PART II

LOST ON THE WAY TO *CHORZÓW*: HAVE ARBITRATORS JUST BEEN PAYING LIP SERVICE TO THE PCIJ'S SEMINAL CASE IN THEIR DAMAGES ANALYSES?

Chapter 4

When it Comes to Applying *Chorzów*, Arbitrators are Staying on the Marked Paths

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To see that arbitrators are not "lost on the way to *Chorzów*," and that they have not "just been paying lip service to the PCIJ's seminal case in their damages analyses," one only need look to the jurisprudence.[1] This article puts ten damages awards to the test — one from every year from 2004 to 2013 — and demonstrates that every last one of them follows the path laid out in the merits decision in the *Case Concerning the Factory at Chorzów* ("*Chorzów*").[2]

The ten cases under consideration involve 25 different arbitrators, claims under eight different bilateral investment treaties ("BITs") and the Energy Charter Treaty, investments in a variety of different industries, and treaty violations that run the gamut. From a bird's-eye view, the relief awarded across these cases resembles a series of Dickensian dichotomies (*e.g.*, the claimant receives no damages,[3] the claimant receives substantial damages;[4] restitution is appropriate,[5] restitution is improper;[6] the valuation date is the time of the treaty violation,[7] the valuation date is the time of the award).[8] And yet, as demonstrated below, each individual damages award

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[1] As part of the Ninth Annual Investment Treaty Arbitration Conference, the author was asked to take the position that arbitrators have been giving full effect to *Chorzów* in their damages analyses. This paper is therefore an advocacy piece and does not necessarily reflect the views of the author. The views expressed in this paper should not be attributed to the author, her law firm, or her clients.

[2] *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) (Judgment No. 13, Merits) ("*Chorzów*"). The ten damages awards under consideration in this article were selected mostly at random. The only requirements for use in this paper were: (1) that the award mention *Chorzów* by name or purport to apply its standard, and (2) that the award be from a case in which the author had not participated as counsel.

[3] *See, e.g.*, *Biwater Gauff (Tanzania) Ltd., v. Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 814(e) (Hanotiau, Born, Landau) ("*Biwater Gauff*").

[4] *See, e.g., ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Award, 2 October 2006), ¶ 543 (Kaplan, Brower, van den Berg) ("*ADC*") (granting a cumulative principal amount of USD 76.2 million to the two claimants).

[5] *See, e.g., Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 571 (Cremades, Hanotiau, Knieper) ("*Arif*").

[6] *See, e.g., Petrobart Limited v. Kyrgyz Republic,* SCC Case No. 126/2003 (Award, 29 March 2005), p. 78 (Danelius, Bring, Smets) ("*Petrobart*").

[7] *See, e.g., MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (Award, 25 May 2004), ¶¶ 240(ii), 247, 251 (Rigo Sureda, Lalonde, Oreamuno Blanco) ("*MTD*").

[8] *See, e.g., ADC*, ¶ 497.

remains true to the "[t]he essential principle"[9] identified in *Chorzów* — *i.e.*, "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[10] Each damages award takes as its starting principle that States must make reparation for the consequences of an internationally-wrongful act.[11] Each damages award recognizes that this principle means that States need only make reparation for the injury actually suffered by the claiming party as a result of the internationally-wrongful act.[12] And each damages award recognizes that, while the standard of proof may be discharged through likely probabilities,[13] relief cannot be awarded on the basis of speculation.

For each damages award under consideration, this article first summarizes the relevant facts and merits findings, before proceeding to demonstrate that the tribunal actually applied the *Chorzów* standard.

2004:

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile

<u>What was the case about?</u> In 1996, Malaysian company MTD Equity Sdn. Bhd. ("MTD") began exploring the possibility of building a mixed-use, planned community outside of Santiago, Chile.[14] MTD located a site in the small town of Pirque and, even though the site was zoned for agricultural use,[15] began taking steps to build the planned community there. MTD signed a promissory contract with the owner of the site in December 1996[16] and, shortly thereafter, sought permission from Chile's foreign investment committee to provide capital to a newly formed corporation (MTD Chile).[17] MTD Chile then planned on using the capital to acquire a 51% stake in a "project company" that would own the land and develop the planned community project.[18] The foreign investment

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9 *Chorzów*, p. 47.
10 *Chorzów*, p. 47.
11 *See Chorzów*, p. 29 (stating that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation" and that "reparation is the indispensable complement of a failure to apply a convention").
12 *See Chorzów*, p. 30 (finding that "it is necessary for the Court to ascertain whether [the allegedly injured companies] have in fact suffered damage as a consequence of the [State action that the Court had deemed wrongful]"); *see also id.*, p. 31 (explaining that "injury resulting for third parties from the unlawful act" should be "exclud[ed] from the damage to be estimated"), p. 48 (adverting to the "risk of the same damage being compensated twice over").
13 *Chorzów*, p. 47 (stating that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, *in all probability*, have existed if that act had not been committed." (emphasis added)).
14 *MTD*, ¶ 41.
15 *MTD*, ¶ 42.
16 *MTD*, ¶ 49.
17 *MTD*, ¶ 52.
18 *MTD*, ¶ 52.

committee approved MTD's application on 3 March 1997[19] and signed a foreign investment contract with MTD two weeks later.[20] MTD thereafter injected approximately USD 17 million into the project.[21]

In the end, the project never got off the ground. Even though the foreign investment committee had approved MTD's injection of funds, and certain government officials had formally endorsed the planned community project,[22] MTD ultimately was unable to convince the relevant Chilean authorities to rezone the project site to allow a mixed-use, planned community.[23] The Minister of Housing and Urban Development formally rejected the planned community project on 4 November 1998.[24] On 2 June 1999, MTD notified Chile of an investment dispute under the Chile-Malaysia BIT.[25] MTD submitted a request for arbitration to ICSID on 26 June 2001.[26]

What was the treaty violation? In a 25 May 2004 award, a tribunal composed of Andrés Rigo Sureda, Marc Lalonde, and Rodrigo Oreamuno Blanco concluded that Chile had violated the fair and equitable treatment obligation in the Chile-Malaysia BIT.[27] The tribunal noted that even though the claimants had started discussing the intended project with Chilean officials as early as 1996, it was not until several years later that the claimants were notified in writing that the government would not rezone the project site to permit a planned community.[28] According to the tribunal, "what is unacceptable . . . is that an investment would be approved for a particular location specified in the application and the subsequent [investment] contract when the objective of the investment is against the policy of the Government."[29] The claimants sought "full compensation"[30] for this treaty violation, such that "the Claimants [we]re restored to the position they would be in had those treaty violations not occurred."[31] The claimants asserted that achieving "full compensation" would entail recovery of: (1) the full cost of their investment (minus any residual value), (2) pre-award interest, and (3) the costs and expenses of the ICSID arbitration.[32]

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19 *MTD*, ¶ 53.
20 *MTD*, ¶ 54.
21 *See MTD*, ¶¶ 55, 57.
22 *MTD*, ¶ 61.
23 *MTD*, ¶ 80.
24 *MTD*, ¶ 80.
25 *MTD*, ¶ 83.
26 *MTD*, ¶ 1.
27 *MTD*, ¶ 166.
28 *MTD*, ¶ 165.
29 *MTD*, ¶ 189.
30 *MTD*, ¶ 215.
31 *MTD*, ¶ 215.
32 *MTD*, ¶ 215.

Did the tribunal purport to apply *Chorzów*? Yes. The tribunal stated that the applicable standard was "the classic standard enounced by the Permanent Court of Justice [sic] in the *Factory at Chorzów*."[33]

How did the tribunal assess damages? As in *Chorzów*,[34] the *MTD* tribunal began by recalling the nature of the internationally-wrongful conduct and considering the limits that that nature might impose upon the scope of relief. Since "Chile's responsibility is related to the approval of the transfer of funds by the [foreign investment committee] in spite of the policy of the Government not to change the [zoning for the project site],"[35] the financial costs related to MTD's decision about whether to invest in Chile,[36] along with the approximately USD 17 million investment that the foreign investment committee had approved,[37] were eligible for recovery. The tribunal deemed various other expenditures — like those that MTD had made *after* it was notified that the project had been rejected — ineligible.[38]

Since the claimants had requested "the full cost of their investment (minus any remaining value),"[39] the tribunal then subtracted the value of MTD's shares in the project company from the approximately USD 21.5 million in investment costs that were eligible for recovery.[40] The tribunal determined the residual value of MTD's shares in the project company by using a share purchase offer that the claimants were contractually bound to accept.[41] Even though the claimants were concerned that the offer did not accurately reflect the value of the shares, the tribunal found that to be of "no relevance,"[42] since the claimants voluntarily had bound themselves to accept the offer.

Consistent with the notion that the State is only responsible for the injury that its wrongful conduct actually has caused,[43] the tribunal then determined whether the claimants themselves were responsible for any of the injury they claimed.[44] The tribunal noted that the claimants "had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants"[45] — for example, "accept[ing] to pay a price for the land with the Project without appropriate legal protection."[46] Since Chile's conduct

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33 *MTD*, ¶ 238.
34 *See Chorzów*, p. 47.
35 *MTD*, ¶ 240(ii).
36 *MTD*, ¶ 240(iii).
37 *MTD*, ¶ 240(i).
38 *MTD*, ¶ 240(ii).
39 *MTD*, ¶ 215.
40 *MTD*, ¶¶ 241.
41 *MTD*, ¶¶ 241.
42 *MTD*, ¶ 245.
43 *See Chorzów*, p. 30.
44 *MTD*, ¶¶ 242–43.
45 *MTD*, ¶ 242.
46 *MTD*, ¶ 242.

was only partially responsible for the injury that the claimants had suffered, the tribunal concluded that "the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment calculated on the basis of the following considerations."[47] In the end, Chile was ordered to pay a principal sum of USD 5.8 million to the claimants, plus interest accruing from the day immediately following the November 1998 notice to the claimants that it was against Chilean government policy to modify the zoning.[48] Since "neither party ha[d] succeeded fully in its allegations, the Tribunal decide[d] that each party shall bear its own expenses and fees related to this proceeding and 50% of the costs of ICSID and the Tribunal."[49]

Did the tribunal actually apply *Chorzów*? Yes. In a case in which the treaty violation involved approving investment expenditures without intending to allow the investment project to go forward, ordering the State to reimburse the investment costs (plus interest, but minus the residual value of the investment, which the claimants recovered through alternative means) is an entirely appropriate way to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[50]

2005

Petrobart Limited v. Kyrgyz Republic

What was the case about? In February 1998, Petrobart Limited ("Petrobart"), a company registered in Gibraltar, entered into a contract with a Kyrgyz State joint stock company named Kyrgyzgazmunaizat ("KGM").[51] The contract stipulated that, in exchange for payments from KGM, Petrobart was to supply 200,000 tons of stable gas condensate to KGM in monthly installments.[52] Petrobart made deliveries to KGM in February and March 1998, and sent five invoices for its services to KGM.[53] KGM paid two of the five invoices, and promised Petrobart in letters transmitted in June and July 1998 that the remaining payments would be forthcoming.[54]

While Petrobart was awaiting payment, the President of the Kyrgyz Republic declared that various KGM assets would be transferred in order

47 *MTD*, ¶¶ 242–43.
48 *MTD*, ¶¶ 247, 251.
49 *MTD*, ¶ 252.
50 *Chorzów*, p. 47.
51 *Petrobart*, p. 4.
52 *Petrobart*, p. 4.
53 *Petrobart*, p. 4.
54 *Petrobart*, p. 5.

to create a new State-run company.[55] Since debts of the nature that were owed to Petrobart would remain KGM's responsibility, Petrobart initiated recovery proceedings against KGM[56] in the Bishkek City Court of Arbitration.[57] In a December 1998 judgment, the Bishkek City Court found that Petrobart was entitled to recover approximately USD 1.5 million, plus 300,000 soms.[58] Before Petrobart could enforce the judgment, however, the Vice Prime Minister of the Kyrgyz Republic wrote a letter to the Chairman of the Bishkek City Court urging him to stay execution of the judgment.[59] The court granted a stay of execution until 18 May 1999.[60]

While the stay of execution was in force, two things occurred that effectively precluded Petrobart from enforcing the December 1998 judgment. First, KGM's assets were transferred to a new company, and then leased out.[61] Second, KGM petitioned for bankruptcy and the petition was granted.[62] When Petrobart asked the bankruptcy administrator for the money that it was owed, Petrobart was informed that it was included on the list of creditors to be satisfied "in third priority."[63] Eventually, Petrobart invoked the protections of the Energy Charter Treaty, and submitted a request for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce on 1 September 2003.[64]

What was the treaty violation? In an award dated 29 March 2005, a tribunal composed of Hans Danelius, Ove Bring, and Jeroen Smets concluded "that the Kyrgyz Republic failed in its respect for Petrobart's rights as an investor in essentially two respects: (a) by transferring assets from KGM to [other companies] to the detriment of KGM's creditors, including Petrobart; and (b) by intervening in court proceedings regarding the stay of execution of a final judgment to the detriment of Petrobart."[65] These actions amounted to a violation of both the fair and equitable treatment provision and the "effective means" provision of the ECT.[66] As reparation for these treaty violations, Petrobart requested the amount that had been granted to it in the Bishkek City Court's judgment, as well as lost profits and outlays and related expenses.[67]

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55 *Petrobart*, p. 5.
56 *Petrobart*, p. 5.
57 *Petrobart*, p. 5.
58 *Petrobart*, p. 6.
59 *Petrobart*, p. 7.
60 *Petrobart*, p. 7.
61 *Petrobart*, p. 7.
62 *Petrobart*, p. 7.
63 *Petrobart*, p. 8.
64 *Petrobart*, p. 15.
65 *Petrobart*, p. 76.
66 *See Petrobart*, pp. 76–77.
67 *Petrobart*, p. 78.

Did the tribunal purport to apply *Chorzów*? Yes. Petrobart argued that the *Chorzów* standard applied,[68] and the tribunal "agree[d] that, in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred."[69]

How were damages assessed? Consistent with *Chorzów*'s recommendation to first consider the appropriate form of relief,[70] the tribunal first considered the possibility of ordering specific performance (specifically, ordering Petrobart to deliver gas condensate to the Kyrgyz Republic and ordering the State to then pay for it).[71] Since Petrobart had ceased operations in the Kyrgyz Republic, however, the tribunal concluded that specific performance was not practical and that compensation was a better option.[72]

The tribunal then determined what injury actually had been caused by the State conduct at issue.[73] According to the respondent, neither urging the Bishkek City Court to stay the execution of the December 1998 judgment nor transferring KGM's assets to other companies caused any harm to Petrobart, since KGM already was insolvent at the time those events took place.[74] Although the tribunal disagreed that KGM was insolvent at the time of the treaty breach[75] — and therefore rejected the respondent's assertion that Petrobart was entitled to zero relief — the tribunal agreed that KGM's financial state was such that Petrobart could not expect full recovery of the December 1998 judgment.[76] Because, in all practicality, Petrobart "would have been able to obtain payment for a substantial part"[77] of the December 1998 judgment, the tribunal ordered that Petrobart be compensated in an amount corresponding to 75% of the judgment (approximately USD 1.1 million),[78] with interest to run from the date of the judgment.[79]

The tribunal then examined Petrobart's claims for lost profits and additional expenditures, rejecting both. According to the tribunal, the lost

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68 *Petrobart*, p. 77.
69 *Petrobart*, pp. 77–78.
70 *Chorzów*, p. 47 ("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").
71 *Petrobart*, p. 78.
72 *Petrobart*, p. 78.
73 *Petrobart*, p. 82.
74 *Petrobart*, p. 82.
75 *Petrobart*, p. 82.
76 *Petrobart*, p. 84.
77 *Petrobart*, p. 84.
78 *Petrobart*, p. 84.
79 *Petrobart*, p. 88.

profits claim was too speculative, since it was unclear whether Petrobart would have been able to sell any more of the gas condensate (and, if so, at what price).[80] The tribunal rejected the claim for additional expenditures because it would have amounted to double recovery — as the tribunal noted, the claim was for expenses incurred in various court and arbitration proceedings, and those proceedings had their own mechanisms for cost recovery.[81]

Did the tribunal actually apply *Chorzów*? Yes. The treaty violation in Petrobart consisted of preventing the claimant from enforcing a judgment that would satisfy a debt the claimant was owed. The tribunal held that, but for the State's actions, the claimant would have been able to recover a substantial portion of the debt, but not the whole debt. Therefore, ordering the State to satisfy 75% of the debt (plus interest) was an entirely appropriate way to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[82]

2006:

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary

What was the case about? In August 1994, after a lengthy, three-part tender procedure conducted by the Hungarian Air Traffic and Airport Administration ("ATAA"), a Canadian company (Airport Development Corporation) was awarded contracts to: (1) renovate an existing terminal at an airport outside Budapest, (2) construct a new terminal at the same airport, and (3) participate in the operation of both the existing and contemplated terminals.[83] In March 1995, Airport Development Corporation and ATAA entered into a master agreement that "laid down the fundamental structures of the whole Project."[84] The master agreement provided for the formation of a wholly-owned subsidiary ("the Project Company") that would: (1) incur the project debt and fund construction work, (2) prepare for terminal operations, and (3) conduct terminal operations. Pursuant to the master agreement, "ATAA and the Project Company would enter into an operating period agreement, which would grant to the Project Company, subject to certain conditions, the right to conduct the terminal operations and to collect the terminal revenues."[85] The operating period agreement was to run for an initial period of 12 years, and

[80] *Petrobart*, p. 82.
[81] *Petrobart*, p. 87.
[82] *Chorzów*, p. 47.
[83] *ADC*, ¶ 96.
[84] *ADC*, ¶ 113.
[85] *ADC*, ¶ 113.

could be extended once, for up to six years.[86] In February 1997, Airport Development Corporation established two companies in the Republic of Cyprus (collectively, "ADC") for the sole purpose of the airport project.[87] ADC completed the new terminal project, and opened the terminal to the public in December 1998.[88]

In April 2000, the government adopted a national aviation strategy that was designed to implement, and otherwise align the country with, EU law in the aviation sector.[89] Pursuant to this strategy, the Hungarian parliament amended the Air Traffic Act in December 2001 to prevent any entity other than ATAA (or its successor) from performing the activities that were then being performed by the Project Company.[90] As a result of this amendment and its implementing decree, "the Project Company was no longer able to operate the Terminals and collect the associated revenues."[91] ADC submitted a request for arbitration on 7 May 2003, invoking the Hungary-Cyprus BIT.[92]

<u>What was the treaty violation?</u> In an award dated 2 October 2006, a tribunal composed of Neil Kaplan, Charles Brower, and Albert Jan van den Berg concluded that Hungary had expropriated ADC's investment[93] — stating in a succinct merits section that "[i]t is obvious to the Tribunal that the measures taken by the Respondent against the Claimants fall well within the scope of the [expropriation provision] of the BIT."[94] The tribunal "c[ould] see no public interest being served by the Respondent's depriving actions of the Claimants' investments in the Airport Project,"[95] and "conclude[d] that the taking was not under due process of law . . . ."[96] It also found that "the actions taken by the Respondent against the Claimants [we]re discriminatory."[97] The tribunal also stated (without further elaboration) that it was "satisfied to conclude"[98] that the fair and equitable treatment, unreasonable or discriminatory measures, and full protection and security provisions of the BIT had "all been breached by the Respondent."[99]

<u>Did the tribunal purport to apply *Chorzów*?</u> Yes. The tribunal stated that "[t]he customary international law standard for the assessment of

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86 *ADC*, ¶ 115.
87 *ADC*, ¶ 80.
88 *ADC*, ¶ 154.
89 *ADC*, ¶¶ 174–75.
90 *ADC*, ¶ 181.
91 *ADC*, ¶ 189.
92 *ADC*, ¶ 14.
93 *ADC*, ¶ 426.
94 *ADC*, ¶ 426.
95 *ADC*, ¶ 429.
96 *ADC*, ¶ 434.
97 *ADC*, ¶ 443.
98 *ADC*, ¶ 445.
99 *ADC*, ¶ 445.

damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory* case."[100]

How were damages assessed? The tribunal began by recalling[101] *Chorzów*'s statement that the "principles which should serve to determine the amount of compensation due for an act contrary to international law"[102] are "[r]estitution 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 . . . ."[103] Because it was "clear that actual restitution cannot take place,"[104] the tribunal assessed "'the value which a restitution in kind would bear.'"[105]

Unlike many other expropriation cases, which assess the value of the investment at the time of the expropriation, the tribunal concluded that because "the value of the investment after the date of expropriation (1 January 2002) has risen very considerably,"[106] the appropriate "date of the valuation should be the date of the Award."[107] Once again quoting *Chorzów*, the tribunal noted that "'the compensation due . . . is not necessarily limited to the value of the undertaking at the moment of the dispossession . . . .'"[108] Using a discounted cash flow ("DCF") model that was based on a business plan that had been approved by ATAA shortly before the expropriation took place, the tribunal then determined the value of ADC's investment at the date of the award.[109] Given that ADC also had been denied the dividend and management fees to which it would have been entitled for the time between the expropriation and the award, the tribunal added those fees to the total amount due.[110] The total amount awarded to the two ADC claimants was approximately USD 76 million. To ensure that the claimants did not benefit from double recovery, ADC was ordered to return its shares in the Project Company to the respondent once the respondent complied with the award.[111] "Since the calculation [of damages] is based on the value of the expropriated investments as of the date of the award, no pre-award interest has accrued."[112]

Although the tribunal upheld most of ADC's damages claim, it denied ADC's request for damages corresponding to lost future development

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[100] *ADC*, ¶ 484.
[101] *ADC*, ¶ 495.
[102] *Chorzów*, p. 47.
[103] *Chorzów*, p. 47.
[104] *ADC*, ¶ 495.
[105] *ADC*, ¶ 495.
[106] *ADC*, ¶ 496.
[107] *ADC*, ¶ 497.
[108] *ADC*, ¶ 497 (quoting *Chorzów*, p. 47).
[109] *ADC*, ¶ 507.
[110] *ADC*, ¶ 518.
[111] *ADC*, ¶ 523.
[112] *ADC*, ¶ 520.

opportunities, "since the Claimants had no firm contractual rights" to the projects that formed the basis of that claim.[113] The tribunal also noted that ADC was "unable to quantify, with any fair degree of precision, the damages that would have resulted from the loss of those alleged opportunities."[114]

Did the tribunal actually apply *Chorzów*? Yes. The internationally-wrongful conduct at issue in *ADC* was the forced takeover of ADC's investment in the airport project shortly after ADC had made substantial improvements to the airport and before ADC was able to reap the full benefit of such improvements. Awarding ADC the value of the investment at the date of the award, and granting ADC all of the dividend payments that it had not received as a result of the government's conduct, was plainly consistent with *Chorzów*, as *Chorzów* itself sanctions proceeding in this manner.[115]

2007:

PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey

What was the case about? In 1994, PSEG Global ("PSEG"), a company registered in the United States, applied to the Turkish Ministry of Energy and Natural Resources to develop a lignite mine and build a lignite-fired thermal power plant in the area of Konya Ilgin.[116] PSEG established a special purpose limited liability company in Turkey (Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi) to serve as the project company. According to the PSEG, the project "envisaged 38 years of commercial operation and a total investment cost of US$804.8 million."[117] Several weeks "before the Implementation Contract was initialed, PSEG advised the Ministry that an additional site exploration had to be conducted before preparing the final Mine Plan, a step that could have an influence in the operation plan and coal production costs."[118] PSEG and

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[113] *ADC*, ¶ 525.
[114] *ADC*, ¶ 515.
[115] *See Chorzów*, p. 51 (posing the following question: "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 . . . had remained in the hands of the [company] and had either remained substantially as it was [at the time of the taking] or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the [same company]?"); *see also id.*, p. 53 (noting that this question would not preclude an award of *lucrum cessans*, if appropriate under the circumstances).
[116] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey,* ICSID Case No. ARB/02/5 (Award, 19 January 2007), ¶ 18 (Orrego Vicuña, Fortier, Kaufmann-Kohler) ("*PSEG (Award)*").
[117] *PSEG (Award)*, ¶ 24.
[118] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey*, ICSID Case No. ARB/02/5 (Decision on Jurisdiction, 4 June 2004), ¶ 21 (Orrego Vicuña, Fortier, Kaufmann-Kohler) ("*PSEG (Decision on Jurisdiction)*").

the project company submitted a revised mine plan to Turkish authorities in December 1997. The revised mine plan called for an additional capital investment of USD 361.6 million, an annual contribution of USD 20 million to cover operating and maintenance costs, and an additional USD 556 million that would be needed during the life of the operation.[119] PSEG proposed that these costs — which would increase the overall costs of the project by approximately USD 1 billion — could be met by increasing the plant's generating capacity.[120] Although Turkish authorities later approved the revised mine plan, the terms of that plan were not incorporated into the concession contract that eventually was approved by the Turkish Council of State.[121] The government demanded several rounds of renegotiations, but those renegotiations were not fruitful. "[E]xcept for a groundbreaking ceremony, there was no mining undertaken or construction started, not even in terms of the necessary preparations to that effect."[122] PSEG and the project company invoked the protection of the US-Turkey BIT and submitted a claim to ICSID.

<u>What was the treaty violation?</u> In an award dated 19 January 2007, a tribunal composed of Francisco Orrego Vicuña, L. Yves Fortier, and Gabrielle Kaufmann-Kohler concluded that the State had acted negligently in the course of the contract negotiations by failing to answer key points of disagreement.[123] According to the tribunal, "there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere."[124] The tribunal further concluded that the authorities' demands for renegotiation amounted to an abuse of authority,[125] and that the claimants were subjected to a "'roller-coaster' effect of . . . continuing legislative changes."[126] These actions amounted to a violation of the fair and equitable treatment provision of the BIT.[127] The tribunal stated that, "[t]o the extent that this [behavior] caused damage, compensation will of necessity be awarded."[128]

<u>Did the tribunal purport to apply *Chorzów*?</u> Yes. Since both parties agreed that the *Chorzów* standard applied,[129] the tribunal determined the appropriate relief on that basis.

<u>How were damages assessed?</u> As the PCIJ had done in *Chorzów*,[130] the *PSEG* tribunal began by recalling the nature of the internationally-wrongful

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[119] *PSEG (Decision on Jurisdiction)*, ¶ 24.
[120] *PSEG (Decision on Jurisdiction)*, ¶ 24.
[121] *PSEG (Decision on Jurisdiction)*, ¶ 32.
[122] *PSEG (Award)*, ¶ 304.
[123] *PSEG (Award)*, ¶ 246.
[124] *PSEG (Award)*, ¶ 246.
[125] *PSEG (Award)*, ¶ 247.
[126] *PSEG (Award)*, ¶ 250.
[127] *See PSEG (Award)*, p. 90.
[128] *PSEG (Award)*, ¶ 256.
[129] *PSEG (Award)*, ¶¶ 281, 295.
[130] *See Chorzów*, p. 47.

conduct and considering the limits that that nature might impose upon the scope of relief. The tribunal stated that even though it had found "that there is in this case a breach of fair and equitable treatment, this breach relates not to damages to productive assets but to the failure to conduct negotiations in a proper way and other forms of interference by the Respondent Government. The appropriate remedies thus do not relate to a compensation for the market value of those assets but to a different objective. This . . . also entails an economic value but of a different nature."[131] The tribunal then awarded the claimants the value of their investment expenses. In doing so, the tribunal took care to differentiate between claimed expenses that were sufficiently linked to the investment and those that were not — rejecting, for example, the claimants' claims for expenses related to "a kind of general forum for policy discussions that, while of interest to the Project, cannot be considered a cost related directly to the Project."[132]

Consistent with *Chorzów*'s direction that "injury resulting for third parties from the unlawful act" should be "exclud[ed] from the damage to be estimated,"[133] the tribunal also rejected the claimants' attempt to recover "expenses incurred by . . . entities that are not parties to these proceedings."[134] Since the tribunal had concluded in its decision on jurisdiction that those entities had no standing in the arbitration,[135] the tribunal stated that it "w[ould] not undo with one hand what it did with the other. This would be the result if compensation is awarded in respect of investments or expenses incurred by entities over which there is no jurisdiction."[136]

The tribunal also ruled out the possibility of awarding lost profits, explaining that it would be inappropriate to award such profits when the project never got off the ground: "By definition, the concept of *lucrum cesans* requires in the first place that there is a lucrum that comes to an end as a consequence of certain breaches of contract or other forms of liability. Here such an element is not only entirely absent but [also] impossible to estimate for the future."[137]

In the end, the tribunal awarded approximately USD 9 million to PSEG, plus interest to run from the average "due date for the period during which expenses were made until payment of the Award."[138]

Did the tribunal actually apply *Chorzów*? Yes. In a case where one of the claimants had expended significant funds for purposes of pursuing an investment project — and the government had entered into a concession

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131 *PSEG (Award)*, ¶ 308.
132 *See PSEG (Award)*, ¶ 336.
133 *Chorzów*, p. 31.
134 *PSEG (Award)*, ¶ 322.
135 *See PSEG (Award)*, ¶ 323.
136 *PSEG (Award)*, ¶ 325.
137 *PSEG (Award)*, ¶ 313.
138 *PSEG (Award)*, p. 90.

contract with the claimant, but the government's conduct prevented the project from ever getting started — wiping out the consequences of the internationally-wrongful conduct was achieved by ordering the State to reimburse the claimant for its investment-related expenditures.

2008:

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania

What was the case about? In 2003, Tanzania was awarded funding from the World Bank, African Development Bank, and European Investment Bank "for the purposes of commissioning a comprehensive program of repairs and upgrades to, and the expansion of, the Dar es Salaam Water and Sewerage Infrastructure . . . . As a condition of the funding, the Republic was obliged to appoint a private operator to manage and operate the water and sewerage system, and carry out some of the works associated with the Project."[139] Tanzania conducted a tender in 2002,[140] and English company Biwater International Limited and German company HP Gauff Ingenieure GmbH and Co. KG-JBG jointly submitted the winning bid. The two companies incorporated Biwater Gauff (Tanzania) Ltd. ("BGT") for the purpose of their investment.[141] In December 2002, BGT incorporated a local Tanzanian operating company ("City Water") to enter into contracts associated with the Project.[142] City Water entered into several contracts with the Dar es Salaam Water and Sewerage Authority (DAWASA) in February 2003[143] and operations of water and sewerage services were handed over to City Water on 1 August 2003.[144] After the handover, "City Water's role was to operate the water production, transmission and distribution systems, operate and maintain the sewerage system, and to build and collect revenue from the customers receiving these services."[145] City Water's performance of the project contracts was insured by a performance bond established through a Tanzanian bank.[146]

City Water supplied water and sewerage services until May 2005.[147] "Between 13 May 2005 and 1 June 2005, a series of events took place which, according to BGT constituted breaches by the Republic under international and domestic law."[148] These events included an attempted termination of the lease contract by the Minister of Water and Livestock Development, a

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139 *Biwater Gauff*, ¶ 3.
140 *Biwater Gauff*, ¶ 3.
141 *Biwater Gauff*, ¶ 4.
142 *Biwater Gauff*, ¶ 5.
143 *Biwater Gauff*, ¶ 6.
144 *Biwater Gauff*, ¶ 8.
145 *Biwater Gauff*, ¶ 8.
146 *Biwater Gauff*, ¶ 12.
147 *Biwater Gauff*, ¶ 14.
148 *Biwater Gauff*, ¶ 15.

call on the entire amount of the performance bond, actual termination of the lease contract, deportation of City Water's senior management, seizure of the company's assets, and the installation of new management and takeover of City Water's business.[149] BGT submitted a request for ICSID arbitration on 5 August 2005, under the UK-Tanzania BIT.

<u>What was the treaty violation?</u> In an award dated 24 July 2008, a tribunal composed of Bernard Hanotiau, Gary Born, and Toby Landau concluded that claimant's investment "was the subject of an expropriation by the Republic,"[150] and that the events described above amounted to violations of the fair and equitable treatment, unreasonable or discriminatory impairment, and full protection and security provisions of the UK-Tanzania BIT.[151]

<u>Did the tribunal purport to apply *Chorzów*?</u> Yes. The tribunal recalled the *Chorzów* standard at the outset of its analysis.[152]

<u>How were damages assessed?</u> Consistent with the PCIJ's conclusion in *Chorzów* that the mere existence of a treaty breach is insufficient to show that injury has been caused[153] — and acting by majority — the *Biwater Gauff* tribunal began its analysis by stating that "[c]ompensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by BGT."[154] The tribunal noted that even though there is no uniform definition of causation, some of the key elements include: "(a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote."[155] For the claimant "to succeed in its claims for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value."[156] BGT could not make such a showing.

According to the tribunal, it was "manifest . . . that serious problems were encountered in the performance of the Lease Contract from the very start."[157] As a result of "numerous management and implementation difficulties," it soon became "clear that City Water simply could not continue without a fundamental renegotiation of the Lease Contract. This

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149 *Biwater Gauff*, ¶ 15.
150 *Biwater Gauff*, ¶ 485.
151 *See, e.g.*, *Biwater Gauff*, ¶¶ 605, 622–28, 696, 731.
152 *See Biwater Gauff*, ¶¶ 775–76 (even though the tribunal's reference to the *Chorzów* standard appears in a passage discussing expropriation, it appears that the tribunal applied the same standard to the non-expropriation violations).
153 *See Chorzów*, p. 30.
154 *Biwater Gauff*, ¶ 779.
155 *Biwater Gauff*, ¶ 785.
156 *Biwater Gauff*, ¶ 787.
157 *Biwater Gauff*, ¶ 486.

renegotiation took place, but failed."[158] Failure of the renegotiation, in turn, "necessarily implied the termination of the lease contract."[159] Thus, by the time that the treaty violations took place, "the termination of the Lease Contract was inevitable in any event, and the losses and damage for which [the claimant] claims in these proceedings had already been (separately) caused."[160]

In these circumstances, the tribunal declined to award any compensation to the claimant.

<u>Did the tribunal actually apply *Chorzów*?</u> Yes. As the PCIJ explained in *Chorzów*, even though "it is a principle of international law . . . that any breach of an engagement involves an obligation to make reparation,"[161] it remains "necessary for the Court to ascertain whether the [allegedly injured parties] have in fact suffered damage as a consequence of the [wrongful conduct]."[162] Since the "essential principle" is "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed,"[163] it follows that an injury that would have been suffered regardless of the wrongful act need not be remedied by the State. Since the *Biwater Gauff* tribunal concluded that, by the time of the treaty violation, "the losses and damage for which [the claimant] claims in these proceedings had already been (separately) caused,"[164] the tribunal's decision not to award compensation was plainly consistent with the essential principle in *Chorzów*.

2009:

Saipem S.p.A. v. The People's Republic of Bangladesh

<u>What was the case about?</u> In 1990, Italian company Saipem S.p.A. ("Saipem") entered into a contract with the Bangladesh Oil Gas and Mineral Corporation ("Petrobangla") to construct a pipeline for the delivery of condensate and gas.[165] The contract directed that disputes be settled pursuant to the ICC arbitration rules.[166] A dispute later arose as to Petrobangla's failure to pay Saipem the full amount owed under the contract, and Saipem initiated arbitration proceedings.[167] When the ICC tribunal concluded that it had jurisdiction over the dispute, Petrobangla

[158] *Biwater Gauff*, ¶ 486.
[159] *Biwater Gauff*, ¶ 486.
[160] *Biwater Gauff*, ¶ 485; *see also id.*, ¶¶ 606, 629, 696, 699, 731, 791–92, 798.
[161] *Chorzów*, p. 29.
[162] *Chorzów*, p, 30.
[163] *Chorzów*, p. 47.
[164] *Biwater Gauff*, ¶ 485; *see also id.*, ¶¶ 606, 629, 696, 699, 731, 791–92, 798.
[165] *Saipem*, ¶ 7.
[166] *Saipem*, ¶ 25.
[167] *Saipem*, ¶¶ 25, 28.

asked a local court to revoke the tribunal's authority.[168] The court granted the request, but Saipem ignored the court's ruling and continued to pursue the ICC claim.[169] The ICC tribunal eventually decided in Saipem's favor and awarded it damages.[170] Petrobangla initiated set-aside proceedings before the Bangladeshi courts.[171] Citing their prior ruling that the ICC tribunal lacked any authority to proceed, the Bangladeshi courts concluded that the ICC award was a nullity and that, therefore, there was nothing to set aside.[172] Saipem filed a request for ICSID arbitration on 5 October 2004, invoking the Italy-Bangladesh BIT.

<u>What was the treaty violation?</u> In an award dated 30 June 2009, a tribunal composed of Gabrielle Kaufmann-Kohler, Philip Otton, and Christoph Schreuer concluded that "the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process"[173] by revoking the ICC tribunal's authority on the grounds that the tribunal had committed procedural misconduct. The tribunal explained that, while "[i]t is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct,"[174] and "[i]t is further true that in making such order national courts do have substantial discretion . . . [the courts] cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute."[175] After "carefully review[ing] the procedural orders referred to in the Revocation Decision, as the cause of the ICC Tribunal's misconduct, the Tribunal did not find the slightest trace of error or wrongdoing."[176] This meant that there was no foundation for the decision to nullify the ICC award. Since the ICC award represented the residual value of Saipem's investment in Bangladesh, the tribunal concluded that the State's actions amounted to expropriation of the entire investment.

<u>Did the tribunal purport to apply *Chorzów*?</u> Yes. The tribunal stated that because the BIT did not specify the valuation standard to be used for fair and equitable treatment violations, "the Tribunal will resort to the relevant principles of customary international law and in particular to the principle set out by the Permanent Court of Justice [sic] in the *Chorzów Factory* case."[177]

<u>How were damages assessed?</u> After reaffirming that there was a direct causal link between the actions of the Bangladeshi courts and the

168 *Saipem*, ¶ 35.
169 *Saipem*, ¶ 37.
170 *Saipem*, ¶ 48.
171 *Saipem*, ¶ 49.
172 *Saipem*, ¶ 50.
173 *Saipem*, ¶ 159.
174 *Saipem*, ¶ 159.
175 *Saipem*, ¶ 159.
176 *Saipem*, ¶ 155.
177 *Saipem*, ¶ 200.

expropriation of the claimant's investment,[178] the tribunal began its relatively succinct discussion of damages by recalling that "the expropriated rights at hand were Saipem's residual contractual rights under the investment as crystallised in the ICC award . . . ."[179] Such being the case, the tribunal concluded "that in the present case the amount awarded by the ICC Award constitutes the best evaluation of the compensation due under the *Chorzów Factory* principle."[180]

The tribunal rejected Saipem's claim for expenses that it had incurred in relation to the intervention of the Bangladeshi courts. According to the tribunal, such expenses were "not part of Saipem's initial investment. Moreover, it is impossible to conclude that Saipem's costs, legal fees and other expenses in relation to the intervention of the Bangladeshi courts have been the object of an expropriation. It follows that these expenses cannot be part of the reparation for the illegal expropriation for which the Tribunal has jurisdiction."[181]

The tribunal ordered the respondent to pay Saipem the sums of USD 5.8 million, USD 265,000 and EUR 110,995.92, plus interest.

<u>Did the tribunal actually apply *Chorzów*?</u> Yes. The logic here is simple, and cannot be better stated than the way that the tribunal explained it: "the expropriated rights at hand were Saipem's residual contractual rights under the investment as crystallised in the ICC Award"[182] and the value of the ICC award was the amount of compensation that it had granted to Saipem (both the principal sum and interest).[183] Wiping out the consequences of the expropriation and restoring the situation that otherwise would have existed meant that the State must pay the ICC award.

2010:

Mohammad Ammar Al-Bahloul v. Republic of Tajikistan

<u>What was the case about?</u> In 1997, Mr. Mohammad Ammar Al-Bahloul, an Austrian national, entered into a series of oil and gas exploration agreements with the State Committee for Oil and Gas in Tajikistan.[184] The State subsequently issued exploration licenses to Mr. Al-Bahloul[185] for certain locations throughout Tajikistan and Mr. Al-Bahloul

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[178] *Saipem*, ¶ 214.
[179] *Saipem*, ¶ 202.
[180] *Saipem*, ¶ 202.
[181] *Saipem*, ¶ 205.
[182] *Saipem*, ¶ 202.
[183] *Saipem*, ¶¶ 202, 211.
[184] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008) (Decision on Liability), ¶¶ 16, 60 (Happ, Zykin, Hertzfeld) ("*Al-Bahloul* Decision on Liability").
[185] *Al-Bahloul* Decision on Liability, ¶ 62.

began working in the most promising area.[186] After pursuing operations for a period of time in cooperation with local workers, Mr. Al-Bahloul "reached the conclusion that the operation would not succeed because of the inadequate technology and level experience of the Tajik side. . . . Discussions then took place with the Prime Minister and the State Committee and . . . they agreed with Claimant to a new approach which involved setting up joint venture entities for oil and gas exploration and production both in the northern and southern parts of the country together with the State Committee."[187] In March 2000, the State entered into two joint venture agreements with a Bahamian company that was wholly owned by Mr. Al-Bahloul.[188] The joint venture was approved by presidential decree in September 2000.[189] In December 2000, the State Committee entered into four additional exploration and production agreements, extending Mr. Al-Bahloul's right to oil exploration and production beyond the areas contemplated by the original licenses and agreeing to provide the necessary licenses to the project company.[190] "No exploration activity was ever carried out in the four additional areas covered by the four December 2000 Agreements."[191] According to Mr. Al-Bahloul, the reason no exploration activity was ever carried out in those areas is because the State refused to provide the necessary licenses. Mr. Al-Bahloul submitted a request for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce on 30 May 2008, invoking the dispute resolution provisions of the Energy Charter Treaty.

<u>What was the treaty violation?</u> In a 2 September 2009 decision on jurisdiction and liability, a tribunal composed of Jeffrey Hertzfeld, Richard Happ, and Ivan Zykin concluded that the State's failure to provide the licenses contemplated in the December 2000 contracts violated the State's obligation in Article 10(1) of the ECT to "'observe any obligation . . . entered into with an Investor or an Investment of the Investor of any other Contracting Party.'"[192] The tribunal found that "[t]he four December 2000 Agreements contain a clear and unconditional obligation on the part of the State Committee, . . . to ensure the issuance of licenses to Claimant necessary for the commencement of exploration work in the four respective areas,"[193] that "[t]he licenses were not forthcoming,"[194] and that there was no evidence on the record that "suggest[ed] an excuse for the Respondent's non-performance."[195] From September 2009 to June 2010,

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[186] *Al-Bahloul* Decision on Liability, ¶ 63.
[187] *Al-Bahloul* Decision on Liability, ¶ 63.
[188] *Al-Bahloul* Decision on Liability, ¶¶ 17, 64.
[189] *Al-Bahloul* Decision on Liability, ¶ 65.
[190] *Al-Bahloul* Decision on Liability, ¶ 67.
[191] *Al-Bahloul* Decision on Liability, ¶ 73.
[192] *Al-Bahloul* Decision on Liability, ¶¶ 256, 268.
[193] *Al-Bahloul* Decision on Liability, ¶ 263.
[194] *Al-Bahloul* Decision on Liability, ¶ 264
[195] *Al-Bahloul* Decision on Liability, ¶ 266.

the tribunal held a separate *quantum* phase to determine what damages, if any, were due to the claimant as a result of the State's treaty violation. The respondent did not participate at all in this phase of the case.

Did the tribunal purport to apply *Chorzów*? Yes. Even though *Chorzów* was not referenced by name, the tribunal stated that it would apply the full reparation standard under international law.[196]

How were damages assessed? The tribunal began its analysis by noting that the "Respondent's non-appearance in this arbitration does not relieve Claimant from the burden of proving his factual allegations."[197] The tribunal explained that "[w]hile, on the one hand, total certainty should not be required in order to assess damages if the existence of damage has been established, on the other hand, the assessment of damages cannot be based on conjecture or speculation. A persuasive factual basis for the assessment must be shown."[198]

The tribunal then addressed Mr. Al-Bahloul's various claims for relief. Although Mr. Al-Bahloul had argued "that specific performance in the form of compulsory issuance of exclusive licenses for the four areas should be granted,"[199] the tribunal found such relief impracticable. The tribunal noted that, during the nine years that had elapsed since the claimant left Tajikistan, "third parties have become active in the four geographic areas where Claimant had been promised exclusive licenses. There is no evidence that their rights were obtained through bad faith conduct on their part . . . ."[200] In such circumstances, the tribunal concluded that it was materially impossible to implement a remedy of specific performance.[201]

The tribunal then turned to the claimant's request for compensation, noting that Mr. Al-Bahloul had asked "not for the value of the licenses which should have been issued, but for the difference in value between two hypothetical scenarios: the value in 2001, had there been no breach, *i.e.*, respondent had issued the licenses in 2001, and the value in 2009 . . . ."[202] The claimant had used the DCF method to determine those values.[203]

The tribunal stated that, for the DCF model to be an appropriate basis for determining compensation, the tribunal would need to be able to accept that the claimant "would have been able to acquire financing for the exploration (but he had no definite offer of financing, just expressions of interest), that upon exploration he would have found hydrocarbons (although the probabilities were low and there is no evidence that any

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196 *Al-Bahloul* Decision on Liability, ¶ 42.
197 *Al-Bahloul* Decision on Liability, ¶ 37.
198 *Al-Bahloul* Decision on Liability, ¶ 39.
199 *Al-Bahloul* Decision on Liability, ¶ 52.
200 *Al-Bahloul* Decision on Liability, ¶ 56.
201 *Al-Bahloul* Decision on Liability, ¶ 63.
202 *Al-Bahloul* Decision on Liability, ¶ 66.
203 *Al-Bahloul* Decision on Liability, ¶ 69.

other company seems to have found hydrocarbons so far) and that he would have been able to exploit and sell the oil (although he had no proven experience in this field). In the Tribunal's view, this entails simply too many unsubstantiated assumptions to justify the application of the DCF-method."[204]

Since the claimant "ha[d] not submitted an alternative valuation of damages,"[205] the tribunal declined to award any compensation.[206]

<u>Did the tribunal actually apply *Chorzów*?</u> Yes. As explained above in connection with the *Biwater Gauff* award, the *Chorzów* standard does not require any reparation to be made when the claimant is unable to demonstrate that he suffered injury as a result of the internationally-wrongful conduct.

2011:

Impregilo S.p.A. v. Argentine Republic

<u>What was the case about?</u> In 1996, the Argentine province of Buenos Aires decided to privatize water and sewerage services and organized a bidding process.[207] A consortium formed by Impregilo S.p.A. ("Impregilo") and several other international companies was the winning bidder.[208] The consortium incorporated and funded an Argentine company ("AGBA") and, in 1999, the Province and AGBA entered into a concession contract for water and sewerage services over seven Argentine municipalities.[209] The concession contract stated that even though tariffs were stated in U.S. dollars, users would receive bills stated in Argentine pesos.[210] "The applicable conversion shall be performed on the basis of the 1 Dollar = 1 Peso parity established in the Convertibility law or any other exchange rate from time to time established by law to replace such parity in force at [the] bill cut-off date."[211] The contract also stated that "'[t]he calculation of applicable tariffs pursuant to Article 28 II of Law 11,820 shall be based on the general principle that tariffs shall cover all operating expenses, maintenance expenses and service amortization and provide a reasonable return on Concessionaire's investment subject to efficient management and operation by the Concessionaire and strict compliance with the applicable service quality and expansion goals.'"[212]

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[204] *Al-Bahloul* Decision on Liability, ¶ 95.
[205] *Al-Bahloul* Decision on Liability, ¶ 97.
[206] *Al-Bahloul* Decision on Liability, ¶ 99.
[207] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (Award, 11 June 2011), ¶ 13 (Danelius, Brower, Stern) ("*Impregilo*").
[208] *Impregilo*, ¶ 14.
[209] *Impregilo*, ¶ 14.
[210] *Impregilo*, ¶ 19.
[211] *Impregilo*, ¶ 19.
[212] *Impregilo*, ¶ 324.

AGBA took possession of the concession in January 2000. In May 2001, AGBA notified the Minister of Public Works and Services of the Province of Buenos Aires that it was having "considerable difficulties in receiving payment for its services from customers. The non-collection rates within the Concession Area had reached spectral figures of around 60%."[213] The Undersecretary of Public Services of the Province of Buenos Aires responded two weeks later, stating that "the issue of non-collection rates was a business risk which AGBA had to bear,"[214] but that the Ministry nevertheless would work jointly with AGBA to try to find a solution (including contractual modifications).[215]

Initially, "the Argentine authorities showed a considerable degree of indulgence and tolerance towards any deficiencies that existed in AGBA's performance"[216] of the concession, and appeared willing to take steps to restore the equilibrium of the concession. In January 2002, however, the Argentine Government enacted Law No. 25,561 "in which utilities contracts were 'pesified' at parity level and tariffs were frozen."[217] AGBA's local regulator "pesified" AGBA's tariffs at parity rate on 11 January 2002.[218] Although "AGBA made various attempts to have the Concession Contract renegotiated and asked for the balance between the parties to be re-established in the new circumstances . . . it is not clear whether any serious negotiations were conducted . . . ."[219] In July 2006, the province governor terminated the concession contract and transferred it to an Argentine entity.[220] Impregilo initiated arbitration proceedings in July 2007, under the Italy-Argentina BIT.

<u>What was the treaty violation?</u> In an award dated 21 June 2011, a tribunal composed of Hans Danelius, Charles Brower, and Brigitte Stern concluded that Argentina had violated the BIT's fair and equitable treatment provision by failing to restore the financial equilibrium of the concession contract.[221] The tribunal explained that "since the new exchange rate caused by the abolition of the fixed legal rate had highly detrimental effects on AGBA, the Province should have offered AGBA a reasonable adjustment of its obligations under the Concession Contract."[222]

<u>Did the tribunal purport to apply *Chorzów*?</u> Yes. The tribunal began its analysis by stating that "[a]s regards compensation, the basic principle

213 *Impregilo*, ¶ 21.
214 *Impregilo*, ¶ 22.
215 *Impregilo*, ¶ 22.
216 *Impregilo*, ¶ 253.
217 *Impregilo*, ¶ 28.
218 *Impregilo*, ¶ 30.
219 *Impregilo*, ¶ 259.
220 *Impregilo*, ¶ 88.
221 *Impregilo*, ¶ 331.
222 *Impregilo*, ¶ 325.

to be applied is that derived from the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case."[223]

How were damages assessed? Consistent with the notion "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, *in all probability*, have existed if that act had not been committed,"[224] the tribunal stated that "it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo. Instead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation."[225]

Even under this standard of proof, however, the tribunal concluded that it could not be "established with a sufficient degree of probability" that the concession would have been profitable but for the treaty violation,[226] since AGBA's "concession covered a risk area with a poor population whose ability — and willingness — to pay for services was very limited."[227] Thus, even though "the Province contributed to some extent to the negative development of the concession,"[228] it would be "inappropriate to calculate damages on the basis of customary economic parameters such as a cost or asset based method or an income method. Instead, the damages to be paid by the Argentine Republic to compensate for unfair and inequitable treatment should be determined on the basis of a reasonable estimate of the loss that may have been caused to Impregilo."[229] The tribunal equated that loss with certain expenditures that Impregilo had made in 2000 and 2001.[230]

Did the tribunal actually apply *Chorzów*? Yes. In a case where the investment had encountered substantial operational difficulties before the internationally-wrongful conduct took place, and where it could not be said that the investment failed solely because of the government's conduct, it was an entirely appropriate application of *Chorzów* to order the respondent to reimburse the claimant for expenditures it had made during the period that the treaty violation occurred.

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223 *Impregilo*, ¶ 361.
224 *Chorzów*, p. 47 (emphasis added).
225 *Impregilo*, ¶ 371.
226 *Impregilo*, ¶ 375.
227 *Impregilo*, ¶ 373.
228 *Impregilo*, ¶ 376.
229 *Impregilo*, ¶ 378.
230 *Impregilo*, ¶ 379.

2012:

Achmea B.V. (formerly known as 'Eureko B.V.') v. Slovak Republic

What was the case about? In the early 1990s, the Slovak Republic established a mandatory and universal public health insurance system.[231] By 2004, that system "had accumulated a deficit of approximately SKK 26 billion,"[232] and the government set out to reform the system through a combination of public and private investment.[233] Shortly after the reform was passed, Eureko, a Dutch private company,[234] applied for a license to operate a health insurance company in the Slovak Republic.[235] The license was granted, and Eureko incorporated a local subsidiary in March 2006 "as a 'greenfield' operation to offer basic healthcare insurance."[236] By January 2007, Eureko's local subsidiary "had obtained a share of around 8.5 percent of the Slovak health insurance market."[237]

Although the 2004 reform "made the Slovak health insurance market attractive to private investors"[238] like Eureko, the reform was "unpopular with part of the population"[239] and "faced strong political opposition within parts of the Slovak Parliament . . . ."[240] Thus, when a new party came to power following parliamentary elections in June 2006, the government "introduced a series of changes to the legal framework governing the health insurance market."[241] These reforms — which were implemented in 2007 — included a decree that "ended the ability of health insurance companies to contract freely with healthcare providers,"[242] an act requiring that "all profits from health insurance be used for healthcare purposes,"[243] and an act that "ended the possibility of a health insurance company selling its insurance portfolio to another health insurance company."[244] Eureko reacted to these 2007 reforms by remaining active, but going into "hibernation" — meaning that it would "stop trying to expand its business and [would] accommodate only its existing clients."[245] On 1 October 2008, Eureko initiated arbitration proceedings against the

[231] *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*) (Award, 7 December 2012), ¶ 86 (van den Berg, Veeder, Lowe) ("*Achmea*").
[232] *Achmea*, ¶ 87.
[233] *Achmea*, ¶ 87.
[234] *Achmea*, ¶ 2. In November 2011, Eureko changed its name to Achmea B.V. *Id.*, ¶ 1.
[235] *Achmea*, ¶ 89.
[236] *Achmea*, ¶ 90.
[237] *Achmea*, ¶ 90.
[238] *Achmea*, ¶ 89.
[239] *Achmea*, ¶ 89.
[240] *Achmea*, ¶ 89.
[241] *Achmea*, ¶ 91.
[242] *Achmea*, ¶ 95.
[243] *Achmea*, ¶ 96.
[244] *Achmea*, ¶ 99.
[245] *Achmea*, ¶ 112.

Slovak Republic,[246] invoking the protections of the Netherlands-Slovak Republic BIT.

What was the treaty violation? In a 7 December 2012 award, a tribunal composed of Vaughan Lowe, Albert Jan van den Berg, and V. V. Veeder, concluded that the 2007 reforms violated the fair and equitable treatment and "free transfer" provisions of the BIT. [247] "[T]he removal of the right to generate profits, coupled with a ban on the transfer of the portfolio, effectively deprived Claimant of access to the commercial value of its investment. The investment could neither be maintained so as to generate profits nor be sold. There was no way in which Claimant could recover the commercial value of its investment."[248]

Did the tribunal purport to apply *Chorzów*? Yes. The tribunal assessed damages by reference to the "well-established approach reflected in the *Chorzów Factory* case."[249]

How were damages assessed? Consistent with the "in all probability" standard described in *Chorzów*, the tribunal began by noting that it was for the "Claimant to prove its case regarding the 'damage caused.' That said, the requirement of proof must not be impossible to discharge. Nor must the requirement for reasonable precision in the assessment of the quantum be carried so far that the search for exactness in the quantification of losses becomes disproportionately onerous when compared with the margin of error."[250]

The tribunal then identified the scope of potential recovery. It rejected the claimant's calculations of the "value of the business and the estimated impact upon that value of the 2007 reforms,"[251] explaining that "[t]hat approach is often used in the case of an expropriation, to put a value on that which has been taken. Here, there is no 'deprivation' or expropriation. Further the investment was in its early stages, in years that saw the very considerable disruption caused by various global economic crises. With a very short track record it is difficult to extrapolate to a robust estimate of the probable future value of Claimant's investment. It is also difficult to separate out the effect of the ban on profits and the ban on transfers from the effect of other measures, which the Tribunal has not found to constitute breaches of the Treaty."[252]

The tribunal stated that, "since Claimant's losses were the costs of defending its position against what proved to be temporary measures in breach of the Treaty, it is right to focus upon what those costs were."[253]

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246 *Achmea*, ¶ 12.
247 *Achmea*, ¶¶ 279, 283, 286.
248 *Achmea*, ¶ 279.
249 *Achmea*, ¶ 322.
250 *Achmea*, ¶ 323.
251 *Achmea*, ¶ 324.
252 *Achmea*, ¶ 325.
253 *Achmea*, ¶ 326.

Those costs were best reflected in a calculation based on the "borrowing cost of capital that was tied upon in Eureko during the time that the ban on profits was in force."[254] The tribunal awarded damages in a principal amount of EUR 22.1 million, net of taxes, plus compound interest from the date that the ban on profits was lifted.[255]

Since the tribunal found that any injury caused by the respondent's breach of its "free transfer" obligation was subsumed within the compensation awarded for the fair and equitable treatment violation,[256] it declined to award additional compensation for the "free transfer" violation.[257]

Did the tribunal actually apply *Chorzów*? Yes. In a case where the treaty violation entailed temporarily locking up the claimant's capital, restoring the borrowing cost of capital was the appropriate way to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[258]

2013:

Franck Charles Arif v. Republic of Moldova

What was the case about? In February 2008, the Government of Moldova organized a tender for the creation of duty free stores at the border with Romania.[259] ICS 'Le Bridge Corporation Limited' SRL — a company 100% owned and controlled by French national Franck Charles Arif — won the tender.[260] Le Bridge entered into a contract with the Customs Service of the Republic of Moldova in July 2008 and was authorized to build and manage the duty free network at certain pre-established state border crossing points,[261] including at the Chisinau International Airport.[262] On 10 November 2009, Le Bridge's competitor in the duty free business ("Dufremol") initiated proceedings before the Moldovan Economic Circuit Court, seeking to cancel Le Bridge's lease agreement for the Chisinau International Airport and requesting suspension of the lease agreement pending a decision on the merits.[263] "On the same day, through an *ex parte* judgment the Economic Circuit Court suspended the Lease Agreement

254 *Achmea*, ¶ 328.
255 *Achmea*, ¶ 334.
256 *Achmea*, ¶ 286.
257 *Achmea*, ¶ 286.
258 *Chorzów*, p. 47.
259 *Arif*, ¶ 41.
260 *Arif*, ¶ 43.
261 *Arif*, ¶ 44.
262 *Arif*, ¶ 87.
263 *Arif*, ¶ 93.

pending a decision on the merits in Dufremol's claim."[264] The very same day, government authorities restricted Le Bridge's access to airport premises.[265] For approximately two years, Le Bridge was prevented — through a combination of petitions by its competitors for suspension of the lease agreement and decisions by various Moldovan courts — from operating the duty free store at the Chisinau airport.[266] On 3 August 2011, Mr. Arif submitted a request for arbitration to ICSID, invoking the France-Moldova BIT.

<u>What was the treaty violation?</u> In an award dated 8 April 2013, a tribunal composed of Bernardo Cremades, Bernard Hanotiau, and Rolf Knieper concluded that Moldova had breached the fair and equitable treatment provision of the France-Moldova BIT. The tribunal explained that the claimant "had a legitimate expectation, created by the respondent, that there was a secure legal framework to operate a duty free store in his leased premises in the Chisinau Airport"[267] and that "[t]he more time passed and the more efforts were made [to prepare the store], the more Mr. Arif was entitled to trust Respondent that it would stand by the contract terms and would allow the realization of the investment."[268] The government violated these legitimate expectations through the series of court rulings suspending the contract, restricting access to the airport duty free store, and "paraly[zing] any business activity on the premises."[269]

<u>Did the tribunal purport to apply *Chorzów*?</u> Yes. The tribunal began its analysis by referring to the principle that "was famously stated in the *Chorzów Factory Case*."[270]

<u>How were damages assessed?</u> Consistent with *Chorzów*'s recommendation to first consider the appropriate form of relief,[271] the *Arif* tribunal first considered whether restitution or compensation were the appropriate remedy. Although the tribunal "consider[ed] restitution to be the preferable remedy,[272] the tribunal noted that, "in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy."[273] Such being the case, the tribunal concluded that the best course of action would be "to

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264 *Arif*, ¶ 93.
265 *Arif*, ¶ 93.
266 *See Arif*, ¶¶ 93–124.
267 *Arif*, ¶ 541; *see also id.*, ¶ 540.
268 *Arif*, ¶ 544.
269 *Arif*, ¶ 545; *see also id.*, ¶ 547.
270 *Arif*, ¶ 559.
271 *Chorzów*, p. 47 ("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").
272 *Arif*, ¶ 571.
273 *Arif*, ¶ 571.

order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days."[274] The tribunal stated that "[i]f restitution is not possible, or the terms of restitution proposed by Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment."[275]

Given that the airport duty free store had never operated, and that there was no "satisfactory basis" for the store's projected revenues, the tribunal concluded that using a DCF methodology would create "an excessively speculative outcome."[276] The tribunal therefore calculated damages on the basis of the claimant's wasted costs.[277] If the claimant were to accept restitution, the amount of compensation was to be MDL 6.5 million. If the claimant chose to reject the restitution option, the amount of compensation was to be MDL 35 million. Interest in either case would run from the date of the award.

Can the damages assessment be reconciled with *Chorzów*? Yes. In a case where the treaty violation entailed preventing the claimant from opening a duty free store that the State previously had authorized the claimant to open and operate, wiping out the consequences of the internationally-wrongful conduct was achieved by ordering the State to find a way to provide restitution to the claimant, or reimburse the claimant for his investment-related expenditures.

* * *

As should be clear from the foregoing analysis, arbitrators are by no means "lost on the way to *Chorzów*." The beauty of the *Chorzów* standard is that it is a map, and — as applied in each case — will lead somewhere new. Arbitrators plainly are going where *Chorzów*'s roads take them.

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[274] *Arif*, ¶ 571.
[275] *Arif*, ¶ 572.
[276] *Arif*, ¶ 576.
[277] *Arif*, ¶ 576.