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Editors' Note

Evaluation of damages in arbitration involving foreign investments in regulated markets presents numerous challenges which need to be addressed from various angles. We open this issue of the Journal with an article by Leonardo Giacchino, Marisa Clery and Isabelle Cotrupi who highlight some aspects that may make it "easier" for the calculation and others that may make it "more difficult" in comparison with non-regulated markets. "More difficult" is the application of a market-based valuation approach, because of the limited number or absence of competitors. Yet, both the income-based and asset-based approaches also involve certain difficulties. With respect to the asset-based approach, the authors point out that different countries use different regulatory values for the assets in order to calculate regulated prices. While the US Performance-Based Regulation is relatively clear cut, other countries' systems adjust initial investments by certain valuation-related factors, and still others, in particular in Latin America, rely on the New Replacement Value of the regulated assets. The application of the income approach may also be both "easier" and "more difficult" in regulated markets. It may be "easier" because prices are regulated and the demand for the good or service is relatively stable; but it may be "more difficult" where regulated prices are subject to changes over time, not only by unilateral action on the part of the regulator but also by regular price and tariff adjustments foreseen in contracts or licences negotiated with the investor. How should therefore in a "but for" scenario the changes of regulated prices be evaluated?

Valuations of investments in regulated markets are also reflected in the Case Notes published in this issue, which have again been meritoriously prepared by dedicated young colleagues of Craig Miles at King & Spalding. The cases concern investments in the energy sector (*CEF Energia B.V. v. Italy; Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania*), in the petroleum industry (*ConocoPhillips Petrozuata B.V. and others v. Venezuela; Perenco Ecuador Ltd. v Ecuador*), and in the mining sector (*Bilcon of Delaware and others v. Canada*; *Glencore International A.G. and Prodeco S.A. v. Colombia*; *Tethyan Copper Company Pty Ltd. v. Pakistan*). The geographical scope of these cases spans from Europe to Africa, and from the Americas to the Far East.

Two cases are of particular interest because they relate to the valuation of a "lost opportunity", namely where the opportunity to develop a project successfully has been unlawfully denied before the project has even gotten started. While the Tribunal in *Bilcon of Delaware and others v. Canada* based its valuation on the amounts expended by the investors, increased by a "value of the opportunity lost", the Tribunal in *Tethyan Copper Company Pty Ltd. v. Pakistan* applied a so-called "modern DCF method" in which it reflected the risks of the project in the cash-flow projections and not in the discount rate.

The problem of valuing an "opportunity" is closely related to the valuation of a "Loss of a Chance" to which the article James Searby prepared for this issue of the Journal is dedicated. He distinguishes between the "loss of a chance proper" and the "loss of a chance in quantification". While in the latter case the damage is caused by the unlawful act and only the amount of damage is uncertain, in the former case the chain of causation is broken. This means that, even if the respondent had acted lawfully, there was still uncertainty about the occurrence of any damage. The best examples include unlawful exclusions from tender processes (or, as in *Chaplin v. Hicks* to which the author refers, in a beauty contest). While tribunals in the past have occasionally addressed the valuation of a chance in quantification, the valuation of the loss of a chance proper seems to explore rather uncharted territory. The author suggests to follow this path further and develops some ideas on how this could be done.

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