for the Settlement of Investment Disputes (ICSID). However, as ICSID tribunals are not bound to follow previously rendered awards, could analysis of their decisions make things more complicated?

Below, we examine ICSID case law and its ability to provide useful guidance to insureds and insurers in considering if and when an expropriation has occurred.

‘Creeping’ expropriation
“Creeping” expropriation is defined by the United Nations Conference on Trade and Development as “a slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment”.

Below, we examine ICSID case law and its ability to provide useful guidance to insureds and insurers in considering if and when an expropriation has occurred.

i) Substantial interference
Establishing “substantial interference” is controversial and is frequently discussed in the field of investment treaty arbitration. Although it is not a traditional “taking” of an investment, if the host state interferes to a significant degree to deprive the enjoyment, use or benefit derived from the investment, a creeping expropriation may have occurred.

Numerous decisions endorse the view that a significant degree of deprivation is required for a tribunal to determine creeping expropriation. The case of Metaclad Corp v United Mexican States (a Nafta arbitration) is particularly pertinent on this:

“... expropriation under Nafta includes not only open, deliberate and acknowledged takings of
property... but also covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably-to-be-expected economic benefit of property, even if not to the obvious benefit of the host state.

However, the real difficulty comes in determining whether the level of interference is sufficient.

An insignificant restriction or interference with property rights is not generally considered a creeping expropriation; the decisive element is the "substantial loss of control or economic value of a foreign investment", according to Brownlie’s Principles of Public International Law, 534, (2012).

For example, the tribunal in Pope & Talbot Inc v Government of Canada rejected the investor’s claim that Canada’s export control regime constituted an expropriation as it interfered with his exports to the US, holding that “the test [should be] whether that interference is sufficiently restrictive to support the conclusion that the property has been ‘taken’ from the owner”.

While the interference may have reduced profits, the investor still exported considerable quantities of his product and earned substantial returns, making his argument unsuccessful.

Numerous decisions have held that the investor’s continued control of an enterprise goes against the finding of a creeping expropriation. The requirement of either total or substantial deprivation has led to numerous decisions denying that an expropriation had occurred, owing to the investor’s retention of control over the investment.

ii) The irreversibility and permanence of the contested measures

The requirement of a certain degree of permanence to the state’s interference is also controversial. While Técnicas Medioambientales Tecmed SA v United Mexican States referred to a “de facto expropriation [being] irreversible and permanent”, subsequent decisions have taken a more pragmatic approach, preferring to look at the effect of the state action even if it amounted to a temporary measure.

For example, the tribunal in Wena Hotels Ltd v Arab Republic of Egypt held that an Egyptian public sector company’s one-year seizure of two hotels, owing to a dispute over lease terms, was more than an “ephemeral interference” and amounted to an expropriation.

iii) Intention versus effect

Often referred to as the “sole effect doctrine”, many tribunals have endorsed the view that it is the effect of the state measure on the economic benefit, value and control over the assets that must be considered and that the state’s intention to expropriate, though of potential assistance, is not decisive.

The expropriation date

This is critical for political risk insurance, yet can be incredibly difficult to determine for creeping expropriations. Is the date determined from the first measure, or the last? What happens when the former falls within a policy period and latter falls outside? ICSID case law could be of assistance here.

In the high-profile decision Siemens AG v Argentine Republic, the tribunal found that the state committed both a direct expropriation via issuing a decree unilaterally terminating Siemens’ service contract, and a creeping expropriation by measures leading to the decree, including suspending certain services under the contract and attempting to impose a “non-negotiable” new agreement.

Significantly, for political risk policy claims, the tribunal stated:

“By definition, creeping expropriation refers to... steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred... the last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back.”

In line with this view, it would appear that reference to the decisions of investment treaty tribunals could provide a degree of certainty to insureds and insurers not only as to if a creeping expropriation has occurred, but when.

Unfortunately, such decisions don’t provide absolute certainty. As noted by the tribunal in Azurix Corp v Argentine Republic: “[t]here is no specific time set under international law for measures constituting creeping expropriation to produce the effect... How much time is needed must be judged by the specific circumstances of each case.”

Conclusion

Should political risk policies include as standard a provision for considering publicly available investment treaty decisions to establish whether an expropriation has occurred? It is difficult to say.

Where the wording refers only to losses suffered as a result of “direct expropriation”, international treaty case law may be more a hindrance than a help.

However, when a wording refers to both direct and indirect expropriation, or events “having the effect of expropriation”, reference to ICSID decisions could provide greater assistance to insurers and insureds than that found in domestic law, which is unlikely to have considered these concepts in such detail.