A FACTORY IN CHORZÓW: THE SILESIAN DISPUTE THAT CONTINUES TO INFLUENCE INTERNATIONAL LAW AND EXPROPRIATION DAMAGES ALMOST A CENTURY LATER

*Timothy G. Nelson**

The stated goal of reparation for violation of international law—including, where appropriate, compensation—is to "wipe out all the consequences of the illegal act."[1] This is often known as the "*Chorzów Factory*" standard—and with good reason, for it is a direct quotation from the 1928 "Merits" decision in the Permanent Court of International Justice ("PCIJ") case of the same name.[2] An intriguing aspect of the case, however, is that the PCIJ in *Chorzów Factory* did not ultimately award damages to the claimant, for the dispute was settled before the court-appointed committee of experts produced their report on the factory's value. And, although the case was a true "investor" claim, in that it involved expropriation of privately-held ownership and licensing rights in a factory, it took many decades for its full significance to become apparent to investment arbitration practitioners.

The *Chorzów Factory* dispute between Germany and Poland must be understood in the overall context of German-Polish relations in the preceding decade, in particular the tumultuous final two years of World War I, as well as the two Peace treaties—

---

* B.A. L.L.B. (University of New South Wales), B.C.L. (University of Oxford). Mr. Nelson is a Partner in the International Litigation and Arbitration Group of Skadden, Arps, Slate, Meagher & Flom LLP, New York. The author wishes to thank Felicity V. Conrad, Associate at Skadden Arps' New York office, for her assistance in preparing this article. The views expressed herein are solely those of the author and are not those of his firm or the firm's clients.

[1] *See, e.g.*, IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 27 (2009); *see also* MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 52 (2008); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 35 (2008).

[2] *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (Judgment No. 13, Merits).

the July 1919 Treaty of Versailles, and its little known (but, at the time, infamous) predecessor on the Eastern Front, the March 1918 Peace of Brest-Litovsk. In the centenary year of World War I's outbreak, it is particularly instructive to recall this context and the nature of the Versailles arrangements, which were critical to the outcome of *Chorzów Factory*.

This article does not seek to explain all of the legal permutations of *Chorzów Factory*, but rather seeks to explain how the dispute arose, and the context in which the Court's 1928 comments about reparation came to be made. It is hoped that this will illuminate future discussions of the *Chorzów Factory* standard.

I. THE EVENTS LEADING TO THE SEIZURE OF THE NITRATES FACTORY

A. *The Kaiser's Factory*

Chorzów (also known as Königshütte) is located in Upper Silesia, in present day Poland. When World War I began in 1914, however, an independent state of Poland did not exist. The Polish state had been extinguished more than a century before, owing to a series of "partitions" conducted by the rulers of Austria, Russia and Prussia in the late 18th Century.[3] Due to this and a host of other historical factors, Polish-speaking populations existed throughout the Austrian, German and Russian Empires. Thus, as of 1914, Upper Silesia was a province in the eastern German Empire, containing both Polish and German-speaking populations.

In March 1915, amid World War I, the German Government entered into a long-term contract with a German company, Bayerische Stickstoffwerke A.G. ("Bayerische"),[4] to establish and build a nitrates factory at Chorzów,[5] on land to be acquired and owned by the German Government. Bayerische was to grant the necessary licenses and machinery, to apply its knowhow and to manage the factory until 1941.[6]

---

[3] 2 NORMAN DAVIES, GOD'S PLAYGROUND: A HISTORY OF POLAND 7 (1982).

[4] In English, "Bavarian Nitrogen Plant A.G."

[5] *See Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1925 P.C.I.J. (ser. A) No 6, at 8 (Aug. 25) (Judgment No. 6, Preliminary Objections) ("*Upper Silesia: 1925 Judgment*").

[6] *Id.*

B. *The Rebirth of Poland and the "Upper Silesia" Question*

Hopes for an independent Poland had been kept alive throughout the 19th and early 20th Centuries, but were dealt a seemingly serious blow in early 1918, when Germany scored a decisive military and diplomatic victory on the Eastern Front.[7] In the Treaty of Brest-Litovsk, signed in March 1918, the new Soviet government renounced all of its former territorial claims along a vast area, thus leaving Poland subject to German hegemony.[8] This aspect of the treaty, which one historian remarks "could scarcely be excelled in Draconian severity,"[9] created considerable resentment among Polish nationalists, who viewed it as "accomplish[ing] the Sixth Partition" of Poland.[10]

Germany's (and Poland's) fortunes abruptly changed again in November 1918, when its Western Front collapsed. The Armistice of November 11, 1918 was expressly conditional upon Germany's "[r]enunciation" of the Treaty of Brest-Litovsk.[11] In the ensuing Paris peace conferences, the Allies supported re-establishment of the Polish state—in a sense recognizing that from at least November 1918, Polish nationalists were already in control of much Polish territory.[12] The Allies' agenda also included reducing Germany's territorial holdings in both West and East, as well as imposing war reparations obligations on Germany. The Treaty of Versailles, signed in 1919, thus provided for various cessions of German territory to Poland and other countries.[13] In those ceded territories, Poland acquired broad powers to confiscate German-owned assets:

---

[7] The Czarist regime was replaced in March 1917 by a "Provisional" government, which in turn was overthrown by Lenin in November 1917 (October 1917 in the Julian calendar). The new "Soviet" government immediately sought an armistice with Germany.

[8] *See* JOHN W. WHEELER-BENNETT, BREST-LITOVSK: THE FORGOTTEN PEACE, MARCH 1918 270-71 (1938).

[9] *Id.* at 270–71.

[10] 2 DAVIES, *supra* note 3, at 385.

[11] Allied Armistice Terms, art. 15, Nov. 11, 1918, *available at* http://www.firstworldwar.com/source/armisticeterms.htm.

[12] 2 DAVIES, *supra* note 3, at 393–94.

[13] Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 3 Treaties, Conventions, International Acts, Protocols and

- Property of the German Government was subject to immediate seizure by Poland (as a "power[] to which German territory is ceded"), subject only to the German Government's right to receive credit for the seized asset, at a value to be determined by the post-war Reparation Commission.[14]
- Property of German nationals could be "liquidated" by Poland, subject only to the rights of those nationals to receive compensation as determined by an arbitral tribunal.[15]

The Allies could not agree whether Upper Silesia (and thus Chorzów) would be a ceded territory, and so deferred the issue by requiring a plebiscite in Upper Silesia in which its inhabitants would "be called upon to indicate by a vote whether they wish to be attached to Germany or to Poland."[16] An Inter-Allied Commission would then "recommend[]" a frontier line for Upper Silesia, having regard "to the wishes of the inhabitants as shown by the vote, and to the geographical and economic conditions of the locality."[17]

C. *The Factory is Assigned to a Private German Owner*

In December 1919, with the future of Upper Silesia still unclear, the defeated German Government sold the Chorzów

---

Agreements Between the United States of America and Other Powers, 1910-1923, S. Doc. No. 67-348, at 3329 (1923) ("Treaty of Versailles"). An associated treaty with the new Polish State addressed certain matters in areas to be ceded to Poland. *See* Treaty of Peace Between the United States of America, the British Empire, France, Italy, and Japan, and Poland, June 28, 1919, 3 Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers, 1910-1923, S. Doc. No. 67-348, at 3714 (1923) ("Minorities Treaty").

[14] Treaty of Versailles art. 256 (authorizing Poland to "acquire all property and possessions situated [in the ceded territories] belonging to the German Empire or to the German States").

[15] *See id.* art. 92 (allowing Polish government to liquidate property of German nationals in areas that were to become Polish territory, provided it followed certain procedures, including that "proceeds of the liquidation" would be "paid direct to the owner," with the owner having the right to seek arbitration for "equitable compensation" in the event the "sale or measures taken by the Polish Government outside its general legislation were unfairly prejudicial to the price obtained").

[16] *Id.* art. 88.

[17] *Id.* art. 88, Annex para. 5.

factory, including the whole of its "land, buildings and installations . . . with all accessories, reserves, raw material, equipment and stocks," to a newly-formed German company, Oberschlesische Stickstoffwerke A.G. ("Oberschlesische").[18] At the same time, Oberschlesische entered into long-term contracts ensuring that Bayerische would continue to manage the company and apply its "patents, licences, experience gained and contracts" in the factory's operations.[19] Oberschlesische's title was registered by local judicial officials (then known as the Königshütte Court of Justice) in January 1920.[20]

D. *Upper Silesia Becomes Part of Poland, with the Geneva Convention Guaranteeing Against Expropriation of German Property*

In 1921, amidst political tension, a plebiscite took place across Upper Silesia, including in Chorzów.[21] The vote (with an overall sixty percent majority for German rule) was divided along ethnic lines, and the Allied Commission, unable to agree on a boundary line, referred the matter to the League of Nations Council, which created a new boundary commission.[22] As a result of this process, Chorzów was allocated to Poland.[23]

"To ease the trauma of partition somewhat," the League directed that the region of Upper Silesia should "continue as a single economic entity, at least in some respects, for the next fifteen years," and thus directed the German and Polish governments to "work[] out an agreement to implement this idea."[24] The resultant treaty, the Geneva Convention of May 15, 1922, contained a number of guarantees to German nationals in

---

[18] *Upper Silesia: 1925 Judgment* at 8–9. In English, the company's name is "Upper Silesia Nitrogen Works."

[19] *Id.* at 9.

[20] *Id.*

[21] *See* Richard Blanke, *Orphans of Versailles: The Germans in Western Poland, 1918-1939*, at 28-29 (1993). It has been said that the lead-up to the plebiscite was marred by various activities of the "Freikorps" (German ultra-nationalist militia), as well as various Polish nationalist uprisings against German authorities. *See id.* at 26–27, 29.

[22] *Id.* at 28–29.

[23] *Id.* at 29, 69.

[24] *Id.* at 30.

the regions to be assumed by Poland—including, of course, Chorzów.

As indicated above, the position prior to the 1922 Convention was that, under articles 92 and 297 of the Versailles Treaty, Poland had the right to seize property owned by the German government and German nationals throughout the areas "ceded" to it as a result of the post-war settlement.[25] The 1922 Geneva Convention altered that arrangement, by providing that, for an initial period of fifteen years, Poland was precluded from conducting Versailles-style seizures of property owned by German nationals in Upper Silesia.[26] During this period, the 1922 Geneva Convention provided (in article 7) that Poland was only permitted to seize large German-owned corporations if a Joint Commission had "recognized" this as "necessary" in the interests of continuity.[27] Similar guarantees applied to large agricultural holdings.[28] In either case, Poland was required to give prior notice of an intent to seize the property and to allow for issues of disputed title to be adjudicated prior to seizure.[29] And Article 6 of the Convention provided that, "***except as provided in these clauses***, the property, rights and interests of German nationals or of companies controlled by German nationals ***may not be liquidated in Polish Upper Silesia.***"[30] Finally, Article 23 further provided that the PCIJ would have jurisdiction over disputes concerning the "construction and application of Articles 6 to 22."[31]

---

[25] *See* Treaty of Versailles arts. 92, 297; *see also supra* notes 13–15 and accompanying text.

[26] Convention Concerning Upper Silesia, Ger.-Pol., art. 8, May 15, 1922 ("1922 Geneva Convention"), *French excerpts available at* http://www.icj-cij.org/pcij/serie_C/C_09_01/C_09_01_05_Interets_allemands_Haute-Silesie_autres_documents.pdf.

[27] *Id.* art. 7.

[28] *Id.* arts. 12–16.

[29] *Id.* arts. 17–24. Article 19 further provided that in the event there was a question over whether an asset was owned by a German national, the Polish government would give notice of its findings in this respect, and allow the owner to appeal.

[30] *Id.* art. 6.

[31] *Id.* art. 23(1).

As the PCIJ later explained, the net result of these treaty provisions was that German property was spared the "regime of liquidation" under the Versailles arrangements, and that, "subject to the provisions [in Articles 7 through 23] authorizing expropriation," *i.e.*, as authorized by a Joint Commission and subject to other procedures, "the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law."[32]

A modern commentator has likened the protection in the 1922 Geneva Convention to modern BIT protection providing for payment of "prompt and adequate" compensation in the event the state takes steps to nationalize foreign-owned property.[33] Although from a strict historical and legal perspective this is an imperfect comparison (not least because the pre-existing Versailles baseline for treatment of German property afforded such a low level of protection, as the PCIJ's above-quoted remarks make clear), the 1922 Geneva Convention was an investment treaty of sorts, in that it operated to constrain the host state's power to seize foreign-owned property, by creating a series of pre-conditions to such seizure. The non-observance of those treaty provisions was to have critical consequences some years later, at the merits phase.

E. *The Factory Is Seized*

In July 1922, soon after Chorzów became part of the Polish state, the regional court of Chorzów declared that Oberschlesische was not the true owner of the Chorzów nitrates factory, and that the prior 1920 judicial order recognizing it as such was "null and void and was to be cancelled."[34] From the standpoint of Polish

---

[32] *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, at 21 (May 25) ("*Upper Silesia: 1926 Judgment*").

[33] *See* Richard J. Hunter, *Property Risks in International Business*, 15 CURRENTS INT'L TRADE L.J. 23, n.138 (2006) ("Before BITS, foreign investment was protected by customary international law that provided for the protection of property by the payment of compensation that was 'prompt and adequate.' One of the most important versions of this standard is presented in The Chorzow Factory Case . . .").

[34] *Upper Silesia: 1925 Judgment* at 9. The Polish officials relied upon a 1920 Polish law purporting to allow the Polish government to seize the assets of German nationals and deprive them of certain other rights, as well as a 1922

law, therefore, the German Government was to be treated as the factory's true owner, with the further consequence that the factory was to be treated as property of the defeated German Government, subject to a Versailles-style seizure.[35] Two days later, Polish officials took complete control of the factory, including all of its movable property, patents and licenses.[36]

II. THE INITIAL "UPPER SILESIA" PROCEEDING

Germany instituted PCIJ proceedings against Poland in May 1925 in the case involving "*German Interests in Polish Upper Silesia.*" In that case, it argued that the 1920 seizure of the Chorzów Factory (as well as the seizure of certain large agricultural landholdings held by German nationals) violated Article 6 of the 1922 Geneva Convention.[37] In its merits decision in 1926,[38] the PCIJ held that the 1922 Geneva Convention had circumscribed Poland's rights to expropriate German property, and that any act of seizure that "derogated" from the procedures in the Geneva Convention was unlawful.[39] Poland's various

---

legislative order permitting the 1920 law to be applied in Upper Silesia. *See Upper Silesia: 1926 Judgment* at 16–18. In the context of the *Chorzów Factory* dispute, the application of this law was later held to be incompatible with the 1922 Geneva Convention. *See infra* note 40 and accompanying text. Other elements of the law had earlier been challenged as incompatible with the 1919 "Minorities Treaty," although this issue was not explored in the *Chorzów Factory* case. *See German Settlers in Poland*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10).

[35] *Upper Silesia: 1925 Judgment* at 9. As regards Article 256 of the Treaty of Versailles, see *supra* note 14 and accompanying text.

[36] *Id.*

[37] Poland had objected that Oberschlesische had attempted to claim compensation under a Treaty of Versailles mixed claims tribunal. *See id.* at 6–7. But, the PCIJ held that the mere pendency of that claim did not preclude Germany's separate claims for breach of Article 6 of the Geneva Convention. *See id.* at 18–21.

[38] Poland made various technical objections to the PCIJ's jurisdiction, which were rejected in August 1925. *See generally Upper Silesia 1925 Judgment.*

[39] *German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, at 22. The court added that Poland's own characterization of the legal basis for the taking was "irrelevant" if the measure *in fact* constituted a taking in violation of the treaty. *See id.* The PCIJ's 1926 opinion added, enigmatically, that the Geneva Convention had not affected Poland's general power to conduct "expropriation for reasons of public utility, judicial liquidation and

actions concerning German property, including a 1922 law purporting to subject such property to seizure, was thus "not compatible" with the 1922 Geneva Convention.[40]

The PCIJ further held that the 1922 Geneva Convention was fully applicable to the Chorzów Factory at the time of taking,[41] and that the rights under the Convention applied not only to Oberschlesische but also to Bayerische (as the owner of intangible rights seized by Poland in contravention of the Convention).[42] It thus gave judgment declaring the seizure of the factory (and other properties) to have violated Article 6 of the 1922 Geneva Convention.[43]

III. THE "INDEMNITY" PROCEEDINGS

A. *The Jurisdictional Decision*

In 1927, after settlement talks had failed, Germany brought suit before the PCIJ, again pursuant to Article 23 of the 1922 Geneva Convention, this time seeking an "indemnity" on behalf of its nationals owing to Poland's improper seizure of the Chorzów Factory. Poland challenged jurisdiction, including on the grounds that Oberschlesische had commenced two separate arbitration proceedings against Poland, seeking compensation, as well as local litigation in the courts of Poland.[44] Overruling this objection,

---

similar measures." *Id.* Poland, however, never claimed that the seizure of the factory was an ordinary "expropriation" in this sense; on the contrary, its position throughout the dispute was that the factory was properly to be regarded as German government property, liable to be seized pursuant to Article 256 of the Treaty of Versailles.

[40] *Id.* at 24. The Court furthermore held that post-war instruments (the Armistice Convention, Protocol of Spa and Treaty of Versailles) did not alter Poland's obligations under the Geneva Convention, which was a later and more specific instrument. *See id.* at 25–30. It furthermore held that, until the moment of transfer of sovereignty, Germany was entitled to transfer title in the nitrates factory, and that Poland had failed to show that this right had been "misused" in the present case. *See id.* at 30, 37–39.

[41] *Id.* at 40.

[42] *Id.* at 41–44.

[43] *Id.* at 81–82.

[44] Oberschlesische had first filed a claim before a Mixed Arbitral Tribunal in Paris pursuant to Article 305 of the Treaty of Versailles, seeking

the PCIJ held that there was nothing in the Geneva Convention that clearly ousted its own jurisdiction to hear Germany's claims for breach of Article 6 of the Geneva Convention.[45]

Poland also claimed that the damages claim fell outside the agreed PCIJ dispute resolution clause in the 1922 Geneva Convention – it claimed that a mere compensation claim was not a claim concerning "differences of opinion, resulting from . . . the application" of the Convention. Rejecting this claim, the PCIJ held that:

> It is a principle of international law that ***the breach of an engagement involves an obligation to make reparation in an adequate form.*** Reparation, therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[46]

This statement (repeated in the later merits ruling) is among the PCIJ's most-quoted pronouncements.[47]

B. *The "Interpretation" Decision*

Poland next sought to avoid litigation by litigating in its own courts. It brought a claim against Oberschlesische in its own courts, seeking a judicial declaration that the 1920 transfer of the Chorzów Factory was invalid, and thus that the factory should be viewed as German state property, subject to seizure under the

---

compensation on the basis that Poland had seized property of a German national in a manner contrary to the Versailles liquidation regime (although Poland had challenged the jurisdiction of this tribunal). *See Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 10, 29-30 (July 26) (Judgment No. 8, Jurisdiction). Oberschlesische filed its second proceeding before the Polish courts seeking to refer the matter to an "Upper Silesian Arbitral Tribunal" pursuant to Part II of the Geneva Convention, although these proceedings apparently had not been served. *See id.* at 10–11. None of these claims had resulted in a merits determination at the time of the 1927 decision.

[45] *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 9, at 30.

[46] *Id.* at 21 (emphasis added).

[47] *See infra* at 15.

Treaty of Versailles.[48] Germany responded by requesting that the PCIJ issue a decision "interpreting" its 1926 *Upper Silesia* decision, so as to make clear that Poland could no longer question either the illegality of the expropriation or the fact that the factory was privately owned at the date of seizure.[49] The PCIJ, granting this request, ruled in December 1927 that, in view of its 1926 decisions, Poland could no longer utilize its own "municipal law" to question the issue of whether Oberschlesische was the owner of the factory at the time of the seizure.[50] The case thus proceeded to the merits phase.

C. *The 1928 Merits Decision*

The PCIJ's 1928 merits judgment began by remarking that:

> It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law."[51] Monetary relief is the "most usual form of reparation."[52]

As a preliminary factual matter, the PCIJ reiterated its prior rulings that Poland's seizure of the factory was contrary to the Geneva Convention, which in turn engaged its responsibility to

---

[48] *Interpretation of Judgments Nos. 7 and 8 (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 13, at 5, 8-9 (Dec. 16) (Judgment No. 11).

[49] Germany also brought an application in October 1927 for "interim measures," arguing that the extent of Bayerische's losses justified an order that Poland immediately pay 30 million Reichsmarks as an interim damages payment. The Court rejected this request on the grounds that the application "cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim." *Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) at 10 (Nov. 21) (Order made on 21 November 1927, Indemnities).

[50] *See id.* at 10–11.

[51] *Factory at Chorzów (Ger. v. Pol.)*, 1928, P.C.I.J. (ser. A) No. 17, at 27-28 (Sept. 13) (Judgment No. 13, Merits).

[52] *Id.* at 28. The PCIJ added that international law operates "in a different plane" to private law, with the claimant State being the one entitled to claim damages. *Id.* It also noted that it was open for states to create private tribunals to adjudicate private claimants' claims for breach of international law, but that nothing in Article 23 of the Geneva Convention affected Germany's entitlement to claim damages in this case. *See id.*

make reparation.[53] It also rejected (much as it had before) Poland's arguments that Oberschlesische's acquisition of the factory in 1919 had been invalid, and/or that the factory was properly viewed as German government property.[54]

Turning to the proper measure of reparation, the PCIJ framed the issue by noting that this was not a situation where a governmental seizure would have been made "lawful" by simply paying "fair compensation"; it was a seizure of a kind that was banned outright under the 1922 Geneva Convention and would only have been lawful had the treaty's "exceptional" procedures been followed (*i.e.*, a joint recommendation by an international commission, notice of taking, etc.).[55] The ***unlawful*** nature of the expropriation had critical consequences; it meant "the compensation due to the German Government [was] *not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment.*"[56] Indeed, it remarked, to limit damages merely to the market value at the time of taking might place Germany and its nationals "in a situation more unfavorable" than they would have been in, had Poland "respected" the 1922 Geneva Convention and refrained from expropriating the interests.[57] Such a result would "not only be unjust," but also "incompatible" with the anti-expropriation provisions of the treaty—it would be "***tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned***."[58]

The PCIJ then turned to the applicable standard of reparation:

---

[53] *Id.* at 29.

[54] *Id.* at 40. The Court also dismissed a last-minute request by Poland for a suspension of the case pending a reference to the Versailles Reparation Commission (Poland had sought to have the factory assessed as German property before that body and sought a postponement of the case, pending the Commission's decision). *See id.* at 45–46.

[55] *Id.* at 46 (citing Geneva Convention art. 7).

[56] *Id.* at 47 (emphasis added). In other words, it may have been proper to limit compensation to the value of the dispossessed enterprise on the date of seizure, ***but only if*** Poland's wrongful act had "consisted merely in not having paid to the two [German] Companies the just price of what was expropriated." *Id.*

[57] *Id.*

[58] *Id.* (emphasis added).

> 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 reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[59]

This rule, it held, was of "particular applicat[ion]" in the present case, given that the 1922 Geneva Convention was aimed to "provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*."[60] The seizure of the factory, "the expropriation of which [was] prohibited by the Geneva Convention," thus triggered an obligation upon Poland to "restore the undertaking ***and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.***"[61] Given that the parties were "agreed" that restitution was impossible, Poland was obligated to pay the "value" of the property in lieu of restitution.[62]

The Court already had extensive briefing from both parties on valuation. It declined, however, to accept the "data[] supplied by the parties."[63] It held, among other things, that:

---

[59] *Id.*

[60] *Id.*

[61] *Id.* at 47–48 (emphasis added).

[62] *Id.* at 48 (holding that "it would not be in conformity either with the principles of law" or the terms of the 1922 Geneva Convention to "infer" that "the question of compensation must henceforth be dealt with as though an expropriation properly so called"—*i.e.*, a lawful expropriation as authorized by the Convention—"was involved").

[63] *Id.* at 49.

- the cost of building the factory in 1915 was not a reliable measure of value, given that it was constructed in wartime, when "the imperious demands of public necessity" may have overridden commercial considerations;[64]
- two prior offers to the German government to purchase the plant in 1919 were not a reliable measure of compensation, not only because "the value of the undertaking at the moment of dispossession does not necessarily indicate the criterion for the fixing of compensation" but also because the particular circumstances of these offers indicated that the bidders were not offering full value, partly due to the "fear" of possible future seizure by the new Polish government (which, the court repeated, were unlawful); and[65]
- it would not take into account offers made during settlement negotiations: "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement."[66]

Having refused to accept the parties' existing submissions, the Court, in the exercise of its power to appoint an expert under Article 50 of its Statute, directed a committee of experts to assess damages. It specified two alternative bases for valuation, namely, the value of the factory at the time of seizure in 1922; *or* the value of the factory "at the date of the present judgment," assuming the factory "had remained in the hands of Bayerische and Oberschlesische[], 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 its German investors.[67] Once the expert valuation was complete, the PCIJ would then assess compensation based upon the restitutionary principles it had articulated.[68] Before this

---

[64] *Id.* at 50.

[65] *Id.*

[66] *Id.* at 51.

[67] *Id.* at 51-52.

[68] *Id.* at 53–54.

could occur, however, the dispute was settled, and the proceeding dismissed.[69]

IV. THE GENERAL USE OF *CHORZÓW FACTORY* IN DEVELOPING THE LAW OF STATE RESPONSIBILITY

At almost every phase of the dispute, the *Chorzów Factory* case generated extremely influential statements on international law. The statement, for example, in the 1927 jurisdictional decision that "the breach of an engagement involves an obligation to make reparation in an adequate form"[70] is directly reflected in Article 1 of the ILC Draft Articles on State Responsibility, which states that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[71] The core holding in the 1928 merits decision — that reparation must "wipe out" the consequences of an unlawful act, and must be restitutionary in nature, are also reflected in the ILC Draft Articles,[72] not to mention

---

[69] *See Factory of Chorzów (Ger. v. Pol.)*, 1929 P.C.I.J. (ser. A) No. 19 (May 25) (Order made on 25 May 1929, Indemnities). The court apparently appointed a committee constituting chemical engineers from Switzerland and Norway. *See* Keith Highet, *Evidence, the Court and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 21 n.100 (1987) (reporting on searches of original PCIJ records).

[70] *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 9, at 21.

[71] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* art. 1 (2001), *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; *see also id.* art 2, cmt. 7 (citing *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 9).

[72] *See, e.g.*, *id.* art. 31(1) ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."); *id.* art. 31, cmt. 3 (citing *Chorzów Factory* (Merits)); *id.*, art. 34 (stating that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter"); *id.* art. 34, cmt. 2; *id.* art. 35 (describing remedy of restitution); *id.* art. 35, cmt. 3 (describing *Chorzów Factory* merits decision as confirming "primacy of restitution"); *id.* art. 36 (describing remedy of compensation); *id.* art. 36, cmt. 3 (quoting *Chorzów Factory* and confirming primacy of restitution); *see also* Draft Convention on the International Responsibility of States for Injuries to Aliens art. 27(3), *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibilities of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 581 (1961) (stating that "[d]amages are awarded in order to: . . . place the injured alien . . . in as good a position, in financial terms, as that in which the alien would have been if the act or omission for which the State is responsible had not taken

numerous international judicial decisions and awards[73]—including numerous cases involving non-economic claims.[74]

Other aspects of the case have also been viewed as significant: the 1926 *Upper Silesia* merits decision has been cited as an early example of how intangible contract rights can be the subject of an expropriation claim,[75] and the "interpretation" decision of December 1927 has been recognized for its importance in developing the principle of *res judicata* under international law.[76] Even the evidentiary methodology adopted by the Court—including its decision to appoint experts pursuant to the Court's statute[77]—has attracted significant scholarly commentary.

V. THE *CHORZÓW FACTORY* DECISION AND EXPROPRIATION DAMAGES

A. *The Early Years: Libya, Iran, and* Amco

Within BIT law, the aspect of *Chorzów Factory* that has generated perhaps the most intense interest relates to the quantification of damages for unlawful expropriation.

This began with the *Libya* cases of the early 1970s, which followed the seizure by Colonel Qadafi's government of

---

place; [and] restore to the injured alien . . . any benefit which the State responsible for the injury obtained as a result of its act or omission"); MARBOE, *supra* note 1, at 27; RIPINSKY, *supra* note 1, at 35.

[73] *See, e.g., Gabčíkovo-Nagymaros Project (Hung./Slovak.)*, 1997 I.C.J. 7, 80 ¶ 149 (Sept. 25); *Eritrea's Damage Claims (Eri. v. Eth.)*, Final Award ¶ 24 (Ethiopia-Eritrea Claims Comm'n 2009), *reprinted in* 49 I.L.M. 177.

[74] *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb./Montenegro)*, Judgment, 2007 I.C.J. 43, 232 ¶ 460 (Feb. 26).

[75] *See* G. C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. OF INT'L L. 307, 316–17 (1962).

[76] *See* Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFR. J. INT'L & COMP. L. 38, 39-40 (1996).

[77] *See* Highet, *supra* note 69, at 11, 21. According to Highet, the earlier *Upper Silesia* phase marked the only time in the life of the PCIJ that live testimony was received. *See id.* at 21–22 & n.98.

concessions previously held by certain Western oil companies.[78] Such actions were potentially contrary to the prior government's commitments in a "Petroleum Law" guaranteeing certain rights to oil concession-holders, including a "stabilization-of-rights" clause.[79] Several arbitration claims seeking compensation for expropriation ensued (again pursuant to the terms of the Petroleum Law).[80]

In one of these, *TOPCO/CALASIATIC*, the sole arbitrator Professor René Dupuy issued a merits award in 1977, in which, after holding that the seizure of the concession was unlawful, he declared that Libya was obligated to make full restitution of the concessionaire's holdings, and issued a decision granting Libya five months within which to take such action.[81] Foremost among the authorities cited in support of this decision was *Chorzów Factory*.[82] And in *Aminoil*, it was likewise recognized that

---

[78] *See* Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 478 (1981).

[79] *Id.* at 479. The parties' rights were governed by "'the principles of law of Libya common to the principles of international law and in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.'" *Id.* at 481–82 (citation omitted). The concessions also included a provision stating that "'[t]he Government of Libya[, the Commission and the appropriate provincial authorities] will take all steps necessary to ensure that the Company enjoys all the rights conferred by this concession'" and that "'[t]he contractual rights granted by this concession shall not be altered except by mutual consent of the parties.'" *Id.* at 479 (citation omitted).

[80] *See id.*; *see also* Robin C.A. White, *Expropriation of the Libyan Oil Concessions—Two Conflicting International Arbitrations*, 30 INT'L & COMP. L. Q. 1, 6 (1981) (noting venue and other details of the *BP* arbitration).

[81] *See Tex. Overseas Petroleum Co. v. Libya*, 17 I.L.M. 3, 36-37 Award on the Merits ¶¶ 110–14 (Int'l Arb. Trib. 1977).

[82] *See id.* at 32, ¶ 97 (citing *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 13)). Of the two other *Libya* arbitrations, one (*BP*) held that general principles of law, rather than international law, applied to the claim. *See BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 309 (Int'l Arb. Trib. 1974); *see also* von Mehren & Kourides, *supra* note 78, at 510; White, *supra* note 80, at 8–10. In the other, *LIAMCO*, the arbitrator issued a decision in which he rejected claims for full restitution as impractical, and instead awarded damages totaling approximately $80 million as "equitable" compensation reflecting the value of the enterprise at the time of seizure. *See Libyan Am. Oil Co. v. Libya*, 20 I.L.M. 1, 86–87 (Int'l Arb. Trib. Apr. 12, 1977). The sole arbitrator, Dr. Sobhi Mahmassani of Lebanon, acknowledged a

"indemnification" for an expropriation that violated international law could be assessed on a different, restitutionary, basis;[83] although the majority declined to hold that the taking in that case was unlawful.

In 1987, in the *Amoco* decision, the Iran-U.S. Claims Tribunal likewise held that damages for unlawful expropriation should be assessed according to the restitutionary standards set forth in *Chorzów Factory*.[84] Observing that "a clear distinction must be made between lawful and unlawful expropriations," it held that "the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking."[85] An "essential consequence" of the restitutionary principles set forth in *Chorzów Factory*, it held, is that compensation ***"'is not necessarily limited to the value of the undertaking at the moment of dispossession' (plus interest to the day of payment)."***[86] The majority in that case, however, determined that because the expropriation in question (interests in an oil production facility) had not violated the terms of the Treaty of Amity between Iran and the United States, it was not necessary to explore quantification of damages under the *Chorzów Factory* standard.[87] The *Sedco* award of 1986 also considered that there was a valid distinction between unlawful and lawful expropriation.[88]

---

potential distinction between lawful and unlawful expropriation, but did not find the expropriation to have been unlawful. *See id* at 85–86.

[83] *See Kuwait v. Am. Indep. Oil Co. (AMINOIL)*, 21 I.L.M. 976 ¶ 138 (Int'l Arb. Trib. 1982) ("[I]n regard to indemnifications due in consequence of illicit acts, where it is as the equivalent of a *restitutio in integrum* that the calculation is in principle effected.").

[84] *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189 ¶¶ 192–203 (1987).

[85] *Id.* ¶ 192 (citing *Factory at Chorzów*, 1928 P.C.I.J. (Ser. A) No. 17, at 47).

[86] *Id.* ¶ 196 (quoting *Factory at Chorzów*, 1928 P.C.I.J. (Ser.A) No. 17, at 47).

[87] Judge Brower delivered a strong dissent, concluding that "the expropriation here was contrary to an undertaking by Iran to stabilize the Khemco Agreement," meaning that (in his view) it was unlawful. *See id.* at ¶ 14 (Brower, J., concurring and dissenting).

[88] *See SEDCO, Inc. v. Nat'l Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180, § III n.35 (1986) (observing that the failure to make any distinction between damages for lawful and unlawful expropriation would produce a perverse

And in the early ICSID case of *Amco Indonesia*, which was a contractual dispute over a wrongfully-revoked hotel license, the Tribunal held (in that case) that international law principles could properly apply to the dispute by reach of Article 42(1) of the ICSID Convention.[89] It also held that *Chorzów Factory*'s restitutionary approach was a properly applicable factor in calculating damages, and then, turning to the proper calculation of damages, held:

> 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, 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. . . . Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to *restitutio in integrum*. The only subsequent known factors relevant to value which are not to be relied on are those attributable to the illegality itself. . . . It is well established in international law that the value of property or contract rights must not be affected by the unlawful act that removed those rights.[90]

One commentator has discussed this reasoning as:

> creat[ing] 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

result in which the "injured party would receive nothing additional for the enhanced wrong done it and the offending State would experience no disincentive to repetition of unlawful conduct").

[89] *Amco Asia Corp v. Indonesia*, No. ARB/81/8, Resubmission Award ¶¶ 1–2 (ICSID June 5, 1990).

[90] *Id.* at ¶¶ 186–87.

> known factors relevant to value which are not to be relied on are those attributable to the illegality itself." 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.[91]

Certain other, differently constituted chambers of the Iran-U.S. Claims tribunal, took a different approach. In *Phillips Petroleum*, for example, a chamber of the Tribunal was unwilling to draw any distinction between unlawful and lawful expropriation, on the basis that the parties' treaty had dictated payment of compensation at market value at the time of taking.[92] Thus, as the ILC noted in 2001, by the close of the 20th Century there remained "controversy" over "standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other."[93]

B. Chorzów Factory *and the Modern BIT Era*

Modern BITs typically restrict a state's right to expropriate to certain defined circumstances. Article 4(1) of the Cyprus-Hungary BIT, for example, states that expropriation may only occur if: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; and (c) the measures are accompanied by provision for the payment of just compensation.

---

[91] Ana Vohryzek, *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID*, 31 LOY. L.A. INT'L & COMP. L. REV. 501, 529 (2009) (quoting *Amco v. Indonesia* ¶ 186 (footnote omitted)). The same commentator appears to consider that the ultimate award in *Amco* was not fully restitutionary in nature. *See id.* at n.138 (opining that "the award that Amco received is consistent only with a damages remedy").

[92] *See Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79 ¶ 109 (1989) (concluding that it "need not decide in the present Case whether the taking was unlawful . . . because, whatever the relevance of that question as a matter of customary international law, it is irrelevant under the Treaty of Amity"); *see also Starrett Hous. Corp. v. Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112 (1987) (similar holding).

[93] Int'l Law Comm'n, *supra* note 70, at 102 n.549 (commentary on article 36).

Article 4(2) further provides that compensation "must correspond to the market value of the expropriated investments at the moment of the expropriation." Article 4(3) further regulates the timing of payment, and provides that, in the event payment is delayed by more than 3 months, it must be accompanied by "payment of interest based on prevailing rates."[94]

Formulas such as this, however, achieve only the calculation of a sum that the expropriated asset would have commanded on the open market[95] at the time of taking. The *Chorzów Factory* approach, measuring the value of the disposed asset at the time of "indemnification," could potentially lead to a different, higher result.

This indeed is what occurred in *ADC v. Hungary*. In that case, the host state (Hungary) had, in 2002, engaged in an "opportunistic" expropriation of an asset (an airport concession) at a time of rising profitability. The damages formula in the Cyprus-Hungary BIT, which would have provided for payment of market value at the time of taking, was only applicable to seizures that conformed with the treaty criteria, which the Tribunal held had not occurred:

> There is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law (*see e.g. Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. at 121). But in the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable

---

[94] Cyprus-Hungary BIT, art. 4. Thus, if the fact or knowledge of expropriation negatively affects the value of the investment, the compensation to be paid should not be reduced *pro tanto*. In *Santa Elena*, for example, it was stated that "[t]he expropriated property is to be evaluated as of the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless." *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ARB/96/1, Final Award ¶ 78 (ICSID Feb. 17, 2000).

[95] Market value has been defined as the "price that a willing buyer would pay to a willing seller" for the asset on the date of the taking "in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat." *Starrett Hous.*, 16 Iran-U.S. Cl. Trib. Rep. ¶ 277.

> in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. This would have been possible if the BIT expressly provided for such a position, but this does not exist in the present case.[96]

The Tribunal, reviewing the state of international law, concluded that *Chorzów Factory*'s statements concerning the standard for reparation retained its "full current vigor."[97] It thus held that damages should be awarded through a "'payment of a sum corresponding to the value which a restitution in kind would bear.'"[98] It then explained:

> 496. 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.
>
> 497. 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.[99]

---

[96] *ADC Affiliate Ltd. v. Hungary*, ARB/05/6, Award, ¶ 481 (ICSID Oct. 2, 2006).

[97] *Id.* ¶ 493.

[98] *Id.* ¶ 495 (citation omitted).

[99] *Id.* ¶¶ 496–97.

Compensation thus awarded in the sum of USD 76.2 million, based on the value of the seized concession at the award date (2006).[100]

At least three subsequent ICSID cases have adopted this approach.

(i) In *Siemens*, confronted again with an unlawful expropriation in violation of a BIT, and *again* citing *Chorzów*, the ICSID Tribunal held that the claimant was "entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages."[101]

(ii) In *Unglaube*,[102] a 75-meter strip of beachfront property had been progressively interfered with through a series of government steps that began in 2003. The Tribunal, however, held that the BIT measure of compensation (fair market value at time of taking) was "binding only with respect to a lawful taking of property,"[103] with the result that the Tribunal could apply *Chorzów Factory* standards and award compensation on a full restitutionary basis. Applying this to the case at hand, it held that, but for the government interference, the property owner could have sold at the peak of the real estate market in 2006, when buyers were "plentiful"[104] and therefore based damages on the hypothesis such a sale would have occurred, albeit six-months before the true peak of the market.[105]

(iii) In *ConocoPhillips*, the tribunal held that, "if the taking was unlawful, the date of valuation is in general the date of

---

[100] *Id.* ¶¶ 499, 519.

[101] *Siemens AG v. Argentina*, ARB/02/8, Award, ¶ 352 (ICSID Feb. 6, 2007), *reprinted in* 14 ICSID Rep. 513 (2009).

[102] *Unglaube v. Costa Rica*, ARB/08/1 and ARB/09/20, Award (ICSID May 16, 2012).

[103] *Id.* ¶ 306.

[104] *Id.* ¶ 316.

[105] *Id.* ¶¶ 317–18.

the award."[106] As at the time of writing, damages in that case have yet to be determined.

The full contours of *Chorzów Factory*, and its applicability in expropriation cases, remain to be explored. Some tribunals have sounded a cautionary note. In *Funnekotter*,[107] the Tribunal (chaired by a former ICJ President) stated that *Chorzów Factory* potentially warranted a distinction between standards for unlawful and lawful expropriation.[108] Nevertheless, it noted some academic and professional opinion was to the "contrary,"[109] meaning that, in its view, the case law was "not perfectly clear" on the issue.[110] Adopting a pragmatic approach, the *Funnekotter* tribunal held that, as it was "not alleged that there was some increase of the value of those farms between the date of the taking and the date of the present award," it followed that "the major points of difference that distinguish computation of damages for lawful expropriation from computation of damages for unlawful expropriation are not here in issue."[111] It thus awarded damages based on market value at the time of taking.

In *Kardassopoulos*, the Tribunal observed that, "[i]n certain circumstances full reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award."[112] On this analysis, "[i]t may be appropriate to compensate for value gained between the date of the

---

[106] *ConocoPhillips Petrozuata B.V. v. Venezuela*, ARB/07/30, Decision on Jurisdiction and the Merits ¶ 342-43 (ICSID Sept. 3, 2013); *see also id.* ¶ 342 (explaining that *Chorzów Factory* had based its analysis upon the "essential principle" of customary international law that an unlawful expropriation is to be determined in line with restitutionary principles).

[107] *Funnekotter v. Zimbabwe*, ARB/05/6, Award (ICSID Apr. 22, 2009).

[108] *Id.* ¶¶ 108–09.

[109] *Id.* ¶ 110 (citing AUDLEY SHEPPARD, THE DISTINCTION BETWEEN LAWFUL AND UNLAWFUL EXPROPRIATION, IN THE INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 172 (2006); Michael W. Reisman & Robert D. Sloone, *Indirect Expropriation and its Valuation in the BIT Convention*, 2004 BRIT. Y.B. INT'L L. 133 (2004)).

[110] *Id.*

[111] *Id.* ¶ 112.

[112] *Kardassopoulos v. Georgia*, ARB/05/18 and ARB/07/15, Award, ¶ 514 (ICSID Mar. 3, 2010).

expropriation and the date of the award in cases where it is demonstrated that the Claimants would, but for the taking, have retained their investment."[113] But in that case, the "date of award" approach was not adopted because the evidence did not indicate that the claimants would have continued to operate their investment, post-1995.[114]

It is also possible that *Chorzów Factory* may have implications that go beyond the quantification of market value. Citing Ripinsky, *Unglaube* also recognized that "illegality of expropriation may also influence other discretionary choices made by arbitrators in the assessment of compensation," with the consequence that, applying "[c]ustomary international law," an interest rate should be applied that will "achieve the result of full reparation."[115] And at least one author has urged that the restitutionary approach means that reparation in BIT cases (including in cases dealing with the "fair and equitable treatment" standard) can be awarded using "unjust enrichment" theories.[116]

* * *

The 1928 *Chorzów Factory* decision stands for at least three major principles: (i) the general rule that reparation must "wipe out the consequences" of the unlawful act; (ii) the rule, stated in *Chorzów* and enunciated in *TOPCO*, that reparation for an unlawful act should be restitutionary—which potentially entitles the claimant to a return of unlawfully seized property; and (iii) the further corollary of the restitutionary principle—reflected in *ADC*, *Siemens*, *Unglaube* and *ConocoPhillips*—that in appropriate cases, damages for an unlawful expropriation can be calculated at a later date than the date of taking.

---

[113] *Id.*

[114] *See id.* ¶ 515; *see also Siag v. Egypt*, ARB/05/15, Award, Dissenting Opinion of Francisco Orrego Vicuña at 5–6 (ICSID June 1, 2009) (observing that some exceptional cases involving "unlawful expropriation" may "justif[y]" a "different standard of compensation" based upon customary international law and a "long-term" damages analysis; observing that the facts of that particular case did not warrant such an approach).

[115] *Unglaube v. Costa Rica*, ARB/08/1 and ARB/09/20, Award, ¶¶ 307, 320 (ICSID May 16, 2012) (citing RIPINSKY & WILLIAMS, *supra* note 1, at 88).

[116] *See* Ana Vohryzek, *supra* note 91 at 580; *see also id.* at 529 (arguing that *ADC v. Hungary* is "clearly" a decision involving "remedial unjust enrichment.").

The fact that the actual dispute in *Chorzów Factory* was settled before a single cent (or zloty) was awarded in damages has not dimmed its impact. Even to this day the *Chorzów Factory* merits decision of 1928 is easily the most important pronouncement on quantum principles to emanate from the World Court.