VALUATION DATE IN INVESTMENT ARBITRATION: A FUNDAMENTAL EXAMINATION OF CHORZÓW'S PRINCIPLES

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I. INTRODUCTION

A tribunal's selection of a valuation date can have an enormous impact on the amount of compensation awarded to a claimant who has been deprived of an investment by the host state. Whether valuation should reflect only those expectations and information available at the time of the expropriation or use hindsight as of the date of the award is the key disputed issue. In *Yukos v. Russia*, the difference between the two approaches (ex ante and ex post) was nothing short of three-fold—its impact in the range of many billions of dollars.[1]

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[1] *Hulley Enters. Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 226, Final Award, ¶ 1826 (July 18, 2014); *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, ¶ 1826 (July 18, 2014); *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, ¶ 1826 (July 18, 2014). At the time of this writing, the *Yukos* awards have been set aside by The Hague District Court's April 20, 2016 decision on jurisdictional grounds. The decision is subject to appeal. Some authors highlight claimants' choice of valuation dates as the most significant change in the realm of the law of damages in international arbitration. *See, e.g.*, John Y. Gotanda, *Assessing Damages: Valuation Standards*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID, 523, 523–32 (2015) ("Gotanda").

While this question remained dormant for decades in the international arena, the current state of the law appears reasonably clear: where they have been victims of unlawful state action, claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation. Different standards set forth in bilateral investment treaties ("BITs")—intended to govern compensation for lawful expropriation—do not apply, and the void is filled by customary international law, as defined by investment tribunals.

Predictability and consistency are, in and of themselves, worthy objectives. Acknowledging consistency should not, however, end the debate. While several recent decisions consider granting claimants the choice of valuation dates to be logical conclusions derived from the widely accepted principles of the *Chorzów Factory* case,[2] that choice also has moral and policy implications. Whether *Chorzów*'s "children" should be seen as creating "a revolutionary remedy or reward for rich corporations at the expense of the world's poor" depends fundamentally on an assessment of the merits of these implications.

This article is structured in five sections that follow this introduction. In the *first* section, it addresses basic notions of valuation in international arbitration, and explains the issues in connection with the use of hindsight by contrasting ex ante and ex post approaches to valuation. The *second* section deals with standards of reparation for expropriation in international investment law, using the *Chorzów Factory* case as a starting point. Section *three* notes how the issue of valuation dates remained, by and large, dormant in the international investment arena up until the end of the twentieth century. The *fourth* section then analyzes how, especially after the award in *ADC v. Hungary*,[3] international investment law developed and came to embrace the notion that, in the case of wrongful state conduct, claimants are entitled to select either the expropriation date or the award date as the valuation

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[2] *Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, Claim for Indemnity-The Merits (September 13, 1928).

[3] *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006).

date. The *fifth* and final section analyzes the current state of the law against the backdrop of first principles and policy concerns.

II. EX ANTE AND EX POST APPROACHES TO VALUATION

A. Valuation Methods: Discounted Cash Flow Analysis

Once liability is established in disputes about expropriation, the ultimate goal is to determine the appropriate amount of damages to which the claimant is entitled in light of the taking. The parties and the tribunal will focus on determining the expropriated assets' value, in one form or another, to substantiate that amount.

The most commonplace method for valuing an enterprise is the so-called discounted cash flow analysis ("DCF"). The DCF method aims to distill an asset's value by analyzing the earning power that the asset would be expected to produce. By contrast, other techniques, including scrutiny of comparable companies or past transactions, take a market-based approach to valuation.

Pursuant to the DCF analysis, value is calculated by projecting the future stream of free cash flows associated with the asset and then discounting them by an appropriate rate that takes into account the passage of time and risk. In investment disputes, identifying the discount rate poses the additional question of whether including country risks concerning potentially illegal state conduct is appropriate. Many cases and authorities exclude the effects of the State's own potential breaches of its treaty obligations.[4]

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[4] *See, e.g., Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 841 (September 22, 2014) ("The Tribunal agrees . . . 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."); *see also* Florin A. Dorobantu et al., *Country Risk and Damages in Investment Arbitration*, 2015 ICSID REV. 1, 13 (arguing that tribunals should distinguish "actionable country risk," from which the investor is protected by the BIT and which should not impact the discount rate, from other "non-actionable country risks" which the investor should bear). Other recent awards, however, have reached a different conclusion. *See, e.g., Mobil Corp. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, ¶ 365 (October 9, 2014) ("[I]t is precisely at the time before an expropriation (or the public knowledge of an impending expropriation) that the risk of a potential expropriation would exist, and this hypothetical buyer would take it into account when determining the amount he

The projected cash flows, in turn, are derived from a variety of factors. As a rule of thumb, the DCF method will be appropriate where there is sufficient historical evidence, a "track record," on which to base the analysis. Comparables and past transactions can function as a sanity check.[5] Other methods, such as the liquidation value or the book value of an enterprise (asset-based approaches to valuation), may be used in other circumstances, such as where the enterprise has no real prospect of generating income. These two situations are usually distinguished, as illustrated by the World Bank Guidelines on the Treatment of Foreign Direct Investment, as the valuation of going and non-going concerns, respectively:

> Without implying the exclusive validity of a single standard for the fairness by which compensation is to be determined and as an illustration of the reasonable determination by a State of the market value of the investment under Section 5 above, such determination will be deemed reasonable if conducted as follows:
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> (i) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value;
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> (ii) for an enterprise which, not being a proven going concern, demonstrates lack of profitability, on the basis of the liquidation value;
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> (iii) for other assets, on the basis of (a) the replacement value or (b) the book value in case such value has been recently assessed or has been determined as of the date of the taking and can therefore be deemed to represent a reasonable replacement value.[6]

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would be willing to pay in that moment. The Tribunal considers that the confiscation risk remains part of the country risk and must be taken into account in the determination of the discount rate.").

[5] *See, e.g., Gold Reserve, supra* note 4.

[6] WORLD BANK, GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT (1992), Guideline IV.6—Expropriation and Unilateral Alterations or Termination of Contracts (defining a "going concern" as "an enterprise consisting of income-

The distinction between "going" and "non-going" concerns reflects tribunals' reluctance to award damages reflecting income-based approaches where projections are deemed too speculative.[7] Claimants shoulder the burden of proving damages with a sufficient degree of probability.[8] Still, while past performance and a history of operations are obviously relevant, valuation on the

producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State"); *see also* MARK KANTOR, *Basic Valuation Approaches*, *in* VALUATION FOR ARBITRATION 7, 91–102 (2008) ("Kantor") (reviewing awards addressing the issue of whether an enterprise can be considered a "going concern," and addressing the valuation of *non*-going concerns).

[7] *See, e.g., Metalclad Corp. v. United Mexican States,* ICSID Case No. ARB/97/1, Award, ¶¶ 119–22 (August 30, 2000) (denying lost profits claim and noting that "where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value"); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, ¶ 8.3.3 (August 20, 2007) (noting that "the net present value provided by a DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative"). In some cases, however, the DCF has been applied to enterprises with no track record of past income. For example, the Tribunal in *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, ¶ 811 (July 29, 2008), found that, while "the enterprise had not been in existence for long enough to have generated the data required for the calculation of future income [and] would not be treated as a going concern under the World Bank Guidelines, and would therefore be more suitable for the 'liquidation value' rather than the DCF method of valuation," the "only asset of real value, namely [the] licence to operate a telecom network ... had a value ... far in excess of its book value [and] directly linked to its potential to produce future income, [such that] there is no realistic alternative to using the DCF method to ascribe a value to it."

[8] *See, e.g., Mobil Invs. Canada Inc. and Murphy Oil Corp. v. Canada,* ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, ¶ 437 (May 22, 2012) (accepting by a majority that "Claimants do not have to prove the quantum of damages with absolute certainty," and that "no strict proof of the amount of future damages is required and that 'a sufficient degree' of certainty or probability is sufficient," so long as "the amount claimed '[is] probable and not merely possible'"); *Vivendi, supra* note 7, at ¶ 8.3.16 ("[I]t is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.").

basis of DCF is always forward-looking—as it must assess the present value of income that is yet to materialize. Establishing a "but-for" world is a predictive *factual* endeavor. Therefore, key assumptions inevitably have to be made about an uncertain future.

B. Ex Ante and Ex Post Approaches to Valuation

Ideally, expropriation and adequate compensation should coincide temporally. Where compensation is promptly paid to the claimant, it will reflect the value of the expropriated asset at the exact date of expropriation (say "time zero" or t_0). Using the DCF technique, the asset's value will reflect calculations projecting its free cash flows at, and discounting them to, t_0. This assumes either that the State will exert its powers of eminent domain lawfully (and pay prompt and adequate compensation) or that a violation can be instantly detected and the victim immediately compensated.

In practice, however, legal proceedings take time and practical problems arise precisely because of the time elapsed between the violation and compensation for that violation. Thus, tribunals will only be able to value an investment and render an award at some point well beyond t_0 (say time t_n). This raises the question of how to properly value at t_n an asset that was expropriated at t_0. Projected cash flows are, by definition, *estimates* about the future. But, by the date of the award, additional information will be available about what *actually* happened after the expropriation date. The asset's value will most likely have fluctuated in the interim period; at t_n it may well be significantly higher or lower than its value at t_0.

The dilemma is therefore the following: Should tribunals use hindsight or, instead, are they constrained to rely on information available (known or knowable) at the date of expropriation? These two approaches reflect, respectively, ex post and ex ante approaches to valuation.

Under an ex ante approach, the claimant will be compensated by receiving the value of the investment at t_0 (adjusted, at the date

of the award, by an appropriate prejudgment interest rate).[9] The value of the asset reflects the expected risks and returns, based on assumptions as to all possible future outcomes and payoffs, *as of time zero*. Subsequent information, even if available, will be ignored as irrelevant. By taking the enterprise, the State relieves the investor of any risk. Price fluctuations are, from the investor's viewpoint, immaterial: Whatever happens, the investor will receive the estimated value of the investment at t_0, such that any ensuing gains or losses will affect only the State.

In contrast, under an ex post approach, the claimant will be compensated by the value of the investment as assessed at a later date (t_n). For practical purposes, t_n will usually coincide with the date on which the award is rendered. By then, the tribunal will be in a position to employ hindsight, relying on data that became available after the wrongful conduct. At that later date, the asset may have gone up or down in value. If its price has risen, the investor will receive a higher amount than the value of the asset at t_0. In contrast, if the value of the asset has decreased, the investor will receive a lesser amount. This means that—in a case where the State has deprived an investor of a business opportunity that required an initial outlay of money but turned out to be a loser—a pure ex post approach would lead, in theory, to negative damages, but of course no claimant would bring suit if it could be expected to pay additional sums to the offender.

C. The Tension Between Ex Ante and Ex Post Approaches to Valuation

An example given by Dunbar, Evans and Weil vividly illustrates the differences between the two approaches in an individual application:

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[9] Financial literature is divided on what the appropriate rate should be. *Compare* James M. Patell et al., *Accumulating Damages in Litigation: The Roles of Uncertainty and Interest Rates*, 11 J. LEGAL STUD. 341 (1982) (equating a claim for compensation with a bond and arguing that the appropriate rate is hence the respondent's borrowing rate, as the claimant effectively bears the risk of default), *with* Franklin M. Fisher & R. Craig Romaine, *Janis Joplin's Yearbook and the Theory of Damages*, 5 J. ACCT. AUDITING & FIN. 144 (1990) ("Fisher & Romaine") (arguing that a claimant should be compensated solely for the time value of money and should therefore earn the risk-free interest rate).

> "[S]uppose that you buy a lottery ticket for $1. Then suppose I steal it from you before the lottery winner becomes publicly known. Assume that on the date of the injury all lottery tickets had an equal chance of winning and there was no shortage of tickets available for $1. Time passes and it turns out that the ticket I stole from you is the lottery winner and is now worth $32 million. How much should I pay you to make you whole? Do I owe you the expected value of the return from the ticket, about 12 cents, called the ex ante value before the event? Or do I owe you the fair market value of the ticket I stole, $1? Or, do I owe you the amount that you would have made had you owned the winning ticket, $32 million, the ex post value—its value after the event?"[10]

While somewhat simplistic, the lottery ticket example captures the inherent tension underlying the choice between the ex ante and ex post approaches. All business opportunities and enterprises are, in some sense, "lottery tickets." Actions in the present are subject to uncertainty that cannot be purged. Only the passage of time will unveil the actual, single outcome within the initial range of multiple possibilities. At least for the most part, however, legal disputes are retrospective. Parties, their experts, and adjudicators are usually empowered by hindsight to eliminate uncertainty as to past events.

As attested by the United States Supreme Court, the prospect of seeming omniscience is tempting. In a dispute concerning the value of a patent, Justice Cardozo, who delivered the opinion of the Court, ordered discovery of evidence relating to sales of the product made after the relevant breach by the defendant. He reasoned that a patent, being "a thing unique," will generally lack

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[10] Michael J. Wagner et al., *Ex Ante Versus Ex Post Damages Calculations, in* LITIGATION SERVICES HANDBOOK: THE ROLE OF THE FINANCIAL EXPERT 8.1 (2007). For a similar example, *see also* Fisher & Romaine, *supra* note 9, at 154–55. The Janis Joplin hypothetical can be roughly summarized as follows: Suppose a thief steals and destroys a signed high school yearbook featuring then student Janis Joplin. At the time of graduation, yearbooks were bought and sold indistinctly for $5. Many years later, Joplin became a star and her autograph was valued at $1,000. What compensation should be afforded to the injured owner: $1,000 or merely $5 plus interest?

contemporaneous evidence of its market value, such that an ex ante valuation will prove inherently imprecise and speculative. In Justice Cardozo's words, "a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within."[11]

Neither the ex ante nor the ex post approach are free from drawbacks. An ex ante approach generally assumes that, at t_0, the expropriated asset can be easily replaced (with the cost of cover serving to mitigate losses). This approach is less compelling, however, if the asset is not freely traded or if the victim of expropriation had reason to price the asset in excess of its market value. In those situations, it will be up to the claimant to provide contemporaneous evidence supporting its projections.[12] That evidence may be insufficient or simply unavailable, in which case the ex ante approach will fail to capture the price at which the former owner, as a hypothetical willing seller, would have disposed of the asset.

The ex post approach also has some awkward implications. On a conceptual level, it may ignore the fact that, by taking the asset, the State also relieved the investor of the risks associated with that asset.[13] Some might argue that the risk-free claimant is adequately compensated by receiving the value of the expropriated enterprise at t_0 adjusted by an appropriate prejudgment interest rate. In addition, from the strict viewpoint of valuation, the use of ex post information in legal proceedings yields inconsistent results as

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[11] *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 698 (1933).

[12] Fisher & Romaine, *supra* note 9, at 156.

[13] *Id.* at 154. For a critical view of Fisher & Romaine's article, see Konrad Bonsack, *Damages Assessment, Janis Joplin's Yearbook, and the Pie-Powder Court*, 13 GEO. MASON U.L. REV. 1 (1990) (denouncing the ex ante approach for failing to compensate claimants for the loss of the property rights of continued ownership and thus of unexpected future gains or losses, and appearing to argue instead for a genuine ex post approach where any decrease in the asset's value should also be reflected in the damages award—excluding only the prospect of negative damages).

negative damages are, by and large, not endorsed as an acceptable outcome.[14]

Suppose that an investor holds the right to explore a site where minerals are believed to exist. The initial required investment to perform exploratory drilling is $100. Assuming a 50 per cent chance of finding minerals with a $500 potential payoff and a 50 per cent chance of failure yielding $0, the net present value of the project is, at t_0, $150 (ignoring time value of money).[15] Before the investor actually makes its initial investment, the host state expropriates the venture. Under an ex ante valuation, an arbitral tribunal would award $150, the sum which factors in the range of possible outcomes envisaged at t_0, as adequate compensation for the taking of the investor's rights. With the use of hindsight, by contrast, the actual outcome of the project will be known. At t_n, the investor will either have a valuable mine, in which case it will expect to realize a $400 profit, or its initial investment will have been a wasted cost giving rise to a $100 loss. Applying the ex post method, a tribunal would award the investor either $400 or *negative* damages, *i.e.*, order the investor to pay to the State $100. Needless to say, the prospect of negative damages appears misguided.

After raising a similar example of a money-losing investment, Fisher & Romain make the following rhetorical invitation: "The reader who finds it hard to accept [the argument against the ex post approach] should attempt to enunciate a principle on which the use of hindsight leads to paying a high award when the asset turns out to have been unexpectedly valuable and does *not* lead to negative damages when the asset turns out to have been a loser."[16] Section V will explore whether such asymmetry can be justified in the legal realm by moral considerations and policy objectives.

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[14] Some courts have nonetheless relied on subsequent events to reduce the amount of compensable damages in cases of contractual breach. *See, e.g., Golden Strait Corp. v. Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12 (March 28, 2007) (holding that damages claimed for wrongful termination of a charter party had to be reduced to account for events subsequent to the wrongful termination, namely the outbreak of war, which would have authorized termination of the contract before its final term).

[15] This equals the two possible payoffs, weighted according to their probability, minus the initial investment: $\left(\frac{1}{2} \times 500\right) + \left(\frac{1}{2} \times 0\right) - 100 = 150$.

[16] Fisher & Romaine, *supra* note 9, at 155.

III. STANDARDS OF REPARATION FOR EXPROPRIATION

In a lawful expropriation, the "fair market value" of the enterprise or asset generally serves as the guiding measure for amounts owed to the expropriated party. That concept is commonly defined as "[t]he price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat."[17] The law distinguishes, however, *compensation* as a remedy for lawful expropriation and *damages* as the appropriate response to unlawful expropriation.[18]

A. Treaty Standards of Compensation for Lawful Expropriations: Fair Market Value at the Time of the Taking

Most, if not all, BITs set forth specific standards of compensation vis-à-vis lawful expropriations. International law recognizes states' eminent domain powers and their sovereign prerogative to expropriate alien property subject to certain conditions. By and large, an expropriation is deemed lawful if the taking is carried out for a public purpose, in nondiscriminatory fashion, in accord with due process or natural justice and upon payment of compensation. The U.S. Model Bilateral Investment Treaty contains standard language in this regard, denying the power to expropriate except where states meet those conditions:

> Article 6: Expropriation and Compensation
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> 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

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[17] *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 113, ¶ 227 (August 14, 1987); *see also Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, ¶ 73 (Feb. 17, 2000).

[18] *See* David Rivkin & Floriane Lavaud, *Determining Compensation for Expropriation in Treaty-Based Oil and Gas Arbitrations*, *in* LEADING PRACTITIONERS' GUIDE TO INTERNATIONAL OIL & GAS ARBITRATION 217, 220–26 (2015) (presenting the distinction between lawful and unlawful state action and showing how these underlying concepts unravel in the context of valuation of assets expropriated in treaty-based oil and gas arbitrations).

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law [and a minimum standard of treatment].[19]

Following the well-known "Hull formula," expropriation must be accompanied by compensation that is "prompt, adequate, and effective."[20] That measure translates into compensation that is: to "be paid without delay"; to "be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place"; "not [to] reflect any change in value occurring because the intended expropriation had become known earlier"; and to "be fully realizable and freely transferable."[21]

If a state pays prompt compensation, the only relevant goal is to compensate the investor, a task for which the ex ante approach to valuation is well-suited. The investor will then recover the fair market value of the enterprise at the time of expropriation (calculated either on the basis of DCF analysis or some form of valuation). Other policy concerns, including deterrence, simply do not arise, and the use of hindsight does not come into play.

B. *Customary International Law's Full Reparation Standard in Light of Unlawful Actions:* Chorzów Factory

While BITs set out conditions for *lawful* expropriations, many tribunals have held that these compensation provisions do not address state responsibility and standards of reparation for wrongful conduct.[22] For these tribunals, when an *unlawful*

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[19] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 6(1), Apr. 20, 2012.

[20] *Id.*

[21] *Id.* art. 6(2).

[22] *See ADC, supra* note 3, at ¶¶ 481–83 ("Since the BIT [in question] does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.").

expropriation takes place, the amount due should rely on principles of customary international law.

The seminal case on the subject is *Chorzów*,[23] whose vitality has been reaffirmed on multiple occasions.[24] In one of the more often quoted passages in international investment jurisprudence, the Permanent Court of International Justice ("PCIJ") laid down the so-called "full reparation standard." The standard affirms the primacy of restitution as a remedy for international wrongs and the possibility of recovery, by the innocent party, of additional damages (such as consequential damages):

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that *reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.* Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.[25]

The *Chorzów* case arose under the League of Nations' 1922 German-Polish Convention concerning Upper Silesia (the "Geneva Convention"), in the aftermath of the First World War and the Treaty of Versailles. Germany espoused claims on behalf of two

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[23] *See Chorzów Factory, supra* note 2.

[24] *See ADC, supra* note 3, at ¶¶ 484–94 (collecting various instances where the principles of *Chorzów Factory* were reaffirmed); *see also CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) (citing *Chorzów Factory* as the standard for compensation in the case of state actions contrary to international law); *Amoco Int'l Fin. Corp. v. Islamic Republic of Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, Partial Award, ¶¶ 191–94 (July 14, 1987); Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, 53rd Sess., April 23–June 1, July 2–August 10, 2001, U.N. Doc. A/56/10, art. 31(1) and 34.

[25] *Chorzów Factory, supra* note 2, at ¶ 125.

German companies that had previously constructed and operated a nitrate factory at Chorzów in Upper Silesia. Under the Geneva Convention, Poland could not liquidate the property, rights and interests of German nationals for 15 years following the transfer of sovereignty, except if, on Poland's request, a Mixed Commission deemed such measures "indispensable to the maintenance of the exploitation."[26] Despite this prohibition, in early July 1922, the Polish courts handed down a decision to the effect that "the right of ownership in the landed property in question was to be registered in the name of the Polish Treasury," and a government-appointed official, pursuant to a decree, "took possession of the factory and took over the management" almost immediately thereafter.[27]

Addressing Poland's actions, the PCIJ made a clear distinction between lawful and unlawful—or permissible and impermissible—conduct. The majority opinion differentiated otherwise legal expropriations (where only payment of compensation is lacking) from prohibited takings, like the one before the court:

> The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation — to render which lawful only the payment of fair compensation would have been wanting; *it is a seizure of property, rights and interests which could not be expropriated even against compensation*, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment nº 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.[28]

The nature of Poland's actions was central to the court's holding. Indeed, an enhanced standard of reparation—*i.e.*, not limited to the value of the enterprise at the date of the taking—was applicable precisely because, rather than exercising eminent domain without

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[26] *Factory at Chorzów (Germany v. Poland)*, 1927 P.C.I.J. (ser. A) No. 9, Claim for Indemnity-Jurisdiction, at 13 (July 26, 1927) (emphasis added).

[27] *Chorzów Factory*, *supra* note 2, at ¶¶ 48–49.

[28] *Id.* at ¶ 123 (emphasis added).

paying compensation, Poland lacked the prerogative to expropriate the nitrate factory. The court reasoned that, under such circumstances, awarding the claimant only the value of the undertaking at the date of dispossession could undermine the purpose of the Geneva Convention and bring about an unfair result:

> *It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment.* This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; *in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention.* Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.[29]

To address those concerns, the court ordered an expert inquiry on damages, reserving its determination on *quantum* for future judgment. The experts on damages were to calculate both (*i*) the value of the factory at the time of the taking, plus any lost profits or losses accrued up until the date of the award; and (*ii*) the value of the enterprise at the date of the judgment in a hypothetical scenario where "that undertaking . . . had remained in the hands of

[29] *Id.* at ¶ 124 (emphasis added).

[the investors], and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind."[30] The court "appreciate[d] the difficulties presented by these two questions [and hence] consider[ed] it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others."[31]

The key distinction between lawful and unlawful state actions and the corresponding remedies laid out in *Chorzów* have become commonplace. Some tribunals have held that *Chorzów* applies not only to expropriation, but also to other breaches for which BITs do not provide specific rules governing remedies. For example, the tribunal in *Lemire v. Ukraine* held that *Chorzów* applies to breaches of the fair and equitable standard even where such breach "does not lead to a total loss of the investment."[32] As such, while debates over valuation dates are more frequent in expropriation cases, they may also arise in the context of other treaty breaches.

To some extent, Article 31 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the "Draft Articles on State Responsibility") also embraces the *Chorzów* principles: States must "make full reparation for the injury caused by the internationally wrongful act."[33] Under Article 34, in turn, "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination[.]"[34]

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[30] *Id.* at ¶ 136.

[31] *Id.* at ¶ 143.

[32] *See, e.g., Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, ¶ 149 (March 28, 2011); *see also BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, ¶¶ 421–29 (December 24, 2007) (applying the *Chorzów* principle as a matter of customary international law and noting that "the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury").

[33] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 24, art. 31.

[34] *Id.* art. 34; *see also Draft Convention on the International Responsibility of States for Injuries to Aliens (Harvard Draft Convention on State Responsibility)*,

While *Chorzów* has come to stand for the distinction in valuation approaches based on the difference between lawful and unlawful expropriation, there remains the question of what constitutes illegality sufficient to trigger enhanced reparation. In *Tidewater*, for example, the tribunal held that "an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation,"[35] adding that "[s]cholars also have insisted on the necessity to distinguish expropriation illegal *per se* and expropriation only wanting compensation to be considered legal."[36] That result was premised on the *Chorzów* dictum stating that a limitation of damages to the value of the enterprise at the date of the taking would have been admissible "if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated."[37] Other cases, however, have rejected this logic, holding that failure to pay compensation may in itself render the expropriation illegal.[38]

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55 AM. J. INT'L L. 545, 580 (1961) (providing that reparation for wrongful conduct may take the form of: "(a) measures designed to re-establish the situation which would have existed if the wrongful act or omission attributable to the State had not taken place; (b) damages; or (c) a combination thereof").

[35] *Tidewater Inv. SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, ¶ 140 (March 13, 2015); *see also Mobil Corp., supra* note 4, at ¶ 301 (holding that "the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful," and stating that a determination on whether an expropriation was unlawful in the absence of payment of compensation must be made "consider[ing] the facts of the case").

[36] *Tidewater, supra* note 35, at ¶ 136.

[37] *Chorzów Factory, supra* note 2; *see also Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Partially Dissenting Opinion of Professor Brigitte Stern, ¶¶ 6–13 (September 16, 2015) (reading *Chorzów* to apply only to expropriations deemed unlawful for reasons other than lack of compensation).

[38] *See, e.g., Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, ¶¶ 497–498 (July 28, 2015) ("It is clear that no compensation has been paid for the properties and therefore that the expropriation did not fulfil the 'lawful' criteria. . . . As no compensation was paid, there is no need to decide whether the acquisition was for a public purpose, whether there was access to due process or. . . whether the acquisition was non-discriminatory."); *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, ¶ 305–06 (May 16, 2012) (holding

IV. THE PREVIOUS PARADIGM: THE PREDOMINANCE OF THE EX ANTE APPROACH TO VALUATION

Historically, tribunals have valued the investment at the earlier of the expropriation date or the date immediately prior to knowledge of the State's intent to expropriate becoming public.[39] In other words, tribunals generally applied a pure ex ante approach to valuation. Indeed, prior to the turn of this century, discussions of the appropriate valuation date centered mostly on the question of when the expropriation itself, as a fact triggering liability, actually occurred; the principle mandating valuation at the date of expropriation, however, was seldom questioned. While similar issues were hotly disputed in the context of American litigation,[40] they mostly remained out of the spotlight in the arena of international investment law.

There are a few likely reasons for the historical predominance of the date of expropriation as the valuation date in investment arbitration, despite *Chorzów*'s early indication that value of the investment at the date of judgment may be relevant. *First*, the choice to value an investment as of the award date initially arose, under the principle of full reparation, in connection with illegal expropriation cases. Some authors suggest that, during the period in question, tribunals seldom ruled that an expropriation was illegal.[41] As already explained, where an expropriation is deemed

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that failure to pay compensation within a reasonable period of time in itself renders the expropriation unlawful).

[39] Manuel A. Abdala & Pablo T. Spiller, Chorzów*'s Standard Rejuvenated—Assessing Damages in Investment Treaty Arbitrations*, 25 J. INT'L ARB. 103, 108 (2008) ("Abdala & Spiller"); Richard D. Deutsch, *An ICSID Tribunal Values Illegal Expropriation Damages from Date of the Award: What Does This Mean for Upcoming Expropriation Claims? A Case Note and Commentary of* ADC v. Hungary, 4 TRANSNAT'L DISPUTE MGMT. 1, 1 (June 2007) ("Deutsch").

[40] *See, e.g., Fishman v. Estate of Wirtz*, 807 F.2d 520, 552 (7th Cir. 1986) (addressing a dispute between ex ante and ex post approaches to value damages incurred as a result of an antitrust injury in the context of a contested bidding process for the Chicago Bulls basketball team; holding, by majority, that "[w]e know of no requirement that damages must always be computed as of the time of the injury or, if not, reduced by some appropriate discount rate to produce a value as of that date," and hence endorsing an ex post approach).

[41] Deutsch, *supra* note 39, at 1.

legal, there is consensus, supported also by *Chorzów*, that an ex ante approach to compensation suffices.

Second, and perhaps more significantly, the value of an investment often fell after expropriation.[42] The date of expropriation (or the date immediately prior to public knowledge thereof) was therefore the date at which the investment held the greatest value.[43] If there were any discussion of the date of valuation, it would center not on the choice between the date of the award or the taking, but instead on how to determine the appropriate date of expropriation for valuation purposes—especially in cases of so-called creeping or indirect expropriation.[44] When events attributable to a respondent depress the asset's value before its effective expropriation, investors might argue for an *earlier*, and not later, valuation date to capture the originally greater value of the investment.[45]

Third, it may be that the specific issue of valuation dates was crowded out by the basic question of how to define just

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[42] Gotanda, *supra* note 1, at 528; Irmgard Marboe, *Compensation and Damages in International Law: The Limits of 'Fair Market Value'*, 7 J. WORLD INV. & TRADE 723, 752 (2006); *see also ADC*, *supra* note 3, at ¶ 496 (explaining that the case before the tribunal was "almost unique ... since the value of the investment after the date of the expropriation ... has risen very considerably while other arbitrations that apply the *Chorzów Factory* standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference").

[43] Deutsch, *supra* note 39, at 7.

[44] *See* W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 150 (2004) ("Reisman & Sloane") (arguing, in the context of indirect expropriations, that tribunals should be able to "disaggregate the moment of expropriation and the moment of valuation—to distinguish the 'moment of expropriation,' which goes to the question of *liability* (i.e., whether an accretion of measures *has* ripened into a compensable expropriation), from the 'moment of valuation,' which goes to the question of *damages*"). Courts and tribunals recognize that rules on compensation should apply "not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of 'taking' the property, in whole or in large part, outright or in stages ('creeping expropriation')." Restatement (Third) of Foreign Relations Law § 712 (1987), cmt. g.

[45] *See Compañía del Desarrollo de Santa Elena*, *supra* note 17.

compensation.[46] From 1960–1990, debates within the field of expropriation centered on "the rules of customary law on compensation," especially as countries just exiting colonial rule sought to establish control over national resources and fought against definitions of compensation that are now routine.[47] As these more fundamental notions shaped the landscape of debates, parties did not engage in legal battles over seemingly more peripheral issues like the valuation date.

Finally, arguments concerning the choice of valuation date are presumably, like any new branch of legal argument, a kind of legal technology—unused and unknown until invented, and then employed by those who have the proper means and incentives to do so. While somewhat speculative, a plausible claim can be made that the reason why disputes over valuation dates seldom came up prior to 2006 is that the winning argument, vis-à-vis the right facts, had simply not yet been made. Once a successful line of reasoning arose, the issue became central to subsequent disputes over damages.

V. CLAIMANTS' CHOICE OF EITHER EX ANTE OR EX POST VALUATION

A. *First Signs of Change by the Iran-U.S. Claims Tribunal*

Some tribunals grappled with time-related issues of valuation in the late twentieth century (particularly in the 1980s and 1990s). In *Amoco International Finance Corporation v. Iran*, for example, the concurring opinion of Judge Brower reasoned that a party injured by an unlawful act must be awarded:

> the greater of (i) the value of the undertaking at the date of loss (. . . including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance *subsequent to the date of loss and prior to the date of the award*,

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[46] Rudolf Dolzer & Christoph Schreuer, *Expropriation, in* PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 98, 100 (2012).

[47] *Id.*

> based on actual post-taking experience, plus (in either alternative) any consequential damage.[48]

In another Iran-U.S. Claims Tribunal case, *Phillips Petroleum*, the tribunal cited *Chorzów* and the distinction flowing from it as being "relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of the taking and the date of the judicial or arbitral decision awarding compensation."[49]

Later investment treaty cases built off *Chorzów* and the language in these Iran-U.S. Claims Tribunal awards to argue for the application of enhanced reparation in the case of unlawful expropriation. In *AMCO v. Indonesia*, for example, the tribunal held that lost profits were recoverable in the event of unlawful taking.[50] Ultimately, the tribunal divided its assessment of lost profits into two phases: for the *first* phase, running up until the date of the award, hindsight was used in the calculations; for the *second* phase, the tribunal computed future profits and discounted them to present value.[51]

These cases effectively announced the principles and laid the groundwork for the later change in paradigm. In addition to confirming the distinction between a lawful and unlawful expropriation, they allowed for recovery of lost profits and additional damages, thereby ratifying the *Chorzów* principle that

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[48] *Amoco Int'l Fin. Corp. v. Islamic Republic of Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, Partial Award, ¶ 300 (July 14, 1987) (emphasis added); *see also* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 512 (1998) (noting that the concurring opinion of Judge Brower was later vindicated implicitly by *Starret* and explicitly by *Phillips Petroleum*).

[49] *Phillips Petroleum Co. Iran v. Islamic Republic of Iran and Nat'l Iranian Oil Co.*, IUSCT Case No. 39, Award ¶ 110 (June 30, 1989).

[50] *AMCO Asia Corp., Pan Am. Dev. Ltd. and PT Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Resubmitted Case), Final Award and Decision on Supplemental Decision and Rectification, ¶ 88 (June 5, 1990 and October 17, 1990).

[51] *AMCO Asia Corp., Pan Am. Dev. Ltd. and PT Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Resubmitted Case), Award, ¶ 196 (May 31, 1990).

reparation for unlawful expropriation must put the claimant in the position it would have been but for the expropriation. Yet the choice between the ex ante and ex post approaches to valuation really took hold only years later.

B. The Turning Point: ADC v. Hungary

The *ADC v. Hungary* case marked a turning point in 2006, by using the time of the award as the valuation date to redress unlawful state conduct.[52] As such, *ADC* represented a clear departure from the rule fixing valuation as of the expropriation date.[53]

The claimants argued that Hungary had expropriated their investment in the Budapest-Ferihegy International Airport when, in December 2001, Hungary issued a Decree taking over the claimants' airport activities.[54] This expropriation, the tribunal found, constituted an unlawful breach of the BIT because it neither served the public interest nor complied with due process.[55] The claimants requested that the market value of the investment be computed as the sum of (*i*) its value as of the award date, "calculated with the benefit of post-taking information," and (*ii*) lost income between the expropriation date and the award date.[56] In the tribunal's view, "[t]he principal issue [wa]s whether the BIT standard is to be applied or the standard of customary international law."[57]

The claimants argued that the illegality of the expropriation subjected it to the *Chorzów*-based standard of reparation, and the tribunal agreed.[58] The BIT, the tribunal held, did not apply in a case where a State has expropriated an investment *unlawfully* (*i.e.* by actions tainted by illegality beyond mere lack of compensation), because the BIT simply did not address the issue of unlawful

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[52] *ADC, supra* note 3.

[53] Deutsch, *supra* note 39, at 1; Kantor, *supra* note 6, at 64.

[54] *ADC, supra* note 3, at ¶¶ 218–19.

[55] *Id.* at ¶ 476(d).

[56] *Id.* at ¶ 242.

[57] *Id.* at ¶ 480.

[58] *Id.* at ¶¶ 480–81.

expropriation.[59] Instead, "[t]he BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable ... since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation."[60]

Invoking *Chorzów* and the notion that injured parties must be put in the position they would have been but for the expropriation, the tribunal acknowledged that the value of the investment had increased after expropriation, which justified using the award date as the valuation date:

> The present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably while other arbitrations that apply the *Chorzów Factory* standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages.

However, in the present, *sui generis, type of case the application of the Chorzów Factory standard requires that the date of valuation should be the date of the Award and not the date of expropriation,* since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed. This kind of approach is not without support. . . .[61]

By choosing the *Chorzów* standard, the tribunal asserted, it did not depart from customary international law or previous cases concerning damages for expropriation. Rather, it endeavored to situate its decision in a long, pedigreed history of international law.

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[59] *Id.* at ¶ 481.

[60] *Id.*

[61] *Id.* at ¶¶ 496–97 (emphasis added).

C. *The Current State of the Law:* ADC's *Progeny*

After *ADC* was issued, several arbitration tribunals found it appropriate to use the award date for purposes of valuing the investment subject to wrongful state conduct, thereby leading to more consistency and certainty. In *El Paso v. Argentina*,[62] for example, the tribunal ruled that the BIT's standard of compensation could not apply to treaty breaches, and instead customary international law and the *Chorzów* standard for illegal State action governed.[63] Turning to the assessment of damages, the tribunal found that "the property ... is to be evaluated by reference not to the time of the dispossession, as in the case of a lawful expropriation, but to the time when compensation is paid," that is, the date of the award.[64] This resulted in a damages assessment that accounted for an increase in crude oil prices after the respondent's breaches.[65]

Like in *El Paso*, the tribunals in *Yukos v. Russia*,[66] *von Pezold v. Zimbabwe*,[67] and *Quiborax v. Bolivia*[68] all found that, where the valuation date was in dispute, the (higher) value of the investment would be determined as of the award date.[69] The *von Pezold* tribunal considered that "compensation should be calculated at the time of the Award, rather than at the time of the unlawful acts."[70] It further stated that the valuation should consider the current value

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[62] *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶¶ 704–05 (October 31, 2011).

[63] *Id.*

[64] *Id.* at ¶ 706.

[65] *Id.* at ¶¶ 734–35 ("[T]he Expert's reduction of the ... damages assessment by considering only information available [at the time of the breach] was not accepted by the Tribunal.").

[66] *Yukos, supra* note 1.

[67] *Von Pezold, supra* note 38.

[68] *Quiborax, supra* note 37.

[69] While it has not yet proceeded to calculate damages, the tribunal in *ConocoPhillips* also held that, "if the taking was unlawful, the date of valuation is in general the date of the award." *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, ¶ 343 (September 3, 2013).

[70] *Von Pezold, supra* note 38, at ¶ 764.

of the asset not simply "as is," but rather as "a hypothetical value ... which would have existed had the [r]espondent not acted unlawfully."[71] Similarly, in *Quiborax,* the tribunal found that the *Chorzów* principle of compensation was meant to "repair[] ... the actual harm done, as opposed to the value of the asset when taken."[72] As applied to that case, this also required a valuation as of the award date.

Finding support in the Draft Articles on State Responsibility, the *Yukos* tribunal spelled out the current state of the law (the "*ADC/Yukos*" rule) in particularly concise and crisp language:

> [I]n the case of an unlawful expropriation ... [c]laimants are entitled to select either the date of expropriation or the date of the award as the date of valuation.[73]

The tribunal justified its approach by arguing that "investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision," because that increase remains part of what the investor lost through the unlawful action of the state.[74] However, the tribunal asserted, "investors do not bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period" because "in the absence of the expropriation the investor could have sold the asset at an earlier date at its previous higher value."[75]

The *Yukos* case not only stands for the proposition, but also illustrates the enormous consequences that can flow from picking either the expropriation date or the award date to value the

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[71] *Id.* at ¶ 766.

[72] *Quiborax, supra* note 37 (Award), at ¶ 377.

[73] *Yukos, supra* note 1, at ¶ 1763. Interestingly, although the parties discussed the appropriate valuation date, claimants themselves did not perform their main damages analysis based on the date of the award, but instead on the (disputed) date of expropriation. *Id.* at ¶ 1760. The tribunal nonetheless chose to award the higher amount obtained by calculating damages as of the date of the award.

[74] *Id.* at ¶ 1767.

[75] *Id.* at ¶ 1768.

investment. Indeed, as pointed out by the tribunal, valuing the investment at the date of the award resulted in an amount in excess of *three times* the value of the investment on the date of expropriation or a difference in quantum of nearly $45 billion: "The total amount of [c]laimant's damages based on a valuation date of 19 December 2004 is USD 21.988 billion, whereas the total amount of their damages based on a valuation date of 30 June 2014 is USD 66.694 billion."[76]

While some have argued that *ADC* reflects a minority (or even "ultra-minority") position,[77] this ignores that tribunals have repeatedly applied its reasoning, even if, on the specific facts and evidence of subsequent cases, outcomes may not have been always identical. Shortly after *ADC* it became clear that the approach favoring use of ex post information in unlawful expropriation cases had taken root.[78]

Less than six months after the *ADC* award was issued, another tribunal relied upon *Chorzów* to value an illegally expropriated investment with ex post information. In *Siemens v. Argentina*, the

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[76] *Id.* at ¶ 1826.

[77] *See, e.g., Quiborax, supra* note 37 (Partially Dissenting Opinion of Professor Brigitte Stern), at ¶ 44. Professor Stern's statement that "in *ADC*, the tribunal stated that valuation at the date of the award is an exceptional situation," *id.* ¶ 46, such that "the *ADC* tribunal itself recognizes that the valuation at the date of the expropriation is the mainstream solution, even in case of unlawful expropriation," *id.* ¶ 47, is misleading. It confounds the facts calling for the application of a rule with the validity and scope of that rule. *ADC* clearly holds that valuation at the date of the award *is* the rule so long as the value of the investment rises after the date of an unlawful expropriation. Where the value of the investment decreases—a fact pattern that had been prevalent up until *ADC*—a *different* rule, which does not negate the *ADC* holding, applies. In reality, even those situations arguably fall within the scope of the *ADC* standard, which gives claimants the higher of the value calculated as of the date of expropriation or the date of the award: it is simply the case that, where the value of the investment decreases post violation, claimants will invariably receive the higher, ex ante value.

[78] Norah Gallagher & Wenhua Shan, *Expropriation and Compensation*, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE, 284 (2009); Kantor, *supra* note 6, at 64; *see also* Abdala & Spiller, *supra* note 39, at 117; Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW 256 (2008) (stating that a new position on the use of ex post information had "emerged," resulting in valuing investments as of the date of the award).

claimant suggested a valuation date based on the date of expropriation while at the same time claiming for future lost profits and additional damages.[79] The tribunal concluded that customary international law must apply where there is a treaty breach because the "[t]reaty itself only provides for compensation for expropriation in accordance with the terms of the [t]reaty."[80] Under customary international law, Siemens was thus "entitled not just to the value of its enterprise as of ... the date of expropriation, but also to any greater value that enterprise ha[d] gained up to the date of [the] Award, plus any consequential damages."[81] Consistent with *Chorzów*, this accounted for the need to "take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act'[.]"[82] Ultimately, the *Siemens* tribunal awarded the claimant the book value of its initial investment and additional damages related to subcontractors' claims arising out of termination,[83] but denied it lost profits, considering the "amount claimed ... very unlikely to have ever materialized."[84] This conclusion does not contradict *ADC/Yukos*, but merely assesses the evidence adduced in the particular case to be insufficient.

As in *Siemens*, the claimants in *Vivendi v. Argentina* argued that *Chorzów* permitted them to claim future lost profits.[85] The tribunal, in determining Vivendi's compensation, also applied *Chorzów* in the case of illegal expropriation because the BIT did not "purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations."[86] Because *ADC* was issued *after* the tribunal accepted post-hearing briefs, the tribunal did not rely on it as an authority.[87] Still, the *Vivendi* tribunal accepted the principle

[79] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶¶ 322, 355 (February 6, 2007).

[80] *Id.* at ¶ 349.

[81] *Id.* at ¶ 352.

[82] *Id.*

[83] *Id.* at ¶¶ 377, 387.

[84] *Id.* at ¶¶ 379 *et seq.*

[85] *Vivendi, supra* note 7, at ¶¶ 8.1.1-8.1.2.

[86] *Id.* at ¶¶ 8.2.3-8.2.5.

[87] *Id.* at ¶ 8.2.3 n.402.

that, in the event of an unlawful expropriation, *Chorzów* would permit an award greater than that provided for by the BIT for lawful expropriations:[88]

> Based on [principles of customary international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.[89]

A tribunal that does not award damages calculated as of the date of the award does not necessarily undermine *ADC*'s authority. Indeed, a tribunal may reaffirm the validity of those principles even where the outcome of a particular case is different from, but not inconsistent with, *ADC*. *Vivendi* itself illustrates the point. The claimants sought the fair market value of a concession established by way of a lost profit analysis.[90] The tribunal found, however, that the claimants had not sufficiently established future profitability to substantiate an award of lost profits,[91] reasoning that "compensation for lost profits is generally awarded only where *future profitability* can be established (*the fact of profitability* as opposed to the *amount*) with some level of certainty."[92] Along the same lines, in *Gemplus v. Mexico*, the tribunal accepted that the *Chorzów* standard allowed for valuation at the award date, but still applied the expropriation date as the "relevant date for assessing compensation" because the value of the investment had fallen after the expropriation.[93]

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[88] *Id.* at ¶ 8.2.5.

[89] *Id.* at ¶ 8.2.7.

[90] *Vivendi*, *supra* note 7, at ¶ 8.2.9.

[91] *Id.* at ¶¶ 8.3.5, 8.3.8.

[92] *Id.* at ¶ 8.3.3 (emphasis in original).

[93] *Gemplus S.A., SLP S.A. and Gemplus Indus. S.A. de C.V. and Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, ¶ 12.43 (June 16, 2010).

Cases other than *Vivendi* and *Gemplus* endorsed the principles laid out in *ADC* but denied greater recovery in light of the fact patterns and evidence at issue. The tribunal in *Biwater Gauff v. Tanzania*, for example, endorsed the principle that "the unlawfully expropriated investor is entitled to damages for the consequential losses suffered as a result of the unlawful expropriation."[94] While stating that "[s]uch losses ordinarily include an entitlement to loss of profits suffered by the investor between the date of the expropriation and the award,"[95] the tribunal denied compensation because the claimants had failed to show proximate causal link between the state's misconduct and the claimed damages.[96] In the tribunal's words, "by the time that [the] expropriation took place, the termination of the [investment] was inevitable in any event, and the losses and damage... had already been (separately) caused."[97]

As a further example, in *Kardassopoulos and Fuchs v. Georgia*, the tribunal accepted that it may be appropriate to use the award date to value investments in unlawful expropriation cases. But it also reasoned that "there must be a factual basis on which to award such higher recovery" and that any such recovery must "measure the damage sustained and not impose punitive damages on the [r]espondent [s]tate."[98] Finding that the claimant would have likely sold the investment anyway, before its rise in value, the tribunal denied any ex post-based recovery.[99] The valuation date was set, therefore, at a date just prior to the taking.[100]

Finally, the tribunal in *Crystallex v. Venezuela* reaffirmed the general principle that customary law applies to breaches of treaty obligations, including lack of fair and equitable treatment, without

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[94] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 775 (June 24, 2008).

[95] *Id.*

[96] *Id.* at ¶ 798.

[97] *Id.* at ¶ 485.

[98] *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶ 513 (March 3, 2010).

[99] *Id.* at ¶¶ 514 *et seq.*

[100] *Id.* at ¶ 517.

undermining the validity of *ADC* and *Yukos*.[101] In *Crystallex*, the parties agreed that the date of expropriation should serve as the valuation date, so the tribunal was not faced with the question of whether the date of the award should apply—the claimant having effectively opted for the date of expropriation.[102] Instead, it faced the "different question" of when expropriation actually occurred.[103]

The parties disagreed as to the precise date of expropriation: Venezuela claimed that the earlier date when a permit to exploit gold deposits was denied (*i.e.*, April 2008) should be used; the claimant contended that the formal rescission of the mine operation contract (*i.e.*, February 2011) was the proper valuation date.[104] Since gold prices had risen by 2011, the claimant submitted that "valuing [its] investment as of April 2008 would deprive [claimant] of the fair market value of its expropriated investments on the date of the taking and of the benefit of its economic foresight (*i.e.*, having predicted at the time it began investment that the price of gold would rise), while improperly rewarding Venezuela for its unlawful conduct by permitting it to take advantage of the increase in the value of [the] investment[.]"[105]

The tribunal ruled in favor of Venezuela valuing the investment as of April 2008, the date when the permit had been refused. In support of its decision, the tribunal explained that "April 2008 is the date that coincides with the culmination of the events surrounding the Permit denial which the Tribunal has found to be both a self-standing breach of FET and the first important act giving rise to the creeping expropriation."[106] It noted that the claimant itself had seen fit to submit a notice of dispute shortly after the permit denial, a fact that "provides further confirmation that in the [c]laimant's own eyes, the dispute had already

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[101] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, ¶ 846 (April 4, 2016).

[102] *Id.* at ¶ 854.

[103] *Id.* at ¶ 844 (explaining that "neither [p]arty has argued in favor of the application of a valuation date as of the date of the award," and that the disagreement as to the date of expropriation "is a different question").

[104] *Id.* at ¶¶ 734, 746.

[105] *Id.* at ¶ 736.

[106] *Id.* at ¶ 855.

materialized in 2008, which implies that the [c]laimant itself considered that a breach had been committed by then."[107]

In effect, the tribunal viewed the claimant in *Crystallex* as seeking the value of its investment to be calculated as of neither the expropriation nor the award date—but as of a third point in time. As such, the award—denying claimant's request—does not detract from the rule set forth by *ADC* and *Yukos*.

In at least one case, however, an investment tribunal arguably went against the grain. Indeed, in the *Unglaube* case, the tribunal stated that "where property has been wrongfully expropriated, the aggrieved party may recover (1) the higher value that an investment may have acquired up to the date of the award."[108] As such, *Unglaube* allows the investor to recover, in theory, the peak value reached by the investment at any point in time between the expropriation date and the award date.

In *Unglaube*, Costa Rica took measures to expropriate a plot of ocean-front beach property to create a national park for the preservation of marine turtles.[109] The tribunal found that "the [r]espondent began, not later than July 22, 2003, to take actions which effectively deprived the [c]laimant Marion Unglaube of her normal rights of ownership," a *de facto* expropriation deemed illegal for lack of prompt compensation.[110] Formal expropriation and transfer of title, however, did not occur immediately, since the claimant successfully challenged, on more than one occasion, the government's actions before local courts.[111]

The tribunal took the view that it should "identify the *highest and best use* of this particular property."[112] It noted that "real estate values in the region rose sharply until mid-2006, but then

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[107] *Id.* at ¶ 857.

[108] *Unglaube*, *supra* note 38, at ¶ 307.

[109] *Id* at ¶ 37.

[110] *Id.* at ¶ 223; *see also id.* at ¶ 210 ("Assuming that compensation was properly provided for and paid, Costa Rica's legal position would have been unassailable . . . .").

[111] *Id.* at ¶ 213.

[112] *Id.* at ¶ 309.

stabilized and declined substantially thereafter." [113] The claimant's damages expert argued that, but for the actions of the respondent which began, at the latest, in 2003, the claimant "would have been free to sell the property in the most favorable market conditions, i.e., at the time of peak demand in July 2006."[114] The expert for Costa Rica criticized that approach for allowing the claimant "to benefit from a presumption of 'perfect market-timing.'"[115]

Yet the tribunal agreed largely with claimant's expert. It held that, had the claimant's "property not been burdened by the effects of the various ineffectual efforts to expropriate [it], [the claimant] would have remained free to deal with or dispose of her property at whatever date she wished between July 2003 and the present date – including the peak period in July 2006."[116] To avoid crediting the claimant "with perfect judgment," though, the tribunal assumed "a sale of property on January 1, 2006—six months before the market peak, and at a figure which gives some consideration to the normal fears and negative contingencies which are present in the minds of sellers and buyers making important investment decisions." [117] The tribunal hence permitted the investor to value the asset as of neither the expropriation nor the award date—but as of a third point in time.

VI. GOING BACK TO FIRST PRINCIPLES AND POLICY

While recent decisions afford investors a choice of valuation date in the event of unlawful state conduct, the question remains as to what principled basis justifies such an approach. Valuation is an objective exercise, and the intrinsic value of an expropriated asset does not change as a result of the taking of that asset being lawful or unlawful. No purely economic theory thus advocates granting injured parties the choice of the valuation date, but the law takes into account other considerations and policy concerns.

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[113] *Id.* at ¶ 313.

[114] *Id.*

[115] *Id.* at ¶ 314.

[116] *Id.*

[117] *Id.* at ¶¶ 317, 318.

A. The Perspective of the State's Conduct

Tribunals endorse some form of *moral* judgment when granting claimants the higher value of the investment as of the award date. The *Chorzów* court made clear that the legal system should react more vigorously to treaty violations, explaining that the limitation of compensation applicable in the event of lawful expropriation should not apply to unlawful state action, "since [that] would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned."[118] As the tribunal in *Yukos* stated, "conflating the measure of damages for a lawful taking with the measure of damages for an unlawful taking is, on its face, an unconvincing option."[119] The same tribunal argued that:

> the question of whether an expropriated investor is entitled to choose between a valuation as of the expropriation date and the date of an award is one best answered by considering which party should bear the risk and enjoy the benefits of unanticipated events leading to a change in the value of the expropriated asset.[120]

This remark, which perhaps was intended to give some technical gloss to the tribunal's reasoning, in reality captures only half of the story. Were the question at hand entirely about the allocation of risk, and assuming the use of hindsight as appropriate, then a claimant deprived of an asset whose value decreases post-taking would receive an amount smaller than the asset's original value. Theoretically, in some extreme cases a sharp drop in the asset's value, coupled with the need for additional investments, may even lead to a finding of zero or negative damages. As described by one economic commentary, there may be cases in which "the offender performed the [] victim a favor by preventing that firm from investing [further] in a money-losing venture."[121]

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[118] *Chorzów*, *supra* note 2, at ¶ 124.

[119] *Id.* at ¶ 1765.

[120] *Id.* at ¶ 1766.

[121] William B. Tye et al., *How to Value a Lost Opportunity: Defining and Measuring Damages from Market Foreclosure*, 17 RES. L. & ECON. 83, 92 (1995).

The *Yukos* passage does not support such an inequitable outcome, however, as it is infused with notions of fairness that go beyond economic theory.

In international investment law, the State's conduct, rather than the position of the investor, may be viewed as the decisive factor to determine the appropriate valuation date. From a strictly economic standpoint, an investor who has been *unlawfully* expropriated of an asset at time t_0 will be in a position equal to that of an investor who has been *lawfully* deprived of an identical asset at that same time t_0. As the claimant in *Siemens* acknowledged, "the value of the asset expropriated is not affected by whether or not an expropriation is lawful, but the amount of compensation due to an investor may be significantly affected."[122] Yet investment tribunals are willing to award the first investor, but not the second, potentially greater sums as of the award date. The reason is arguably not to reward the wronged investor or simply to "make it whole." Instead, by applying the *ADC* standard, tribunals further different goals, including fairness and deterrence of future illegal conduct.

B. Awarding Damages as a Disgorgement Remedy

The award of damages using the date of award as the date of valuation may be analogized to a *disgorgement* remedy. Disgorgement focuses on the State and its unlawful conduct rather than on the investor. It serves "to deny the expropriating state any benefit from its delict. That the investor receives a reinforced value of its expropriated investment is coincidental."[123] The investors' own interests (in obtaining enhanced compensation) are aligned with, but subordinated to, the systemic objectives of fairness and deterrence.

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[122] *Siemens*, *supra* note 79, at ¶ 324. Some authors have argued that damages should be strictly compensatory. *See, e.g.*, Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 152, n.149 (2003) ("[T]he distinction [between compensation for lawful and unlawful acts] is problematic because the loss suffered by the investor is a private loss and compensation must be strictly determined on the basis of causation and foreseeability. So long as the host state's act gives rise to a secondary obligation to compensate the investor, the legal character of that act on the *inter*-state plane (*ie* the distinction, for instance, between lawful and unlawful expropriations) should have no bearing on the assessment of damages.").

[123] Reisman & Sloane, *supra* note 44, at 138.

The notions of fairness and deterrence should not be confused with the notion of punishment, as some commentators have suggested.[124] Mandating wrongdoers to disgorge any ill-gotten gains does not, in principle, amount to a punitive measure. Indeed, disgorgement is limited to the gains obtained as a result of the violation, and it does not impose any additional harm or penalty on the wrongdoer. In addition, disgorgement does not account for the probability that violations might go undetected or otherwise not be redressed, concerns usually addressed by imposing fines or increased damages (*e.g.*, treble damages or punitive fines).[125]

Awarding an amount of damages greater than the value of the investment at the time of the expropriation may, to some degree, appear fortuitous. Suppose three upstream oil and gas firms hold similar exploration licenses in the host country. In light of the then prevailing oil prices, all three licenses are worth $100 at time zero. Also at time zero, the host country targets firms A and B and expropriates, in discriminatory fashion (*i.e.*, unlawfully), their licenses with a single decree. Firm C is luckily spared of these violations of international law, and continues to operate its business as usual. Subsequent events are as follows:

- Firm A immediately files a request for arbitration under the applicable BIT. The proceedings run smoothly, and the tribunal is able to conclude its mandate with brevity. At the time of the award (t_1), oil prices have peaked in light of an economic boom. The license, worth only $100 at the time of the taking, is now valued at $150. Holding the expropriation unlawful and thus

[124] *See Quiborax*, *supra* note 37 (Partially Dissenting Opinion of Professor Brigitte Stern), at ¶ 56 ("[T]he solution suggested by *ADC* and *Yukos* is biased in favor of the investors and that the solution which systematically applies the harshest damages on the Respondent State resembles punitive damages, which are excluded in international law.").

[125] *See, e.g.*, Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 95 (2009) ("Perhaps a more serious concern is that disgorgement might be too modest a remedy. To fully deter misconduct, one would want the penalty to equal the total harm created by the conduct divided by the ex ante probability of detection and successful adjudication [which] may thus require the authority to impose fines.").

applying the *ADC/Yukos* rule, the tribunal awards Firm A $150 (the higher of $100 and $150).

- Firm B also immediately files a request for arbitration under the applicable BIT. The proceedings, however, take much longer to conclude than those of firm A. The award in firm B's arbitration is only rendered at a later point in time (t_2), when, in the ensuing economic bust, oil prices have hit a trough. The license is now worth only $75. On the basis of the *ADC/Yukos* rule, firm B elects, of course, to value the license as of the time of the taking. Accordingly, the tribunal awards Firm B $100 (*i.e.*, the value of the license at time zero).
- Firm C, who has continued in operation throughout, now holds a license worth $75.

The hypothetical above shows different outcomes for each of firms A, B and C at t_2. Paradoxically, firm C, who has not been a victim of unlawful state action, is in the worst position within the group. It now holds an asset worth merely $75, recording a net loss of $25 against its position as of time zero. Had firms A and B *not* been expropriated, they too would have been worse off, owning, like C, a depressed asset at t_2. But firm A's and firm B's payoffs are different: firm A has benefitted from the increased value of the license at t_1, accruing $50 in gains; firm B, on the other hand, has received the original price of the license, $100, despite its lower value at t_2, with a net change of zero. In other words, firm A was recompensed for risks it did not take—guaranteed any possible upside with no downside; firm B was merely immunized from risks negatively impacting the value of the asset post-taking. The host country, in turn, has incurred aggregate losses of $100, *i.e.*, the combined monies awarded in favor of firms A and B (100+150=250) *minus* the current value of the two licenses at t_2 (75+75=150).

This example illustrates the argument that the goal of the *ADC/Yukos* rule may not only be to make the investor whole, but also to reprove the illegal state conduct by obliging the host state to give up its ill-gotten gains — "to wipe out all the consequences of the illegal act," including benefits accrued by the wrongdoer, as

required under *Chorzów*. Firms A and B were victims of the same wrongful acts with respect to equivalent assets. Therefore, their respective payoffs cannot be reconciled solely by recourse to notions of reparation. In addition, the mere idea of restitution would, under a pure ex post approach, lead to situations where a claimant could receive an asset that is now worth less than what it was worth at the time of the taking.

These outcomes are not haphazard or unsound. They consistently and purposively seek to deter international wrongs. This is done by barring the state from enjoying positive fluctuations while allocating to it the downside of any events occurring after the offense. A disgorgement-type remedy rejects the need for strict correlation between right and duty, or the injustice specifically suffered by the victim and the wrongdoer's liability. It transcends, in other words, the simple notion of corrective justice to achieve goals beyond mere compensation—namely, deterring international wrongs and furthering morality (including by preventing unjust enrichment) so as to promote a stable framework for international investment. [126] An instrumental approach to remedies is commonplace in other realms of the law.[127] Strong positions against the *ADC/Yukos* rule, in contrast, invoke—at least implicitly—the notion of corrective justice to advocate that international law should seek only strict compensation as a remedy, with no regard to deterrence or any other instrumental goals.[128]

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[126] For similar justifications in the context of contract law, see Melvin Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 580 (2006).

[127] *See* Lon Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). Tellingly, Fuller and Perdue begin their classic article by stating that "legal rules can be understood only with reference to the purposes they serve" and invoking the "notion that law exists as a means to an end." *Id.* at 52.

[128] *Quiborax, supra* note 37 (Partially Dissenting Opinion of Professor Brigitte Stern), at ¶ 56 ("[T]he solution suggested by *ADC* and *Yukos* is biased in favor of investors. ... A legal solution cannot just be based on what is more favorable to one of the parties."); *id.* at ¶¶ 99–100 ("[F]luctuations of the market do not flow from the illegal act, ... [so] [u]sing *ex post* data clearly introduces an externality as far as the consequences of the illegal act is concerned." (emphasis omitted)). For a very similar critique of disgorgement as a contract remedy, explicitly based on a theory of corrective justice, see Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT. L. REV. 55

For policy reasons, the law may rightly choose to allocate any subsequent gains to the investor while letting future losses lie where they fall (*i.e.*, with the State). The apparently random results obtained in light of market fluctuations merely acknowledge that, at the time of effective relief (*i.e.*, when the tribunal orders a State to pay sums to the investor), the State could have sold the underlying asset and realized either capital gains or losses. Some contract law scholars favor protection of the disgorgement (or restitution) interest in the analogous situations where the promisee was entitled to specific performance which, by reason of the promisor's breach, is no longer available. "The disgorgement interest should be protected in such cases to protect the integrity of contract law: unless disgorgement is awarded in such cases, a promisor could subvert the right to specific performance simply by completing an irreversible breach[.]"[129] This line of reasoning has intuitive appeal in cases of unlawful expropriation, where restitution of the property wrongfully expropriated—the closest equivalent to specific performance—is generally impossible. The *ADC/Yukos* rule can then be understood, in line with *Chorzów*, as allowing for the "payment of a sum corresponding to the value which a restitution in kind would bear"—mandating the State to disgorge any potential gains so as to protect the integrity of the international investment system, and at a minimum compensating the investor for the damages suffered at the time of the violation. In contract parlance, the claimant, in such cases, is given the choice between, respectively, its restitution and expectancy interests.

(2003). Weinrib argues that considerations extraneous to the immediate relationship between the parties should not affect the extent of a defendant's liability, since any "[s]uch incoherently one-sided justifications favour or disfavour one of the parties relative to the other, and thereby fail to be fair from the standpoint of both." *Id.* at 60. He also claims that while a gain may have been realized through a breach, "the question that corrective justice raises is whether this breach establishes not merely the historical origin of the gain—its cause in fact, to use tort terminology—but also the normative connection between the gain and the promisee's entitlement to it." *Id.* at 74. It is unclear, however, whether Weinrib's theory would bar disgorgement in the context of expropriation, as he admits that "disgorgement is an appropriate remedy when the defendant wrongfully alienates something to which the plaintiff had a proprietary right," such as "in the old waiver of tort cases [where] property is wrongfully misappropriated and sold above market value." *Id.* at 77–78.

[129] Eisenberg, *supra* note 126, at 584.

Those who argue that events subsequent to the violation "are not caused by the illegal act and therefore should not be taken into account when calculating the reparation due"[130] ignore that any benefits accruing to the host state necessarily presuppose the unlawful expropriation and, as such, constitute ill-gotten gains. Claiming that any damage to the investor is not per se increased by subsequent events misses the point: reparation under *Chorzów* aims to wipe out all the consequences of the illegal act—and this may entail not only granting reparation to investors, but also wiping out any benefits to the wrongdoer. It also ignores that, in an ex post valuation, the value of the investment will also be *negatively* impacted by events subsequent to the violation and independent from the illegal act, from bear markets to subsequent government policies and regulations that may have reduced the asset's economic use.[131]

Giving claimants an absolute choice might create the risk of opportunistic behavior, but tribunals are well equipped to detect and bar such conduct. If the award date may serve as the valuation date and the current value of the asset is depressed, for instance, the claimant may gain from, and the State bears the inverse risk of, drawn-out proceedings. Of course, the legal process should not be abused by claimants' intentional delays in the hopes of positive price fluctuations (or by states' inverse attempts to use proceedings to their advantage).

Once the *ADC/Yukos* rule is properly framed as a policy-driven choice, a host of questions arise as to when the disgorgement remedy is appropriate. A close reading of *Chorzów* indicates, for instance, that it may not have been intended to apply to cases of otherwise lawful expropriation where only compensation was

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[130] *Quiborax, supra* note 37 (Partially Dissenting Opinion of Professor Brigitte Stern), at ¶ 101.

[131] *See, e.g., Compañía del Desarrollo de Santa Elena, supra* note 17, at ¶ 84 ("If the relevant date were the date of this Award, then the Tribunal would have to pay regard to the factors that would today be present to the mind of a potential purchaser. Of these, the most important would no doubt be the knowledge that the Government has adopted an environmental policy which would very likely exclude the kind of tourist, hotel and commercial development that the Claimant contemplated when it first acquired the Property").

lacking.[132] This raises a number of related issues, including whether tribunals should endeavor to distinguish different types (or degrees) of unlawful conduct, applying the *ADC/Yukos* rule only to more egregious violations. It also raises other more technical issues, such as whether tribunals valuing an investment at the award date should look at what *actually* happened or at what *would* have happened had the claimant retained its investment. Parties and tribunals have not yet spelled out answers to these questions in detail, but they are likely to dominate the ensuing landscape of debates.

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[132] *Chorzów Factory*, *supra* note 2, at ¶ 124 (stating in *dictum* that a limitation of damages to the value of the enterprise at the date of the taking would have been admissible "if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated"); *see also Tidewater*, *supra* note 35, at ¶ 140 (holding that "an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation"); *Mobil Corp.*, *supra* note 4, at ¶ 301 (holding that "the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful," and stating that a determination on whether an expropriation was unlawful in the absence of payment of compensation must be made "consider[ing] the facts of the case." *But see Von Pezold*, *supra* note 38, at ¶¶ 497–498 ("It is clear that no compensation has been paid for the properties and therefore that the expropriation did not fulfil the 'lawful' criteria. . . . As no compensation was paid, there is no need to decide whether the acquisition was for a public purpose, whether there was access to due process or. . . whether the acquisition was non-discriminatory."); *Unglaube*, *supra* note 38 at ¶¶ 305–06 (holding that failure to pay compensation within a reasonable period of time in itself renders the expropriation unlawful).