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I. INTRODUCTION

Compensation for the nationalization of foreign investment has been called "one of the most controversial areas of international law"[1] largely because of the wide range of remedies that are employed by various legal systems for breach of contract as well as for interference with property rights. In awarding damages resulting from investment disputes between private investors and foreign states, tribunals of the International Center for the Settlement of Investment Disputes (ICSID) generally assess compensation according to the estimated lost profits the injured investor would have derived from the investment, which embodies the familiar "expectation measure" of U.S. contract law.[2] However, on occasion ICSID tribunals have granted recovery for actual losses, meaning the costs of the investment, or *damnum emergens* as they are known in some civil law systems which follow the old Roman Law tradition, much as a domestic court might award "reliance measure" damages. While the reasoning for the tribunals' decisions to fix damages according to losses incurred as opposed to (or sometimes in addition to)[3] gains foregone is often unclear, there is a sound economic rationale for a reliance-based standard of compensation. Most importantly, the error costs of imperfect damages based upon the level of actual investment should be lower than those derived from other methods, and secondarily, confidentiality of sensitive

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[1] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 437 (2d ed. 2004).

[2] *See, e.g.*, Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., 35 I.L.R.136, 186 (1963).

[3] Actual costs are typically argued in the alternative to lost profits by the claimant party.

information is secured. Both of these advantages create incentives for further foreign direct investment, which is one of the primary objectives of the ICSID Convention and its dispute settlement system.

A. Topics for Discussion

This article will examine the types of situations and expenses which ICSID tribunals have compensated by awarding damages for actual losses suffered and will attempt to illustrate how this choice is generally economically efficient. It will begin by outlining standards of damage remedies that are commonly employed in international law and will conclude with some criticisms of the reliance measure in the investment context. As this article is forum-focused, it will not examine reliance-based remedies in international investment law under other regimes, such as United Nations Commission on International Trade Law (UNCITRAL) arbitrations or under the Iran-U.S. Claims Tribunal, in any detail. Moreover, this article will not explore, other than incidentally, the highly contentious issue of asset valuation methods used in international investment arbitration,[4] which are rightly viewed as secondary to the finding of the compensation *standard* applicable to the dispute.[5] Similarly, the limitations of remoteness and foreseeability which feature in the assessment of damages both in common law and international systems will not be examined. An attempt to define the term *investment* directly is beyond the scope of this article, although some examples of the types of expenses that ICSID tribunals will recognize when granting recovery will be seen. Finally, this article will not directly consider the controversial issue of when state regulatory actions amount to an expropriation[6] for the purposes of assessing compensation.

B. A Brief Introduction to ICSID

ICSID was established by the multilateral Convention on the

[4] For a recent discussion of valuation methods in international investment law, see T.W. Walde & Borzu Sabahi, *Compensation, Damages and Valuation*, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1049 (Peter Much Linski, Federico Ortino & Christopher Schreuer eds., Oxford University Press 2008); C.N. Brower & M Ottolenghi, *Damages in Investor State Arbitration*, 4:6 TRANSNAT'L DISP. MGMT. 1 (2007); Mark Kantor, *Valuation for Arbitration: Uses and Limits of Income-Based Valuation Methods*, 4:6 TRANSNAT'L DISP. MGMT. 1 (2007); Irmgard Marboe, *Compensation and Damages in International Law: The Limits of "Fair Market Value"*, 7 J. WORLD INV. & TRADE 723 (2006); Thomas W. Merrill, *Incomplete Compensation for Takings* 11 N.Y.U. ENVTL. L.J. 110 (2002).

[5] SORNARAJAH, *supra* note 1, at 486.

[6] For a recent discussion of this topic, see Justin R Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 FLA. ST. J. TRANSNAT'L L. & POL'Y 275 (2007).

Settlement of Investment Disputes Between States and Nationals of Other States which entered into force in 1966[7] and is part of the World Bank, located in Washington, D.C., United States, although its proceedings may take place elsewhere. Generally speaking, ICSID provides facilities for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states, although under its Additional Facility Rules, states which are not party to the Convention may now use ICSID tribunals for dispute settlement, as well as for certain other fact-finding proceedings.[8] Independent arbitral tribunals are constituted for each case under the procedural framework provided by the ICSID Convention and using the center's facilities. Arbitration or conciliation under ICSID is entirely voluntary, but once consent is given it cannot be withdrawn unilaterally by either side. There are currently more than 150 countries which have ratified the convention and the caseload of the tribunals has increased substantially in recent years largely due to the proliferation of Bilateral Investment Treaties (BITs).[9] In the past decade, ICSID tribunals have resolved many disputes resulting notably from the economic crisis in Argentina, as well as privatization initiatives associated with the fall of communism in Eastern Europe. Typically, ICSID disputes relate to troubles encountered by Western corporations which have invested in large projects in the developing or lesser-developed countries due to political upheavals in those countries.

Before embarking on the discussion of the key ICSID decisions, let it be said that in establishing remedies in international investment arbitration, the investment contract or BIT is of paramount importance. The first step in the tribunal's assessment of an appropriate measure of damages, and indeed its first step with respect to issues of jurisdiction and liability, is to examine the text of the investment contract or relevant treaty itself. This is because under the ICSID Convention, the tribunal is required to "decide a dispute in accordance which such rules of law as may be agreed by the parties."[10] Most of the now more than two thousand BITs require some form of prompt compensation for expropriations or other breaches of investment contracts,[11] as do multilateral treaties such as the North

[7] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[8] ICSID, Additional Facility Rules, Art. 2, *available at* http://icsid.worldbank.org/ICSID /StaticFiles/facility/AFR_English-final.pdf.

[9] *See generally* ICSID, http://icsid.worldbank.org/ICSID/Index.jsp (last visited Mar. 19, 2008).

[10] ICSID Convention, *supra* note 7, at Art. 42.

[11] *See, e.g.*, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection Of Investment (2004 Model BIT), Arts. 5.5, 6.2, *available at* http://www.ustr.gov

American Free Trade Agreement (NAFTA), under which disputes are also brought before ICSID.[12] It is also not uncommon for a concession contract to leave open the nature of damages that will be available for breach, in which case the fixing of damages is expressly granted to the ICSID tribunal under the Convention.[13] In such cases, the tribunal will point to the law of the host state or, more problematically as we shall see in the next section, to the principles of international law.[14] Any of the above categories can lead the tribunal to a consideration of monetary damages linked to the extent of actual investment; however, the interplay of sources of authority for principles of international law has rendered remedies in international commercial arbitration highly uncertain, especially in the case of state actions such as expropriation,[15] which is often the very type of dispute brought before ICSID.

II. ASSESSING DAMAGES IN INTERNATIONAL LAW

Although it is conceded that there is no clear principle of compensation for nationalization of property in international law,[16] there is almost universal consensus among international tribunals that the purpose of damages for breach of contract is to place the injured party in the position it would have been in had the contract been performed as promised.[17] International jurisprudence appears to suggest that compensation must repair, as far as possible by financial means, the damage caused by the illegal act, and this may include both losses incurred as well as gains foregone. Such a goal was famously pronounced by the Permanent Court of Justice in the *Chorzow Factory* case when it wrote that reparation must "wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed had that act not been

/assets/Trade_Sectors /Investment /Model_BIT/asset_ upload_ file847_ 6897.pdf (calling for "prompt compensation" based on the "fair market value of the investment" but offering no insight as to compensation for lost profits or actual investments).

[12] North American Free Trade Agreement art. 1110(2), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 612, at 641–42 (defining "compensation" as fair market value immediately before expropriation). For further discussion of compensation for state interference with investors under NAFTA, see Jeffrey Turk, *Compensation for Measures "Tantamount to Expropriation" Under NAFTA: What it Means and Why it Matters*, 1 INT'L L. MGMT. REV. 41 (2005).

[13] ICSID Convention, *supra* note 7, at Art. 42.

[14] *Id.*

[15] CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 193–94 (1987).

[16] SORNARAJAH, *supra* note 1, at 436. Sornarajah believes that the lack of uniformity is due as much to different jurisdictions' views on property protection as their different approaches to compensation. *Id.* at 452.

[17] John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 GEO. J. INT'L L. 61, 99 (2004).

committed."[18] This principle of *restitutio in integrum* is mirrored in the International Law Commission's Draft Articles on State Responsibility, which states that the state responsible for an internationally wrongful act "is under an obligation to compensate for the damage caused thereby" and such compensation shall cover "any financially assessable damage including lost profits in so far as it is established."[19] With respect to breaches of contract in particular, international commercial arbitration has similarly established that the purpose of damages should be to "place the party to whom they are awarded in the same pecuniary position that they would have been in had the contract been performed."[20]

Civil law systems' terminology regarding damages are derived from the Roman law principles of *lucrum cessans* (gains prevented) and *damnum emergens* (actual loss suffered), and some combination of these two heads of damages is typically applied in international fora to achieve the objective *restitutio in integrum.*[21] *Lucrum cessans* essentially mirrors the primary objective of normal damages remedies in U.S. contract law, which is the fulfillment of expectations that have been induced by the making of a promise—the so-called "expectation measure." This is an amount of money that would put the injured party in the position he or she would have been in had the contract been properly performed, or which would give him or her the benefit of the bargain.[22] In the context of international investment law, the expectation measure is properly viewed as the loss of profits that would have been earned from the investment, but for the interference of the host state. Lost future profits were awarded, for example, in *Sapphire v. N.I.O.C.*, noted above, despite the inherently speculative nature of the investment concession.[23] The second chief category or head of damages for breach of contract in international law, *damnum emergens*, is conceptually similar to the reliance measure,[24] which compensates an injured party for any actions it undertook to its detriment in anticipation of the other party's contractual performance, resulting in a loss

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[18] Case Concerning the Factory at Chorzow (Germany v. Polish Republic), 1928 P.C.I.J. (Ser. A) No. 17, at 47 (Sept. 13) [hereinafter *Chorzow*].

[19] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, art. 36, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

[20] *See, e.g.*, Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., 35 I.L.R. 136, 185–86 (1963).

[21] Gotanda, *supra* note 17, at 65.

[22] RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 117, at 769 (4th ed. 2001).

[23] *Sapphire*, 35 I.L.R. at 187–88.

[24] Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 55 (1936) (observing the similarity between reliance and *damnum emergens* and noting that reliance damages may include foregone opportunities elsewhere, while expectation damages may not).

because of breach. Under this measure, damages may be recovered for an amount representing the extent of the investments incurred for the purposes of performance.[25] In the context of international investment law, the reliance measure is best seen in awards representing actual or direct investment costs incurred by the investor. Terms such as "sunk costs," "wasted costs," or "out-of-pocket expenses" could also describe this remedy with limited practical differences.

While both *lucrum cessans* and *damnum emergens* are often claimed by the injured party, and often both awarded,[26] *damnum emergens* is typically awarded as an alternative when lost profits as per the expectation or *lucrum cessans* approach cannot be measured with sufficient certainty. Clearly parties whose investment activities have been adversely affected by the actions or omissions of the states in which they invest may receive compensation commensurate with their lost profits before an ICSID tribunal. Moreover, such amounts need not be demonstrated with complete certainty, and recovery will not be denied solely because the quantum is difficult to determine.[27] However, ICSID tribunals are reluctant to award damages based on lost profits if such profits would be highly speculative and would result in an amount grossly disproportionate to the sum that was invested.[28] In particular, ICSID tribunals hesitate to award damages for lost profits to a new industry or one where there is limited record of profits.[29] On the other hand, *damnum emergens* appears to be always recoverable.[30]

Although the assessment of *damnum emergens* has been praised by Gray as straightforward[31] in a way that lost profits is not, evaluating the

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[25] RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1981); MURRAY, *supra* note 22, § 117, at 769.

[26] *See infra* Section V (noting that such awards are subject to denial of double-recovery).

[27] *See, e.g.*, Mar. Int'l Nominees Establishment v. Republic of Guinea, Award, ICSID Case No. ARB/84/4, 4 ICSID (W. Bank) 54, 75 (1989). This is in keeping with modern U.S. jurisprudence which typically permits recovery of lost profits, even for un-established businesses, if the losses can be proved with reasonable certainty. *See* Gotanda, *supra* note 17, at 71.

[28] *See, e.g.*, Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, 5 ICSID (W. Bank) 209, 232 (2000); Wena Hotels Ltd. v. Arab Republic of Egypt, Award, ICSID Case No. ARB/98/4, 6 ICSID (W. Bank) 89, 125 (2000).

[29] *See, e.g.*, Asian Agric. Prod. Ltd. v. Republic of Sri Lanka, Award, ICSID Case No. ARB/87/3, 4 ICSID (W. Bank) 245, 293 (1990); *Metalclad*, 5 ICSID (W. Bank) at 232. Although it is now largely discredited, the "new business rule" of U.S. jurisprudence encapsulated this problem of estimating future profits for unestablished businesses. *See, e.g.*, Cent. Coal & Coke Co. v. Hartman, 111 F. 96, 98 (8th Cir. 1901). U.S. courts will typically allow lost profit assessment if it can be proven with reasonable certainty. *See* Gotanda, *supra* note 17, at 71–72.

[30] *See, e.g.*, Amco Asia Corp. v. Republic of Indonesia, Award, ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 377, 498–506 (1984).

[31] GRAY, *supra* note 15, at 201 (referring to the damages assessment in Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., 35 I.L.R. 136 (1963), a non-ICSID arbitration).

extent of actual investments in a particular project is not as orthodox as it might initially appear. In the words of one ICSID tribunal, "it is a matter of controversy whether to use funds invested as a measure of the value of the investment."[32] This tension may rest upon the often unappreciated difference between the value of the investment that has been seized by a foreign state and the associated damages resulting therefrom, for example, a lost future income stream. This key paradigm is itself founded upon the important distinction between compensation resulting from a lawful government expropriation and damages for an illegal act such as an unlawful expropriation or a breach of contract.[33] While the latter might properly require assessment by reference to expectation losses, the former may be within the sphere of reliance-based damages.[34] However, the ICSID tribunals that have awarded actual cost of investment do not appear to acknowledge this distinction when deciding upon a *standard* for assessing damages. Rather, the tribunals seem most concerned with accuracy and the avoidance of speculation through credible verification of amounts invested. Thus the primary objective in the remedy selection process is one of precision, which may be explained according to an underlying motive of efficiency, as shall be discussed in Section IV. Hojer has suggested that ICSID tribunals may view actual investments as a "starting point"[35] when assessing an appropriate remedy, but ultimately the decision to implement a reliance-based remedy will depend upon the contents of the particular investment contract or BIT, the circumstances of each case, the type of investment, and importantly the nature of the violation, such as whether it involves an expropriation or the violation of the fair and equitable treatment standard that appears in most investment agreements.

III. RELIANCE-BASED DAMAGES: RECOVERY FOR ACTUAL INVESTMENTS AT ICSID

In some cases the tribunal has completely ignored a claimant's request

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[32] Siemens A.G. v. Argentine Republic, Award, ICSID Case No. ARB/02/8, 2007 WL 1215068, ¶376 (2007).

[33] GRAY, *supra* note 15, at 202 (noting that the significance of the distinction is not entirely clear). Generally, the term "compensation" is used to remedy lawful takings and "damages" is used when the taking was unlawful, although there is no practical difference between the two concepts. Brower & Ottolenghi, *supra* note 4, at 4. Sornarajah also notes that the seminal dicta from *Chorzow* was limited to unlawful takings, a fact that is not appreciated by many legal scholars. SORNARAJAH, *supra* note 1, at 453–56.

[34] SORNARAJAH, *supra* note 1, at 470 (referring to principles enunciated in Amoco Int'l Fin. Corp. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 493 (1982)).

[35] Kaj Hober, *'Fair and Equitable Treatment'—Determining Compensation*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 79,101 (Rainer Hofmann & Christian J. Tams eds., 2007).

for damages based upon out-of-pocket expenses incurred through their activities, preferring instead to focus on the compensation of lost profits.[36] The tribunal has also noted that compensation for investment costs should be considered normal, stating: "previous arbitral tribunals . . . have overwhelmingly favored the award of lost investment costs," a reference to the LIAMCO ad hoc oil concession arbitration which itself urged that *damnum emergens* should be awarded in international investment disputes as an absolute minimum, representing the value of tangible goods and the cost of installations as well as unknown expenses.[37] In the very same dispute, the ICSID tribunal commented that the determination of a lost investment is a "relatively simple operation,"[38] unlike the calculation of lost profits, a conclusion that is not obvious given the many assets that may require consideration. However, this may depend on one's view of simplicity—establishing the correct equation to denote future income could be more burdensome.

In contrast to the enormous quantity of ICSID jurisprudence regarding the valuation of lost profits for the purposes of damages awards, there is startling little ICSID case law concerning investment-based compensation. Review of this limited material reveals that the determination of lost investments at ICSID is essentially an accounting exercise, the principal difficulty of which is establishing the veracity of the evidence presented regarding expenditures.

Actual investment expenses were recovered by the claimant in *Wena Hotels Ltd. v. Arab Republic of Egypt*[39] as an alternative to an award for lost profits to compensate for the expropriation of hotels in Cairo and Luxor. Lost profits were unrecoverable both because there was an insufficient record of profits before the seizure on which to base an estimate and because the amount claimed (£46) was grossly disproportionate to the amount invested (£9). In fixing damages based instead on the claimant's actual investments in the hotel projects, the tribunal added that the fact that expenses were incurred by the claimant's affiliates was immaterial, although adjustments were made to account for erroneous double counting of certain unidentified expenses. This determination survived an evidentiary challenge at a later annulment proceeding—the respondent's allegation that various financial documents were missing was rejected, the

[36] *See, e.g.*, Mar. Int'l Nominees Establishment v. Republic of Guinea, Award, ICSID Case No. ARB/84/4, 4 ICSID (W. Bank) 61 (1997) (where lost profits could be ascertained readily based on past performance).

[37] Liberian E. Timber Corp. v. Republic of Liberia, Award, ICSID Case No. ARB/83/2, 2 ICSID (W. Bank) 346, 371 (1994) (citing Libyan American Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1 (1981)).

[38] *Id.* at 372.

[39] Wena Hotels Ltd. v. Arab Republic of Egypt, Award, ICSID Case No. ARB/98/4, 6 ICSID (W. Bank) 89 (2000).

tribunal noting that it may assess the credibility and completeness of evidence at its own discretion.[40] This case underlines the importance of reliable evidence in the establishment of a cost-incurred remedy.

A reliance-based measure of damages was contemplated by ICSID in its high-profile arbitration of a NAFTA dispute between Metalclad, the subsidiary of a Mexican corporation, and the United States regarding the latter's interference with a landfill development project through both unfair treatment and expropriation.[41] As an alternative to the fair market value of the assessment, the claimant corporation proposed the actual investment in the landfill as an appropriate means of fixing compensation. The tribunal viewed actual investments as the correct mechanism for ascertaining compensation because a claim of market value based on future profits could not be adequately substantiated by reference to past performance, given the insufficient record of the landfill's prior commercial activity. In arriving at this decision, the tribunal cited similar practice by the Iran-U.S. Claims Tribunal, which had used a value of investment method to gauge compensation in the absence of a realistic estimate of future profits.[42] The actual investment method was also seen as being consistent with the celebrated guidelines from the International Court of Justice in *Chorzow*, which, as noted in Section II, established that compensation should "wipe out the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed."[43] Metalclad used U.S. federal income tax documentation and an independent auditor's reports to substantiate its investment costs, which included such items as personnel, insurance, travel, telephone, accounting and legal, consulting, office, property, and plant and equipment costs. The tribunal adopted a more stringent approach to preparatory costs, denying recovery for costs incurred in the year prior to Metalclad's purchase of the company which owned the landfill because such costs were seen as too remote to the investment. This aspect of the ruling illustrates that limiting principles of damages familiar to common law jurisdictions are relevant to the establishment of remedies by ICSID tribunals.

The ICSID tribunal elected to assess damages based on the reliance measure in the recent case *PSEG Global Inc. (Claimant), Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi (Claimant) v. Turkey*

[40] Wena Hotels Ltd. v. Arab Republic of Egypt, Annulment Proceeding, ICSID Case No. ARB/98/4, 6 ICSID (W. Bank) 129, 143–44 (2002).

[41] Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, ¶ 120, 5 ICSID Reports 209, 232 (2000).

[42] Phelps Dodge Int'l Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (Mar. 19, 1986).

[43] *Chorzow*, *supra* note 18, at 47.

(Respondent).[44] As an alternative to a claim for lost profits, claimants PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi argued that they deserved compensation in the amount of the investment by the Turkish government for its legislative interference with the companies' operations of the newly privatized energy sector in Turkey's central region. The particular out-of-pocket expenses cited included costs of preparing the power plant project as well as mine studies, contract negotiations and financing, environmental costs, permits and license fees, and legal and consulting fees. The respondent Turkey contended that more than half of the claimed costs were incurred by other companies actually unrelated to the energy project and consequently should not be compensated. More importantly, Turkey argued that investment costs should not be awarded because the project would have ultimately led to a loss, a restriction on the application of the reliance remedy seen in U.S. contract law,[45] and one that has not been universally applied, as will be shown below. In expanding upon the precise expenses for which compensation could be paid, the tribunal stated:

> An investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work . . . even in connection with pre-investment expenditures, particularly when . . . there is a valid and binding Contract duly executed between the parties.[46]

The tribunal awarded investment-based damages of approximately nine million dollars, although only those expenses actually incurred by the claimants themselves, not those by related companies, were included, and the award was diminished slightly because of erroneous double-counting for certain smaller expenses. The cost of contract negotiation itself and legal fees therein, meaning some expenses incurred even before the existence of any legal obligation, were also viewed as legitimate expenses deserving of compensation.[47] Previous ICSID case law, notably *Metalclad*, has suggested that preparatory expenses prior to the execution of the investment contract will not be recoverable, even if they could be

[44] PSEG Global Inc. v. Republic of Turkey, Award, ICSID Case No. ARB/02/5, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC630_En&caseId=C212 (Jan. 19, 2007) [hereinafter *PSEG*].

[45] MURRAY, *supra* note 22, at § 121 D (citing Bausch & Lomb v. Bressler, 977 F.2d 720 (2d Cir. 1992). The logic behind this rule is that damages should not be awarded that will allow parties to escape the risk of bad bargains.).

[46] *PSEG*, *supra* note 44, ¶ 304.

[47] RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981) (indicating that recovery for detrimental reliance incurred before contract formation was controversially permitted by the British Court of Appeal in Anglia TV v. Reed, 3 All E.R. 690 (1971) and is now acknowledged under U.S. contract law).

considered part of the investment.[48] Whether or not such costs are recoverable may, of course, depend on the wording of the particular investment agreement. It is noteworthy that legal fees incurred in establishing an investment (rather than disputing losses from an affected investment) have been explicitly labeled "out-of-pocket" costs by another ICSID tribunal and compensated accordingly.[49] The tribunal's decision to award the investment costs in *PSEG* appeared to be based primarily on the fact that the amounts claimed had been subjected to a careful and credible audit. That the electricity project may have ultimately led to a loss had it been completed was influential in preventing the tribunal from awarding lost profits, which it viewed as highly speculative, but a prospective loss on the contract did not appear to undermine the compensation for out-of-pocket costs, as it might well have in domestic U.S. law had the loss been sufficiently established by the respondent.[50]

Another ICSID tribunal considered the extent of recovery for investment-related expenses in *Autopista Concesionada de Venezuela, C.A. (Claimant) v. Bolivarian Republic of Venezuela (Respondent),*[51] a dispute brought by a Venezuelan company against the Venezuelan government regarding a concession to build and improve a highway system connecting the city of Caracas to the coast, which was hindered by the government's decision to freeze highway toll rates due to a citizen uprising. Venezuela argued that under the terms of the concession agreement, the respondent company could only claim out of pocket expenses incurred through activities that fulfilled the terms of the agreement. Although the tribunal allowed the respondent to claim for lost profits as well, pointing to a more broadly phrased provision of the agreement allowing other heads of damages, the tribunal did state that with respect to the investment costs, only those out-of-pocket costs sustained under the terms of the contract could be compensated. In order to ascertain which particular investment costs could be claimed, the tribunal examined financial statements prepared by the respondent company, which it viewed as presumptively reliable, noting however that an unexplained increase in recorded costs would not be recoverable. Applying Venezuelan law, recovery of bidding costs was not permissible (although they were not in fact claimed), but negotiation costs were. A loan extended by the claimant to an affiliate company was not

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[48] MTD Equity Sdn. Bhd. v. Republic of Chile, Award, ICSID Case No. ARB/01/7, 2005 WL 578418 ¶¶ 217, 240(ii) (May 25, 2004) (upheld following Annulment Proceeding ICSID Case No. ARB/01/7 and holding that the preparatory work was not compensable under the law of Chile).

[49] Liberian E. Timber Corp. v. Republic of Liberia, Decision on Rectification, ICSID Case No. ARB/83/2, 2 ICSID (W. Bank) 343, 381 (1986).

[50] MURRAY, *supra* note 22, at § 121 D.

[51] Autopistsa Concesionada de Venez., C.A. v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB/00/5, 6 ICSID (W. Bank) 419 (2003).

viewed as a legitimate out-of-pocket expense because it could not be substantiated through the claimant's expert's unreliable testimony. The tribunal ruled that although legal costs arising out of the highway project (apart from the ICSID arbitration itself) were the valid subject of a claim, only those costs incurred as a result of the respondent's action could be recovered—not those involving litigation with private citizens who had disrupted the highway project. As the claimant did not properly segregate these two categories of legal cost in its financial records, the tribunal awarded half of the claimant's legal costs (an amount representing what the tribunal saw as the expenses relating to dealings with the Venezuelan government). Costs of soil studies prepared by the claimant company in anticipation of the project were awarded, despite the fact that they were incomplete and had no current value to either party. Administrative costs incurred regarding the ongoing operation of the highway project during the disruptions were recoverable, although the tribunal discounted the claimant's specified amount by ten percent to reflect the tribunal's impression that the amount was excessive given the incompleteness of the expert's report on this matter. The total amount of out-of-pocket expenses awarded to the claimant company was just over two billion BS.[52] Additional amounts were recovered for lost profits which were specifically allowed under the concession agreement, irrespective of any concurrent recovery for expenses.

Out-of-pocket expenses were examined by the tribunal in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*[53] for a claim involving a Hong Kong company's investments in tourist facilities near the Giza Pyramids and on the Mediterranean coast of Egypt, which were later opposed by citizens because of concerns of damage to ancient sites and artifacts, and resulted in the public expropriation of the designated land. As an alternative to damages based upon the value of the investment project at the time of expropriation, the claimants requested compensation for out-of-pocket expenses, including a loan to an affiliated company, capital and development costs, and pre- and post-project cancellation administrative and legal costs. The tribunal outlined the nature of these expenses:

> [C]onsiderable amounts of time and money were spent on negotiating, planning and implementing the project. [The Claimant] made capital contributions and loans [to its affiliate] . . . these amounts must be reimbursed as part of . . . fair compensation . . . [W]hen the project was cancelled, construction was under way and considerable marketing activity had been carried out. Most of the

[52] Bolivars, the Venezuelan currency.

[53] S. Pac. Prop. Ltd. v. Arab Republic of Egypt, Award, ICSID Case No. ARB/84/3, 3 ICSID (W. Bank) 189 (1992).

> detailed engineering design and specifications for the first phase . . . had been completed. A construction contract had been concluded for the infrastructure, construction had begun and lot sales had commenced. To the extent that the expenses associated with this activity have been proven . . . reimbursement of such expenses is also part of . . . fair compensation.[54]

Recoverable development costs were further elaborated to include allocation of salaries, travel and entertainment expenses of executives, recruitment and relocation of personnel, as well as consultations for marketing and banking. Again, the recovery of these amounts was contingent upon the production of documentation detailing the specific nature, date, and amount of expense incurred in order to confirm that they were legitimately related and directly connected to the project. Such expenses were viewed by the tribunal as irrecoverable losses because of the cancellation of the tourist development project. It is significant that the tribunal denied recovery for any investment expenses that could not be verified through proper documentation, including those where the individual payee could not be identified. The tribunal also oddly included litigation costs associated with its own procedure as legitimate "out-of-pocket" expenses that should be compensated in order to make whole the party who had suffered the loss.[55] This does not appear to fit with the U.S. concept of detrimental reliance since litigation costs are not incurred for the purpose of performing the contractual obligation.

The *Southern Pacific* tribunal also interestingly distinguished between ordinary out-of-pocket expenses and those involving the costs of lost opportunity in making a commercial success of the project, illustrating that the parity between the concepts of *damnum emergens* and reliance is not absolute.[56] Most significantly, the tribunal noted that the appropriate situation in which reliance-based damages should be awarded is when the value of the investment at the time of expropriation is either nil or *less than the out-of-pocket expenses*.[57] As discussed earlier, this is the exact opposite of U.S. common law which denies reliance-based recovery where there would have been a loss in performance.[58] The tribunal's logic is unclear here as damages should not be awarded in an amount that enables parties to avoid the natural risk of bad bargains. In *Southern Pacific* the investment value at the time of expropriation of the project was determined to be more than the previously calculated out-of-pocket expenses. The tribunal

[54] *Id.*, ¶ 384.

[55] *Id.*, ¶ 386.

[56] *See* Fuller & Purdue, *supra* note 24 (indicating that reliance would typically not award opportunity costs).

[57] S. Pac. Prop., 3 ICSID (W. Bank), ¶ 388.

[58] MURRAY, *supra* note 22, at § 121.D.

consequently awarded the difference between the value of the project at expropriation and the investment costs in addition to the previously calculated out-of-pocket expenses (approximately three million dollars).[59]

In the resubmitted *Amco Asia v. Indonesia*[60] case regarding the nationalization of a hotel apartment complex, the ICSID tribunal criticized the asserted method of Net Book Value of invested assets as a means of ascertaining the extent of expenditures, noting that this method had typically been used in international law where compensation for prospective earnings was unavailable for some reason, such as a legislative bar to profit-based recovery in the law of the host state.[61] While a full treatment of asset valuation methodology is beyond the scope of this article, it should be noted that it is unfortunate that no precise definition of the concept of Net Book Value was given by the tribunal here, other than the somewhat unhelpful "assets minus liability."[62] Further elaboration would have been illuminating because of the important role that depreciation necessarily plays in the valuation of reliance-based expenditures. One would expect that capital assets purchased for the purpose of an investment which is subsequently expropriated should not be assessed at their initial cost but rather diminished according to the decline in the assets' value over their use, i.e. during the profit-earning period prior to the termination of the investment due to expropriation, otherwise over-compensation will result. Without addressing this important issue directly, the tribunal concluded that the Net Book Value methodology was inappropriate with respect to certain types of assets, such as long-term contractual rights, ultimately preferring to focus on projected future profits as the measure of damages, which it ascertained using Discounted Cash Flow analysis.[63] Interestingly, the

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[59] S. Pac. Prop., 3 ICSID (W. Bank), ¶ 389 (noting the tribunal adjusted upwards the investment expenses awarded because of the devaluation of the US dollar that had occurred since the project had begun in 1978).

[60] Amco Asia Corp. v. Republic of Indonesia, Resubmitted Case: Award, ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 569 (1990).

[61] *Id.* at 615–16 (noting the tribunal listed numerous other situations in which Book Value of assets had been used, including, strangely, "where the claimant himself had requested as damages the reimbursement of his invested capital" which would seem to be a very common occurrence).

[62] *Id.* at 615 (noting another ICSID tribunal explained that Book Value is an appropriate means of valuing a recent investment where there is no market for the assets that have been expropriated; however it is often also used to value costs actually incurred which were wasted in the effort to generate revenue. *See* Siemens A.G. v. Arg. Republic, 2007 WL 1215068, ¶ 355.).

[63] *Id.* at 620–22 (stating that depreciation issues were relevant for the purposes of assessing future profits as well). Another ICSID tribunal has noted that discounted cash flow is itself a highly speculative measure and should be used with caution. *See* ADC Affiliate v. Republic of Hungary, Award, ICSID Case No. ARB/03/16, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231, ¶ 502 (Oct. 2, 2006).

original tribunal had noted that the value of physical assets would also inform the result of a future profit analysis; however the approach is not always appropriate:

> [T]he value of the physical assets lost by the investor due to the taking of the investment is added to the discounted cash flow in order to assess the total amount of the damages . . . [but] this method might raise serious problems in cases where at the end of the contractual relationship (or of the legal relationship comparable to a contractual one), the injured party would not have been entitled to keep valuable goods previously utilized for the operation of the business. Moreover, the value of physical assets thus utilized is itself essentially based on the earnings that such utilization may yield; therefore, the valuation of the net cash flow may well reflect the commercial value of the physical assets.[64]

The conclusion here appears to be that a future profit analysis may paradoxically be the best way to assess a past-investment based loss. This is seen in the concepts of Net Present Cash Flow, which attempts to fix a current value of the investment according to the projected value of lost future business. Indeed the complexities of the various accounting measures lead one to question the rigidity of the boundaries between the simple categories of reliance and expectation-based damages, which may well be the reason that both *lucrum cessans* and *damnum emergens* are typically argued by the claimants in ICSID arbitrations.

In *Azurix Corp. v. Argentine Republic*, claimant Azurix asserted that the extent of its compensation for the expropriation of its water concession by Argentina should be based on the actual investment method, and the tribunal felt that this method was appropriate because the investment in question "is recent and highly ascertainable."[65] This case is worthy of recognition because the tribunal was concerned that the "aggressive" price paid for the concession by the claimant was excessive compared to other bids. The tribunal held that in fact no well informed investor would have paid such a high amount based on the modest estimated revenues of the project. Consequently, gauging damages according to amounts invested is not always a sensible approach because such amounts may be commercially unreasonable in the circumstances. In awarding compensation for investment costs based on an amount that an independent well-informed third party would have paid for the concession, which was substantially less

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[64] Amco Asia Corp. v. Republic of Indonesia, Award, ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 413, 501–502 (1984).

[65] Azurix Corp. v. Arg. Republic, Award, ICSID Case No. ARB/01/1, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5, ¶ 425 (July 14, 2006).

than what the claimant actually paid, the tribunal appeared to be merely reiterating a familiar aspect of the reliance remedy: damages will be recovered for the costs of performance *reasonably incurred.*

Although the text of the ICSID awards is not always clear on the point, it must be emphasized that while the tribunal permits recovery for both lost investments and lost profits, it does not permit double recovery (costs and profit) for the same items, which would result in costless gain for investments and which would be invidious even for the lowest risk commercial activities. In order to avoid double recovery, the amount awarded for lost profits must be reduced by the investment amount such that compensation for lost profits is always net.[66]

The adjustment of investment-based compensation because of an award for future profits was seen in *Liberian Eastern Timber Corporation v. Republic of Liberia,*[67] a dispute involving a concession agreement for the harvesting of forest products. Here the tribunal explicitly reduced the recovery for investment in infrastructure, machinery, and equipment because that amount had already been included in the calculation of net profit: i.e. the figure for expected profit was derived from gross income expected minus costs incurred. The only investment cost that was not reduced in this way was a bank penalty on a loan, taken out for the purposes of the investment, that was imposed because of Liberia's interference with the project. Although the concept of "profit" necessarily means net rather than total gain, this is not always apparent when ICSID awards include both lost future income and out of pocket expenses. It is often necessary to review the tabulated amounts at the end of the award rather than the text of the judgment in order for this understanding to emerge.

IV. EFFICIENCY GOALS OF ICSID AWARDS

The cases discussed above divulge very little by way of *ratio decidendi* with respect to the selection of cost-based damages other than the traditional concern for achieving accuracy, primarily by avoiding the prediction of uncertain future profits based on unverifiable evidence. That there is little economic analysis of investment law[68] and certainly none that has focused on ICSID is somewhat surprising because although the ICSID tribunals do not attempt to justify their decisions on efficiency grounds, the

[66] *See* Kantor, *supra* note 4, ¶¶ 69-71.

[67] Liberian E. Timber Corp. v. Republic of Liberia, Award, ICSID Case No. ARB/83/2, 2 ICSID (W. Bank) 346 (1986).

[68] Exceptions include Fabrizio Marrella & Irmgard Marboe, *'Efficient Breach' and Economic Analysis of International Investment Law,* 4:6 TRANSNAT'L DISP. MGMT. 1 (2008); Alan O. Sykes, *Public v. Private Enforcement of International Economic Law: Standing and Remedy,* 34 J. LEGAL STUD. 631 (2005) (advocating private claims for monetary damages in international investment law but not in international trade).

selection of remedies in this manner is grounded in economic theory. Put simply, compensation based upon amounts actually invested is chosen by ICSID tribunals because such awards serve the obvious function of reducing error costs.

Courts and tribunals suffer from a deficiency in information regarding laws or facts which results in mistakes when applying substantive legal principles. One of the most common mistakes on the part of adjudicatory bodies is their failure to assess the quantum of damages accurately such that a breach of contract (or a tortious injury) is not properly compensated. With perfect information available, a court will be able to craft a perfect remedy (which is often seen as the level at which the injured party would be indifferent between performance and breach or injury and cash),[69] but as this is a logical impossibility, courts must seek a second-best alternative, which is to apply as much information (facts and law) as possible without the *process* cost of evaluating this information exceeding the advantage of accuracy in pronouncing the correct judgment. Thus, in their attempt to minimize error costs (the inevitable failure to select a perfectly accurate judgment), courts are compelled to craft remedies based on the most reliable available information.[70]

In each of the ICSID cases discussed above there was a large quantity of cost-oriented information readily available to the tribunal in the form of expert testimony or financial records which was readily applied to tailor a remedy that approximated perfection. Were a profit-focused or expectation type standard pursued, this information would have had less utility (or even none) but more importantly the risk of adjudicative errors would have risen because of the consequential resort to predictive modeling as a basis for judgment. However, the provision and examination of extensive cost-based evidence also represents a process cost to the disputants, and one that could ultimately result in resistance against the use of ICSID as a means of adjudicating disputes because of higher litigation fees. In contrast, the tribunal's determination of future profits appears to involve essentially the application of one or more formulae to historical revenue data, an exercise which appears to entail a much diminished (and less costly) evidentiary consideration than the assessment of numerous individual assets.[71]

There are also social costs that result from the imposition of an imperfect remedy that the tribunals have attempted to avoid through reliance-based damages. These are the distortions in incentives that are

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[69] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 303 (3d ed. 2000).

[70] *Id.* at 376.

[71] These process cost differentials are the general impression of this author based purely on a reading of the cases discussed herein (notably *Autopista* and *Azurix*) and cannot be verified because litigation costs as disclosed are not segregated according to their mathematical and or evidentiary components.

implicated from either over-compensation or under-compensation of an injury resulting from an expropriation or broken investment agreement.[72] If the injured investor is compensated below the level of perfection, then other investors will be reluctant to engage in foreign direct investment in the future—which is one of the purposes of the ICSID Convention.[73] Merrill has suggested, however, that the failure to compensate an investor fully may result in positive incentives: foreign firms may be discouraged from engaging in investments that are harmful to a foreign state in case such actions result in a regulatory response from that state.[74] If an injured investor is over-compensated, this might be viewed as an interference with a state's sovereign right to nationalize its own industry in the interest of its people. An excessive damages award will then undermine the political legitimacy of future investment arbitration.[75] Moral hazard may also ensue, as investors will allocate the risk of their investments to the respondent state during dispute settlement.[76] Over-compensating investors may give them the perverse incentive to act irresponsibly,[77] for example, by engaging in activities which although profitable, are damaging to the local environment. Furthermore, with excessive damages, host states will be discouraged from terminating economically wasteful projects where to do so would be efficient, a so-called "efficient breach."[78] The important point here is that in order for a state to engage in a rational assessment of efficient remedies it will need to be able to calculate ex ante the costs of breach and compare them to the cost of compliance.[79] The readily discernable (or at least estimable) nature of actual investment costs (as opposed to estimated future profits) thus represents an attractive remedy from an incentive perspective because the determinations should be expected to approximate reality in most situations. Such incentive effects are particularly acute even for a private tribunal like ICSID as most of its cases are now disseminated on the internet and in case reporters and many disputes now receive extensive media coverage.

Although again not directly referenced in any ICSID cases, reliance-based damages may be preferable from an efficiency perspective because

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[72] COOTER & ULEN, *supra* note 69, at 377.

[73] Uncompensated losses associated with government takings have been termed "demoralization costs." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1224 (1967).

[74] Merrill, *supra* note 4, at 135.

[75] Walde & Sabahi, *supra* note 4, at 4.

[76] *Id.* at 12.

[77] Turk, *supra* note 12, at 70.

[78] Marrella & Marboe, *supra* note 68, at 8.

[79] *Id.* at 13 (noting that the costs to the state may not be simply the payment of damages – there will be reputational costs that could result in difficulty attracting foreign investment in the future).

the proof of expectation damages based upon projected profits may require the innocent party to divulge potentially sensitive information about their own internal business strategy,[80] unlike investment-related information such as labor and equipment costs. Expected profits could amount to "showing one's hand" in a way that could advantage competitors, whereas the pricing of supplies might be publicly available information. Obviating the need to disclose profit information would assuage some of the confidentiality concerns that have cultivated ICSID members' reluctance to publish all awards in their entirety and in so doing lessen the widespread disdain for the forum from the international community because of its lack of transparency. Increased transparency of ICSID awards is of vital importance with respect to the integrity of the arbitral process, to the confidence of its users in the system and—most importantly from an economic standpoint—the effectiveness of ICSID in encouraging foreign investment.[81] Since both confidentiality and transparency of the proceedings are highly desirable features of international commercial arbitration, remedies that facilitate both objectives should be pursued. Whereas information regarding lost profits might expose investors to unwanted scrutiny from competitors, actual expenditures would do little more than demonstrate the business acumen associated with a past project.

V. SUITABILITY OF RELIANCE-BASED REMEDIES

The appropriateness of reliance-based compensation may depend on whether the injurious behavior was the result of an expropriation, or was for violations of the fair and equitable treatment standard, as the former terminates an investment whereas the latter may still permit ongoing business activity.[82] In the case of an expropriation, an award of lost profits may be more apt because the likely higher quantum will represent the most investor-friendly approximation of the injuries sustained and an award of something less than anticipated missed profits from the seized investment will represent incomplete compensation. If the investment activity continues, however, with some unfair treatment from the host state falling short of expropriation, then an award of profits could well represent a double-recovery given that some profit may be maintained. The difficulty in fixing compensation for breaches of the fair and equitable treatment standard is exacerbated by the lack of reference to compensation for such injuries in treaty language (in contrast to expropriation), and consequently

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[80] RICHARD EPSTEIN, TORTS § 21.3 (1999).

[81] *See, e.g.*, Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 213, 215–17 (Rainer Hofmann & Christian J. Tams eds., 2007).

[82] Hober, *supra* note 35, at 83.

compensation for such violations will often depend on the circumstances of each dispute.[83]

Some commentators have criticized the application of contract law's somewhat rigid categorization of heads of damage to the arena of international investment in part because of this concern for double-recovery engendered by the application of both *damnum emergens* and *lucrum cessans* to activities that comprise both individualized assets and future income streams.[84] However, as suggested above, double recovery should be prevented by the application of a net rather than gross profit determination, which one might expect would amount to *lucrum cessans* minus *damnum emergens* rather than in addition to it, although of course any formula including both heads would require twice the resources in calculation (double process costs) as well as a corresponding increase in error potential. Clearly, the circumstances of each case will dictate the optimal remedial approach, which will take into account the risks of under- and over-compensation as noted above.

Assessing damages in investment arbitration on the basis of the amount of investment has been recommended by Wells because this measure is likely to approximate full market value, at least in the case of recently acquired assets.[85] It is significant that none of the ICSID cases discussed herein appeared to consider recovery for the actual investment costs of intangibles such as business goodwill, customer loyalty, or reputation. The use of the *damnum emergens* measure in the investment context has been condemned for its inability to address such losses, as well as for failing to account for incremental increases in value for development activities in an unfinished project beyond their initial acquisition cost.[86] However, this objection represents more a criticism of individual asset valuation methodology rather than the standard of compensation, an often blurred distinction that must be kept in mind during the remedy stage of an award. Once the various expenses for which damages will be paid have been identified via a standard of compensation, the evaluation process operates as a separate and very complex aspect of ICSID adjudication. Commentators have observed that arriving at a precise valuation of damages in investment disputes is a much more difficult task than merely

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[83] Ioana Tudor, *Balancing the Breach of the FET Standard,* 4:6 TRANSNAT'L DISP. MGMT. (2007); Peter Mulchinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard,* 55 INT'L & COMP. L.Q. 527 (2006).

[84] *See, e.g.*, Marboe, *supra* note 4, at 727–28; Walde & Sabahi, *supra* note 4, at 1.

[85] Louis T. Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia,* 19 ARB. INT'L 471, 474–75 (2003).

[86] Kantor, *supra* note 4, at 10, 22–23.

establishing the standard to be applied.[87] Although not properly the subject of this article, there has been some indication in the application of the reliance measure that a wide range of valuation methods are used by ICSID. Indeed a flexible interplay of many methods has been advocated by commentators.[88] In quantifying the precise value of an investment (via whatever standard of damage), the tribunal has stated that its methodology and reasoning should be fully transparent.[89] Unfortunately, the preceding examination has shown that there is very little explanation offered by ICSID tribunals as to the precise methodology of evaluation of actual investment-based compensation. This general shortcoming of international arbitration has been acknowledged by commentators[90] and remains a legitimate grievance of disputants at ICSID as well as those in the academic community.

It is difficult to discern any instructive jurisprudence from ICSID cases regarding awards of actual investment costs, other than the indisputable assertion that they are more likely to be implemented when future profits are highly indeterminate. In addition to the stipulation of actual investment recovery in an investment contract or BIT, it can also be concluded that detailed, verifiable financial statements are essential to the success of a claim for actual investment losses. ICSID awards are manifestly fact-oriented and it would not be far wrong to characterize ICSID tribunals as fact-finding bodies. This statement is intended to be descriptive rather than judgmental. The extent to which the tribunal focuses on the evidence tendered by the parties for the purposes of assessing damages for nationalization claims should be familiar to U.S. observers, as the process of adducing financial evidence for the purposes of valuation, often with the aid of expert testimony, has been compared to that of domestic U.S. takings litigation under the U.S. Constitution.[91] One must also recall that under the ICSID Convention, the tribunals are empowered with total discretion in deciding on the relevance and admissibility of evidence adduced by the parties, as well as in exercising the power to request further information.[92]

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87 Brower & Ottolenghi, *supra* note 4, at 13–14.

88 Walde & Sahadi, *supra* note 4, at 22 (suggesting that complexity of valuation methods may require the use of the tribunal's own expert).

89 Amco Asia Corp. v. Republic of Indonesia, Award, ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 377, 466–67 (1984).

90 *See, e.g.*, Brower & Ottolenghi, *supra* note 4, at 1.

91 Merrill, *supra* note 4, at 115–17..

92 CHRISTOPHER SCHREUER, THE ICSID CONVENTION: A COMMENTARY 647 (2001). *See also* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 43, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966); The ICSID Arbitration Rules, rule 34(1) (2003) ("The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.").

This is the type of adjudication to which contracting members assent by virtue of their ratification of the Convention.

The attempt to subject the assessment of damages in international arbitration to general rules of law has been opposed in favor of a more pragmatic approach based on, inter alia, the relationship between the parties.[93] Such remedial flexibility is particularly important in disputes that are essentially fact-based.[94] While remedial flexibility is a worthwhile objective, the process must have determinacy, which is perhaps the most appealing feature of reliance-based measures even if full compensation is ultimately compromised. Complete compensation may not always be the most desirable goal. Indeed international investment law has shown a trend towards partial compensation for many types of takings by foreign states, such as those which are lawful or those where the investor had adopted bad industry practices.[95]

VI. CONCLUSION

Gray has termed the quest for a single method of calculating compensation for breach of international contracts "a chimera that has been obsessively pursued by many scholars,"[96] and this article has by no means attempted to suggest that it has found the answer in relation to international investment arbitration. Rather than abandon the common law of contract's preference for lost profit-based compensation, this article has demonstrated that ICSID's occasional recourse to actual investment losses is a suitable complement to expectation-oriented damages in some circumstances, and one that is, perhaps unknowingly, based upon principles of efficiency. In addition to reducing error costs of faulty compensation because of evidentiary reliability, and the associated incentives engendered therein, reliance-based awards at ICSID will also serve to enhance confidentiality of dispute settlement without impeding transparency. ICSID's use of *damnum emergens* may reflect its willingness to escalate the process costs of adjudication through voluminous but verifiable evidence rather than risk raising the error costs of faulty judgments based on uncertain expectations. Given the incentives that should ensue from the application of this "safer" measure, the observed application of reliance-based damages at ICSID can be applauded and other international fora should be urged to follow suit.

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[93] GRAY, *supra* note 15, at 206.

[94] Peter Ashford, *Documentary Discovery and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 89, 96 (2006).

[95] SORNARAJAH, *supra* note 1, at 485.

[96] GRAY, *supra* note 15, at 202.