuation of businesses, financial assets including shareholdings, and other assets, and of wasted costs. James recently testified at hearings in connection with Ciecarmex in an ICSID case, and in an unrelated ICC matter, and has served or is serving as a joint expert on behalf of Claimants in separate ICSID and ICC matters.

James has recently worked in assessing damages in disputes relating to alleged expropriation, breach of contract, disputed shareholder agreements, frustration of contract, and other matters. He has acted as expert or been closely involved in matters involving the governments of Algeria, the Congo, Egypt, Georgia, Hungary, Iran, Kazakhstan, Nigeria, Pakistan, the UK and the US, and has worked on commercial matters involving parties based throughout EMEA, Central Asia, and the Americas.

Along with 16 of his colleagues, James is one of the 50 leading experts, across all areas of expertise, active in commercial arbitration worldwide, as identified by The International Who’s Who of Commercial Arbitration 2011.

James is a member of the Standing Committee of the ICC’s Centre for Expertise, has acted as instructor at the Masters in International Dispute Settlement programme at the University of Geneva, and as an expert witness at advocacy workshops organised by the Foundation for International Arbitration Advocacy (FIAA). James has presented to the Investment Treaty Forum on damages issues and presented to the IBA on insolvency issues in May 2011.

The CFA Institute has awarded James the right to use the Chartered Financial Analyst designation. James holds a Master in Public Policy degree from Harvard University’s Kennedy School of Government, where he was a Fulbright Scholar and focused his studies on business, government, and finance. James was awarded first class honours in his BA from Oxford University in Philosophy, Politics, and Economics. Until 2003 James worked at Bain & Co., where he spent six years as a strategy consultant. James is a non-executive Director of F&C Zircon, a hedge fund managed by F&C Asset Management, a leading UK-based investment management group.

Thank you

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