

Unjust Enrichment Unjustly Ignored:

Opportunities and Pitfalls in Bringing Unjust Enrichment

Claims Under ICSID

ABSTRACT. The article seeks to find a space for unjust enrichment in international investment dispute resolution and to demonstrate the ways in which international arbitrators' sloppiness in applying unjust enrichment begets undesirable results. The article reviews the role of unjust enrichment in international investment disputes, first historical and then hypothetical. By examining historical arbitrations, the Iran-U.S. Claims Tribunal, international and national parameters for unjust enrichment, and reinterpreting influential decisions like *Chorzow* and *ADC v. Hungary* the article demonstrates a long history of reliance on unjust enrichment. Consistent reliance supports the idea that unjust enrichment is a general principle of international law. General principles of international law are protected by bilateral investment treaties' fair and equitable treatment standard. Thus unjust enrichment claims fall under the fair and equitable treatment standard in bilateral investment treaties. Unjust enrichment claims also surmount ICSID's substantial jurisdictional barriers, and may prove pivotal in international investment cases involving intellectual property disputes. Along the way, the article attempts develop tenets for unjust enrichment that lend themselves to consistent application and hence facilitate the process of fair decision-making.

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I. INTRODUCTION

Most scholars, arbitrators, and international lawyers, if pushed, would not be able to answer a simple question: “Does unjust enrichment play a role in the International Centre for Investment Disputes (“ICSID”)?” In this Article I seek both to answer the question and to outline a future role for unjust enrichment in ICSID. The Article reviews the role of unjust enrichment in international law, first historical and then hypothetical. I conclude that unjust enrichment is prohibited, and thus a cause of action, under the fair and equitable treatment standard in bilateral investment treaties, owing to its reexamined use in cases like *Chorzow* and *ADC v. Hungary*. I then show that if unjust enrichment is a cause of action, it may prove instrumental in cases involving intellectual property disputes.

Unexpectedly, my examination of current international law revealed a pattern of lawyers and tribunals treating unjust enrichment with evasive reliance and carelessness. The pattern appears self-perpetuating, as international lawyers undermined unjust enrichment standards by using it indiscriminately, which in turn ensured that tribunals viewed the concept as a weak ploy, long depreciated by casual use. I aim to show that despite this degradation, unjust enrichment remains a useful tool if used precisely and sparingly. Indeed, it is so useful that tribunals like that of *ADC v. Hungary* employ it, even if they call it something else. As well, it would seem that eliciting behavior by cementing expectations and awarding just remedies requires consistent and precise application of legal concepts, and that the sloppy use of unjust enrichment degrades both the concept itself and related ideas that misappropriate the idea to fill a legal lacunae. This applies particularly to international investments, which engender high levels of interdependence and reliance. Thus, disciplined unjust enrichment claims would be a useful part of international investment tribunals’ “fair

and equitable treatment standard” toolkit. In the end, I seek to convince the reader that if applied with precision, unjust enrichment may be used as an effective cause of action and remedial measure in ICSID disputes.

Each piece of my argument requires extended independent exploration. Ideally, connecting the disparate elements of my argument at the beginning will facilitate better understanding throughout the Article, so I open by sketching my argument. In sum, my argument is as follows. Unjust enrichment can easily be categorized as a *general principle of law* under Article 38(I)(c) of the Vienna Convention. Looked at en masse, the use of unjust enrichment in international arbitration decisions including *Lena Goldfields*, *The Chorzów Factory Case*, and *ADC v. Hungary* establishes its pride of place as a *general principle of customary international law*. Establishing unjust enrichment as a legal principle included in the corpus of customary international law provides claimants protection from unjust enrichment under bilateral investment treaties (“BITs”). This protection manifests as follows. BITs house a limited number of protections, all of which are agreed upon before signing. These protections include, among others: compensation for expropriation, and fair and equitable treatment requirements. Fair and equitable treatment is a catchall, requiring, at a minimum, that a signatory State not violate principles of customary international law with respect to investors from another signatory State. If I show that unjust enrichment is a principle of customary international law, then, unjust enrichment falls under the umbrella protection of the fair and equitable treatment clause contained in most BITs.

The next part of the argument proceeds as follows. To avoid abuse, and owing to the idiosyncratic nature of unjust enrichment, unjust enrichment’s intrinsic restrictions must influence the way in which a claimant brings an unjust enrichment

claim under the fair and equitable treatment clause and the subsequent remedy. One should think of the fair and equitable treatment clause as housing an unjust enrichment claim. Thus, an unjust enrichment claim would need to be proved on its own merits. Once the tribunal determines that there is reasonable belief that an unjust enrichment occurred, the claim would satisfy a breach of the fair and equitable treatment standard. This two-tiered structure is required in large part because unjust enrichment is based purely on what the defendant gained, so both the analysis and the remedy are distinct from other causes of action. This dovetails with the need to discipline the application of unjust enrichment.

In addition to qualifying as part of the fair and equitable treatment standard's menu of protected rights, unjust enrichment is able to surmount the significant jurisdictional barriers ICSID presents. Hence, it is a valid claim under ICSID. Lastly, since unjust enrichment claims generally allow only one remedy—restitution—restitution should be the only remedy available to successful unjust enrichment claims brought under the fair and equitable treatment clause, even if the treaty allows for other remedies.

Overall, I begin my argument with basic definitions and build slowly thereupon. Broadly speaking, Section II: History, explores unjust enrichment parameters, sets out an international standard, and introduces past cases. Part A defines unjust enrichment and sets out universal parameters stemming from the Iran-US Claims tribunal and domestic legal codes. In Part B, I review unjust enrichment's treatment in international law. First, I demonstrate that preventing unjust enrichment is a general principle of law. From there, by surveying cases and scholars, I seek to show that unjust enrichment is not only a general principle of law, but also a principle of customary international law. The international law survey opens with the history of

unjust enrichment in international claims tribunals, focusing on the *Chorzów Factory Case* in Section B.2 and *ADC v. Hungary* in Section B.3. I attempt to demonstrate that the oft-cited *Chorzów Factory*¹ case offers unjust enrichment as a remedy and that some cases citing it rely on unspoken ideas of unjust enrichment, particularly *ADC v. Hungary*.² In Section B.4 I briefly examine unjust enrichment language in ICSID cases—to assess the current role unjust enrichment plays in ICSID decision-making. I move on to Section B.5, the Iran-U.S. Claims Tribunal, which provides guidance on applying unjust enrichment internationally.

In Section III: Hypothetical, I use a sweep of hypotheticals based on the *Mihaly v. Sri Lanka*³ fact pattern to explore jurisdictional thresholds, merits-based limitations, and general boundaries for a future claimant bringing an unjust enrichment claim under ICSID.

II. HISTORY

A. DEFINING UNJUST ENRICHMENT

Understanding unjust enrichment is essential. The wide range of interpretations and debates surrounding the concept, as well as the multi-faceted role the term “unjust enrichment” plays in legal rhetoric, complicate comprehension. Unjust enrichment eludes definition, its imprecise nature simultaneously lending itself to and defying misapplication. Hence appreciating unjust enrichment entails a broad and frustratingly inconclusive examination.

Unjust enrichment can be defined as:

¹ The Factory at Chorzów (Germ. v. Pol.), 1928 P.C.I.J. (ser A) No.17 (September 13).

² ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary, Award, ICSID Case No ARB/03/16, IIC 1 (2006).

³ Mihaly International Corporation v Sri Lanka, Award, ICSID Case No ARB/00/2, IIC 170 (2002).

(1) The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected; (2) A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense; and (3) The area of law dealing with unjustifiable benefits of this kind.”⁴

It is also defined as (4) “[a] legal doctrine stating that if a person receives money or other property through no effort of his own, at the expense of another, the recipient should return the property to the rightful owner, even if the property was not obtained illegally.”⁵ As well, (5) “unjust enrichment is a legal term in English law and in several other jurisdictions, denoting a particular type of causative event in which one party is unjustly enriched at the expense of another, and an obligation to make restitution arises, regardless of liability for wrongdoing.”⁶

In the second and fifth definitions, unjust enrichment invokes two separate concepts. One is a causative event resulting in “unjust enrichment” (which actually begs the question), and the other is the remedy—restitution. Restitution simply means returning something to the owner or person entitled to it. Restitution, employed as a legal remedy, is based upon returning gains, unlike compensation for damages, which is founded upon the plaintiff’s loss.⁷ Unjust enrichment, then, is both what the claim is based on, and the amount by which the defendant was unjustly enriched. Accordingly, a claim for unjust enrichment can be either a separate cause of action or a measure of and justification for an award.

⁴ Black’s Legal Dictionary, 2004, (8th ed. 2004), Thomson, definition of “unjust enrichment”.

⁵ Online Legal Dictionary, (NOLO) definition of “unjust enrichment”, available at <http://www.nolo.com/definition.cfm/Term/D87B554E-A16D-4320-81572AA5FB784730/alpha/U/>

⁶ Wikipedia, “Unjust Enrichment” at www.wikipedia.org.

⁷ Wikipedia, “Restitution” at www.wikipedia.org.

Restitution and unjust enrichment are inextricably intertwined. While the principle of unjust enrichment underlies restitution claims, restitution as a remedy is available where unjust enrichment is not the cause of action (at least in common law countries).⁸ Two causes of action can trigger restitution: wrongs committed and unjust enrichment.⁹ Generally, in a claim based on wrongs committed, compensation is awarded according to the loss suffered. In some instances, however, the loss is speculative or unsubstantiated, leaving the plaintiff without compensation. Courts may remedy this by measuring damages based on the respondent's "unjust" gains, also known as restitution.

Alternatively, courts allow claims whose sole cause of action is unjust enrichment. In this instance, restitution is the only remedy permitted. While British courts allow plaintiffs to choose unjust enrichment as a remedy in cases where it provides greater compensation than loss-based alternatives,¹⁰ some countries only allow restitution when it would award less than a loss-based remedy.¹¹ These divergences impact when, where, how, and why a plaintiff and/or a court would use unjust enrichment as a cause of action and as a measure of damages.¹² This distinction also means that a choice must be made between the limited French code compensation method and the common law concept of disgorgement. In Section B, below, I quickly introduce some national parameters of unjust enrichment.

1. Domestic Legal Codes: Unjust Enrichment

Common law countries are not unitary in their understanding of unjust enrichment. While English courts seek enrichment "at the expense of the claimant,"

⁸ See Dickson, Brice, "Unjust Enrichment Claims: A Comparative Overview" [1995] Cambridge Law Journal 54(1), 100.

⁹ Wikipedia, "Unjust Enrichment".

¹⁰ See Dickson at 106.

¹¹ *Id.* at 113-115 (France is one such example).

¹² See *Id.*

there is no explicit reference to the claimant suffering a loss.¹³ Conversely, under U.S. law the claimant must show “an impoverishment.”¹⁴

As well, U.S. law requires a connection between loss and gain, and if interpreted like French law, the connection must be direct. Also, where English law asks what remedies should be applied, U.S. law seeks “an absence of a remedy,” implying that U.S. courts, unlike English courts (but like French courts), use unjust enrichment only where no other claim can be made.

Lastly, where U.S. courts increasingly use “absence of justification for enrichment,” England employs, “was the enrichment unjust?” Again, U.S. usage mimics the civil law approach. The “enrichment unjust” approach requires the claimant to identify at least one specific factor legally recognized as rendering the defendant’s enrichment unjust. On the contrary, the “absence of justification approach” identifies enrichments with no legitimate explanatory basis, without looking to black-letter legal factors.

Indeed, U.S. treatment of unjust enrichment mirrors France in all but one key area, disgorgement. Modern French textbooks generally agree that an unjust enrichment claim must satisfy five prerequisites:

¹³ Five stages of analysis guide most English lawmakers. (1) Was the defendant enriched? (2) Was the enrichment at the expense of the claimant? (3) Was the enrichment unjust? (4) Does the defendant have a defense? (5) What remedies are available to Claimant?¹³ Each of these stages presents complications domestically, not to mention internationally. Enrichment, for example, could be both tangible (monetary) and intangible (use of a nature reserve). And who determines when enrichment is “unjust”, particularly since it does not require a wrongdoing or illegality.”English law relies on the following factors to determine step 3 “unjust enrichment”: mistake of fact, mistake of law, duress, undue influence, total failure of consideration, and miscellaneous policy-based unjust factors such as ‘withdrawal within the *locus poenitentiae*’. English law also relies on: ignorance/powerlessness, unconscionability, partial failure of consideration, and absence of consideration. These last four, however, are more controversial [Burrows, *The Law of Restitution* at p. 7; Dickson at p.106; Birks, “The English Recognition of Unjust Enrichment” [1991] L.M.C.Q 473]

¹⁴ The United States bases its legal framework on the 3rd Restatement of Restitution. In practice courts look to satisfy five components: (1) an enrichment, (2) an impoverishment, (3) a connection between enrichment and the impoverishment, (4) absence of a justification for the enrichment and impoverishment (this has also been stated as “was the enrichment unjust”), (5) absence of a remedy provided by the law [Schroeder v. Buchhiltz, 2001 ND 36, 622 N.W.2d 202].

“(1) the plaintiff’s loss must be a direct or indirect consequence of the defendant’s enrichment, *though the defendant can be required to pay only the lesser of the plaintiff’s loss or the defendant’s own enrichment*; (2) the plaintiff must not have been at fault; (3) the plaintiff must not have acted in his or her own interest; (4) neither the enrichment nor the related impoverishment must be legally justifiable; (5) no other remedy than the *action de in rem verso* must be available in law for the kind of loss in question.¹⁵

French courts allow the plaintiff “only the lesser of the plaintiff’s loss or defendant’s own enrichment.” Hence, the award is capped at the amount of the plaintiff’s loss.

This means that French parameters do not allow for disgorgement of profits.¹⁶

Conversely, U.S. law, while requiring some loss, does not limit the quantum of the award to the plaintiff’s loss, but rather uses the defendant’s gain to set the quantum limit. This distinction has substantial practical implications, as the quantum under each approach may vary wildly. Thus, a choice must be made as to which country’s standard to follow, the more limited award or the more expansive.

Luckily, other European countries’ civil codes permit and inspire compromise. Italian unjust enrichment law, for example, resembles French law quantum limitations, but appears to create a carve out for bad faith, “the defendant must pay the lesser of the impoverishment suffered by the plaintiff or the enrichment enjoyed by the defendant: only if the defendant has acted in bad faith is the defendant fully

¹⁵ Dickson at 113.

¹⁶ In addition, the French preclude any cases wherein the plaintiff benefited or was at fault. This *prima facie* excludes any case involving illegal activity or gain by the plaintiff. Dickson explains that the French notion of *faute* (fault), “is wider than the notion of negligence in English law. It embraces intentional as well as merely careless conduct... A plaintiff who is in breach of contract cannot therefore claim restitution against the other contracting party and a plaintiff who compromises an honest claim cannot later try to get out of the arrangement by claiming restitution.¹⁶ Dickson continues exploring the wide notion of *faute* in the context of “the plaintiff must not have acted in his or her own interest”¹⁶. “A plaintiff who undertakes work for his or her own benefit cannot claim restitution from a defendant who also happens, whether accidentally or not, to benefit from the work.” [114]

liable.”¹⁷ And, the German code for unjust enrichment nearly parallels the Anglo-American code.

German scholars identify two types of unjust enrichment claims: *Eingriffskondiktionen* (unlawful interference) and *Leistungskondiktionen* (performance derived).¹⁸ Each type elicits different legal treatment. *Leistung* applies to frustrated/defective contracts. The law requires that restitution occur even when a “legal justification existed for the enrichment at the time of its occurrence but has later disappeared or when an anticipated purpose to be fulfilled but the performance does not materialize.”¹⁹ More importantly, *Eingriffskondiktionen* does not “presuppose that the plaintiff suffers a loss. A person who uses a machine which otherwise would have been lying idle, is therefore liable under this head.”²⁰ The German conception of unjust enrichment compensation must mirror the Anglo-American idea of disgorgement -- if no loss is required to find unjust enrichment, it follows that loss cannot limit the award.

2. International Unjust Enrichment: Creating Universal Parameters

Exploring national parameters leaves us at a stalemate, particularly regarding disgorgement. Because the amount awarded under disgorgement could be markedly greater than that reflected solely in the plaintiff’s loss, leaving the matter open would breed inconsistencies. As I will explore later, inconsistency undermines expectations,

¹⁷ Id at 119, see also Italian Civil Code of 1942 (arts 2041-2042). “there must be a causal nexus between the plaintiff’s impoverishment and the defendant’s enrichment, as well as absence of any good legal reason for either phenomenonThe defendant cannot claim an allowance for payments he or she has had to make by virtue of receiving the enrichment, nor can the defendant claim compensation for improvements. The defendant is liable even if he or she is an indirect beneficiary of enrichment and even if the plaintiff, in paying money that was not due the defendant, made no mistake.”

¹⁸ Ibid at 120

¹⁹ Ibid at 121

²⁰ Ibid at 121

and weakens the concept itself. As well, participants should know what the appropriate remedy is. As international law expands, precision in awards acquires utmost importance, and national conceptions of a concept should not impact quantum.

Thus, some determination must be made ex-anti. Past practice provides minimal guidance on the matter. The Iran-US Claims Tribunal employs U.S. parameters, lending some small support to the idea of disgorgement. All of the cases therein, however, could be considered to reflect the overlap between the plaintiff's loss and defendant's gain.

My instinct is to choose the common law and German option. First, the common law option includes the French conception. Conversely, selecting the French award method would preclude elements of the common law option (disgorgement). With a more expansive option, jurists can take into account contributing factors, and limit the award accordingly. Indeed, most common law scholars and courts factor in considerations such as bad faith and ignorance.²¹ Conversely, upfront limitations may handicap jurists. As well, some international cases seem to include the idea of disgorgement.²²

As I will explore below, the area in which unjust enrichment has real utility is in intellectual property dispute resolution. In intellectual property cases, the amount gained often far surpasses the amount lost. And disgorgement of profits is the reason that unjust enrichment is such an apt remedy. Know-how is very difficult to price, and an idea without action may be worthless. Thus, limiting the amount awarded to the plaintiff's loss would cripple the utility of unjust enrichment, and make determining the quantum extremely difficult. For intellectual property cases, then, there will be an efficiency loss, as plaintiffs must prove both the elusive quantum of

²¹ See the compensation section below.

²² Takings cases in the ICJ, like *Papamichlou*, are one example.

the loss and the gain. This is not to say that if there is a significant loss a tribunal could not use that as a cap for the award, just that the tribunal should not be limited to that.

Thus, for the sake of this paper, and perhaps inviting torrents of criticism, I assume that unjust enrichment includes the possibility of disgorgement of profits above and beyond the loss suffered. Although making an admittedly arbitrary decision invites discomfort, having a single, universally applied conception of unjust enrichment is critical. International investment disputes deal with enough confusion, and the tenets of legal concepts should not contribute. Having decided to include disgorgement, I continue exploring my proposed parameters for international unjust enrichment.

For clarity (and because I am exploring it in the context of ICSID), I will use the definition relied on by a few of the ICSID tribunals. These tribunals borrowed their definition from the Iran-U.S. Claims Tribunal cases, thus it reflects U.S. unjust enrichment tenets:

The concept of unjust enrichment is recognized as a general principle of international law. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification. As the Iran-U.S. Claims Tribunal has stated more specifically:

There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to

*the injured party whereby he might seek compensation from the party enriched.*²³

Thus there are five requirements in an unjust enrichment claim: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) absence of a justification for the enrichment and the impoverishment (this has also been stated as “was the enrichment unjust?”²⁴), and (5) absence of a remedy provided by the law.²⁵

Claims in unjust enrichment boast a number of defenses. Complete defenses defeat the whole claim. Partial defenses reduce the value of the claim. Defenses include: change of position, agency/ministerial receipt, bona fide purchase for value without notice (not available to defendants who were enriched directly from the claimant), counter-restitution, and illegality.²⁶ I will briefly define each of these defenses, in turn.

“Change of position” reduces the value of the claim against the defendant where the defendant shows he changed his position in good faith reliance on the enrichment.²⁷ “Agency/ministerial receipt” applies where the defendant received the enrichment as an agent and handed it over without notice of the plaintiff’s claim.²⁸ “Bona fide purchase for value without notice” may be raised through a third party by

²³ Saluka Investments BV v Czech Republic, Judgment of the Swiss Tribunal, Ad hoc—UNCITRAL Rules, IIC 211 (2006) at para. 449, citing *Benjamin Isaiah v. Bank Mellat, Iran –US Claims Tribunal*.

²⁴ US courts are increasingly using “absence of justification for enrichment”, England employs, “was the enrichment unjust.” US usage mimics the civil law approach. The “enrichment unjust” approach requires the claimant to identify at least one specific factor legally recognized as rendering the defendant’s enrichment unjust. On the contrary, the “absence of justification approach” identifies enrichments with no legitimate explanatory basis, without looking to black-letter legal factors.

²⁵ *Schroeder v. Buchhiltz*, 2001 ND 36, 622 N.W.2d 202; these tenets have been explored and upheld in other Iran-U.S. Claims Tribunal cases, such as *Future Trading Inc. Khuzestan Water and Power Authority*, 9 IRAN-U.S.C.T.R., 46 (1985), *Schlegel Corporation v National Iranian Copper Industries Company* 14 IRAN-U.S.C.T.R., 176 (1987).

²⁶ Dickson at 107.

²⁷ Peter Birks, “An Introduction to the Law of Restitution”, Oxford University Press, Oxford, UK (1985) at 410.

²⁸ *Id.* at 432

parties who received the claimant's property indirectly.²⁹ "Counter-restitution" applies if the claimant's claim would leave the claimant unjustly enriched at the expense of the defendant.³⁰ "Illegality" prevents the claimant from relying on evidence of his own illegal acts to show that he has a claim against the defendant. In such cases, the court may refuse to help him.³¹

If the five components are satisfied and no defense succeeds, then the claimant is entitled to a gains-based remedy, often equated with restitution. Restitution may require returning property or awarding equivalent compensation.³²

While many scholars separate unjust enrichment from restitution, some see the two as inseparable. For example Andrew Kull, the reporter for the New Restatement of Restitution (U.S.), states:

My proposition is that the law of restitution be defined exclusively in terms of its core idea, the law of unjust enrichment. By this definition it would be axiomatic that (i) no liability could be asserted in restitution other than one referable to the unjust enrichment of the defendant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant's

²⁹ *Id.* at 439

³⁰ *Id.* at 415

³¹ *Id.* at 424

³² *Id.* at 25. *See also* Dickson (This is a common law oriented exploration of unjust enrichment, in keeping with *Bank Isaiah*. Knowing the law of the Respondent country is key. Dickson explores German, French, Italian, Dutch, English, and US laws on unjust enrichment. French law introduces new limitations to unjust enrichment claims. Firstly, they are a last resort in that "no other remedy...must be available (113)." Unjust enrichment as a measure of damages is also a last resort if the rules are followed to their logical conclusion. Notice that French courts allow the plaintiff "only the lesser of the plaintiff's loss or defendant's own enrichment." This means that given the option, a plaintiff will never opt for unjust enrichment if another remedy is available. Again, like the United States, an unjust enrichment claim is an exclusive cause of action, useful where nothing else is available. In addition, the French preclude any cases wherein the plaintiff benefited or was at fault.

unjust enrichment.³³

Kull's argument is summed up well in the Restatement (Third) Restitution "a person who is unjustly enriched at the expense of another is liable in restitution to the other, and further noting that the law of restitution is the law of unjust enrichment."³⁴ Even if the claimant brought a case under a different cause of action, where a court awards restitution, there is an acknowledgement of and reliance upon unjust enrichment.³⁵

Prominent scholars like Peter Birks disagree, preferring to divide the two concepts.³⁶ Birks distinguishes unjust enrichment from wrongful enrichment, and claims that restitution can follow either; therefore restitution and unjust enrichment can be unrelated. In wrongful enrichment, according to Birks, there is already a breach or wrong of some kind, and thus the remedy (restitution) is not founded on unjust enrichment. Only where there is no "wrong" can one find unjust enrichment.³⁷ I agree with Birks on a practical level, as demonstrated in instances like the Iran-U.S. Claims Tribunal, where they required that there be no other available cause of action before allowing an unjust enrichment claim. Hence unjust enrichment only applied where no legal wrong could be found. This threshold requirement recognizes Birks' distinction as a functional limitation on unjust enrichment claims.

Theoretically, however, restitution is a gains-based remedy, and to provide a gains-based remedy the court must intuitively justify it on grounds that the gain was inappropriate. I would adopt Kull and Smith's view, while recognizing that courts

³³ Andrew Kull, 'Rationalizing Restitution' 83 Calif. L. Rev. 1191 (1995) at 1196.

³⁴ American Jurisprudence 2d, Restitution Generally on Westlaw.

³⁵ Stephen A. Smith, *The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?*, 36 Loyola. L. REV. 1037, 1043 (2003) at 1061 (although, he uses the terms "direct" and "remedial" to describe "cause of action" and unjust enrichment as a "remedy").

³⁶ Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, Texas Law Symposium: Restitution and Unjust Enrichment, (Jan 12-13, 2001) available at <http://www.utexas.edu/law/conferences/restitution/birks.doc>.
29 *Id.* at 27

may apply practical limitations to protect the integrity of contract and other policy interests. Thus, while for clarity of thought and in keeping with divisions created by courts, I explore the two separately, it is important to note that I consider the two indivisible. This non-distinction is particularly salient later in the Article, as assuming interchangeability allows me to leapfrog from remedial unjust enrichment within *Chorzów* to using unjust enrichment as a cause of action in an intellectual property case. Having sketched unjust enrichment, I now explore its role in international law, moving from early cases to the Iran-U.S. Claims Tribunal.

B. UNJUST ENRICHMENT IN INTERNATIONAL LAW

Many consider unjust enrichment a general principle of law. Some, like the *Saluka* Tribunal, see it as a general principle of international law.³⁸ Others, like Georg Schwarzenberger, fall somewhere in between. “On the fringes of international law, the principle [of unjust enrichment] tends to already be accepted as a general principle of law, recognized by civilized nations.”³⁹

Most legal systems recognize unjust enrichment.⁴⁰ The Statute of the International Court of Justice Article 38(I)(c) states that “[th]e Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... the general principles of law recognized by civilized nations.”⁴¹

According to Moore and echoed by Whiteman:

"Article 38 of the Statute also directs to Court to apply 'the general principles of law recognized by civilized nations.' As all nations are civilized, as 'law implies civilization,' the reference to 'civilized nations' can serve only to

³⁸Saluka at 449.

³⁹ Georg Schwarzenberger, *International Law* vol. 1, p.580, 655 (1957).

⁴⁰ This is supported in part by my exploration above. Also note that Latin American countries, and Shar'ia law countries recognize unjust enrichment.

⁴¹ Statute of the International Court of Justice, Article 38.1(c) (1945).

exclude from consideration primitive systems of law.” It empowers the Court to go outside the field in which States have expressed their will to accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems of municipal law or generally agreed upon among interpreters of municipal law. It authorizes use to be made of analogies found in the national law of the various States.”⁴²

Under Moore’s analysis, Article 38(I)(c) permits international courts to use unjust enrichment because it is one of the “general principles of law recognized in civilized nations.”⁴³ This statement is not merely my derivative logic. In Whiteman’s Treatise on International Law, she quotes Lord McNair:

"It may be asked: What are these 'general principles of law recognized by civilized nations'? Where are they to be found? It is not possible to point to any code or book containing them. Much of the content of public international law proper has been developed by tribunals and by writers out of these general principles, and my view is that same source will prove equally fruitful in the application and interpretation of those contracts which, though not interstate contracts and therefore not governed by public international law *stricto sensu*, can more effectively be regulated by general principles of law than by special rules of any single territorial system. They will be developed both by contracting parties who realize the suitability of general principles of law and by tribunals which are called upon to adjudicate upon contracts of this type. I do not propose to prepare a list of the rules of law likely to be recognized as 'general principles.' 'Unjust enrichment' has been referred to

⁴² Whiteman, Treatise on International Law, page 90, volume 1, quoting Moore.

⁴³ See also Oppenheim, Vol 1, "The meaning of that phrase (Art. 38) has been the subject of much discussion. The intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular private law, in so far as they are applicable to relations of States. (p.29) According to Oppenheim, "Paragraph 3 of Art. 38 nevertheless constitutes an important landmark in the history of international law inasmuch as the States parties to the Statute did expressly recognize the existence of a 3rd source of international law, independent of, although merely supplementary to, custom or treaty. This was in fact the practice of international arbitration before the establishment of the Court, in its establishment a number of international tribunals, although not bound by the Statute, have treated x as declaratory of existing law. (Cites Lena and others). And Bin Cheng at page. 173, "It would seem therefore that an act is internationally unlawful whether it violates a treaty, a rule of customary international law, or a general principle of law recognized by civilized nations."

above in the Lena Goldfields Award, and I shall mention only one other likely candidate, among many, for recognition [Respect for Acquired Rights]."⁴⁴

The above quote supports the idea that a concept becomes part of international law through multinational recognition coupled with use by subsequent tribunals. And Lord McNair and Whiteman use unjust enrichment as *the* example of this phenomenon. In support of Lord McNair, I demonstrated widespread recognition above in my domestic exploration; and in the next few sentences I will demonstrate international tribunals' use. In International Damages Volume 3, Whiteman explores quasi-contractual damages.⁴⁵ In case after case, she finds that:

International law includes within its compass a large body of equity. Accordingly the extent to which claimants have been allowed to recover damages in international cases on grounds of equity apart from legal rights under existing contracts constitutes an important phase of the subject under discussion [damages]. There are numerous cases where damages have been allowed in situations resembling, more or less closely, an implied or quasi-contractual relation. Various reasons are given for the allowance of damages on such cases. At other times the reason is stated in the familiar terms of "equity" and, at other times, merely on the ground that international law allows recovery in such a situation. Whatever the reason given in the decision, the important point is that damages are allowed in situations where it might be difficult to explain the decision on grounds of either the wrongful breach of or interference with an express contract."

Whiteman goes on to list dozens of international arbitrations employing some type of

⁴⁴ Whiteman at 93, quoting Lord McNair, "The General Principles of Law Recognized by Civilized Nations", XXXIII Brit. Yb. Int'l L. (1957) 1,15-16. Also refers to Lauterpacht, 67-71, and Cheng.

⁴⁵ International Damages Volume 3, Whiteman, from pages 1732 to 1760,

unjust enrichment.⁴⁶ She closes with two cases, both of which use language supporting the idea that unjust enrichment is a general principle of international law.⁴⁷

Even given this wealth of evidence, unjust enrichment's current status remains unclear. This may be due to Christoph Schreuer's 1974 work cautioning against using unjust enrichment liberally, and subsequent (resulting?) sloppiness and embarrassment surrounding its application. As well, while most countries accept unjust enrichment claims, their prerequisites vary, and since unjust enrichment lacks a universal conception, it remains an amorphous and open-ended legal area.

Unjust enrichment's tentative standing and open-ended parameters are further complicated by its inherently moral nature.⁴⁸ Determining who deserves to be enriched is a loaded policy decision. Judges dealing with countries and investors are balancing very complicated economic interests, and thus prefer to circumvent any accusations of bias. Some might argue that only in cases where the morality is clearer than the panel's legal legitimacy, as in *Lena Goldfields*, would employing unjust

⁴⁶ Whiteman at 1734. Referring to payment of excessive taxes, use or benefit enjoyed "there have been a large number of cases where damages have been allowed for the seizure of private property for public use or benefit. While the decisions were not necessarily couched in terms of implied contract or unjust enrichment, they distinctly hold that where property is taken for the public use or benefit there is a duty under international law to make compensation thereof." She provides also examples of cases from Also discusses quantum meruit (1741); supplies furnished (1746) "services performed" (1748), work and labor done (1753), "expenses incurred" "in good faith reliance upon acts of the respondent government", and "advances made."

⁴⁷ Id. at 1760, citing *Government of Turkey v. Sir W. J. Armstrong Whitworth and Co. and Vickers Ltd.*, VIII Recueil des decisions des tribunaux arbitraux mixtes (1928) 996, 1001, translation. "[T]he extinction of the contractual obligation leaves in existence, however, the pecuniary obligations resulting from the acts performed before the extinction, as this latter should not result in the illegal enrichment of one of the parties to the detriment of the other; as there is no reason to presume that the Treaty intended to set aside this fundamental principle, so much in conformity with the rules of equity, but just the opposite, since the Treaty orders the Mixed Arbitral Tribunal to be guided by justice, equity, and good faith, and as to the application of the rules of equity is required in particular when it comes to disputes arising from the interpretation of contracts, we should therefore assume that it is the duty of the Tribunal to decide whether and to what degree the defendants have benefited by an ungrounded enrichment at the expense of the claimants.

⁴⁸ American Jurisprudence 2d, Restitution Generally ("Restitution is based not upon contract or statute, but upon justice, morals, equity, and good conscience").

enrichment behoove the tribunal.⁴⁹ If the act is not *per se* illegal, adjudging the enrichment unjust to one party requires selecting a deserving party. Indeed, according to Andrew Burrows, “in some areas the law is best explained as responding to policy constraints on the pure principle of unjust enrichment.”⁵⁰

These caveats, however, should not and have not deterred courts from relying on unjust enrichment. If anything, they explain why courts are not always explicit about their reliance thereupon. Often, if another legal remedy or cause of action is available, arbitral panels choose the more established remedy or cause of action. And, more importantly, claimants only raise unjust enrichment as a subsidiary cause of action or where it offers greater benefits as a remedy. Neither motive likely elicits favorable treatment from tribunals. These complications may explain why ICSID tribunals have not yet explicitly relied on unjust enrichment, but are not enough to keep international tribunals from using it.

Unjust enrichment is a useful cause of action and remedy, and a general principle of law at the very least. The Iran-U.S. Claims Tribunal definition, with disgorgement potential, creates a standard that can be applied universally. A universal standard does two things. First, it will limit abuses of unjust enrichment, both implicit (where it is silently imported into unrelated damage calculations and distorts the resulting quantum) and explicit (cheap shots and unsubstantiated uses). Second, a universal standard will create a well-defined and welcome space for unjust enrichment in international investment dispute resolution.

1. Early Tribunals

⁴⁹ This case was one of the first international arbitrations, and the legal legitimacy of the tribunal was unclear. The tribunal was a rushed and ad hoc affair.

⁵⁰ Burrows, *The Law of Restitution* at p. 7

From the 1890's onward tribunals relied on unjust enrichment. *Lena Goldfields* is perhaps the mother of all unjust enrichment claims in investment disputes.⁵¹ The USSR breached a concession contract with the Lena Goldfields mining company by creating circumstances fatal to Lena's business. The Company claimed damages for contract breach or "alternatively, restitution of the full present value of the Company's property by which the government had been unjustly enriched."⁵² The ad hoc arbitral panel, having only a day to debate and faced with the novel and politically charged task of ruling against a country, awarded damages for unjust enrichment.⁵³ Relying on Soviet and Continental European law, the court determined:

The conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations there under and to be compensated in money for the value of the benefits of which it has been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the Court prefers to base its award on the principle of "unjust enrichment", although in its opinion the money result is the same.⁵⁴

Other cases also relied on remedial unjust enrichment, including *Thomas C Baker's Case*,⁵⁵ *Sucrerie de Roustchouk v. Etat hongrais*,⁵⁶ *The Edna*,⁵⁷ *Spanish Zone*

⁵¹ *Lena Goldfields*, *supra* note X (PLEASE NOTE, I've left *supra*'s unfinished, as I assume edits will rearrange footnotes); See also V.V. Veeder, "Lena Goldfields Arbitration: The Historical Roots of Three Ideas" (1998) 47 Int'l & Comp. Law. Quarterly 747.

⁵² *Id.* at paras.23–24

⁵³ See Veeder.

⁵⁴ See *Lena Goldfields*.

⁵⁵ *Thomas C. Baker Case*, Moore, *International Arbitration* vol. 4, p.3668 (1898).

⁵⁶ *Sucrerie de Roustchouk v. Etat hongrais*, *Recueil des decisions des Tribunaux Arbitraux Mixtes* 772 (1926)

Morocco Case,⁵⁸ *General Finance Corporation v United Mexican States*,⁵⁹ *William A Parker v United Mexican States*,⁶⁰ and the *Landreau Arbitration*.⁶¹ The *Landreau Arbitration*,⁶² for example, involved two brothers (French and American) with a concession to find guano in Peru. In keeping with the contract's terms, they provided the Peruvian government with information identifying guano deposits. The United States sued on the American brother's behalf after Peru refused to make the stipulated payments and repudiated the contract. After finding Peru's rescission legal, the Tribunal held that "[Peru] was bound to pay on a *quantum meruit* for the discoveries which they appropriated for their own benefit."⁶³

As well, in both *William A. Parker v. United Mexican States*⁶⁴ and *General Finance Corporation v. United Mexican States* the tribunals awarded restitution where contracts were considered void. In *General Finance*, the tribunal required Mexico to "reimburse claimant to the extent it has been unjustly enriched" for water concession contracts considered void for delegating sovereign authority.⁶⁵

Additionally, the Peace Treaties following World War I employed unjust enrichment to compensate companies whose business contracts had been dissolved

⁵⁷ The Edna, 34 Am. J. Int'l L. 737 (1940)

⁵⁸ Spanish Zone Morocco Case, 2 R.I.A.A. 616

⁵⁹ General Finance Corporation, US Dept of State, Publication 2859, Arbitration Series 9,546.

⁶⁰ William A Parker v. United Mexican States, 4 R.I.A.A. 35.

⁶¹ Landreau Arbitration, 1 R.I.A.A 352.

⁶² *Id.* at 294.

⁶³ *Id.* at 294. Interestingly, Schreuer used this case and others to argue that unjust enrichment was primarily a remedy, and should remain thus until a more uniform standard for unjust enrichment is set. There are two possible responses to Schreuer. First, examining the *Landreau Arbitration* makes clear that the Tribunal allowed a *claim* for unjust enrichment. The Tribunal's statement that the rescission was legal means there was *no illegal wrong* to be remedied. Thus, in awarding a remedy, they must have admitted a claim of unjust enrichment to justify any award whatsoever. That is, perhaps, an inconsequential argument. More importantly, and addressing Schreuer's valid concern about lacking "a precise range of application,"⁶³ Schreuer's argument should no longer prevent tribunals from using unjust enrichment, as the Iran-U.S. Claims Tribunal has laid the groundwork for this "precise range." Indeed, the inconsistency ICSID cases show is unjustified given the precedent set by the Iran-U.S. Claims Tribunal, and the relative ease that tribunal experienced in applying them.

⁶⁴ *Id.* at 296.

⁶⁵ *Id.* at 296.

during the war. According to Christoph Schreurer, these Mixed Arbitral Tribunals frequently applied “restitutionary techniques based on considerations of unjust enrichment,”⁶⁶ where uncompleted business dealings had lost their contractual basis.

The Chorzów Factory Case may be both the most famous and most unrecognized example of this. ICSID tribunals rely heavily on *Chorzów* as precedent for remedies. Thus, showing that experts in *Chorzów* would have explored unjust enrichment if Poland and Germany had not settled, would contribute significantly to establishing unjust enrichment as a general principle of international law. Below, I attempt to do exactly that, arguing that *Chorzów* endorses unjust enrichment. This reading challenges conventional interpretations of *Chorzów* as solely endorsing expectation damages.

2. *The Chorzów Factory case*

The German government sued Poland for expropriating a private German investor’s factory after World War I. Poland was allowed to seize German state companies in its territory, but was not permitted to occupy private interests. The German government had sold the Chorzów factory to a private company at a deep discount before its seizure in 1922. Poland operated and developed the Chorzów factory from the time of seizure until 1928, the date of the award.⁶⁷

Germany won the case. The Permanent Court of International Justice (“PCIJ”) found that since the seizure didn’t comply with treaty regulations, it was not merely an expropriation, but rather an *illegal* seizure meriting damages above and beyond restitution.⁶⁸ Restitution was the Geneva Convention’s prescribed remedy for

⁶⁶ Christoph Schreurer, “Unjustified Enrichment in International Law”, *The American Journal of Comparative Law*, vol. XXII, No. 2, p. 281, 289 (1974). See also Whiteman, Damages.

⁶⁷ See *The Factory at Chorzów (Germ. v. Pol.)*, 1928 P.C.I.J. (ser A) No.17 (September 13).

⁶⁸ *Id* at 39-40.

expropriation.⁶⁹ Using restitution as its baseline, the *Chorzów* Tribunal laid out a menu of award calculations. The case settled, so the expert never chose the best calculation method. Before settlement, however, the Tribunal presented the following questions to the expert:

I. A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

I. B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922., to the date of the present judgment, if it had been in the hands of the said Companies?

II. What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (Including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, 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, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?⁷⁰

Question I invites one key inquiry. While the Tribunal clearly awards

⁶⁹ *Id.*

⁷⁰ *Id.* at 43-44.

restitution for the value of the company at the time of taking, what exactly are they offering post-1922? The question, “[w]hat would [have been] the financial results....which would probably have been given by the undertaking thus constituted from ...1922 to...the present judgment, if it [the factory] had been in the hands of the said Companies?” welcomes two interpretations.

Under the first interpretation, Part B of the award is based on hypothetical profits/losses. If so, what constitutes the basis for these losses/profits? In Question II the Tribunal mentioned using data from a similar company to approximate Chorzów’s gains/losses. But analogous company data is mentioned explicitly in reference to calculating damages for Question II, current fair market value.

The second way to read the question is to assume that the Tribunal, when referring to “in the hands of the said Companies,” was speaking about “the Companies” [Chorzów] as *beneficiaries of the profits/losses*. The Tribunal then was asking that the expert examine the books from Chorzów during the years Poland ran it, and use those real profits and losses to determine what should be awarded the deprived Companies.

The Tribunal further muddled this point by subsequently supporting both hypotheses.

The purpose of question I is to determine the monetary value, both of the object[s] which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stocks at the moment of taking possession by the Polish Government, together with any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert opinion.⁷¹

The above statement, with its use of “probable profit” supports the first interpretation.

⁷¹ *Id.* at 44.

And yet, a later statement seems to support the second interpretation.

As regards the *lucrum cessans*, in relation to question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, *real or supposed*, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be *included in the real or supposed value of the undertaking at the present moment*. If, however, *the reply* given by the experts to *question I B* should show that *after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years*, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.⁷²

Only the actual Chorzów factory operations could yield “real” profits. And recall that Question IB addresses profits between 1922 and the present. So if the Tribunal was asking the expert to calculate profits and losses based on the “years during which the factory was working at loss” and “real” profits are to be taken into account, then Question I must be relying on Chorzów’s financial information while under the Polish government.

If the Tribunal was awarding the value of the property at taking plus any real profits the Polish government made from the factory during the years it controlled the factory, then the Tribunal was effectively awarding the amount by which Poland was enriched, or in other words, unjust enrichment. Whereas hypothetical lost profits are damages based on what the Claimant could have earned; relying on the current value of the factory or awarding the amount that the Polish government was actually enriched was a gains-based calculation.

⁷² *Id.* at 45 (italics added for emphasis).

Interestingly, the mention of using “real” profits to calculate “*lucrum cessans*” in Question II also introduces a gains-based remedy to Question II. Just calculating the FMV including the future flow of profits, involves evaluating the value at taking and then projecting a growth rate comparable to that of a like company and estimating the resulting potential profits. This calculation leaves no space for real profits. Hence, repeated referrals to real profits when presenting Question II mean that the Tribunal also wanted to assess the current value of the factory in determining the remedy. Having both the hypothetical future value and the current value of Chorzów allowed the Tribunal additional remedy options. As awarding the Claimant the current value of the factory is a gains-based recovery (the Claimant walks away with the value-added by the Respondent), the Tribunal clearly intended to include the unjust enrichment award option.

Other language in the *Chorzów* opinion suggests that the Tribunal requested an unjust enrichment calculation. The Tribunal’s decision to include the value of the chemical factory in the value of *Chorzów*, even though the factory was not built and unapproved at the time of the seizure, is one such example:

It must be stated that the Chorzów factory to be valued by the experts includes also the chemical factory. Besides the arguments which, in the Polish Government's opinion, tend to show that the working of the said factory was not established on a profitable basis-arguments which it will be for the experts to consider-that Government has claimed that the working depended on a special authorization, which the Polish authorities were entitled to refuse. But the Court is of opinion that this argument is not well-founded.⁷³

The Tribunal based its opinion that the argument was “not well-founded” on the German company’s plans and on the fact that chemical factories are normal in that

⁷³ *Id.* at 46.

type of business.⁷⁴ It is worth noting, however, that the German companies are getting the benefit of the Polish government's work and expansion.

In addition, the *Chorzów* Tribunal, perhaps from necessity, used restitution as a starting point, both morally and substantively:

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, as far as possible, wipe-out all the consequences of the illegal act and re-establish 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.⁷⁵

In short, restitution grounds *Chorzów*. The Tribunal introduced damages to augment restitution, and gave the expert a range of options for calculating the additional damages. "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."⁷⁶ One method the Tribunal proposed is what we today would deem expectation damage calculations [calculating FMV with future flow of profits by finding the value at taking and then projecting a rate comparable to that of a like company]. Another method was restitution plus hypothetical lost profits up until the award. In yet another alternative, the expert could have based the award on the disgorgement of the current real value of the factory, which would be unjust enrichment, as it would be based on what the Polish

⁷⁴ *Id.* at 46.

⁷⁵ *Id.* at 41.

⁷⁶ *Chorzów* at 45.

state owned at the time [including future value]. Lastly, the award might be based on another unjust enrichment calculation, restoring the value of the factory upon seizure plus disgorgement of any real profits the Polish state accrued while it possessed the factory.

ICSID tribunals, citing *Chorzów*, overwhelmingly focus on the fair market value (FMV) option, using the phrase “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed” to justify their damage award. The International Law Commission (“ILC”) Articles now codify this standard.⁷⁷

Some tribunals, however, have combined the *Chorzów* award possibilities. The general trend of giving judicial leeway on award calculations may support these creative combinations. These cases, including *Azurix* and *LG&E* cite *SD Myers*. According to *Azurix*, “the lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to the tribunals to determine it in light of the circumstances of the case taking into account the principles of international law and the provisions of NAFTA.”⁷⁸ Older cases, while more restrained, did blend *Chorzów* remedy options, at least in dicta. For example, the resubmitted *Amco* Tribunal invokes *Chorzów* and then, in dicta, blends unjust enrichment and damages—using one party’s enrichment to approximate the other’s sustained damage.⁷⁹

⁷⁷ Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (the *Draft Articles* or *DARS*).⁴ In accordance with the PCIJ, reparation: “[...] must, so far as possible wipe out all the consequences of the illegal act and re-establish 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 [...]”

⁷⁸ *Azurix* at para. 422,

⁷⁹ *Amco* at para.184.

If the purpose of compensation is to put *Amco* in the position it would have been in had it received the benefits of the Profit-Sharing Agreement [citing *Chorzów*], then there is no reason of logic that requires that to be done by reference only to data that would have been known to a prudent businessman in 1980. It may, on one view, be the case that in a lawful taking, *Amco* would have been entitled to the fair market value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if *Amco* is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique.⁸⁰

The above blending, read in conjunction with the following statement, creates a situation wherein the Respondent is responsible for the downside risk of lost value due to expropriation and for the upside possibility of increasing the value of the investment. “The only subsequent known factors relevant to value which are not to be relied on are those attributable to the illegality itself.”⁸¹ Read closely, if the value of the taking drops because of Respondent, the drop will be excluded. If, however, the Respondent increased the property value, this can be included since it is known data. The successful Claimant would get the greater of the actual value (through restitution approximation) or the hypothetical value if the actual investment underperformed.

Then, in *ADC v. Hungary*,⁸² the Tribunal used *Chorzów* to justify an award that is clearly remedial unjust enrichment. *ADC v. Hungary* is the case that truly opens the door for unjust enrichment claims in ICSID.

⁸⁰ *Id.* at para.186. The award which Amco receives, however, is consistent only with a damages remedy. So, this is not a condemnation of the award itself, but, rather, to highlight to ambiguity introduced through the exploration.

⁸¹ *Id.*

⁸² *Id.*

3. *ADC v. Hungary*

ADC had a concession to build a new terminal in the Budapest airport. Their contract included the right to operate the entrepreneurial shops at the terminal, handle the baggage, and a separate component for managing and training employees. The management-training agreement provided that the Hungarian government would pay ADC a fixed fee each year for training airport personnel and management. After ADC completed the new terminal, the Hungarian government passed a law preventing ADC from operating the terminal—effectively edging them out. A few years later, after the airport became a major international hub, the Hungarian government sold the airport to a British company (BAA) for \$1.2 billion dollars. ADC sued for expropriation in ICSID.

The Tribunal found for ADC. Finding an “illegal expropriation” since the BIT requirements for a “legal” expropriation weren’t met, the Tribunal decided that the BIT-prescribed expropriation remedy, restitution of the value of the property at taking, did not apply.⁸³ Instead, the Tribunal decided to use the *Chorzów* customary international law standard for “illegal” expropriation. Relying on *Chorzów*, the ADC Tribunal awarded restitution of the value of the property at the time of the award, rather than at the time of expropriation.⁸⁴ This reflects one of the options granted in

⁸³ *Id.* at p. 36 and 52, BIT Article 4 (1. *Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by provision for the payment of just compensation.* [emphasis added] 2. *The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation.* [emphasis added] 3. *The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.* 4. *The compensation must be paid without undue delay upon completion of the legal expropriation procedure [emphasis added], but not later than three months upon completion of this procedure and shall be transferred in the currency in which the investment is made. In the event of delays beyond the three-months' period, the Contracting Party concerned shall be liable to the payment of interest based on prevailing rates. [Query whether the standard doesn't imply that all expropriations that come to court are inherently illegal, as, if the criteria were met, the claimant would already have received the fair market value of their expropriation.]*

⁸⁴ See exploration below.

Chorzów Question II, explored above. Thus, the Tribunal awarded the Claimant’s portion of the increased value of the terminal after Hungary had developed, operated, and increased its air traffic. This is not the hypothetical value of what Claimant would have earned, nor in any way approximates Claimant’s loss. Rather, the award was based on disgorgement of what Hungary gained unjustly from Claimant’s investment.

In dicta, the Tribunal focused on Hungary’s gain from ADC’s know-how (i.e. management contract).⁸⁵ And on the management contract’s compensation for services “[t]he management fee of 3% payable in each calendar year commencing on and after the Operations Commencement Date ... was designed in large part to compensate the Claimants for the services that had been rendered by the Terminal Manager ... before the Operations Commencement Date,”⁸⁶ consisting largely of “on-going supervision and knowledge transfer [ADC management] provided.”⁸⁷ The management contract paid a fixed annual rate; so higher passenger volume would not have increased the amount Claimant received. Indeed, the management contract was the piece that least supports an award of the Respondent’s disgorgement of profits, unless the award is intended to reflect the benefit Hungary received from “know-how.” These fees, however, are awarded independently of (and on top of) the restitution award. Other elements, operational ones, were given a fixed percentage—so here again, the Tribunal may have awarded a remedy exceeding the value of Claimant’s possible loss.⁸⁸ This is not to say the Tribunal was wrong. Just that as a

⁸⁵ See para.149.

⁸⁶ *Id.* at para. 148.

⁸⁷ *Id.* at para. 149.

⁸⁸ See *Id.* at para. 509 (“The Respondent further criticises the IRR used by LECG. Schedule C to the Agreement establishes a target IRR of 15.4% with an upper limit of 17.5%. In the Tribunal’s view, LECG was justified in using the upper limit. As it is shown by the Claimants and it is borne out by the events subsequent to the expropriation, the Budapest Airport is indeed one of the fastest growing airports in the world. That increase in traffic would certainly have caused an IRR superior to the

damages remedy the result is untenable.

The Tribunal discussed *Chorzów* and its applications at length. First, the Tribunal recognized *Chorzów*'s primacy, "The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory*."⁸⁹ The Tribunal continued, quoting *Chorzów*, "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."⁹⁰ After using *Chorzów* to justify awarding a remedy other than the BIT mandated one, the Tribunal stated:

The PCIJ considered that the principles to determine the amount of compensation for an act contrary to international law are: "*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.*"

The Tribunal continued with an exploration of the current role of *Chorzów* in international investment disputes.⁹¹ In its discussion it listed a wide range of ICSID cases, Oppenheim's *International Law*, the ILC draft articles, and recent ICJ cases, all of which cite *Chorzów* as accepted customary international law.⁹² After its arsenal of

contractual cap of 17.5%. Furthermore, the fact that the 2002 Business Plan forecast substantially increased projected dividends in 2010 and 2011 is due to the fact that the Project Loan was scheduled to be repaid by the beginning of 2009, thereby decreasing the costs of the Project Company and increasing the revenues that were available for distribution as dividend in 2010 and 2011"); See also *Id.* at para. 508 (where one should note that the contract may have included a clause with "two alternative responses to better-than-expected Project Company performance (i.e., tariff adjustment and dividend waiver), which would refute my statement, but not challenge the idea that unjust enrichment is the underlying justification for the Tribunal's award").

⁸⁹ *Id.* at para. 484.

⁹⁰ *Id.*

⁹¹ *Id.* at Paragraphs 487-493

⁹² *Id.* (citing *S.D. Myers, Inc. v. Canada*, UNICTRAL (NAFTA) Award (Merits), 13 November 2000, para.311; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, held at paragraph 122; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Award, Case No. ARB/01/8, 12 May 2005, the ICSID Tribunal stated in para.400; *Petrobart Limited v. The Kyrgyz Republic*, Arbitration No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty), 29 March 2005, the Tribunal held at pages 77 and 78; R. Jennings

evidence, the Tribunal went on to decide that “[t]he remaining issue....What consequence does application of this customary international law standard have for the present case....[I]t is clear that actual restitution cannot take place.”⁹³ Thus, “[i]t is, in the words of the *Chorzów Factory* decision, ‘payment of a sum corresponding to the value which a restitution in kind would bear’, [on] which is the matter to be decided.”⁹⁴ The Tribunal explained:

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.⁹⁵

Here, in response to an *actual* increase in value under Hungary, the Tribunal did not award restitution of the value of the property at the time of expropriation.

and A. Watts, *Oppenheim’s International Law* (9th ed., 1996), pages 528-529.); *Amoco International Finance Corporation v. Iran*, 15 IRAN–U.S. C.T.R. p.189 at p.246 (paras.191-194); and *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, 25 May 2004, para.238.; Case Concerning the Gabčíkovo-Nagymaros Project, (Hung. v. Slovakia), 1997 I.C.J. 7 (Sept. 25) para.152; the LaGrand Case, (Ger. v. U.S.), 2001 I.C.J. 466 (June 27), relied (at para.125); Case Concerning the Arrest Warrant of 11 April 2000, (Democratic Rep. Of Congo v. Belg.), 2002 I.C.J. 3 (February 14), the Court again invoked (at para.76); Case Concerning Avena and other Mexican Nationals, (Mexico v. U.S.), 2004 I.C.J. 12 (March 31) at paras.119-121, relied on the same principle quoted from *Chorzów* in the Gabčíkovo-Nagymaros, LaGrand and Arrest Warrant Judgments (and set forth in paragraph 484 above); Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9)

⁹³ *Id.* at para. 485.

⁹⁴ *Id.* at para. 495.

⁹⁵ *Id.* at para.496.

Rather, the Tribunal awarded the Claimant the current value of the property—reflecting developments within Hungary and by the Hungarian government—by awarding restitution at the date of the award.⁹⁶ The amount awarded then is the amount that Hungary gained through possession—or disgorgement of Respondent’s unjust enrichment. The unspoken theoretical basis of the Tribunal’s award became more apparent with the example it chooses to support its remedy:

This kind of approach is not without support. The PCIJ in the *Chorzów Factory* case stated that damages are “*not necessarily limited to the value of the undertaking at the moment of dispossession*” **It is noteworthy that the European Court of Human Rights has applied *Chorzów Factory* in circumstances comparable to the instant case to compensate the expropriated party the higher value the property enjoyed at the moment of the Court's judgment rather than the considerably lesser value it had had at the earlier date of dispossession.**⁹⁷

The statement I bolded is both the crux of the *ADC* award and definitively an unjust enrichment award. Indeed, invoking enjoyment by the Respondent signals a *gains-based evaluation and justification*.

Also interesting is the case that the *ADC* Tribunal relied on to support their interpretation of *Chorzów*, as *Papamichalopoulos* clearly employs unjust enrichment.⁹⁸ This case, however, is an ICJ takings decision, and therefore might not be considered persuasive for ICSID cases.

⁹⁶ *Id.* at para. 497.

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Papamichalopoulos and Others v. Greece* ((1966) E.H.R.R. 439) (available also on Westlaw at 1995 WL 1082483 (ECHR)) at para. 36-45, “The Court ordered restitution of the land, including all of the buildings and other improvements made over the intervening years by the Greek Navy, and further (para. 39) if restitution would not be made: “[T]he Court holds that [Greece] is to pay the applicants, for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence of the buildings and the construction costs of the latter.” Restitution would be the value of the land at the time of expropriation. Restitution of the current value is no longer restitution based on a claim of damages, but is now a gains-based award restoring Respondent’s ill-gotten gains.

The ADC Tribunal also noted the *Papamichalopoulos* Tribunal's reliance on Chorzów's standard for illegality. Finding that, as a consequence of illegality, "international case law, of courts or arbitration tribunals, affords the Court a precious source of inspiration.... In particular, the Permanent Court of International Justice held as follows in its judgment of 13 September 1928 in the case concerning the factory at Chorzów."⁹⁹

The above train of thought leads one to believe that *Chorzów* has created a standard for awarding unjust enrichment for illegal takings, if the value of the property at issue increased significantly. The language of damages here is attached to a remedy that in no way approximates the loss to the Claimant, but rather assumes that the Respondent's gain suffices as a proxy. While the monetary result is merited in situations where the Tribunal cannot assess actual loss, the language justifying the result should be that of unjust enrichment rather than damages, to avoid conflating ideas.

The ADC Tribunal found additional support for awarding the appreciated value of the Terminal in *Texaco Overseas Petroleum Company*.¹⁰⁰ Concluding, the Tribunal held:

[I]t must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award, which the Tribunal takes as of September 30, 2006.¹⁰¹

The Tribunal's rather novel interpretation of the *Chorzów Factory* standard is not incorrect. It simply relies on a relatively unexploited option in the *Chorzów* remedy menu. What is novel is the introduction of the *Chorzów* unjust enrichment option into

⁹⁹ *Id.* at para. 36.

¹⁰⁰ ADC at para. 498.

¹⁰¹ *Id.* at 499.

the ICSID toolkit.

ADC's silence regarding its reliance on unjust enrichment remains problematic. Its remedy was clearly unjust enrichment, and motivating the remedy was some belief that Hungary did not deserve to be enriched at *ADC*'s expense. The Tribunal, however, outright rejected unjust enrichment. "Consequently, the Tribunal rejects the Claimants' claim for damages under the unjust enrichment approach, which, in the Tribunal's opinion, has not been substantiated by the Claimants with either sufficient facts or law."¹⁰² An exploration of the DCF calculation method and other related calculation details directly preceded the Tribunal's rejection of unjust enrichment. There was no segue. In fact, one wonders how the Tribunal happened upon this statement. Awarding restitution of the value of the property, including Hungary's added value would seem to discourage casually discarding unjust enrichment. As well, when relying on restitution, a remedy based on unjust enrichment, the Tribunal might spend some time differentiating the two. They are not the same, but are similar enough that casual disregard is problematic, especially when reading between the lines of the decision demonstrates the Tribunal's reliance on unjust enrichment.

In the Tribunal's defense, the Claimant's LECG calculations inexplicably resulted in markedly different amounts under the unjust enrichment approach and restitution approach.¹⁰³ Restitution is the remedy for an unjust enrichment claim, so the \$23 million difference was mysterious. But it would explain the Tribunal rejecting the unjust enrichment calculation method. Rejecting the elevated calculation measure, however, only served to further complicate the issue by creating a false dichotomy between restitution and unjust enrichment. Tribunals' silence regarding

¹⁰² *Id.* at para. 500

¹⁰³ *Id.*

unjust enrichment makes awards like that of *ADC* awkward—as it used damage calculation measures and language for an award that was gains-based. One unexpected negative outcome is that mixing and matching gains-based awards with damages can lead to duplicative awards and windfalls. If a tribunal awards the claimant the gains accrued by the respondent, the claimant cannot then get the damages they suffered, as those damages would most likely be subsumed within the outlay costs necessary for the actual gains.¹⁰⁴

Chorzow and *ADC* are not alone in relying on unjust enrichment. As Whiteman demonstrates in her Treatise, older cases frequently relied on unjust enrichment. Later ICSID cases have done so to a lesser degree, often in a manner that resembles *ADC*'s unmeasured treatment. Mentioning a few examples demonstrates that *ADC* and *Chorzow* are not alone and substantiates the claim that unjust enrichment is a general principle of international law.

4. Unjust Enrichment in ICSID

ICSID courts have touched briefly on issues of unjust enrichment. Both lawyers and tribunals have used unjust enrichment frivolously, thereby weakening the concept. I list some examples below. The *Repsol v. Ecuador* Respondent used unjust enrichment to shame the tribunal. The “Committee was morally obligated to avoid any illegal and unjust enrichment.”¹⁰⁵ In *Siemens v. Argentina*, Argentina used the

¹⁰⁴ The Tribunal may have awarded a partially duplicative remedy, given that they awarded both the current value of the Claimant’s interests (including the assets’ future value) and unpaid dividends for the time between the expropriation and the award. The award would only be duplicative, however, if Hungary used the money from the unpaid dividends to invest in increasing the Terminal’s profitability. Simply awarding “(a) the estimated value of the Claimant’s stake in the Project company as of the Award date” would allow the Company to get the profits Hungary earned (without any input costs from the Company), while avoiding the possibility of a duplicative award, as one might assume a good chunk of the payments received from dividends would have been reinvested to achieve the sort of growth the airport realized under Hungary.

¹⁰⁵ *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador)* ICSID Case No. ARB/01/10 Decision on the Application for Annulment (English) (2007) at para.23. (This appeal had no impact, as the annulment committee sustained the award.)

concept to contest compound interest saying, “this element of the Claim amounts to an attempt by the claimant to unjustly enrich itself in the circumstances of this case.”¹⁰⁶ As well, unjust enrichment arose as a cause of action in a few cases where claimants tossed everything possible at the respondents.¹⁰⁷ In these cases, arbitral panels were able to avoid employing unjust enrichment by relying on other, more traditional, causes of action. Alternatively, in *Enron* and *Azurix*, claimants invoked unjust enrichment as a remedial measure with no reference to respondent’s enrichment.¹⁰⁸ Then in *CMS, LG&E*,¹⁰⁹ *AME v. Zaire*,¹¹⁰ *Southern Pacific Properties* and others, respondents invoked the possibility of the award unjustly enriching the claimant as a defense to reduce damages. In addition, cases like *Inceysa v. Ecuador* employed unjust enrichment as a successful jurisdictional defense.¹¹¹ Lastly, in *Santa Helena*, the tribunal used unjust enrichment in dicta to support compound interest.¹¹²

¹⁰⁶ Siemens v Argentina, ICSID Case No. ARB/02/8 (Germany/Argentina BIT) (2007) at para.125.

¹⁰⁷ See Amco v. Indonesia and Saluka.

¹⁰⁸ Azurix Corp v Argentina, Award, ICSID Case No ARB/01/12, IIC 24 (2006); Enron Corporation and Ponderosa Assets L.P. v The Republic of Argentina, ICSID; Decisions on Jurisdiction, 14 January and 2 August 2004; Award, 22 May 2007 at paras.349, 383-449. Enron suggested the unjust enrichment of Argentina as one measure of compensation.¹⁰⁸ According to Enron, the unjust enrichment approach results in amounts for December 31, 2001, ranging from US \$579,475,694 to US \$582,018,216, depending on whether a “purchase price” or a “wealth transfer” variant is adopted.” The Tribunal dismissed this claim probably because claimant made no good argument for the increased award value under unjust enrichment.

¹⁰⁹ LG&E Capital Corp., LG&E International, Inc. (Claimants) v Argentine Republic (Respondent) (Decision on Objections to Jurisdiction), ICSID Case No. ARB/02/1, 2004 WL; See also *Enron v. Argentina* wherein Respondent, Argentina makes a very similar claim at para.238. In *LG&E v. Argentina*, Respondent Argentina accuses Claimant, LG&E, of attempting to unjustly enrich itself. ¹⁰⁹ “They are not only trying to use the Bilateral Treaty as an insurance policy against the general economic crisis, but also desire to enrich themselves illegitimately in such a context.”¹⁰⁹ (LG&E Energy Corp and ors v. Argentina, AWARD, ICSID Case No ARB/02/1 at para. 108. The Tribunal here was sympathetic, forgiving Argentina for some of the loss on “state of necessity” grounds.¹⁰⁹ (para. 33-53; 59-62; and 90-98.

¹¹⁰ American Manufacturing & Trading, Inc. (Claimant) v Republic of Zaire (Respondent) ICSID Case No. ARB/93/1 (1997). at para. 7.15. The Tribunal uses unjust enrichment as a mitigating factor that “should be taken into account in the event that any compensation is awarded in this case.”¹¹⁰

¹¹¹ In *Inceysa v El Salvador*,¹¹¹ El Salvador used local courts to get out of a contract. The other party, Inceysa sued under ICSID for enforcement or compensation. The Tribunal denied jurisdiction on grounds of unjust enrichment to Claimant if the contract were performed. Claimant, Inceysa, defrauded El Salvador to obtain the contract, and thus any enrichment was unjust. Specifically, the Tribunal found: “The acts committed by Inceysa during the bidding process are in violation of the legal principle that prohibits unlawful enrichment. The written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation. Applying the principle

This list does not even begin to address the more subtle case-specific differences. Nor does the list highlight the lack of evidence and argument, which lawyers in these cases presented (or failed to present). As well, the list does not do justice to the off-handed dismissals (sometimes warranted, sometimes not), the implicit reliance, and the misuse of the concept by both tribunals and lawyers. Indeed, the indiscriminate and unclear use of unjust enrichment by all parties undermines the integrity of what could be a useful and fair tool in international arbitration.

Some ICSID tribunals, however, have explored unjust enrichment in a productive manner. In these cases, the lawyers often failed to make a strong case. Still, these cases merit examination, as they may guide future applications of unjust enrichment. As well, they demonstrate that even though there has been some disappointing treatment of unjust enrichment, it has not been written off entirely. In addition, it is of interest that ICSID tribunals nearly always use the Iran-U.S. Claims Tribunal definition of unjust enrichment. This means that although the tribunals and lawyers have been all over the map, there is some consensus as to the correct application of unjust enrichment.

a) *Saluka* (Cause of Action)

*Saluka v. The Czech Republic*¹¹³ represents one of the few instances where a Claimant (Saluka) in an ICSID case employed unjust enrichment as a cause of action

discussed above to the case at hand, we note that Inceysa resorted to fraud to obtain a benefit that it would not have otherwise obtained.”

¹¹² *Santa Helena v. Costa Rica at para.103*. The tribunal used unjust enrichment in dicta to justify awarding compound interest. ¹¹² In discussing appropriate damages the *Santa Helena* Tribunal states “the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.”¹¹²

¹¹³ *Saluka Investments v. Czech Republic*, UNCITRAL, Judgment of the Swiss Tribunal (German), 7 September 2006

(albeit subsidiary) under a bilateral investment treaty (“BIT”). Saluka contended that the Czech Republic violated BIT Article 3’s “fair and equitable treatment” clause by “fail[ing] to prevent the unjust enrichment of CSOB at the expense of the IPB shareholders, including Saluka, upon the transfer of IPB’s business to CSOB and the aforementioned State aid following the forced administration.”¹¹⁴

The Tribunal rejected Saluka’s argument, stating first that “[t]he concept of unjust enrichment is recognized as a general principle of international law.”¹¹⁵ The Tribunal continued, quoting the unjust enrichment tenets from the Iran-U.S. Claims Tribunal to frame the discussion.¹¹⁶

Proceeding, the Tribunal highlighted a key ambiguity, whose interpretation will dictate the future of unjust enrichment claims under BITs. The question, which the Tribunal put forth, but did not answer, was, “[i]f it is assumed that the “fair and equitable treatment” standard also includes the general principle of unjust enrichment, [then] an investor would therefore also be protected by this standard against unjust enrichment by the host State.”¹¹⁷

The Tribunal left its own threshold question unanswered, instead invalidating the claim on the grounds that “there was no enrichment of the Respondent to the detriment of the Claimant.”¹¹⁸ Specifically,

[i]n the case before the Tribunal, the question would be whether the Czech State has, by means of the transfer of IPB’s business to CSOB and the provision of the aforementioned State aid following the forced administration, taken or received anything of value at the expense of

¹¹⁴ *Id.* at para. 310

¹¹⁵ *Id.* at para.449

¹¹⁶ *Id.*

¹¹⁷ *Id.* at para.450. [emphasis added]

¹¹⁸ *Id.*

Saluka. For the reasons set out below, the Tribunal would answer this question in the negative.¹¹⁹

The Tribunal began by maintaining that actions that enrich a company cannot be considered to enrich a shareholder.¹²⁰ Following, the Tribunal drew a conclusion that may dissuade investors from making unjust enrichment claims, namely that:

it was IPB's and not the Claimant's banking business that was transferred to CSOB. IPB's assets were owned by IPB itself, not by its shareholders. Again, the concept of the separateness of the company from its shareholders prevents the Tribunal from equating IPB and Saluka. Consequently, CSOB did not receive anything at the expense of Saluka.¹²¹

This was a particularly odd argument given that in cases like *Enron v. Argentina*, shareholders were awarded damages for expropriation owing to lost share value.¹²²

Subsequently, the Tribunal rejected Claimant's argument that "for the Czech Republic to become liable towards Saluka it is sufficient to establish that the Czech Republic actively participated in a conspiracy to enrich one private party at the expense of another by using regulatory powers to effect an illegal transfer of ownership in IPB's business."¹²³ Finding the argument "legally not well founded,"¹²⁴ the Tribunal went on to explain that "[i]t stretches the principle of unjust enrichment beyond its proper scope."¹²⁵ In delimiting the scope of unjust enrichment the Tribunal

¹¹⁹ *Id.*

¹²⁰ *Id.* at para. 452

¹²¹ *Id.* at para.453.

¹²² *See Enron v. Argentina...*

¹²³ *Id.* at para. 454.

¹²⁴ *Id.* at para.455.

¹²⁵ *Id.*

said, “The notion of one party being an accessory to an unjustified transfer between two other parties is not part of the concept of unjust enrichment.”¹²⁶

This was a valid interpretation of unjust enrichment parameters, as the State must be enriched at the expense of the Claimant. This argument did not, however, adequately address the issues presented in the surrounding statements. In this last statement, the Tribunal distinguished expropriation from unjust enrichment. As explored below, there is substantial overlap between unjust enrichment and expropriation. This differentiation is one of a few key differences that make investors prefer expropriation to unjust enrichment when choosing causes of action (the others being a better assortment of damages and a set of specific rules outlining expropriation).

Also of interest in *Saluka* are the sources the Tribunal cited. Consistent with almost all tribunals following its publication, they cited Schreuer’s *Unjustified Enrichment in International Law* as evidence that unjust enrichment is a general principle of international law.¹²⁷ They also referenced the *Lena Goldfields* litigation.¹²⁸ And, in defining unjust enrichment, they relied on *Benjamin Isaiah v. Bank Mellat* from the Iran-U.S. Claims Tribunal.¹²⁹

The *Saluka* monetary award is currently unavailable. It will be interesting to see if they rely on restitution and unjust enrichment principles in their calculations.

b) *Azurix v. Argentina* (Remedy)

¹²⁶ *Id.*

¹²⁷ *Id.* at footnote 50.

¹²⁸ *Id.*

¹²⁹ *Id.* at footnote 51.

In *Azurix v Argentina*, the claimant, Azurix, requested that compensation be based on “unjust enrichment.”¹³⁰ Azurix provided the Tribunal with a variety of compensation methods without preference, and the value each would yield. First was the “actual investment” method, at \$449 million when it acquired the Concession plus \$102.4 million in additional capital contributions to ABA, and \$15 million in consequential costs. Second was the “book value” method, which provided \$516.9, \$484.6, \$483.9, or \$482.2 million, depending on the date. Lastly, Claimant Azurix asked for, “unjust enrichment - on the benefits received by the Province. On this basis, the Province was enriched by the Canon, the further investment of \$102.4 million, and the time value - interest - of the funds. In the case of the Canon, Azurix submits that in accordance with the NERA report, the consideration of the time value would raise it to \$450.5.”¹³¹

Here the claimant misused unjust enrichment, as they failed to substantiate the value that Argentina received from the funds at any point in the case. The value Argentina received would be based on the form of the funds and what Argentina did with those funds, rather than the amount of money thrown at a State company. The claimant’s oversight enabled the Tribunal to easily dismiss the claim, first distinguishing damages from unjust enrichment:

As to compensation on account of an unlawful act, it is based on the loss suffered, while, in the case of unjust enrichment, it is based on restitution: for instance, what can be claimed, at least under some civil law regimes, is restitution of the lower of the amount contributed by the impoverished or the gain made by the enriched.¹³²

¹³⁰ *Azurix v Argentina*, Award, ICSID Case No. ARB/01/12 (2006) at para. 411.

¹³¹ *Id.*

¹³² *Id.* at 436.

The Tribunal’s statement might imply that unjust enrichment, and thus restitution, can be employed only in isolation—or as in some countries’ legal codes, where no other cause of action can be brought. This is reflected in the Iran-U.S. Claims Tribunal. The Tribunal, however, was more likely referring to causes of action under unjust enrichment, which do only allow restitution. In cases for wrongs, restitution is one of many available measurements for damages.

Of interest is the Tribunal’s reference to civil law regimes’ limitation on restitution for unjust enrichment—it must be the minimum amount given, as it is “the lower amount contributed by the impoverished or the gain made by the enriched.”¹³³ If this principle applies internationally, investors will only want to employ unjust enrichment damages where no other damages are available, as unjust enrichment will always, by law, be the smallest award.

Also useful is the court’s recycling of the Iran-U.S. Claims Tribunal definition invoked by *Amco v. Indonesia*.¹³⁴ This may signal the beginning of universal parameters (customary international law?) and acknowledgement of the Iran-U.S. Claims Tribunal as a source of expertise. “The Iran-US Tribunal, which has dealt with claims based on the principle of unjust enrichment on several occasions, defined the principle of unjust enrichment and its applicability as follows....”¹³⁵

After perhaps the most thoughtful and holistic discussion of unjust enrichment in an ICSID tribunal, the arbitrators offhandedly dismissed unjust enrichment.¹³⁶ The dismissal probably reflected the Claimant’s failure to argue the case in terms of enrichment. The Tribunal instead awarded the claimant \$165,240,753 dollars plus compound interest based on the actual value of the investment. Of the \$165 million,

¹³³ *Id.*

¹³⁴ *Id.* and cite para. In *Amco* at para. X.

¹³⁵ *Id.*

¹³⁶ *Id.* at para. 438.

\$60 million was from the fair market value of the initial investment, and \$102 million was from additional capital contributions. Interestingly, the \$60 million was only a fraction of Azurix's initial investment, which it calculated at around \$450 million. The amount was reduced because "no well-informed investor...would have paid for the Concession the price...paid by Azurix."¹³⁷ The Tribunal qualified this statement, however, "[T]he Province accepted the price paid by Azurix...and benefited from the alleged aggressive price paid." It repeats this a paragraph later. "The Tribunal cannot ignore the fact that...the Province benefited from the alleged aggressive price paid."¹³⁸ While this was mentioned in the paragraph just before awarding the \$60 million, it is unclear how the Tribunal factored in the Province's benefit. All we know is that they did, and therefore it smacks of unjust enrichment.

Azurix was one of the first ICSID tribunals to explicitly explore unjust enrichment as a compensation tool. Earlier cases, like *Guinea v. Maritime (SOTRAMAR) Annulment*,¹³⁹ demonstrate implicit reliance, and acceptance of unjust enrichment as a principle of international law.

c) *Guinea v. Maritime*

The *Guinea v. Maritime* proceedings provide an interesting, if confusing, portrayal of unjust enrichment principles. In partially annulling the award, the Ad hoc Committee blamed the Tribunal's failure to state reasons for its damages calculation. The Committee "finds that to the extent that the Tribunal purported to state the reasons for its decision, they were inconsistent and in contradiction with its analysis of damages theories."¹⁴⁰ Specifically, the Committee contended that:

¹³⁷ *Id.* at 425.

¹³⁸ *Id.* at 428.

¹³⁹ *MINE v. Guinea (Annulment Decision)*, 5 ICSID Rev. 95 (1990).

¹⁴⁰ *Id.* at para. 6.106.

the damages calculation by the Tribunal [does] not purport to estimate profits that SOTRAMAR (Claimant's company) would have made, but rather take as a base either the actual or hypothesized profits under the substitute Afrobulk/Guinomar arrangements. The theory underlying this approach, which was not articulated either by the parties or by the Tribunal, may have been that for Guinea to keep the fruits of the substitute arrangements, which according to the Tribunal's ruling on breach of contract it had concluded in violation of the Agreement, would have constituted unjust enrichment, and that MINE should therefore be awarded the same share of those profits as it was entitled to receive if they had been SOTRAMAR profits.¹⁴¹

Here, the original Tribunal, which for various reasons did not want to mention unjust enrichment, employed unjust enrichment both to legitimize and determine damages. Using the gains Guinea received from its new royalty agreement to estimate damages meant that the amount Guinea received (or was enriched) were what MINE was awarded.

The Tribunal finds that MINE's loss of profits may be measured adequately by the afrobulk agreement: the 50 cents per ton which Guinea received from afrobulk for the right to carry bauxite under Art. 9 during a two-year period rightfully belongs to SOTRAMAR. In addition, it seems fair to conclude that such an arrangement could have been extended, or negotiated with others, to a total period of 10 years ... The quantity of bauxite carried during the 10-year period under such an arrangement is 38,437,127 tons; and this tonnage, multiplied by 50 cents per ton, produces the total due SOTRAMAR of

¹⁴¹ *Id.*

\$19,218,563. Under Art. 9(B) of the Convention, SOTRAMAR's net profits were to be taxed 30% by Guinea, and the remaining 70% was to be divided equally between MINE and Guinea. Therefore MINE is entitled to 35% of the total, producing the principal sum of \$6,726,497.¹⁴²□

The original award, shown above, was restitution of ill-gotten gains. The Committee annulled it simply because the Tribunal had not justified their award. Notice that the Committee did not question employing unjust enrichment as justification, only its undisclosed use. Thus, had the Tribunal employed unjust enrichment explicitly, rather than simply discarding other options and calculating an award using no legal explanation, they may not have been overruled.

d) Conclusion

These cases show that ICSID tribunals do entertain the notion that unjust enrichment is a general principle of international law. ICSID cases are complex both because they rely on BITs and because they are not purely contractual or off-contract cases. Rather they combine tort law, property law, contract law, and frustrated contracts. Thus, if anything ICSID cases need off-contract remedies. Non-ICSID cases involving international business and frustrated contracts demonstrate the utility of unjust enrichment for international investment, relying on unjust enrichment through rules like the Vienna Convention CISG.¹⁴³

While an entryway remains for unjust enrichment as a cause of action and a measure of damages, ICSID cases have not employed it. Again, expropriation's

¹⁴² Maritime International Nominees Establishment ("MINE") (Claimant) v Republic of Guinea (Defendant) AWARD, ICSID Case No. ARB/84/4 at Section 9.

¹⁴³ United Nations Vienna Convention on Contracts for the International Sale of Goods 1980 (CISG) Articles 81 and 84 in *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, ed. Franco Ferrari, Harry Flechtner, Ronald A Brand, Chapter V Provisions Common to the Obligations of the Seller and of the Buyer, Section V. Effects of Avoidance, 2004 by Sellier. European Law Publishers GmbH, München / Sweet & Maxwell

primacy, unjust enrichment's complex prerequisites, and unjust enrichment's exclusivity may be explanatory.¹⁴⁴ Also, the inherently moral nature of unjust enrichment decision may dissuade judges. Regardless, even in ICSID, the door is open—and one might see a claim with speculative losses employ unjust enrichment to calculate damages.¹⁴⁵

The Iran-U.S. tribunal also dealt with investment disputes, and effectively incorporated unjust enrichment. Indeed, as later ICSID cases demonstrate when citing Iran-U.S. Claims Tribunal parameters, the Iran-U.S. Claims Tribunal cemented universal parameters. Standardization prevented the cherry picking that equitable concepts can introduce. If anything, the Iran-U.S. Claims Tribunal shows the effectiveness of considered application of unjust enrichment, and underscores the error of ICSID tribunals' sloppy dismissals. Exploring the Iran-U.S. Claims Tribunal case law introduces the universal parameters for unjust enrichment in international investment disputes.

5. Iran-U.S. Claims Tribunal

The Iran-U.S. Claims Tribunal kicked off in the wake of the 1979-1981 hostage crisis. The Tribunal aimed to settle contract, property, and debt claims of U.S. nationals against Iran and vice versa, as well as contractual disputes between the two states. The Iran-U.S. Claims Tribunal is a mixed tribunal, composed of nine

¹⁴⁴ See footnote x for an exploration of the relationship between expropriation and unjust enrichment.

¹⁴⁵ This is especially true given recent decisions, in which the tribunal assumes great deal of leeway on award calculations. These cases, including *Azurix* and *LG&E* cite *SD Myers*. According to *Azurix*, at paragraph 422, “in *SD Myers* the tribunal considered that the lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to the tribunals to determine it in light of the circumstances of the case taking into account the principles of international law and the provisions of NAFTA.” *SD Myers*, para.303-319.

judges: three Iranian, three American, and three others. While the Tribunal relies on international law, they employ Iranian and U.S. law to fill voids.¹⁴⁶

The Iran-U.S Claims Tribunal solidified and fleshed out unjust enrichment as a *cause of action* in the international arena.¹⁴⁷ If Professor Kull's argument that unjust enrichment and restitution are inseparable is convincing, then the distinction was merely semantic, and this is irrelevant. That said, a practical framework for allowing unjust enrichment as a cause of action is vital in limiting abuse. The Iran-US Claims Tribunal was very careful in creating boundaries for its application. As mentioned above, *Bank Isaiah* laid out five prerequisites and later cases elaborated on them, fine-tuning and ultimately creating a solid set of transplantable unjust enrichment parameters. For example, in *Sea-Land*:

The Tribunal set unjust enrichment apart from other remedies which could independently found a cause of action. Thus it stated:

*There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.*¹⁴⁸

According to Wayne Mapp,

¹⁴⁶ Mapp, Wayne, *The Iran-United States Claims Tribunal: The First Ten Years, 1981-1991*, Manchester, New York: Manchester University Press, 1993.

¹⁴⁷ Unlike western legal systems, Shari'ah law does not embrace the concept of interest. Interest is money made without work. Shari'ah law forbids money made thus (*See supra*). The resurgence of Shari'ah law in Muslim countries complicates international business transactions—particularly given this concept. In fact, Iran-US Tribunal's acceptance of unjust enrichment claims might be motivated by their need to balance international with national laws. Balancing U.S. common law with Iranian Shari'ah law may have demanded creativity and reliance on less common general principles—such as unjust enrichment.

¹⁴⁸ *Id.* at 168

The Sea-Land claim also included expropriation as a cause of action, and apart from the duty to compensate, expropriation is not necessarily a breach of international law. Although there is a close relationship between causes of action founded on expropriation and unjust enrichment they have been perceived by the Tribunal as quite separate. Thus the Tribunal has awarded compensation to claimants if the respondent state has been enriched at the expense of the claimant, whether or not the respondent state has committed any act of expropriation.¹⁴⁹

Practically, this means that for ICSID and other international investment disputes, an unjust enrichment claim would only occur where no expropriation claim is possible. Expropriation claims are well defined, explicitly endorsed causes of action, whereas unjust enrichment remains unclear. Expropriation's primacy may explain unjust enrichment's relatively slim role, as a case would only be brought where the state was enriched without expropriation. Unjust enrichment's utility is further limited by inherent requirements such as direct causation between loss and gain, the exclusion of other remedies and causes of action, and policy pitfalls. The concept of unjust enrichment, however, underlies many expropriation claims.

What distinguishes unjust enrichment claims from expropriation, then, is probably the nature of the respondent State's gain, as well as the type of property the claimant possessed. It is unclear whether intellectual property can be expropriated. If so, then in some intellectual property cases, property rights may be established where there is a patent or copyright, allowing for expropriation. In other cases, know-how or other benefits may not have a legal property right attached, so unjust enrichment

¹⁴⁹ *Id.* at 169.

would be the only cause of action, as unjust enrichment requires no illegal action. If intellectual property cannot be expropriated, then all intellectual property disputes must be brought as unjust enrichment claims. As will be explored in Section III, using unjust enrichment as a cause of action will allow the Claimant to get through jurisdictional thresholds where expropriation may not. And, unjust enrichment claims are not limited to restitution at the time of the taking, unlike most BIT remedies for legal expropriation.

Moving on, *Lockheed Corporation v. Iran*¹⁵⁰ confirmed earlier decisions forbidding unjust enrichment where a contract existed.¹⁵¹

First, as the Tribunal has held in other cases, the claimant must establish that there is no valid and enforceable contract on which an action for damages could be based. Secondly, the claimant must establish that the respondent has been enriched at the claimant's expense, the extent of such enrichment and that it would be unfair for the respondent not to pay for the benefits it has received.¹⁵²

Mapp adds:

The doctrine of unjust enrichment as an independent cause of action has been progressively developed by the Tribunal ... The *Schlegel Corporation v National Iranian Copper Industries Company*¹⁵³ ... observed that the rule against unjust enrichment represents a principle

¹⁵⁰ *Id.* at 169. *Lockheed Corporation v. Iran*, 18 IRAN-U.S.C.T.R., 292 (1988). Unjust enrichment was found inapplicable in this case because there was an existing contract.

¹⁵¹ *Id.* (TCSB Inc. v. Iran, 5 IRAN-U.S.C.T.R., 160, 172 (1984); Futura Trading Inc. Khuzestan Water and Power Authority, 14 IRAN-U.S.C.T.R., 176 (1987)).

¹⁵² *Id.* at 169.

¹⁵³ *Schlegel Corporation v. National Iranian Copper Industries Company*, 14 IRAN-U.S.C.T.R., 176 (1987).

based on justice and equity and therefore makes it necessary to take into account all the circumstances of each specific situation.¹⁵⁴

In sum, unjust enrichment claims can only be made where there is no claim for expropriation and no contract, and where the five prerequisites are met.

In addition to setting clear parameters for bringing unjust enrichment claims, Iran-U.S. Claims Tribunal cases by default explore unjust enrichment award calculations. These calculations vary significantly according to the factual circumstances of the case. As well, there is general judicial debate over correct computation. The Tribunal in *Sea-Land* pointed out that “[o]pinions differ as to the basis of computation of damages. The predominant view seems to be that damages should be assessed to reflect the extent by which the state has been enriched. Judge Jimenez de Arechaga considers that where the ‘enriched’ state has obtained no benefit, no compensation should be payable at all.”¹⁵⁵ This limits both where unjust enrichment is applicable and the amount awarded. The *Sea-Land* Tribunal continued exploring award calculations, stating:

Equity clearly requires that cognizance be taken of the defacto situation, and this explains why there is no discernible uniformity in the practice of international tribunals in this respect. Important factual circumstances to be taken into account are the level of investment; the period during which the foreign investor has been able to make a profit; and the benefit actually derived by the host country from its acquisition.¹⁵⁶

Applying these considerations to the *Sea-Land* facts, the Tribunal held:

Compensation for unjust enrichment cannot encompass damages for loss of future profits. The Tribunal must aim instead to place a monetary value

¹⁵⁴ Mapp at 171.

¹⁵⁵ *Sea-Land* at section (v) (B).

¹⁵⁶ *Id.*

on the extent to which PSO [Iranian Ports and Shipping Organization] was enriched by its premature acquisition of the facility... The Tribunal must establish whether PSO did in fact avail itself of the facility after Sea-Land's departure. PSO in its Statement of Defence denies having used the installations and facilities at the terminal but there is some evidence that it did make use of them.¹⁵⁷

The Tribunal here estimated that premature use of the Sea-Land facility enriched the PSO by approximately \$750,000.00.¹⁵⁸ This figure comes from the Tribunal's projected gain—based on PSO documents discussing what PSO could have gained during the 611-day period that Sea-Land remained unexploited (which the Tribunal used to estimate the profits that occurred when PSO later began exploitation), coupled with documents showing that there was in fact a subsequent exploitation.¹⁵⁹

The *Sea-Land* Tribunal, however, didn't allow recovery for lost moveable property in the instant case. The *Sea-Land* Tribunal explained:

[u]njust enrichment requires that Sea-Land be compensated for those items and assets left in Iran of which PSO or the Government obtained the use and benefit. It does not permit the Tribunal to compensate Sea-Land for the loss of unpaid debts, freight charges, and termination expenses, none of which resulted in the enrichment of PSO or the Government.¹⁶⁰

And, in this case, the Tribunal found no evidence that Iran had used the property left by Sea-Land. Compensation for garage inventory and other equipment was similarly denied.¹⁶¹

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

The Tribunal concluded that “[t]he Ports and Shipping Organization [PSO] is obligated to pay Sea-Land Service, Inc. Seven Hundred Fifty Thousand United States Dollars (US \$750,000.00).” This award reflected only the value of the estimated early use of the property, and did not give any money for lost equipment or lost future profits.

In contrast, the *Schlegel* tribunal based its award on quantum meruit. Here, Schlegel was a subcontractor. Schlegel wanted to be paid for building a reservoir lining for the Copper Company, with whom it had no contract because Schlegel’s contract was between Schlegel and another contractor. Because no contract existed between the Copper Company and Schlegel, the case was considered off-contract, allowing for an unjust enrichment claim.¹⁶²

When Schlegel had performed its work, the result was that the Copper Company had acquired a reservoir lining to its specifications provided by a company it had effectively nominated to do work supervised and approved by its own engineers...The Tribunal finds that the enrichment was and remains unjust. The evidence is clear that the Copper Company has never paid the balance due for Schlegel's work. Nor is there any doubt, given Binnie's issuance of the Maintenance Certificate, that Schlegel's work had been satisfactorily completed ... The Tribunal concludes under the circumstances that, once the work had been completed by the sub-contractor Schlegel, and it had for good and valid reasons appealed to the Copper Company for payment directly, it was manifestly unjust for the Copper Company to deny payment to Schlegel under Article 59(2), particularly when it would not have incurred any loss to itself by doing so. The Tribunal holds, consequently, that the Copper

¹⁶² Schlegel at para. 10-14.

Company has been unjustly enriched and must therefore pay Schlegel the balance due of 12,934,124 rials.¹⁶³

Here the Tribunal awarded the balance owed Schlegel for their work plus 10.5% interest per annum.¹⁶⁴ This award resembles a damages award, given that Schlegel received what was owed them in their contract. Like many quantum meruit cases, the Tribunal based the value of the labor on the price fixed by the contract. So that, even though the award resembled damages, it was calculated on the value to the respondent, which just happened to equal the amount owed the claimant. This distinction is important because in the second instance (restitution), if the Copper Company never used the reservoir, then there would be no award.

In *Benjamin Isaiah*, the claimant sued for \$380,000. Bank Mellat was holding the money and refused to turn it over to him. Here, “the Tribunal believes that it would be inequitable for such a bank to be able to escape liability to the beneficial owner of the funds represented by such a dishonored check and retain the funds to which the bank has no claim.”¹⁶⁵ Consequently, “the Tribunal holds that the Respondent Bank Mellat has wrongfully detained Mr. Isaiah's \$380,000 since 10 January 1979 and that Isaiah is entitled to an award in that amount.”¹⁶⁶ The Tribunal, however, declined to award interest:

The award of interest is certainly permissible in the discretion of the Tribunal. In this case there is no evidence that the International Bank of Iran or its successor, Bank Mellat, deliberately deprived the Claimant of his money; on the contrary, the evidence indicates that the Bank made unsuccessful efforts to restore its credit facilities with Chase Manhattan Bank so that the check could

¹⁶³ Id. at paras. 15-17.

¹⁶⁴ Id. at para. 20.

¹⁶⁵ *Isaiah v. Bank Mellat* at Section IV.

¹⁶⁶ Id. at Section IV.

be paid. In view of the special circumstances in this case, the Tribunal declines to award interest.¹⁶⁷

All of these cases present facts demanding different award calculations for unjust enrichment. Each tailors the award to fit the facts of the case. Benjamin Isaiah simply got his money back. Schlegel received the value of their labor, which had been done expressly for the benefit of Copper Company. And, in *Sea-Land*, the Tribunal approximated the value that PSO got from prematurely occupying a facility.

The Iran-U.S. Claims Tribunal set out clear tenets for unjust enrichment as a cause of action. The most important tenet is that unjust enrichment can only be brought where *no other cause of action is available*. Thus, Claimants cannot bypass contracts to get better results through an off-contract cause of action. This both protects the integrity of the contract and confines unjust enrichment claims.

In addition, unjust enrichment claims have internal restrictions. By law unjust enrichment claims only get restitution (monetary or otherwise). Restitution occurs only where the respondent actually gained something, and thus, the respondent will never pay more than they have profited, unlike damages claims. This ensures that the remedy corresponds to the violation. If the violation is not necessarily illegal, a damages award might deliver unjust results.

ICSID tribunals should employ the detailed parameters set out by the Iran-U.S. Claims tribunal. Some additional issues, however, require addressing. First, is unjust enrichment an acceptable cause of action under ICSID? If so, how would one bring it and what barriers need to be confronted? Lastly, what are the tenets of unjust enrichment within ICSID cases?

¹⁶⁷ Id. at Section V.

III. HYPOTHETICALS: UNJUST ENRICHMENT APPLIED

In my view, a small subset of cases would benefit from unjust enrichment claims—cases that otherwise might not get jurisdiction or where damages would not appropriately redress the grievance. In this Part, I refer specifically to off-contract intellectual property disputes, where the value of the Respondent country’s benefit exceeds Claimant’s loss.

A successful claim must meet ICSID jurisdictional requirements. Thus, a claimant must show:

- (i) that there was a dispute;
- (ii) that the dispute was a legal one;
- (iii) that the dispute arises directly and not indirectly out of an investment; and
- (iv) that there was an investment out of which a legal dispute has directly arisen.¹⁶⁸

A successful claim under unjust enrichment takes the following form. First, there must a dispute. Easy enough. Second, the dispute must be legal. As explored below, this requires finding a clause in the BIT that the respondent violated. Here, I argue that the applicable clause is the “fair and equitable treatment standard.” The “fair and equitable treatment standard” requires that signatory nations not violate customary international law with respect to investors from contracting states. If unjust enrichment is part of customary international law, then it is protected under the fair and equitable treatment standard. This requires two steps: (1) Claimant must show that unjust enrichment is a part of customary international law, and (2) Claimant must show that unjust enrichment, as understood by international law, occurred. Thus, the Claimant must have a case that fulfills the Iran-U.S. Claims Tribunal tenets for unjust enrichment. So,

¹⁶⁸ *Id.* at para. 31.

- (1) There must an enrichment;
- (2) With a corresponding loss;
- (3) Close causal connection between the loss and the enrichment;
- (4) No justification for the enrichment; and,
- (5) No other cause of action available (thus, if you have a contract claim, you cannot rely on unjust enrichment, and unjust enrichment can only be brought in isolation).¹⁶⁹

In addition to just being good law, these parameters serve to weed out frivolous cases, contractual cases, and cases that might fall under another BIT standard. This makes unjust enrichment a cause of action and remedy for those who would otherwise have no voice, because they only occur where “no other cause of action is available.”

Fulfilling the Iran-U.S. Claims Tribunal parameters for unjust enrichment claims has the secondary benefit of ensuring that the larger claim meets most of ICSID’s jurisdictional requirements. The requirements that the respondent state “be enriched” and that there be a “close causal connection between the loss and the enrichment,” dovetail with ICSID jurisdictional requirements. Namely, that “the dispute arises directly and not indirectly out of an investment;” and that there be “an investment out of which a legal dispute has directly arisen.”

As well, the Iran-U.S. Claims Tribunal unjust enrichment requirement that there be a “corresponding loss” addresses a concern particular to NAFTA. NAFTA Article 1116: Claim by an Investor of a Party on Its Own Behalf, states that: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: ...and that the investor has incurred loss or

¹⁶⁹ *Supra* note X.

damage by reason of, or arising out of, that breach.”¹⁷⁰ Here, NAFTA requires that the investor “incur loss or damage” to bring a claim. Put simply, this NAFTA requirement is satisfied because it is intrinsic to unjust enrichment, as a valid claim requires that the investor suffer a “corresponding loss.”

Having met all four jurisdictional requirements for ICSID and assuming a victory on the merits, only the remedy remains. Even though “fair and equitable treatment” violations give a great deal of judicial discretion relative to remedies, I argue that unjust enrichment claims should only receive restitution/unjust enrichment. This is because, as I explore above, the two are inseparable. The entire unjust enrichment claim is spent proving an enrichment to the other party, of which you deserve a part. Thus, asking to be compensated for *loss* would be unsubstantiated and inapt. In many ways, bringing a claim for unjust enrichment under the umbrella of “fair and equitable treatment,” is the same as asking for unjust enrichment as a remedy. As well, part of what makes unjust enrichment fair is that the claimant can only get compensated based on what the Respondent gained, so countries will not be forced to pay out money they never had.

The argument outlined above is explored in detail below. To illustrate how the limitations listed above and others will interact with ICSID requirements, I present a series of hypotheticals based on *Mihaly*.¹⁷¹

A. *MIHALY*

In the case itself, Claimant, Mihaly International Corporation, sued Sri Lanka under the United States-Sri Lanka BIT. Mihaly wanted compensation for its pre-contractual investment, made during negotiations for a Build Operate Transfer

¹⁷⁰ NAFTA, Section A-Investors, Chapter 11, Article 1116(1).

¹⁷¹ *Mihaly International Corporation v Sri Lanka*, Award, ICSID Case No ARB/00/2, IIC 170 (2002).

(“BOT”) concession to build a new power plant. In 1992, Sri Lanka solicited bids for the project, eventually selecting the Claimant. During the negotiations Claimant engaged in extensive planning and projections including the plant design and financial projections.¹⁷² Mihaly claimed that some two to four percent of the \$400 million projected to build the power plant were spent in designing and planning the plant.¹⁷³ Negotiations failed after a few years, and no contract was signed.¹⁷⁴

Mihaly sued under the BIT, for a violation of “fair and equitable” treatment because it was never compensated for its pre-contractual expenditures, which it considered an investment. The Tribunal, however, found that pre-contractual expenses are not an “investment” protected by the BIT, as defined by the Washington Convention.¹⁷⁵ Since Sri Lanka never signed a contract, they never agreed to ICSID jurisdiction. “The operation of SAEC was contingent upon the final conclusion of the contract with Sri Lanka, thus the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka.”¹⁷⁶

Unjust enrichment is inapplicable in the actual *Mihaly* case, as Sri Lanka didn’t benefit from Mihaly’s plans. If, however, Sri Lanka had used the power plant plans to create a power plant, then, Mihaly would have an excellent cause of action under unjust enrichment. And, unlike awarding pre-contractual damages, which would open the floodgates for a new array of lawsuits, unjust enrichment claims bring with them inherent limitations.

B. *MIHALY* 1

¹⁷² *Id.* at para. 36-42.

¹⁷³ *Id.* at para. 34.

¹⁷⁴ *Id.* at para. 47.

¹⁷⁵ *Id.* at Para. 56-61.

¹⁷⁶ *Id.* at para.48.

Assume, then, that all the *Mihaly* case facts remain, save one. In the new *Mihaly*, “*Mihaly 1*,” Sri Lanka used Mihaly 1’s plans to build the power plant — without compensation. The substantive case is as follows.

Sri Lanka was unjustly enriched at the expense of Mihaly 1 because Sri Lanka benefited from Mihaly 1’s property without compensation. Mihaly 1 suffered a corresponding loss of both potential profits from the plant and more importantly from the two to four percent costs of their uncompensated outlay in creating the plan. In addition, there was significant causal connection between Mihaly 1’s loss and Sri Lanka’s gain, as Sri Lanka was able to use Mihaly 1’s work and outlay to create a power plant benefiting Sri Lanka. As well, given the facts of *Mihaly*, none of the defenses apply (illegal activity, duress, etc.), since Sri Lanka had a public bid for the project. Lastly, Claimant has no other cause of action, as the claim was not based on a contract, and was not illegal.

While the substantive claim, based on the merits, seems relatively simple, the threshold jurisdictional barriers in ICSID present substantial complications. In addition to proving the claim on its merits, Mihaly 1 must show that its pre-contractual expenses— because they led to an unjust enrichment for Sri Lanka—are considered an investment under the BIT and that there is a valid legal dispute, meaning that unjust enrichment violates one of the BIT provisions.

Jurisdiction presents a series of obstacles, one of which is inconsistency. Arbitral panels are still debating whether BITs’ *lex specialis* trumps the Washington Convention, or vice versa—so jurisdictional thresholds must be examined under both interpretations. In many instances where two overlap or one is silent, they can be considered as a unitary threshold for jurisdiction.

The Washington Convention, Article 25 states that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”¹⁷⁷ The original *Mihaly* Tribunal found that Mihaly was “a national of another Contracting state” and therefore the only relevant jurisdictional issue is *ratione materie* [underlined above].¹⁷⁸ To get jurisdiction *ratione materie* (subject matter jurisdiction), Claimant must show:

- (i) that there was a dispute;
- (ii) that the dispute was a legal one;
- (iii) that the dispute arises directly and not indirectly out of an investment; and
- (iv) that there was an investment out of which a legal dispute has directly arisen¹⁷⁹

1. Jurisdiction

In exploring jurisdiction, I begin by fulfilling the Washington Convention Article 25 requirements listed above, then move to BIT specific requirements, and lastly to the fair and equitable treatment standard.

a) Washington Convention Requirements: (iv) Investment

Establishing that an “investment” occurred was the crux of the original *Mihaly* case:

The most crucial and controversial contentions of the Parties were concentrated upon the existence vel non of an “investment”...A

¹⁷⁷ *Id.* at para. 28.

¹⁷⁸ *Id.* at para. 25-27.

¹⁷⁹ *Id.* at para. 31.

fortiorissime, without proof of an “investment” under Article 25(1), neither Party need to argue further, for without such an investment, there can be no dispute, legal or otherwise, arising directly out of it, which could be submitted to the jurisdiction of the Centre and the Tribunal.¹⁸⁰

As was discussed above, the fact that the Tribunal didn’t consider a pre-contractual expense with no benefit an “investment” motivated the Tribunal’s refusal to give Mihaly jurisdiction. In *Mihaly I*, however, Sri Lanka benefiting unjustly from the pre-contractual expense transforms the nature of the claim to include the requisite “investment.” The Washington Convention lets the parties determine what constitutes an “investment,” leading to amorphous requirements.¹⁸¹

The Tribunal in *Helman International Hotels A/S v. Egypt* states that “to be characterized as an investment a project ‘must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State’s development.’”¹⁸² *Patrick Mitchell* provides a more nuanced reading of these requirements:¹⁸³

There are four characteristics of investment identified by ICSID case law¹⁸⁴ and commented on by legal doctrine, but in reality they are interdependent and are consequently examined comprehensively. The first characteristic of investment is the commitment of the investor, which may be financial or through work, indeed, in several ICSID

¹⁸⁰ *Id.* at para. 32.

¹⁸¹ This means that many scholars think that BIT definitions of investment govern. The *Mihaly* tribunal thought otherwise, as will be explored later.

¹⁸² *Helnan International Hotels A/S v Egypt*, Decision of the Tribunal on Objection to Jurisdiction, ICSID Case No ARB/05/19, IIC 130 (2006) at para. 77.

¹⁸³ *Mitchell v Congo, the Democratic Republic of the*, Decision on Application of Annulment of Award, ICSID Case No ARB/99/7, IIC 172 (2006).

¹⁸⁴ *Id.* at para. 27 (referring to *Fedax N.V v. Republic of Venezuela* (Case No. ARB/96/3), Decision on Objections to Jurisdiction, July 11, 1997, 5 ICSID Rep. 186 (2002); *CSOB v. Slovak Republic* (Case No. ARB/97/4); *Salini Constrittori S.p.A. and Italistrade S.p.A v. Kingdon of Morocco* (Case No. ARB/00/4, Deicsion on Jurisdiction, JJuly 23, 2001).

cases the investor's commitment mainly consisted in [sic] its know-how.¹⁸⁵

The *Mitchell* Tribunal's broad reference to "know-how" and flexible reading of the four investment characteristics, provides an opening for unjust enrichment claims in cases where the BIT does not explicitly recognize intellectual property, and/or where the intellectual property rights were not patented.

The *Mitchell* Tribunal continues:

Other characteristics of investment are the duration of the project and the economic risk entailed, in the sense of an uncertainty regarding its successful outcome. The fourth characteristic of investment is the contribution to the economic development of the host country.¹⁸⁶

Note that the location of the investment and the amount actually invested in the project are not listed criteria. While they may help a claim, a claim can succeed with little financial investment and where that investment is primarily made in a country other than the Respondent country.¹⁸⁷

Meanwhile, the *Mitchell* Tribunal emphasized the importance of "contribution to the economic development of the host state."¹⁸⁸ In support, the Tribunal pointed to *Fedax*, "which involved promissory notes issued by the Republic of Venezuela" and *CSOB*, which involved a loan.¹⁸⁹ In *CSOB*, the Tribunal found that "[u]nder certain circumstances a loan may contribute substantially to a State's economic development."¹⁹⁰ As well, "the contribution," though "essential" does not have to be "sizeable or successful."¹⁹¹ And, "of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to

¹⁸⁵ *Id.* (referring to *Holiday Inns S.A and others v. Morocco*; *Amco Asia Corporation and others v. Republic of Indonesia*; *Salini v. Morocco* (foot note 7)).

¹⁸⁶ *Id.*

¹⁸⁷ See *SGS v. Pakistan*, *Fedax*, and *CSOB* for examples of tribunals' flexible interpretations of "investment."

¹⁸⁸ *Mitchell* at para. 27.

¹⁸⁹ *Id.* at para. 30.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at para. 33.

contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.”¹⁹²

If the Tribunal relied on the Washington Convention criteria in *Mihaly I*, they would find that an “investment” had occurred. Analyzing this through the relevant criteria: (1) Substantial Investment. Substantial investment occurred over the course of the negotiations. *Mihaly I*’s expert calculated that two to four percent of its expenditures occurred in the planning phase.¹⁹³ As well, “it is standard practice accepted by host governments, lenders and other equity investment to include the sponsors’ development expenditures in the investment cost.”¹⁹⁴ Even if the monetary expenditure did not suffice, the *Mitchell* Tribunal highlights many cases that consider “work” and/or “know-how” to constitute “investment.” And the know-how appropriated by the government from *Mihaly I* certainly fits the *Mitchell* description.

(2) Duration. The one to two years that *Mihaly I* spent developing the plans for a power plant should suffice in terms of duration, especially considering their long-term goals. As the *Mitchell* Tribunal said, “ICSID tribunals do not have to evaluate the real contribution of the operation in question.”¹⁹⁵

(3) Risk. Investments, particularly in the Buy-Operate-Transfer (“BOT”) format, present a significant risk to the investor, as the initial investor bears the risk of natural disasters, war, etc., which would increase the project’s costs.

(4) Contribution to economic development of host state. According to *Mitchell*, economic development is a broad concept. *Mihaly I* doesn’t even require a broad reading of economic development. Economic development occurred prima

¹⁹² *Id.*

¹⁹³ *Mihaly* at para. 34.

¹⁹⁴ *Id.*

¹⁹⁵ *Mitchell*, *supra* note X.

facie in *Mihaly I*—as the entire case surrounds the host State’s enjoyment of an enrichment. Sri Lanka utilizing Mihaly 1’s plans clearly contributed to its economic development, even if the contribution by Mihaly 1 was involuntary. And of course, Mihaly 1’s initial intent was to do the same. It is precisely this *actual* contribution to Sri Lanka’s economic development coupled with Mihaly 1’s know-how investment that separates *Mihaly* from *Mihaly I*. In *Mihaly* there is no economic contribution and no contract, and in *Mihaly I*, there is a provable and substantial contribution.

Fulfilling the Washington Convention requirements are vital for Mihaly 1’s case, even if the BIT covered “intellectual property” or business “interests.” Although some tribunals think that BIT definitions of investment preempt the Washington Convention, the Tribunal in *Mihaly* found that since a contract had not been entered into, BIT language did not apply. Thus, even if the Mihaly 1 plans were considered intellectual property, they would be precluded unless Mihaly 1 could find somewhere else to hang their cause of action hat (i.e. “customary or conventional” international law).

So, Mihaly 1 will first have to prove that its pre-contractual expenses meet the four “customary law” or Washington Convention components for “investment.” Then, the Tribunal might want to ensure that the “investment” would be an “investment” as defined under the BIT. In this case, the Claimant would have to prove that their “investment” could be placed within one of the listed categories defining “investment” in the BIT.

b) BIT Definitions of Investment

BITs often offer more generous definitions of “investment.” In *CSOB v. Slovakia*, for example, the Tribunal found that under the BIT Art. 1(1)(c) “investment” is “any asset” including: “monetary receivables or claims to any

performance related to an investment.”¹⁹⁶ The Tribunal held that the BIT terms were broad enough to encompass loans, but that not “any loan” meets the requirement of an investment under the Washington Convention.¹⁹⁷ Additionally, in *Helman*, the Tribunal finds that broad language such as “asset,” “any other rights,” “any similar rights,” “pursuant to a contract having an economic value,”¹⁹⁸ “shows that Article 1 [of the Egypt BIT] encompass [sic] wide concepts.”¹⁹⁹ Hence, if the *Mihaly I* Tribunal believed that *lex specialis* [BIT rules] governed, the Claimant would have an easier case to make.

The BIT in *SGS v. Pakistan* also boasted a broad definition of investment. “Investment is defined so as to....include every kind of asset and particularly:....(c) claims to money or to any performance having economic value...as well as all other rights given by law, by contract, or by decision of the authority in accordance with the law.”²⁰⁰ ”This “non-exhaustive” definition was, according to the Tribunal, “sufficiently broad to encompass the PSI agreement.”²⁰¹ As well, relying on *lex specialis*, the Tribunal in *SGS v. Pakistan* found for the Claimant, even though SGS invested very little in Pakistan itself.²⁰²

Likewise, in dicta the *PSEG Global v. Turkey AWARD* held that “[a]n investment can take many forms before actually reaching the construction stage, including more notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with Pre-investment

¹⁹⁶ *Ceskoslovenska Obchodni Banka, AS v Slovakia*, Decision on Objections to Jurisdiction, ARB/97/4, IIC 49 (1999), 24 May 1999 at para.77.

¹⁹⁷ *Id.* at para. 77-80.

¹⁹⁸ *Helnan International Hotels A/S v Egypt*, Decision of the Tribunal on Objection to Jurisdiction, ICSID Case No ARB/05/19, IIC 130 (2006), Oct. 17, 2006 at para.79.

¹⁹⁹ *Id.*

²⁰⁰ *SGS Société Générale de Surveillance SA v Pakistan*, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/13, IIC 223 (2003), Aug. 6, 2003, at para. 134.

²⁰¹ *Id.* at 135.

²⁰² *Id.*

expenditures.”²⁰³ And while the Tribunal was referring primarily to its own case, wherein a valid contract was signed, and it distinguished itself from *Mihaly*, it pointed out that, “in *Mihaly* the decision did in fact consider that it might well be the case in other investments that the moneys spent of expenses incurred in their preparation can be swept under the umbrella of such investment.”²⁰⁴

In *PSEG*, the Tribunal gave jurisdiction even though no work had been done. And probably correctly, given the BIT’s definition of investment:

“Investment” means every kind of asset in the territory of one Party owned or controlled, directly or indirectly, by nationals or companies of the other Party, including assets, equity, debt, claims and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or other interests in the assets thereof; (iii) a claim to money or claim to performance having economic value and associated with the investment; (iv) intellectual property and industrial property rights, including rights with respect to copyrights, patents, trademark, trade names, industrial designs, trade secrets and know-how and goodwill; (v) any right conferred by law or contract, and any licenses and permits pursuant to law; and; (vi) reinvestment of returns, and of principal and interest payments arising under loan agreements.²⁰⁵

This is a fairly typical BIT definition of “investment.”

The above BIT language provides a number of options for *Mihaly* 1. *Mihaly* 1’s plans are “intellectual property,” because intellectual property includes “industrial designs” and “know-how.” As well, the right to compensation where someone profits from your design is “a right conferred by law” in almost all countries. Lastly, an

²⁰³ PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Turkey, Award and Annex, ICSID Case No ARB/02/5, IIC 198 (2007), 19 January 2007 at para.304.

²⁰⁴ *Id.* at para. 302.

²⁰⁵ PSEG Global Inc and ors v Turkey, Decision on Jurisdiction, ICSID Case No ARB/02/5, IIC 197 (2004), 04 June 2004 at para. 66 (citing BIT Article 1(1)).

industrial design and/or a company's outlay, which benefited another company, could be considered both "interests in the assets of a company" and/or "a claim to money or to performance having economic value." These options do not apply to the original *Mihaly* because if the host country doesn't use the designs, then there is no "intellectual property right," "know-how," nor any "assets" in a *going concern*. The fact that the investment is used is the lynchpin to being deemed an "investment."

Having found that *Mihaly 1*'s investment qualifies as a protected "investment," both under the Washington Convention and under typical BIT language, I move to the other Washington Convention jurisdictional requirements. First, I explore requirement (iii) "that the dispute arises directly out of an investment,"²⁰⁶ and then "(ii) that the dispute was a legal one."²⁰⁷ Fulfilling requirement (ii) necessitates analyzing the "fair and equitable treatment standard."

c) Washington Convention Requirements: (iii) That the dispute arises directly and not indirectly out of an investment.

Finding a causal connection is straightforward in the current hypothetical because Sri Lanka directly benefited from *Mihaly 1*'s investment. This dovetails with restrictions inherent in unjust enrichment, as unjust enrichment per se requires a causal connection between the Claimant's loss and the unjustified enrichment. This element will complicate cases where a third party benefits from the investment, as "*Mihaly 2*" will explore.

d) Washington Convention Requirements: (ii) That the dispute was a legal one: Fair and Equitable Treatment.

A violation of local law or even a general principle of law is not enough to get jurisdiction under ICSID. The Respondent country must violate something that the

²⁰⁶ See Washington Convention requirements, *Supra* note X.

²⁰⁷ *Id.*

Tribunal understands to be contained within an article of the BIT. Investors, then, must find a hook to hang their unjust enrichment claim on within the BIT. For *Mihaly I*, a violation of the “fair and equitable treatment” standard is the simplest.

Although tribunals’ applications of “fair and equitable treatment” could be depicted as a gradient, for simplicity’s sake, I am going to break it into three general readings: broad, moderate, and narrow. The narrowest reading is that “the obligation to treat an investment fairly and equitably refers to the minimum standard of treatment of aliens under customary international law.”²⁰⁸ The moderate reading would be that “fair and equitable” requires “a higher standard of conduct more in consonance with the objective of the treaty.”²⁰⁹ Lastly, *Tecmed* reflects the broad standard, where the Tribunal finds that “fair and equitable” requires not violating investor expectations.²¹⁰

Siemens v. Argentina provides a useful survey of “fair and equitable treatment:”

In their ordinary meaning, the terms “fair” and “equitable” mean “just”, “even-handed”, “unbiased”, and “legitimate”... It follows from the ordinary meaning of “fair” and “equitable” and the purpose and object of the Treaty [to intensify economic cooperation...and create favorable conditions for investments] that these terms denote treatment in an even-handed and just manner conducive to fostering the promotion and protection of foreign investment and stimulating private initiative. Terms such as “promote” or “stimulate” are action words that indicate that it is the intention of the parties to adhere to conduct in accordance with such purposes.²¹¹

²⁰⁸ *Siemens v Argentina*, *Supra* note X at para 289

²⁰⁹ *Id.*

²¹⁰ *Id.* at para. 299.

²¹¹ *Id.* at para. 290.

“Just” is the first word used to define the ordinary meaning of “fair and equitable treatment.” “[J]ust manner” only strengthens this connection. *Unjust* enrichment is based on the idea of “just.” By definition, the enrichment must be unjust to qualify in the merits stage. The “fair and equitable treatment” standard, if nothing else, purports to ensure that the host State treat the investment in a “just manner.” Benefiting unjustly from the investment, then, must violate the “fair and equitable treatment” standard. And if the standard is violated literally, then, there must be a legitimate cause of action for unjust enrichment contained within the standard. If a definitional argument does not suffice, perhaps adding the argument that unjust enrichment violates customary international law will.

The *Siemens* Tribunal continues:

There is no reference to international law or to a minimum standard [in the instant Treaty’s definition of fair and equitable]. However, in applying the Treaty, the Tribunal is bound to find the meaning of these terms under international law bearing in mind their ordinary meaning [just, etc.], the evolution of international law and the specific context in which they are used.²¹²

The Tribunal adds:

The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment. In 1927, the US-Mexican Mixed Claims Commission considered in the *Neer* case that a State has breached the fair and equitable treatment obligation when the conduct of the State could be qualified as outrageous, egregious or in bad faith or so below international standards that a reasonable and impartial person would easily recognize it as such. This description of conduct in breach of

²¹² Id at. para. 291.

the fair and equitable treatment standard has been considered as the expression of customary international law at that time. For the Tribunal the question is whether, at the time the treaty was concluded, customary international law had evolved to a higher standard of treatment.²¹³

The Tribunal describes a narrow reading in *Genin* where, “[a]n international minimum standard...could only be breached by “a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”²¹⁴

Later tribunals adopted a more “modern” reading, or as I called it, moderate reading. “To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”²¹⁵

Recent interpretations go even further, moving to the broad interpretation. For example, according to *Waste Management II*:

The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety, --as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in the administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.²¹⁶

²¹³ *Id.* at 293.

²¹⁴ *Id.* at para. 294.

²¹⁵ *Id.* at 295 (citing *Mondev International Ltd v United States*, Award, ICSID Case No ARB(AF)/99/2, IIC 173 (2002) at para. 123)

²¹⁶ *Id.* at 297 (citing *Waste Management, Inc v Mexico*, Award, ICSID Case No ARB(AF)/00/3, IIC 270 (2004) at para.98).

Tecmed reflects this new standard, describing “just and equitable treatment” as requiring, “[t]reatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”²¹⁷

Mihaly 1’s unjust enrichment claim should fit into the moderate and broad “fair and equitable treatment” standards. The narrow standard, based on customary international law from the 1920s, will be a more difficult case.

Beginning with the easiest is well, easier. Under the “investor’s expectations”²¹⁸ standard, “fair and equitable treatment” becomes a catchall clause within the BIT. This interpretation allows broad judicial discretion, as investor expectations are myriad and subjective. Thus, an unjust enrichment claim fits effortlessly. Mihaly 1’s expectations that their project plans not be exploited by Sri Lanka without compensation would place unjust enrichment within the ambit of “fair and equitable” standard. Also, as nearly every country allows some type of cause of action to prevent unjust enrichment, Mihaly 1 could surely point to their expectations that local laws prohibiting unjust enrichment be followed, and consequently that Mihaly 1 had the BIT supported right to expect that Sri Lanka not be enriched at its expense. Couple this with a definitional argument about “just” standards and “unjust” enrichment, and Mihaly 1 has a solid claim.

Over and above the proceeding arguments, the moderate “modern customary law”²¹⁹ standard requires demonstrating that preventing unjust enrichment is customary international law. Here, bringing up instances where the Iran-US Claims Tribunal, and current ICSID cases employ unjust enrichment is key. For example, highlighting tribunals’ unjust enrichment explorations and addressing the ambiguities

²¹⁷ Id at 298 (citing *Tecnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2, IIC 247 (2003) at para. 154).

²¹⁸ *Id.* (Tecmed)

²¹⁹ *Siemens*, *supra* note X.

tribunals like *Enron*²²⁰ and *CME*²²¹ rely on to avoid determining unjust enrichment's applicability in ICSID is a good starting place. Mihaly 1 can then easily point to *ADC v. Hungary* as an example of a tribunal using unjust enrichment in ICSID—both by awarding restitution and in its unspoken reliance on unjust enrichment. Lastly, Mihaly 1 Claimants could point to the options granted by *Chorzów*, so often cited as customary international law, as grounds for accepting a claim of unjust enrichment under a BIT. Once the Court accepts that preventing unjust enrichment is required under customary international law, Mihaly 1 can move on to proving that unjust enrichment in fact occurred.

Mihaly 1 stumbles under the narrow “bad faith” reading of the fair and equitable treatment standard. Here, Mihaly 1 would have to show that there was bad faith on the part of Sri Lanka. For example, that Sri Lanka had intentionally sabotaged the contract so that they wouldn't have to share in the power plant profits. This, however, would be a breach of good faith, and might bar an unjust enrichment claim, as any other available cause of action preempts unjust enrichment. Conversely, if Sri Lanka had no intention of creating the plant, or a new government came in and then decided to use the plans a few years later, Mihaly 1 would most likely fail to get jurisdiction under the narrow “fair and equitable treatment” standard.

Assuming that the Tribunal applied the moderate or broad interpretation of the fair and equitable treatment standard, Mihaly 1 has succeeded in getting jurisdiction as: (1) the initial outlay for the power plant design was an investment under the Washington Convention customary standards and the BIT language; (2) there was a dispute (3) arising directly from the investment (Sri Lanka's enrichment resulted from their utilizing Mihaly 1's plans); and (4) the dispute was legal, as Mihaly 1 was able

²²⁰ *Supra* note X

²²¹ *Supra* note X

to point to a violation of the “fair and equitable treatment” standard in the relevant BIT.

2. Merits

The merits would have been explored during the jurisdiction phase, to show that the “fair and equitable treatment” standard was violated by unjust enrichment. Here Mihaly 1 would just be careful to provide evidence of what the other person had gained and NOT what it had lost. Mihaly 1’s loss would be relevant only insofar as it was directly connected to Sri Lanka’s gain. Mihaly 1 must prove:

An enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.²²²

In the instant case, Mihaly 1 can show that Sri Lanka, by building the power plant designed by Mihaly 1, was enriched, as Sri Lanka both did not have to pay for the power plant design and is now benefiting from more power— and that they would not have built the power plant were it not for expectations of gain. Mihaly 1 can then show that they created the designs, which were appropriated without compensation— and thus suffered a loss. They do not need to show that the loss was sizeable nor comparable to the remedy they request, as they are employing a gains-based remedy. Mihaly 1 will then demonstrate that there was no justification for the enrichment (fraud on their part, state of necessity, or some other legal defense or reason given by Sri Lanka). Lastly, Mihaly 1 will show that no other remedy is available. They can accomplish this by pointing to the fact that no contract exists—therefore they are not

²²²Iran-U.S. Claims Tribunal tenets, *supra* note x and y.

undermining a contract's integrity. They might have to distinguish the case from expropriation, and might do so on the attenuated nature of claiming an expropriation of purely (unpatented) intellectual property, rather than a contract or physical asset, the majority of which was created in an unrelated country.

The merits will directly impact jurisdiction, as proving a violation of the "fair and equitable treatment" standard requires proving that an unjust enrichment, as defined by international law standards, occurred. Since the case is argued in terms of gain, the remedy must also reflect the underlying justification for the decision, defendant's unjust gain.

3. Remedy

Here is the real advantage of an unjust enrichment case in an intellectual property context. Often, gains from intellectual property far exceed their initial outlay—particularly in things like know-how. A remedy based on the other party's gain, then, is ideal for the claimant. Some scholars and the U.S. government see restitution of the defendant's gain as the best way to award remedies in intellectual property ("IP") disputes. The U.S. Trade Secret Act mandates restitution for a number of IP violations.²²³ As well, James W. Hill argues that trade secret law should be based on unjust enrichment. He argues that damages don't suffice, because of the difficulty faced in approximating the claimant's loss and because the claimant often suffers little loss relative to the defendant's undeserved gain.²²⁴

Restitution provides a range of options, sensitive to the facts of the case and judicial discretion. For example, in *Mihaly I*, the Tribunal could award Mihaly 1 a

²²³ According to the U.S. Department of Justice, Uniform Trade Secrets Act, VIII.D.1. "Restitution is Available—and Often Required—in Intellectual Property," available at <http://www.usdoj.gov/criminal/cybercrime/ipmanual/08ipma.html>

²²⁴ James W. Hill, Trade Secrets, Unjust Enrichment, and the Classification of Obligations, 4 Va. J.L. & Tech. 2 (Spring 1999), 1522-1687.

percentage of the profits from Sri Lankan power plant. This percentage might correspond to the value of the plans relative to the power plant's total value, including future profits.²²⁵ (This would reflect the *ADC v. Hungary* award, less the amount awarded for dividends and the unpaid management contract fees.) I would recommend that the Tribunal limit the award to the percentage of real profits, keeping in mind that Mihaly 1 did not expend anything in the building of the plant and that Sri Lanka did, and that future profits may be speculative. In Daniel Friedmann's analysis, when a defendant's contribution entails a loss or expenditure while constituting a major element that led to the benefit, the defendant's expenditures should be considered.²²⁶ Awarding only a percentage of profits recognizes Defendant's expenditures, as Defendant's costs would be covered before profits are awarded. Even awarding all profits is better for a Defendant than awarding the entire value of the investment.

Awarding a percentage of profits is both consistent with the restitution award in *ADC*, and it addresses incentives for countries to develop, while minimizing waste. Awarding the entire profit has precedents both in *Snepp* and perhaps in Question II of *Chorzów*.²²⁷ In *Snepp*, a CIA agent published a book without getting permission from the CIA. He had to disgorge all profits from the book, even though he had contributed much of the work. Friedmann reminds us:

[T]here is a venerable line of equity cases which allowed recovery of profits for breach of fiduciary duty even where the defendant acted innocently and was unaware of the fact that his conduct is wrongful.

²²⁵ See *Edwards v Lee's Administrator* (1936) 96 SW 2d 1028 ('*Kentucky Cave Case*') (The owner of the entrance of the **cave** set up a tourist industry, based on the sights to be *Seen* in the **cave**, the stalagmites and stalactites and so on. One third of the scenic **cave** extended under his neighbor's land. The court awarded the neighbor a corresponding share of the profits.)

²²⁶ Daniel Friedmann, RESTITUTION FOR WRONGS – THE MEASURE OF RECOVERY from the Texas Law Symposium on Restitution and Unjust Enrichment, 2001, available at <http://www.utexas.edu/law/conferences/restitution/friedman.pdf>

²²⁷ *Snepp v. United States*, (1980) 444 US 507.

Once the defendant's conduct was characterized as breach of fiduciary duty his good faith as well as his contribution were often disregarded and he was held liable to hand over all his profits, despite the fact that these were mostly the result of his efforts and skill.²²⁸

But, he goes on to explore recent cases such as *Boardman v. Phipps*²²⁹, which mitigate earlier awards of all profits. Friedmann concludes that there are four options for unjust enrichment awards:

- 1) The plaintiff will receive all profits, subject only to a deduction of the defendant's investment in money or property.²³⁰ Such a result was often reached in cases of breach of fiduciary duty.
- 2) The same result as under (1) except that the defendant will also be remunerated for his skill, ingenuity, risks undertaken and labor (*quantum meruit*). He will similarly be paid for the use of any other resources that he invested.²³¹
- 3) The profits will be divided between the plaintiff and the defendant in accordance with their relative contribution. This is a common solution in the "mixed fund" situation (monies of both parties were used in a successful venture). It is however submitted that such a result might be warranted in appropriate circumstances where the defendant's contribution was by way of labor, ingenuity, risk undertaken and skill.
- 4) The plaintiff will receive the objective value of that which was taken from him. Profits in excess of this amount will remain in the hands of the defendant. Such a result is the opposite of that reached under (1).²³²

²²⁸ Friedman, *supra* note 270, at 12, (citing *Keech v Sanford* (1728) 25 ER 223; *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All ER 378 (H.L.); *Lac Mineral v International Corona Resources Services* (1989) 61 D.L.R. (4th) 14, noted [1990] L.M.C.Q. 4 (Davies) 460 (Birks). Cf. Also *Meinhard v. Salomon* 249 N.Y. 458 (1928).)

²²⁹ *Boardman v. Phelps*, 2 A.C. 46(H.L.)(1967).

²³⁰ Where, however, the investment of the defendant was illegal or immoral (e.g., payment of bribe to a third party) it is conceivable that it will not be deducted from the plaintiff's claim.

²³¹ A possible measure of the defendant's entitlement is the income which he would have derived from his work and resources in an alternative business or occupation.

²³² Friedmann, *supra* note 270, at 13.

The option granted in the award might depend on the defendant's innocence.

According to Freidmann:

The Restatement Restitution (2d) Council draft No. 1 §10 adopts a very liberal approach towards the mistaken improver subject only to the provision that the remedy given to the improver will not unduly prejudice the owner. This approach is however confined to the mistaken improver. The lot of the conscious wrongdoer is apparently much harsher. His whole investment is forfeited. Thus, suppose that D enters P's land, removes timber, causes it to be cut, hauled and sawn, thus producing lumber that is much more valuable than the standing timber. If D was a conscious trespasser then under the Restatement's Council draft he has no claim for the benefit officiously conferred on P.²³³

Thus, the award granted Mihaly 1 should vary depending upon Sri Lanka's innocence and Sri Lanka's contribution.

Suppose that the design created by Mihaly 1 was worth \$1,000,000 and that the power plant cost \$399 million to build and now produces an annual profit of \$5 million. Thus, \$1 million of what Sri Lanka possesses belongs to Mihaly 1.

Under (1), Mihaly 1 will receive all the profits including the estimated future profits based on *Snepp* and other early common law decisions. This option might occur where Sri Lanka intentionally avoided entering the contract in order to costlessly exploit Mihaly 1's plans. It is not, however, a good option, as it provides a windfall to the plaintiff. As well, under this option, unjust enrichment as understood by Birks and the Iran-U.S. Claims Tribunal would not apply, as there is a breach of good faith, which allows for an alternative cause of action—making it a wrongful, rather than unjust enrichment.

²³³ *Id.* at 17.

Using (2), Mihaly 1 receives the \$5 million dollars and future profits, and will reimburse Sri Lanka for its expenses in building the power plant. Sri Lanka will thus get its \$399 million back, but not share in any of the profits. This is a better option in the case of an intentional appropriation of Mihaly 1's designs.

In (3), Mihaly 1 and Sri Lanka split the profits, in proportion with their investments. Thus, Mihaly 1 would get 1/400 of the profits. The Tribunal might find, however, that Mihaly's design was worth more than its market value (considering the difficulty in valuing intellectual property) and thus award a larger percentage of the profits. This solution seems fair to both parties, and appears the least punitive.

Under (4), which is most favorable to Sri Lanka, Sri Lanka retains the \$5 million in annual profits after refunding the FMV of Mihaly 1's design (\$1,000,000). This solution might be desirable where Sri Lanka was unaware that the design was not theirs to keep. An example might be where a new government comes in and innocently uses the design.

I think that Friedmann accurately summarizes the matrix a court should employ:

If the defendant was a conscious wrongdoer and his contribution consisted mainly of his own skill and labor, the court may deny him any compensation. However, in extreme cases in which his skill and labor created most of the benefit, some allowance might be made. The defendant's case is even stronger where he made an actual expenditure that contributed to the benefit. Allowance should be made for such contribution even in the case of conscious wrongdoer, though the court should have discretion to allow it only in part.²³⁴

Understanding the incentives remedies create is important. Firstly, it is preferable that the country exploits the plans, as it capitalizes on labor done, and prevents a

I. ²³⁴FRIEDMANN, *SUPRA* NOTE 270, AT 20.

deadweight loss. Assuming a percentage of profits are paid out through restitution, the situation is beneficial to both country and investor. Indeed, as *Mihaly* shows, the investor's costs are sunk unless Sri Lanka builds the plant. The award then should encourage building by limiting the amount of restitution to a proportional interest, but not cut so finely as to dissuade investors from pre-contractual expenses, or encourage countries to avoid signing contracts. There is a danger, if tribunals give awards that are too low, of creating incentives for countries to refuse to enter contracts, and then try the product out, getting the work for free, and paying only if the project succeeds.²³⁵ This point is moot, however, if the country lacks the funds to develop the project.

C. OTHER HYPOTHETICALS: FINER POINTS

Having explored the most straightforward case, I move on to consider complicating factors. In the second hypothetical "*Mihaly 2*," I assume the same facts, except that a third party, not Sri Lanka, built the power plant. Here I explore four potential third party beneficiary scenarios:

- a. The third party paid a large sum to Sri Lanka and knew that the plans were *Mihaly 2*'s.
- b. The third party paid a large sum to Sri Lanka and didn't know that the plans were *Mihaly 2*'s.

²³⁵ See Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 472 (1992) ("[I]n the intellectual property setting, giving creators restitutionary rights tends to encourage consensual markets." In other words, the availability of a restitutionary remedy may encourage persons to, for example, make licensing agreements with trade-secret owners, instead of the remedy serving as a *substitute* for such market transactions. In fact, in intellectual property, the restitution of benefits conferred may be regarded as a "more fundamental" right than the liability for harms done to a create. See also *Weitzenkorn v. Lesser*, 256 P.2d 947, 959 (Cal. 1953) ("Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.")

- c. The third party got the plans for free and knew that the plans were Mihaly 2's.
- d. The third party got benefits for free and didn't know that the plans were Mihaly 2's.

In scenarios “a” and “b” a claim for unjust enrichment should prevail against Sri Lanka, for the amount Sri Lanka received for the plans.²³⁶ Here the seller (Sri Lanka) benefited directly from Mihaly 2's plans. The claim would parallel *Mihaly 1* exactly, and perhaps even facilitate award calculations. If, however, the buyer profited exponentially after purchasing the plans, it is unlikely that Mihaly 2 would be able to recover any of the buyer's profits. Unjust enrichment claims against third party beneficiaries are rarely recognized.²³⁷ As well, the third party, where innocent, has the “bona fide purchase for value without notice” defense.²³⁸ Indeed, Mihaly 2 would struggle to find jurisdiction for such a claim, as the causal connection required under the Washington Convention between the dispute and the investment would be stretched. And, the third party would most likely not be a signatory to the BIT. This problem is explored in an auxiliary manner in *Saluka*, where the Tribunal decided that an unjust enrichment claim failed because the entity directly enriched was a company— leaving the country only indirectly enriched from its interests in the company.²³⁹ *Saluka* may impose interesting limitations on unjust enrichment claims, as it could mean that future Tribunals have to decide whether claims may be levied against State companies, and how much interest the Respondent State must have in the enriched company to be considered directly enriched.

²³⁶ This would have precedent in *ADC v. Hungary*, *supra* Section I.

²³⁷ See Birks, *Wrongful Enrichment*, *supra* note X.

²³⁸ See Part I, defenses to unjust enrichment, *supra* note X.

²³⁹ See *Saluka*, *supra* note X.

This brings us to “c.” “C”, in this hypothetical, is a company in which the State has some interests. Applying *Saluka* means that jurisdiction and winning on the merits both depend on how much interest Sri Lanka has in the company. For example, a purely State-owned company resembles *Mihaly I*, and would easily gain jurisdiction and win on the merits.

If Sri Lanka owns a controlling interest, however, the problem is complicated. Now there are other shareholders who might not know of the enrichment. A successful unjust enrichment claim, however, does not require that the Defendant know of the unjust enrichment. In this instance, an unjust enrichment claim may succeed. Even under *Saluka*, I think that a controlling interest should be enough to prove that the State was a direct beneficiary—although this may lead to problems of piercing the corporate veil.

If Sri Lanka has minority interests in the company that receives the *Mihaly 2* designs and develops them, *Mihaly 2* bleeds. In this instance, *Saluka* precedent prevents an unjust enrichment claim. I think this is a hard call, particularly given that unlike *Saluka*, recent ICSID decisions refuse to separate entitlement to share value from company action. Cases like *Gami*²⁴⁰ (Mexico’s conduct impaired the value of its shareholdings to such an extent that it must be deemed tantamount to an expropriation), *Enron*,²⁴¹ and *CMS*²⁴² liken a drop in company share value to expropriation and allow the shareholder to recover the loss. True, these decisions arise in contexts other than unjust enrichment, but still present an interesting counterpoint to *Saluka*. It would be odd to say that an increase in a company’s shares, wherein Sri Lanka receives a portion of the profits, is not an enrichment to Sri Lanka,

²⁴⁰ See *GAMI Investments Inc v Mexico*, Final Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 109 (2004) (Nov. 15).

²⁴¹ See *Enron*, *supra* note X.

²⁴² See *CMS* *supra* note X

when other cases have awarded minority shareholders company lost profits. Perhaps, then Mihaly 2 could get a portion of the dividends or some of Sri Lanka's shares in the beneficiary company. Since unjust enrichment doesn't require intent, the same would apply to "d."

Mihaly designed the power plant specifically for Sri Lanka. What if Mihaly had designed a fungible product? Assume that "*Mihaly 3*" could have or did sell the design to another country. The case in this instance hinges on Mihaly 3 sustaining some loss (assuming we use the Iran-U.S. Claims Tribunal requirements). While not all countries require a corresponding loss, a correlated loss serves to exclude claims for perfectly fungible intellectual property, like computer programs, which belong under the WTO regime. In the instant case, it would be up to judicial discretion as to whether Mihaly 3 sustained a loss, either because it didn't find a replacement buyer or because there were losses incurred in finding a new client.

Should the fact that "*Mihaly 4*" patented their dam design influence the outcome? Using a patent without permission violates property laws, so the Claimant might not even need an unjust enrichment cause of action. Rather Mihaly 4 might sue under expropriation. Since another cause of action is available, under the Iran-US Claims Tribunal standards, the Claimants would be barred from bringing an unjust enrichment claim. As well, using intellectual property, in isolation, might not constitute expropriation. Regardless, they could ask for the award to be based on unjust enrichment—relying on *ADC* and *Chorzów*.

A subtler problem arises during negotiations. At what point is the information gleaned from an extended negotiation considered unjust enrichment to the State if the State later capitalizes on the information without entering into a contract? States will frequently use negotiations to gratuitously derive the necessary know-how and

intellectual legwork for a new project. Intellectual property regulations do not protect trade secrets and know-how unless there is a confidentiality agreement. This hypothetical then would hinge on the existence of a confidentiality agreement between the State and the company, and the extent to which the company could show that the State's project relied on their ideas. These would pose substantial, but not insurmountable barriers to bringing an unjust enrichment claim. The high barriers should serve to prevent frivolous suits, and maintain the space for independent invention. Allowing these claims, however, will prevent blatant information mining and preserve good faith and openness in negotiations.

Another area requiring exploration is that of timing. The ad hoc committee in *Amco* says that res judicata limitations do not apply to unjust enrichment actions.²⁴³ Thus, if Mihaly failed under the 2006 claim, they could sue a few years later under unjust enrichment, once Sri Lanka developed the power plant based on Mihaly designs. This is an area that will require fine-tuning—as repeat claims are inefficient.

IV. CONCLUSION

²⁴³ ICSID Case No. ARB/81/1 (Resubmitted Case: Award) *Amco Asia Corporation (Claimant), Pan American Development Limited (Claimant), PT Amco Indonesia (Claimant) v Republic of Indonesia (Defendant)* ICSID Case No. ARB/81/1, 1988 WL 1103904 (APPAWD) at para. 156. *Amco's* third cause of action was unjust enrichment, specifically that "Indonesia would be unjustly enriched if permitted to retain both the benefits of *Amco's* investment and the earnings which *Amco* could have obtained from such investment. The Tribunal made no explicit determination regarding whether ICSID tribunals considered unjust enrichment a cause of action, opting to show that Indonesia had not been directly enriched. *AMCO's* resubmitted case, however, opens an entirely new avenue. "The Tribunal here refers also to Indonesia's contention at paragraph 34 of its Observations on the Jurisdiction of the New Tribunal. Indonesia there contends that no unjust enrichment claim may be advanced by *AMCO* because this would create »a seemingly new argument to evade the legal force of res judicata«. But unjust enrichment was never the subject matter of a finding by the first Tribunal, as although the issue had been advanced before that body, it reached its pertinent findings on other grounds. Even if the present Tribunal had found that the statement of the ad hoc Committee on the lawfulness of the licence revocation was res judicata, the claim of unjust enrichment could still be advanced in the present proceedings." This raises a number of issues. For instance, tribunals must explore unjust enrichment claims and dismiss them with valid justifications, or risk retrying cases. *If* unjust enrichment escapes res judicata, *and* is considered a valid cause of action, *then* countries risk retrial or lengthened trials, and claimants should be exploiting this opportunity.

Increasing recognition of intellectual property's value will prompt more claims that could and probably should employ unjust enrichment. Avoiding unjust enrichment may become increasingly problematic, as tribunals scramble to find substitute rhetoric for a concept easily identified as unjust enrichment. This is not to say that unjust enrichment should be employed liberally. Equitable remedies require rigid parameters to protect the integrity of legal concepts and contracts, and prevent the misuse that current ICSID pleadings demonstrate.

In the end we should start getting comfortable with unjust enrichment. It will reemerge in international investment disputes soon, and better that it have universally applicable tenets when it does so. Indeed, *ADC v. Hungary* has already opened the door. As *Chorzow, Lena*, the Iran-U.S. Claims Tribunal, recent ICSID cases, and scholarly treatises show, unjust enrichment is a general principle of international law, and has been since the early-twentieth century. And, the fair and equitable treatment standard, which all BIT's contain, protects customary international law. Thus, unjust enrichment is protected by the "fair and equitable treatment" standard in BITs. As I show using the *Mihaly* hypothetical series, unjust enrichment meets ICSID jurisdictional thresholds, and meets a legal need inherent in increasingly prevalent intellectual property cases.

In the end, there is a space for unjust enrichment in ICSID. A silent player in customary international law, housed within "fair and equitable" treatment, and fulfilling all of the ICSID jurisdictional criteria, unjust enrichment is simply awaiting the right set of facts and a disciplined application.

