

**IBA Annual Conference, Chicago
Investment Treaty Arbitration Workshop
September 19, 2006**

**PRINCIPLES RELATING TO COMPENSATION
IN THE INVESTMENT TREATY CONTEXT**

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I. INTRODUCTION

Once liability in a case is established, attention turns to the consequences of that finding and to assessing the appropriate remedy. The legal principles relating to the remedy, however, depend upon the law applicable to the dispute and the nature of the claim presented.

This paper addresses principles relating to compensation in the context of claims arising under investment treaties. There are various types of claims that may be presented to arbitration in the context of an investment treaty and the same principles do not necessarily extend to all such claims – so one must beware of over-generalizing.

In most investment treaty arbitrations, the dispute relates to a claim that a respondent State has failed to abide by its treaty obligations. In those cases a finding of liability means a finding that the State has failed to abide by its treaty obligations and the law therefore that governs the available remedies is international law.

It is possible, however, to have an investment treaty arbitration of a dispute that is not limited to claims of a treaty violation by a State. Some treaties arguably permit arbitration of disputes not limited to claims that the treaty has been violated. Some treaties expressly include a jurisdictional basis to submit claims arising from a contract, such as an “investment agreement,” to arbitration.¹ Such treaty language is found in the U.S. 2004 Model BIT,² which contemplates

¹ Such claims are to be distinguished from treaty claims arising from so-called “obligations” or “umbrella” clauses in which the claim is that the treaty itself is violated due to the failure of the State to abide by undertakings in respect of a contractual obligation.

the possibility that disputes arising from an investment agreement may be submitted to arbitration in accordance with the treaty's provisions. For such claims, the treaty simply provides the forum, but does not supplant the otherwise governing law. The law governing the contract will govern the remedies for any breach established and thus the principles for fixing compensation will be derived from that governing law.

One may include in the category of investment treaty arbitration any arbitration that proceeds under the ICSID Convention. The ICSID Convention, however, provides a forum for arbitration not only of disputes arising under investment protection treaties, but also for contract and other types of disputes. Many ICSID cases relate to contract or other types of disputes in which the law governing the available remedies is the law agreed by the parties, either in a contract or otherwise, or the law of the host State, and in only some circumstances, international law.³ The principles relating to compensation as a remedy for a treaty violation therefore do not necessarily apply to all disputes submitted to ICSID arbitration.

This paper focuses on those cases in which the dispute at issue is a claim that a State has breached a treaty-based obligation, where the governing law is international law.

II. THE BASIC PRINCIPLE

As a matter of international law, when a State breaches a treaty obligation, its conduct is considered a “wrongful act” for which reparation is due for any injury caused thereby. The basic principle that States are obligated to make “full reparation” for any injury caused by an internationally wrongful act is set out in Article 31 of the International Law Commission's Articles of State Responsibility.⁴ ILC Article 2 provides that “an internationally wrongful act”

² U.S. 2004 Model BIT, available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT, Art. 1 (definitions of investment agreement), Art. 24 (submission of claims to arbitration) and Art. 30 (governing law).

³ See Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States (“ICSID Convention”), Art. 42(1).

⁴ See James Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* (Cambridge University Press 2002). The ILC's Articles on State Responsibility are widely relied upon as authoritative statements as to the content of the international legal principles addressed therein and generally are assumed to have application in the investor-State context. See, e.g., ILC Article 33, comment (4) (noting the direct application in part of the Articles in the context of investment protection agreements). In the context of investment treaty claims, one should be mindful of any specific rules relating to remedies set forth in the applicable treaty that necessarily would take precedence in a given case, recalling that the principles described in the ILC Articles on State Responsibility in any event are general or “default” principles. See Dina Shelton, *Righting Wrongs: Reparations in the Articles on*

occurs when there is State conduct that constitutes “a breach of an international obligation of the State.” Thus a failure by a State to accord treatment as set out in an applicable investment treaty is an internationally wrongful act giving rise to the obligation to make full reparation for any injury caused thereby.

This raises the question, what does it mean to make full reparation for any injury caused by the wrongful act? The classic statement, most frequently cited is the one of the Permanent Court of International Justice in the *Chorzów Factory* case:

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 – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁵

A number of observations about this rule can be made.

A. Causation

Whether one follows the phrasing of ILC Article 31(1), providing that a state is responsible to make “full reparation for the injury caused by the internationally wrongful act,” or that “reparation must...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,” one must accept that causation is a legal and not a strictly factual concept. As the Commentary to the ILC Articles explains, “the subject matter of reparation is, globally, the injury resulting from and

State Responsibility, 96 AJIL 833, 838 (2002). See also David D. Caron, “The ILC Articles on State Responsibility: the Paradoxical Relationship between Form and Authority,” 96 AJIL 857 (2002) (discussing the scope of application of the ILC Articles).

⁵ *Factory at Chorzów, Merits, 1928, PCIJ, Series A, No. 17*, p.47.

ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”⁶

What injury is “caused by” the internationally wrongful act, or another way, what are the “consequences of the illegal act,” is a question that requires an assessment of the principles of causation in the law. The principles relating to causation in international law are developed in great deal of commentary and jurisprudence and could readily form the basis for a detailed analysis as a stand alone topic. Like rules that exist in national systems, the principles regarding causation in international law are designed to require reparation only when the injury is not “too remote” or “inconsequential.” Terms such as “proximate causation” and “foreseeability” are often employed to convey the sense that “but for” causation is not sufficient to give rise to liability. The law requires a sufficient link or nexus between the wrongful act and the injury before any obligation to make reparations for that injury will be imposed.

Rules of causation thus operate to incorporate a sense of proportionality into the obligation to make reparation for wrongful acts as they require tribunals to make determinations about the reasonableness of requiring one party or the other to bear the burden of losses when they occur.⁷

B. Restitution

The general rule as expressed in the *Chorzów Factory* case regarding the duty of a State to make reparation suggests that the primary and preferred remedy for a wrongful act is restitution. The ILC Articles on State Responsibility explain that while reparation can take various forms, including restitution and compensation,⁸ restitution may be awarded only if it “is not materially impossible” and if it “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”⁹ Thus the notion of returning to the *status quo ante* is always subject to the condition that doing so not place a disproportionate burden on

⁶ ILC Articles on State Responsibility, Art. 31, comment (9).

⁷ See also ILC Articles on State Responsibility, Art. 31, comment (10). See also Shelton, *supra* note 4.

⁸ ILC Articles on State Responsibility, Art. 34.

⁹ ILC Articles on State Responsibility, Art. 35.

the State; the relative burden on the State being measured against the incremental benefit, if any, of restitution over an award of compensation.¹⁰

In the context of investment disputes, the impracticality of requiring restitution has been observed in many cases and in some commentary.¹¹ Restitution is rarely the appropriate or even desired remedy in the investor-State context. Given in particular the reluctance of investor-State arbitral tribunals to encroach upon State sovereignty, the case where restitution would be considered appropriate would be unusual.¹²

In the context of an expropriation claim in particular, it is relevant to consider that it is not unlawful for a State to expropriate property. The law recognizes that States may expropriate property; the law simply requires that if a State does so, it must do so for a public purpose, on a non-discriminatory basis effected in accordance with due process of law and accompanied by prompt and effective payment, etc. The fact that States have the right to expropriate property makes it unlikely, in most cases, that a tribunal would consider it reasonable to order a State to return property rather than simply to pay for it and for any injury caused by the taking (if not taken lawfully).

There are a number of investment treaties that provide expressly that the State retains the right to award compensation in lieu of restitution – making restitution even less likely to be

¹⁰ See Shelton, *supra* note 4 at 838 noting that “[T]he articles insist on the obligation of full reparation but provide for some flexibility, incorporating an element of proportionality or taking into account equitable considerations in affording reparations,” and observing that in the *Diversion of Water from the River Meuse* case, (1937 PCIJ (Ser. A/B), No. 70 at 78 (June 28)), Judge Hudson in his individual opinion quoted the applicable reparations language from *Chorzów Factory*, and then added: “Yet, in a particular case in which it is asked to enforce the obligation to make reparation, a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles.” In that case the Court refused to decree specific performance of an obligation the applicant itself was not performing.

¹¹ See, e.g., *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1 (award of Nov. 20, 1984), 1 ICSID Rep. 413 (“It is obvious that this Tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the license: such actions are not even claimed, and it is more than doubtful that this kind of *restitutio in integrum* could be ordered against a sovereign State.”); see also Schwebel, *Speculations on Specific Performance of a Contract between a State and a Foreign National* in RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD (1965); Higgins, *The Taking of Property by the State*, *Recueil des cours* 176, 321 (1982-III).

¹² See also Charles N. Brower and Jason D. Brueschke, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 476 (Martinus Nijhoff 1998) (discussing Iran-US Claims Tribunal’s reluctance to award restitution). See also ILC Articles on State Responsibility, Art. 36, comment (3) (“Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons.”).

awarded in those instances.¹³ In the context of ICSID arbitration, it also may be relevant to consider that only monetary awards benefit from the strong enforcement provisions contained in the ICSID Convention.¹⁴

C. Compensation

When a State acts wrongfully and restitution is not an available or sufficient remedy (*i.e.*, nearly all investor-State cases), compensation is owed. Compensation is owed in an amount sufficient “to wipe out the consequences of the unlawful act” (as noted above subject to the limitations of causation), *i.e.*, to “compensate for the damage caused thereby.”¹⁵ Although “damage” includes “material or moral” damage, compensation deals only with “material” or “financially assessable damage.”¹⁶

Thus, compensation, which in this context is also sometimes referred to as “damages,”¹⁷ does not include punitive damages, as it is remedial only. There is a lot of authority that punitive damages are not permitted in international law on the basis that it is not a proper basis for an award against a sovereign State. Decisions of the Iran-United States Claims Tribunal reflect the view that punitive damages are not available, “even in case of unlawful expropriation the damage actually sustained is the measure of reparation, and there is no indication that ‘punitive

¹³ See, e.g., North American Free Trade Agreement, Article 1135(1) (“Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.”); Energy Charter Treaty, Art. 25(8) (“An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted.”).

¹⁴ See ICSID Convention, Art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”).

¹⁵ ILC Articles on States Responsibility, Art. 36.

¹⁶ *Id.* Compensation is not a remedy for “moral” damage. Moral damage may be remedied by Satisfaction, the principles of which are addressed in ILC Articles on States Responsibility, Art. 37.

¹⁷ Compensation as a remedy for a wrongful act and as addressed in ILC Articles on States Responsibility, Art. 36, is synonymous with the term “damages” as it is frequently used. In the context of the substantive requirement that States expropriate only against prompt adequate and effective compensation, compensation refers to the content of the State’s substantive obligation in respect of expropriation rather than as a remedy for a wrongful act. The fact that the term compensation thus sometimes is linked to wrongful conduct and sometimes is not, can create some confusion in particular in discussions of claims regarding expropriation.

damages’ could be considered.”¹⁸ The few examples sometimes cited as providing precedent for such an award may be seen as cases in which the injury was not “private” or “economic,” but was “public” or “political” and for which “satisfaction” (such as an apology) was determined to be the appropriate remedy, which is arguably distinguishable.¹⁹

The principle that compensation is only owed in respect of financially assessable damage refers both to the fact that compensation is not meant to remedy “moral” injury, and to the fact that compensation is owed only in respect of injuries that are quantifiable with some degree of certainty, *i.e.*, the scope of the injury (and thus the obligation to compensate) cannot be too speculative.

III. EXPROPRIATION CLAIMS

When a claim is made that a State has expropriated property, there are two possible aspects to compensation that may be owing. The first aspect relates to the fact that when a State expropriates property it has an obligation to pay compensation for that property. International law recognizes the right of States to expropriate property, so long as they, *inter alia*, pay compensation. In many investment treaties, the obligation to pay compensation in the event of an expropriation is expressly recognized as a substantive treaty obligation of the State. The second aspect relates to the fact that where a State expropriates but fails to compensate in the

¹⁸ See Brower and Brueschke, *supra* note 12 at 477 (citing *Amoco International Finance Corporation v. Iran*, Partial Award No. 310-56-3 (14 July 1987), 15 Iran-US CTR 189, 248). *But see also* Separate Opinion of Judge Brower in *Sedco, Inc. and National Iranian Oil Company*, Interlocutory Award No. ITL 59-129-3 (27 Mar. 1986), reprinted in 10 Iran –US CTR 189, 205 n. 40 (observing that it would be logical to permit an award of punitive damages against a state that unlawfully expropriates property on the ground that “[i]n the absence of such damages being awarded ... that State is required to furnish only the same full compensation as it would need to provide had it acted entirely lawfully.”) As discussed further below, however, there may be differences in the compensation owing in the event of an lawful expropriation and the compensation owing for damages caused by an unlawful expropriation.

¹⁹ See Christine Gray, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 26-28, 41-43 (Oxford 1990). One such example is the *Im Alone* case (1935 Canada/US, 3 RIAA 1609), sometimes cited as an example of an award of “punitive damages.” In that case the U.S. Coast Guard unlawfully sunk a Canadian ship in the Gulf of Mexico that was smuggling alcoholic beverages into the United States. The Commission concluded that no compensation ought to be paid for the loss of the ship because the ship was engaged in illegal activity. The Commission also concluded, however, that as sinking the ship was an unlawful act, the United States “ought formally to acknowledge the illegality of its actions” and to apologize to the Canadian Government, and “as a material amend in respect of the wrong” should pay \$25,000 to the Canadian Government. *Id.*, 3 RIAA at 1618.

face of a treaty obligation to do so, that failure is a wrongful act for which reparation is owing.²⁰ The question in the investment treaty context then is what reparation is due.

The amount of compensation owing as a matter of the state's substantive obligation as to the expropriation is not necessarily the same as the amount owing as a compensatory reparation where the State expropriates in a manner inconsistent with its treaty obligation.

A. The Substantive Obligation to Pay Compensation

One does not need to dig very deep into commentary and jurisprudence regarding expropriations in international law to find great debates on the content of a State's obligation to compensate when it expropriates property. Many today would say that there is now a consensus, that as a matter of customary international law, the standard of compensation that is due is full or fair market value of the property taken. Even if that might still be debated, however, in the context of investment treaty claims, the content of the States' obligation is often addressed expressly as a matter of convention.

The Energy Charter Treaty is one such example. It provides in Article 13 in regard to expropriations, or measures having an equivalent effect, that they are to be "accompanied by the payment of prompt, adequate and effective compensation."²¹ As to what amount is adequate, Article 13 also provides that:

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (herein referred to as the 'Valuation Date').

²⁰ As a matter of customary international law, there is authority for the proposition that a mere failure to pay compensation will not render the expropriation unlawful, and a tribunal in that circumstance will simply award the compensation that is due. *See, e.g., Chorzów Factory*, Judgment No.13 (Indemnity), September 13, 1928, Series A, No. 17 in vol. I WORLD COURT REPORTS (Hudson, ed.) at 677. Despite the broad acceptance that compensation is due in the face of an expropriation, the reluctance to conclude that an uncompensated expropriation is *ipso facto* unlawful stems from the recognition that States fundamentally have the right to expropriate and, perhaps, that compensation may be easily awarded. Where an expropriation claim is presented under a treaty that the treaty has been breached due to an uncompensated expropriation (as may occur particularly where only a limited scope of claims may be submitted to arbitration, as some treaties permit arbitration only of alleged breaches of the treaty), it would be open to the tribunal to conclude that the uncompensated expropriation is a violation of the treaty and hence an unlawful act, particularly where the treaty expressly sets forth the compensation obligation.

²¹ Energy Charter Treaty, Art. 13(1)(d).

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

The principle, now very widely accepted and reflected in very many investment treaties, is that where compensation is deemed to be owing for a taking,²² absent extraordinary circumstances,²³ the compensation should be equal to the fair market value, immediately prior to the expropriatory measure, of the property taken. Some treaties describe the required compensation as being that which is “just” or “appropriate.” Such terms do not necessarily signal a different standard of compensation, however. As the World Bank Guidelines on the Treatment of Foreign Direct Investment observe,²⁴ the amount of compensation that ordinarily will be just or appropriate will be the fair market value of the investment.

There need not be an “active market” for the property in question to be valued for purposes of compensation, but compensation should reflect an objective, real and full value – and in that sense, a “market” measure.²⁵

As to the date of valuation, a number of treaties, like the Energy Charter Treaty, make reference to the traditional rule that valuation is to be assessed as of the date of the taking, but

²² Compensation might not be due, or might be reduced, where the investment is taken by the State as a sanction for violations of law that were in force prior to the taking, such as violations determined by a court of law. *See, e.g.*, World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV(9), 31 ILM 1363 (1992). In such cases the taking is more properly seen as an exercise in police powers and not an expropriation. Obvious examples might include forfeiture of property used in the commission of a crime.

²³ In the event of non-discriminatory, large-scale social reforms under exceptional circumstances of war or similar exigencies, compensation at an amount less than the fair market value of the property immediately prior to the taking may be sufficient. *See, e.g.* World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV(10), 31 ILM 1363 (1992). Such takings are to be distinguished from takings of specific investments. *See, e.g.*, U.S. Restatement (3rd) Foreign Relations Law, sect. 712 (1987) (“in exceptional circumstances, some deviation from the standard of [full] compensation” might be justified”); 1 OPPENHEIM, INTERNATIONAL LAW 352 (8th ed.) (“[I]n cases in which fundamental changes in the political systems and economic structure of the State or far-reaching reforms entail interference, on a large scale, with private property.... [i]t is probable that, consistent with legal principle, [the] solution must be sought in the granting of partial compensation.”).

²⁴ World Bank Guidelines on the Treatment of Foreign Direct Investment, para. 39, 31 ILM 1363, 1376 (1992).

²⁵ *See, e.g.*, *American International Group Inc. v. Iran*, Award No. 93-2-3 (19 Dec. 1983), 4 Iran-US CTR 96, 106-07 (“The evidence in this case indicates that there has not been an active market for Iran American’s shares. In the absence of such a market, Claimants have relied on appraisals concerning the value of the company by two independent actuaries.”). The lack of an active market for a certain type of property, however, may raise evidentiary challenges for a tribunal trying to assess what a fair measure of such value may be.

absent any expropriatory effects. The issue of the date of valuation can present interesting questions, however, particularly in the context of a creeping expropriation,²⁶ and in view of the requirement that valuation is to be done without taking expropriatory effects into consideration. The response to such questions will turn on the facts of the particular case. Similarly, whether any post-expropriation events can be taken into consideration in assessing value may turn on whether such events were foreseeable at the time of the taking so as to affect value.²⁷

B. Fair Market Value

Questions frequently arise as to what is the most appropriate way to measure the fair market value of property. The answer depends upon the nature of the property taken and the availability of evidence as to value. The measure of fair market value is a question of economics and/or accounting and is not (or should not be) a function of any bright-line legal rule. It is unfortunate that much of the jurisprudence and commentary in this area seems to reflect confusion about economic and accounting concepts which in turn leads to a confused (and/or confusing) discussion of the applicable legal rules.

Although assessing compensation is not strictly a legal determination, there are legal constraints to the analysis. As noted above, causation principles must be considered – and in the context of expropriation one must assess carefully the threshold question, what was “taken,” *i.e.*, what is being valued? In addition, any award of compensation must be based upon evidence and is subject to the constraint that it must not be based upon “too speculative” a measure. Those considerations can influence the approach ultimately relied upon for a measure of value.

²⁶ See, e.g., W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 2003 Brit YB Int'l L 115 (2004) (examining issues relating to date of valuation of property for purposes of establishing compensation for a taking in the context of indirect expropriations effected over an extended period of time).

²⁷ In this context, the issue of foreseeability of the post-expropriatory events refers to events that would have affected market value, *i.e.*, they should be taken into account to the extent that it is reasonable to conclude that the market would have “absorbed” an expectation as to those events as regards the value it would assign the property at issue. That should not be confused with foreseeability insofar as the occurrence of a certain injury is concerned that is relevant in the context of assessing causation and thus liability for harm and thus is a different concept. See, e.g., *Starett Housing Corporation v. Iran*, Award No. 314-24-1 (August 14, 1987), 16 Iran-US CTR 112, 122-23 (post-taking events to be excluded from valuation “unless they were reasonably foreseeable on the valuation date...[s]uch subsequent events...may be used only to test assumptions made as to the future.”). See also Brower and Brueschke, *supra* note 12 at 554-55.

When the property at issue is something tangible, like real estate, the method to be used to measure its fair market value is a relatively straight-forward exercise. Likewise, property for which there exists readily determinable market measures of value, does not present difficult challenges. The difficulties and conceptual confusion arise when the property taken is a business, a so-called going concern, or contract rights to a long-term concession contract, for which a stream of income was expected, or shares in a closely-held company or other special purpose vehicle whose sole asset is a set of contract rights. When one must assess the market value of assets whose value is derived from the fact that they are income generating, the analysis is more challenging.

When considering how to determine compensation for taking such property one begins with the definition of the “fair market value.” It means “the 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,”²⁸ and in making this determination, one must assume away any impact on value of the State’s expropriatory conduct. In other words, if there were no expropriatory conduct and if this property was going to be sold – what would the hypothetical purchase price be?

C. Different Measures of Fair Market Value

The fair market value of an enterprise or other income generating property might be measured in a number of ways. Most of the discussion in the legal literature relating to the various possible measures of fair market value center on the question of whether a discounted cash flow valuation is appropriate as a measure of fair market value of an enterprise – and if so, under what circumstances.

A discounted cash flow is a measure of the income generating potential of a business – it is a way to measure the size and reliability of the profit stream that one might expect to realize as

²⁸ *E.g., INA Corporation v. Iran*, Award No. 184-161-1 (August 12, 1985), 8 Iran-US CTR 373, 380. *See also* World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV(5), 31 ILM 1363 (1992) (“fair market value will be acceptable if determined by the State according to reasonable criteria related to the market value of the investment, i.e., in an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.”).

the owner of the enterprise.²⁹ In order to determine what someone would pay for that source of income today, the expected profit stream is “discounted” to obtain a present value that is meant to reflect what the expectation of that particular stream of income would be worth today bearing in mind that other investment opportunities exist in the market.

What the discounted cash flow valuation sets out to do (roughly) is to measure the revenue that the enterprise will generate, year by year, over its expected future life and subtract the expected expenses year by year. The resulting “profit” stream is then discounted by a factor to reflect (a) the time value of money, (b) expected inflation, and (c) the risk associated with realizing the cash flow in the first place. This requires an assessment of a number of future-looking factors:

- What the revenue of the enterprise will be over the years;
- What the expenses of the enterprise will be over the years;
- What the opportunity cost of keeping one’s funds tied up in the given enterprise and not reinvesting them elsewhere – that is, a comparative assessment of other possibly available investment opportunities;
- What the effects of inflation will be on the income stream over the years, as inflation over time lowers the value of an income stream at a given level; and
- What the risks are that the projected revenue in fact will be realized.

That analysis requires a lot of assessments about the future – and in some circumstances, those assessments can be difficult to make reliably. There are times when such assessments can be made reasonably well. The reliability of this approach has to be considered on a case-by-case basis with an appreciation of the elements of the analysis and what they represent.

The fact that such assessments necessarily require projections and estimates regarding future events and thus by definition are based upon degree of speculation does not render them *per se* too speculative as a basis for award. Such valuation methods are widely used in business, *i.e.*, in fixing “real” market values, and a number of investment treaties as well as the World

²⁹ See, *e.g.*, World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV(6), 31 ILM 1363 (1992).

Bank Guidelines on the Treatment of Foreign Direct Investment expressly mention that a discounted cash flow analysis may be an appropriate measure of value and thus as a basis for an award of compensation.

Nevertheless, there are occasions when the factors needing to be assessed to use a discounted cash flow valuation are too difficult to discern reliably, and in those cases tribunals tend to conclude that such a measure of valuation should not be used because it leads to a speculative measure. In those circumstances, such as, for example, where there is no “history of profitability,” tribunals opt for other measures of fair market value. Strictly speaking, the discounted cash flow method still could be used where there is uncertainty – that is, where there is high degree of uncertainty as to what future revenues and costs would be, the discounted cash flow method simply calls for application of a higher discount factor to reflect the greater risk that the predicted level of profits in fact would be achieved. What tribunals tend to do in such cases, however, rather than simply apply a very high discount factor, is revert to other means of measuring the fair market value of the enterprise or property.³⁰ The principal other method used is referred to as book value.

Book value is an accounting concept that in some loose sense may be seen as a measure of the same thing – the market value of the company. Book value means the difference between the enterprise’s assets and liabilities as recorded on its financial statements in accordance with whatever accounting principles are applicable in the relevant jurisdiction.³¹ Various accounting principles, however, differ and the books of the company invariably reflect a variety of discretionary determinations as to how to record what in a way that may distort what may reasonably be a fair measure of a market value.

Book value usually reflects the company’s historical cost of its assets, *i.e.*, what it paid for the assets, minus amounts written off to account for depreciation. When determining the book value of a company, discretionary decisions are made as to what is to be treated as “capital”

³⁰ When the future profits are very uncertain, a discounted cash flow analysis would lead to a very low or even negative value. That, however, does not mean that the subject property is worthless. It simply means that it may not have meaningful value as a profit generating venture in comparison to other possible investments. It may have a liquidation value or value in some other respect.

³¹ See, *e.g.*, World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV(6), 31 ILM 1363 (1992).

(and hence “booked as an asset”) and what is to be treated as an “expense” (and therefore not counted in the same way). Also, when one considers the amount of capital “on the books,” one should assess whether such capital contributions, which might have been made over time and simply recorded at their historic costs, were adjusted to account for inflation. Such considerations, as well as the nature of any depreciation deductions, which usually are taken with reference to particular accounting rules or tax considerations relevant in the jurisdiction rather than as an effort to reflect market value, limit the evidentiary value of this measure significantly.

To some degree, when the various assumptions relating to the book value measurement are analyzed, one can assess the extent to which it reflects (or can be adjusted to reflect) what the owner itself has in effect “invested” in the company as a measure of its value.³²

There are other measures of fair market value that are possible. Where a book value is not available, it is possible that another measure of “amounts invested” by the investor in an enterprise is the only reasonably available measure of value. The amount that the investor itself, in effect, “paid” for the enterprise is some evidence of its market value – although it is not necessarily a reliable measure because one can invest more than what something is worth or less. With no other reliable measure, a tribunal therefore may conclude that the amount “invested” is a measure of the “fair market value” of the property. Certainly, the amount the investor “paid” to acquire the investment provides at least some evidence of its value.

There may also be times that the market value of an enterprise can best be valued by reference to its liquidation value – where the value of its parts (net of liability) is greater than the enterprise’s profit generating potential.

It is important to underscore that each of the several methods of determining the fair market value of profit generating assets aims to do the same thing. They do not represent different standards of compensation.

³² See generally Valuation of Assets in International Takings, Thomas R. Stauffer, 17 Energy Law Journal 459 (1996).

D. Whether Accounting for “Lost Profits” Lead to “Double Counting”

One sometimes encounters discussions in legal literature and in arbitral decisions relating to compensation for expropriation that seeks to distinguish between (1) “the assets” of which the former owner was deprived and (2) the “profits” the owner would have earned had it kept the property. Some argue that lost profits should only be awarded when an expropriation is unlawful and others argue that in any event to award both is double compensation.

When it comes to the valuation of income producing assets, like contract rights or a business (as distinct from a piece of machinery), the separation between the value of the assets and the lost profits reflects a confusion. It confuses the difference between calculating the value of assets expected to generate a certain profit stream and the question whether “lost profits” should be awarded as a separate head of damage.

When a claimant receives compensation representing the market value of his assets – where those are income producing assets – the valuation takes into account how effective those assets are at producing an income. One will pay more for a business that is expected reliably to yield 100 dollars a year than for a business that may or may not yield 50 dollars a year. One factors that assessment into the price one pays for the business – but that is not giving the seller the anticipated profit stream (assuming the price is assessed correctly). Once one is in effect “bought out,” one may well to invest the proceeds elsewhere – but that is not “double recovery.”

E. Concepts of *Damnum Emergens* and *Lucrum Cessans* Distinguished

The Roman law concepts of *damnum emergens* and *lucrum cessans* – or damages arising and profits lost – are classically applied in the context of the determination of heads of damages potentially available for breach of contract and tort claims and are sometimes discussed in the context of remedies for wrongful acts generally and in an international law context. When the issue is the measure of compensation that is owing as a substantive obligation in the event of an expropriation, *i.e.*, the economic value of expropriated property, the concepts of *damnum emergens* and *lucrum cessans* do not apply.

One nevertheless encounters these concepts discussed in a number of cases in which claims of expropriation are addressed. Upon examination, it is evident that the discussion in

those cases reflects either non-acceptance of fair market value as the standard of compensation, a confused sense of how to determine the fair market value of income-generating assets,³³ or simply claims for damages owing for tort or breach of contract that are considered as well.

For example, in the *Liamco*³⁴ case, the arbitrator describes that, “the municipal legal systems of most civilized countries consider the loss of profit together with the damage sustained as the constituent elements of compensation in the fields of both torts and breaches of contracts.” And, the arbitrator in the *Sapphire*³⁵ case explains that full compensation for breach of contract “includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit loss (*lucrum cessans*), for example the net profit which the contract would have produced.” In neither case is this a reference to the standard of compensation for an expropriation.

In a typical breach of contract case, the injured party, in reliance upon the contract, may have incurred expenses placing himself in a position to perform the contract with an expectation of receiving some revenue in return that would both reimburse expenses incurred, plus provide some degree of profit. When the other party fails to perform in a situation where the injured party already incurred expense, in order to wipe out the consequences of the breach, the injured party must be compensated for the expenses already incurred and must be awarded the profits lost – as those two elements would be the equivalent of substituting for contract performance – that is, together, they are economically equivalent to obtaining the revenue not earned (or, in common law terms – giving the party the “benefit of his bargain”).

Typically, the loss sustained by the injured party (i.e., the expenses incurred) is usually easy to determine; whereas the profit that would have been realized can be more difficult to establish, as there may be some degree of speculation as to what really would have been earned. For that reason in the *Shufeldt Claim*, the arbitrator held that “the *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not too remote or

³³ See, e.g., *Amoco International Finance Corporation v. Iran*, Partial Award No. 310-56-3 (14 July 1987), 15 Iran-US CTR 189.

³⁴ *Libyan American Oil Co. (Liamco) v. Libyan Arab Republic*, 62 ILR 140, 202 (Mahmassani, sole arb.) (1977).

³⁵ *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, 35 ILR 136, 186 (Cavin, sole arb.) (1963).

speculative.”³⁶ This, however, is not the nature of the analysis done to determine the amount of compensation owing for a taking. The *damnum emergens/lucrum cessans* approach does not apply to a determination of the fair market value of property. If an investor were to obtain compensation consisting of the value of its expropriated property (*i.e.*, what it would have obtained from an arms-length purchaser for its contract rights (assuming contracts rights were “expropriated”)), it would not also be entitled to its “sunk costs.” These costs would have been incurred anyway, and if the investor were to obtain the full value of the property, plus costs, by definition, it would receive an award greater than the value of the property taken (as presumably the price for the property takes into consideration the investment already made).

F. Distinction Between Lawful and Unlawful Expropriation

One may consider whether the customary distinction found in jurisprudence and commentary between lawful and unlawful expropriations as regards the available remedy is relevant to a determination of remedies in the context of an investment treaty claim.³⁷

This is a question that merits a more full discussion than undertaken here, but one may briefly observe, as noted above, that there is a distinction between the *content* of the treaty obligation as regards expropriation and the remedy for the failure of a State to fulfill that obligation. The State party to the treaty accepts the conventional obligation that if it expropriates property, it may do so only under certain conditions – *i.e.*, it will do so only where there is a public purpose; it will do so in accordance with due process; and it will pay compensation according to a particular standard (typically against prompt payment of the fair market value in a convertible currency, etc.). When a State expropriates in a manner inconsistent with its treaty obligation, it has violated the treaty. It is, by definition, an unlawful act. The State is then under an obligation to make full reparation for any injury caused by the unlawful act.³⁸ The reparation most usually awarded is compensation for the damage.

³⁶ *Shufeldt Claim (United States v. Guatemala)*, 2 RIAA 1080 1099 (Sisnett, sole arb.) (1930).

³⁷ See Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY* 169 (Juris 2006).

³⁸ ILC Articles on State Responsibility, Art. 34.

It is possible in a given case, as a matter of fact, that the only damage sustained due to the unlawful act was the loss of the value of the property taken. That, however, is not necessarily so. It is possible that an investor will have suffered losses greater than the loss of the fair market value of its property. If such further damage can be demonstrated, there is no reason why such injury could not then form the basis for a claim for compensation.

There is some authority that the *Chorzów Factory* case demonstrates that when an expropriation is unlawful the way to ensure that full compensation is awarded is to compare the value of the expropriated property as of the date of the taking with the value of the property as of the date of the award (taking actual post-taking events into account) and to award the greater of the two, together with any consequential damages suffered beyond the lost value of the property.³⁹ The Court's opinion in that case demonstrates that it was not satisfied with the evidence of value presented by the parties. It considered that in the case at hand the costs of constructing the factory did not necessarily reflect its value. It also considered that the evidence presented of the value of the factory as of the date of the taking (certain sale contracts) did not evidence the factory's true value because that was a "period of serious economic and monetary crisis" and the price suggested by the sales contracts submitted as contemporaneous evidence of value reflected the unlawful expropriatory effects of Poland's conduct (which was not to be taken into account in assessing compensation) and that the then current value of the factory was very much higher.⁴⁰

In the context the Court decided to pose several questions to an expert designed to elicit more evidence as to the factory's value and that further submissions from the parties then would be made regarding the expert's findings. The questions presented by the Court were (1) to ascertain the value of the enterprise (including its "future prospects") on the date of the dispossession and to assess what its profits or losses would have been (had it not been taken) from that date until the present (date of the Court judgment) and (2) to ascertain the value of the enterprise at the current time (date of the Court judgment) (including its "future prospects")

³⁹ See, e.g., *Amoco Int'l Finance Corp. v. Iran*, (Award of 14 July 1987), 15 Iran-US CTR 189, 289 (Brower concurring).

⁴⁰ See generally *Chorzów Factory*, Judgment No.13 (Indemnity), September 13, 1928, Series A, No. 17 in vol. I WORLD COURT REPORTS (Hudson, ed.) at 677-682.

assuming it had developed proportionally to other businesses of the same kind in the industry.⁴¹ As to the relevance of assessing the value from the perspective of two different dates, the Court explained:

The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is connected. In view of these difficulties, the Court considers 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. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.⁴²

As it turned out, the case settled before the Court could consider the results of the expert evaluation and further submissions of the parties.

In any event, the Court was express in its view that as the expropriation was unlawful, compensation was not limited to the value of the enterprise as of the date of the taking, plus interest to the date of payment, and that the expropriated party was to be put back in same economic position it would have been in had the unlawful act not occurred.⁴³ The Court considered that an analysis of the value of the enterprise as of different dates, given the facts of that case, was an appropriate means of assessing the value upon which compensation should be awarded in that particular case. Given other facts, other means of valuation might have been appropriate. The Court also considered whether the expropriated party suffered further damage beyond the loss of the enterprise. It entertained the possibility that the expropriated party may have been subject to “competition injurious” to its other businesses due to the fact that its trade secrets may have been unlawfully revealed to a third party via the expropriation of its

⁴¹ *Id.* at 680-81.

⁴² *Id.* at 682.

⁴³ *Id.* at 677.

enterprise.⁴⁴ Although the Court was sympathetic to that complaint, there was insufficient evidence presented to support the claim. The certain conclusion from the case is that the remedy for an unlawful expropriation is not in principle different from the remedy for any other wrongful act – it is only the measure of the harm, as a factual matter, that necessarily varies from case to case.

In the context of investment treaty claims, where an expropriation claim is presented, one must consider the scope of the submission to arbitrate contained in the particular treaty at issue. In some circumstances, claims for compensation could be submitted to arbitration without a claim that the State violated the treaty, but rather simply to adjudicate the compensation that is owed in accordance with the treaty standard, in other cases arbitration is limited to claims that the treaty has been violated in some respect. It may be important to distinguish between whether the Tribunal is permitted simply to award the compensation that should have been paid had the State expropriated in accordance with law or whether the claim is that having expropriated unlawfully, the investor has suffered losses beyond even the fair market value of its property.

IV. CLAIMS BASED ON TREATY VIOLATIONS OTHER THAN EXPROPRIATION

As evident from the discussion above, the principles of compensation are the same for any violation of a treaty – it is compensation for the damage caused thereby. What varies from case to case and from claim to claim is the nature and scope of the injury.

In many investor-State treaty arbitrations, claims are presented that the facts and circumstances of the case constitute at the same time an expropriation in violation of the treaty's provisions, a denial of fair and equitable treatment, a denial of full protection and security, etc. When liability is established on the basis that certain events constitute an expropriation in violation of the treaty's standards as well as, *e.g.*, a denial of fair and equitable treatment, should the measure of compensation vary depending upon the basis of liability? In short, not if either way there is a finding that there has been an unlawful act – compensation in all circumstances should wipe out the consequences of that act. As discussed above, however, as regards expropriation, claims are not always presented in terms of a treaty violation.

⁴⁴ *Id.* at 684.

Whereas the substantive obligation to provide compensation for an expropriation entails assessing the fair market value of the subject property, damages for a treaty violation are not necessarily focused on an assessment of market value – they are focused on the particular injury caused by the unlawful act. While there may be cases in which a reasonable measure of loss suffered is the fair market value of the subject property, there also may be cases in which awarding the market value of property does not compensate for the loss. In those cases, the claim presented will matter (*i.e.*, whether one seeks to provide the compensation for an expropriation that the treaty requires as a matter of substance or whether one seeks to remedy an unlawful treaty violation).

This distinction may be illustrated with the example where the subject property is a long-term contract providing a certain entitlement to revenue. If there is a determination that the contract has been “expropriated,” and if one were to assess the level of compensation that the State owes as a substantive obligation, one might argue that the compensation should be the “fair market value” of the contract rights. If, however, the contract is with a state-entity where “sovereign” or “country” risk is a material element that would depress the “market value” of the contract rights, the compensation that would be “owing” as a remedy for an “expropriation” would be less than the economic equivalent of actual performance (*i.e.*, the compensation that would be owing if assessed as a treaty violation). Plainly, the compensation owing for an interference with contract rights should be the economic equivalent that contract performance would bring (without any market discount for “country risk” of default) – it should not be an analysis of the “fair market value” of the contract.⁴⁵

With regard to contracts, it is sometimes observed that if the object is to put an investor back in the place it would have been in had the wrongful act not occurred, to award both the

⁴⁵ Although there is a good deal of authority that contract rights may be expropriated, and moreover that doing so is always unlawful (*e.g.*, US Restatement (3rd) Foreign Relations Law § 712), there is also authority questioning whether the notion of an expropriation can apply to a contract. That debate was among the factors that led to the incorporation in many investment treaties of “obligations” or “umbrella” clauses. The fact that it is not possible to expropriate a contract “lawfully” is a tension with the definition of expropriation as a sovereign right of a State. See Thomas W. Wälde, *The “Umbrella (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A comment on Original Intentions and Recent Cases*, 1 TRANSNATION’L DISPUTE MGT 54, 60 (2004), available at www.transnational-dispute-management.com. In any event, respect for rule of law requires that contracts be enforced and respected in accordance with their terms. A violation of a contract requires a remedy that does not give either party a “windfall.” There is no basis to assume that the value of contractual performance in accordance with the contract’s terms will be equal to the fair market value of the contract – indeed it may frequently be higher or lower.

amount spent in performing the contract and the lost profits (discounted to present value) is “double counting.” It is not. In order to wipe out the consequences of the breach, the injured party must be compensated for the expenses already incurred and must be awarded the profits lost, as the two elements together would be the equivalent of substituting for contract performance.⁴⁶ By comparison, when one is being compensated for the fair market value of property, one should not receive both “sunk costs” as well as the fair market value of the property, as the fair market value of the property will encompass compensation for the monies invested in the enterprise (and as such very likely will not necessarily be equal simply to “lost profits”).

V. INTEREST

When an award of interest is necessary to ensure full compensation, such as where there is a delay in payment from the date of the injury (or the date from which the obligation to compensate otherwise arises)⁴⁷ until the date of the payment of the award, it is an allowable part of the compensation due.⁴⁸ Issues arise as to whether the interest component of the award should be simple or compound and the basis upon which the rate of interest should be established.

The weight of authority for a long time was to the effect that international law does not support an award of compound interest. The decisions of the Iran-United States Claims Tribunal reflect that, as that Tribunal consistently denied claims for compound interest. In *RJ Reynolds Tobacco v. Iran*, the Tribunal did not find

“[a]ny special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, ‘[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable’...Even though the term ‘all sums’ could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the

⁴⁶ That of course assumes that contract revenues would have been sufficient to cover the expenses incurred plus yield a profit after that.

⁴⁷ The Commentary to the ILC Articles on State Responsibility cites to examples where tribunals have held that interest should run from the date a demand for payment was made as in some circumstances liability would not arise until should a demand was made. *See* ILC Articles on State Responsibility, Art. 34 comment (10).

⁴⁸ ILC Articles on State Responsibility, Art. 38.

clause in the light of the international rule just stated, and thus excludes compound interest.”⁴⁹

In the context of investor-State arbitration cases, however, the more recent authorities that have based their award of compensation on the principles supported by international law,⁵⁰ starting with *Compania des Desarrollo de Santa Elena v. Costa Rica*,⁵¹ have awarded compound interest, and there are now many other such examples. As to the rate of interest, if interest is to serve an effective compensatory function, the rate at which interest should be paid must depend on the circumstances of the case, which is the rule adopted by the ILC Articles on State Responsibility.

VI. APPROXIMATION OF DAMAGES

It is often observed that many arbitral awards seem to arrive at quantum figures in an imprecise manner even where the parties have presented detailed submissions accompanied by expert analyses, exacting calculations, alternative formulae and valuations.⁵² Sometimes awards seem to be expressed in such general terms that it is difficult to determine what principles were applied to arrive at the final figure. Although it is true that many final awards do seem to be based upon an inexact approach, that does not relieve the parties from having to base claims for compensation upon reliable evidence, and while arbitral tribunals are required to issue reasoned awards, there are a number of practical factors that sometimes work against the well articulated award.

⁴⁹ *RJ Reynolds Tobacco v. Iran*, (1984) 7 Iran-US CTR 181, 191-92, citing Whiteman, *Damages*, vol. III, p. 1997. See also ILC Articles on State Responsibility, Art. 38, comment (8).

⁵⁰ In many, if not most cases, awarding compound interest serves a more effective compensatory function recognizing the lost time value of money. In considering recent precedents one may observe that there are a number of recent ICSID arbitrations in which the award of compensation did not include compound interest because the applicable law did not permit it in the circumstances. As noted above, not all ICSID cases provide useful guidance on principles of compensation applicable in international law. See, e.g., *Ceskoslovenska obchodni banka v. Slovak Republic*, ICSID Case No. ARB/97/4 (award of 29 December 2004), available at www.investmentclaims.com (Czech law did not permit the application of compound interest without agreement); *Autopista Concesionada de Venezuela v. Venezuela*, ICSID Case No. ARB/00/5 (award of 23 September 2003), available at www.investmentclaims.com (Venezuelan law did not permit the application of compound interest without agreement).

⁵¹ *Compania des Desarrollo de Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1 (Award of 17 Feb. 2000), 5 ICSID Rep. 153.

⁵² See, e.g., Brower and Brueschke, *supra* note 12 at 668.

Arbitral tribunals usually strive to render a unanimous award, and so a more general expression regarding the amount sometimes is all that can be agreed, and while that suggests the decision might have been based on a more equitable than legal approach, that is not necessarily so. Another factor tending toward generalization is that the tribunal might have been persuaded by the evidence presented, but only to a point, so that the award does not reflect a precise valuation as much as a decision that the evidence presented supports an award up to a certain amount (after which it is too uncertain for comfort). As a practical matter, few arbitral tribunals are well-equipped to recalculate figures based on a sophisticated economic model if they do not accept all the values proffered by parties and the parties rarely agree on a single model that would permit the tribunal to accept some inputs, but not others, and yet calculate an exact amount based on an agreed formula, and so approximation is inevitable. Similarly, many parties would object to a Tribunal hiring a “neutral” expert to perform the necessarily calculations, as it may be seen as too great a delegation of the arbitrators’ decision-making authority – where a dispute calls for an accountant to be the arbitrator, the parties are free to so agree. Finally, at some point, the cost/benefit to the parties of giving the Tribunal the time and the resources to calculate an exact figure does not support continuation of the proceeding until such certainty of result can be achieved. Justice sometimes requires that a solution, even if imprecise, be reached. So in some respects we may have to tolerate some “Solomonic” decisions.⁵³

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⁵³ See Markham Ball, *Assessing Damages in Claims by Investors Against States*, 16 ICSID Rev-FILJ 408, 425-26 (2001) (describing a number of investor-State cases in which the tribunal appears “for one reason or another, to have given up on analysis and to have ‘split the baby’”).