Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims under ICSID

Ana Vohryzek

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol31/iss3/5
Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID

ANA VOHRYZEK*

I. INTRODUCTION

Most scholars, arbitrators, and international lawyers, if pushed, would not be able to answer a simple question: "Does unjust enrichment play a role in the International Centre for Settlement of Investment Disputes ("ICSID")?" This Article seeks both to answer this question and to outline a future role for unjust enrichment in ICSID.

While past ICSID tribunals have not explicitly endorsed unjust enrichment, they have repeatedly relied on it. Importantly, ICSID tribunals' unacknowledged reliance on unjust enrichment has led to misapplication and confusing awards. The Article argues that the most effective way to resolve the issue is for ICSID tribunals to explicitly recognize unjust enrichment. In addition, tribunals' de facto use of unjust enrichment supports the idea that unjust enrichment is a principle of international law that future ICSID tribunals may recognize. Specifically, the Article reexamines cases like Chorzów1 and ADC v. Hungary2 and maintains that they rely on unjust enrichment.

The Article reviews the role of unjust enrichment in international and domestic law. Unjust enrichment is a principle

* Ana Vohryzek graduated from Yale Law School in May 2009. She is currently working with Eduardo Zuleta, an international arbitrator, in Bogota, Colombia. In January 2010, she joins Latham & Watkins, San Francisco. She would like to thank Sergey Ripinsky, with whom she worked at the British Institute for International and Comparative Law, and professors Michael Reisman and Guillermo Aguilar-Alvarez for their invaluable guidance and support throughout the process.
respected by most domestic legal codes and many international forums (e.g., Iran-U.S. Claims Tribunal), and thus is arguably a principle of customary international law. While the exact details of unjust enrichment differ slightly between countries, the principle, its applicability, and its general parameters are substantially the same. The Article considers that since the Iran-U.S. Claims Tribunal provided a set of parameters that reflect widely agreed upon principles, these parameters represent a good synopsis of relevant customary international law.

The Article concludes that unjust enrichment might be brought as a cause of action under the fair and equitable treatment standard in bilateral investment treaties. Lastly, the Article attempts to show that since unjust enrichment is a cause of action, it may prove instrumental in cases involving intellectual property disputes.

As mentioned above, the examination of current international law reveals a pattern of lawyers and tribunals carelessly employing unjust enrichment. The pattern appears self-perpetuating. International lawyers undermine unjust enrichment standards by using it indiscriminately, which in turn ensures that tribunals view the concept as a weak ploy, long depreciated by casual use. Despite this degradation, unjust enrichment remains a useful tool if used precisely and sparingly. Indeed, it is so useful that tribunals such as ADC v. Hungary employ it, even if they call it something else.\(^3\) As well, awarding just remedies requires consistent and precise application of legal concepts. Consistent interpretation and application of unjust enrichment can help shape the conduct of potential litigants by cementing the expectations of the parties. The sloppy use of unjust enrichment, therefore, degrades both the concept itself and related ideas that misappropriate the idea to fill legal lacunae. This applies particularly to international investments, which engender high levels of interdependence and reliance. Thus, disciplined unjust enrichment claims would be a useful part of international investment tribunals’ “fair and equitable treatment standard” tool kit. Indeed, if applied with precision, unjust enrichment may be used as an effective cause of action and remedial measure in ICSID disputes.

Each piece of the argument requires extended independent exploration. Because connecting the disparate elements of the

\(^3\) See id. ¶¶ 484-485.
argument at the beginning will facilitate better understanding throughout the Article, a brief summary of the argument follows. Unjust enrichment can be categorized as a general principle of law as that term is used under Article 38(1)(c) of the Statute of the International Court of Justice.⁴ Viewed en masse, the use of unjust enrichment in international arbitration decisions, including Lena Goldfields⁵ and Chorzów Factory,⁶ establishes its pride of place as a general principle of customary international law. Establishing unjust enrichment as a legal principle included in the corpus of customary international law provides claimants protection from unjust enrichment under bilateral investment treaties (“BITs”). This protection manifests as follows. BITs house a limited number of protections, all of which are agreed upon before signing.⁷ These protections include, among others, compensation for expropriation and fair and equitable treatment requirements.⁸ Fair and equitable treatment is a catchall requiring, at a minimum, that a signatory State not violate principles of customary international law with respect to investors from another signatory State.⁹ Once it is shown that unjust enrichment is a principle of customary international law, unjust enrichment then falls under the umbrella protection of the fair and equitable treatment clause contained in most BITs.

Due to the idiosyncratic nature of unjust enrichment and the possibility of abuse, the concept’s intrinsic restrictions must influence both the way in which a claimant brings an unjust enrichment claim under the fair and equitable treatment clause and the subsequent remedy. One should think of the fair and equitable treatment clause as housing an unjust enrichment claim. Thus, an unjust enrichment claim needs to be proved on its own merits. Once the tribunal determines that there is reasonable

-----

⁴. Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute] (“The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply ... the general principles of law recognized by civilized nations ...”).
⁸. Id.
belief that an unjust enrichment occurred, the claim would satisfy a breach of the fair and equitable treatment standard. This two-tiered structure is required in large part because unjust enrichment is based purely on what the defendant gained, so both the analysis and the remedy are distinct from other causes of action. This dovetails with the need to discipline the application of unjust enrichment.

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

Overall, the argument begins with basic definitions and builds slowly thereupon. Broadly speaking, Part II explores unjust enrichment parameters, sets out an international standard, and introduces past cases. Part II.A defines unjust enrichment and sets out universal parameters stemming from the Iran-U.S. Claims Tribunal and domestic legal codes. Part II.B reviews the treatment of unjust enrichment in international law. First, it demonstrates that preventing unjust enrichment is a general principle of law. From there, by surveying cases and scholars, it is shown that unjust enrichment is not only a general principle of law, but also a principle of customary international law. The international law survey opens with the history of unjust enrichment in international claims tribunals, focusing on Chorzów Factory in Part II.B.2 and ADC v. Hungary in Part II.B.3. This Article demonstrates that the oft-cited Chorzów Factory offers unjust enrichment as a remedy, and that some cases, such as ADC v. Hungary, cite to it relying on unspoken ideas of unjust enrichment. Part II.B.4 briefly examines unjust enrichment language in ICSID cases—to assess the current role unjust enrichment plays in ICSID decision-

making. Part II.B.5 discusses the Iran-U.S. Claims Tribunal, which provides guidance on applying unjust enrichment internationally.

Finally, Part III uses a sweep of hypotheticals based on the Mihaly v. Sri Lanka fact pattern to explore jurisdictional thresholds, merits-based limitations, and general boundaries for a future claimant bringing an unjust enrichment claim under ICSID.

II. HISTORY

A. Defining Unjust Enrichment

Understanding unjust enrichment is essential. The wide range of interpretations and debates surrounding the concept, as well as the multi-faceted role the term "unjust enrichment" plays in legal rhetoric, complicate comprehension. Hence, appreciating unjust enrichment entails a broad and at times frustratingly inconclusive examination.

Unjust enrichment can be defined as:

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

It is also defined as "[a] legal doctrine stating that if a person receives money or other property through no effort of his own, at the expense of another, the recipient should return the property to the rightful owner, even if the property was not obtained illegally." As well, "[a]lthough unjust enrichment may arise from fraud or several other predicates, the element of fraud or tortious conduct on the part of a defendant is not necessary in an action for unjust enrichment . . . . A person who has been unjustly enriched at the expense of another is required to make restitution to the other." 6

In the second and fifth definitions, unjust enrichment invokes two separate concepts. One is a causative event resulting in "unjust enrichment," and the other is the remedy—restitution. Restitution

simply means returning something to the owner or person entitled to it. Restitution, employed as a legal remedy, is based upon returning gains, unlike compensation for damages, which is founded upon the plaintiff’s loss. Unjust enrichment, then, is both what the claim is based on, and the amount by which the defendant was unjustly enriched. Accordingly, a claim for unjust enrichment can be either a separate cause of action or a measure of and justification for an award.

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

Alternatively, courts allow claims whose sole cause of action is unjust enrichment. In this instance, restitution is the only remedy permitted. While British courts allow plaintiffs to choose unjust enrichment as a remedy in cases where it provides greater compensation than loss-based alternatives, some countries only allow restitution when it would award less than a loss-based

---

17. 42 C.J.S. Implied and Constructive Contracts § 10 (2007) ("The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff. Restitution rectifies unjust enrichment by restoring the other to the position he or she formerly occupied either by the return of something he or she formerly occupied either by the return of something he or she formerly occupied either by the receipt of its equivalent in money. In order to recover under a theory of restitution, the plaintiff must show that he or she conferred a nongratuitous benefit on the defendant; the defendant realized some value from the benefit, and it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. A benefit which may warrant restitution may be any type of advantage such as that which saves the recipient from any loss or expense.").
18. See Dickson, supra note 10 at 104.
22. See Dickson, supra note 10, at 105-06, 116.
remedy. The most significant distinction is between the limited French code compensation method (restitution of the loss) and the common law concept of disgorgement, which includes restitution of the loss plus any additional benefits. While divergences do exist, and ultimately a choice must be made with respect to disgorgement, unjust enrichment looks much the same across countries as all impose the same general parameters.

Article 38(1) of the Statute of the Permanent Court of International Justice simply requires that court apply "the general principles of law recognized by civilized nations." Thus, inter-country differences that do not impact the principle itself do not undermine unjust enrichment's position as a general principle of international law under Article 38(1). Indeed, it is almost certain that every country provides for any given cause of action slightly differently. Part II.B, below, introduces some national parameters of unjust enrichment.

1. Domestic Legal Codes: Unjust Enrichment

Common law countries differ slightly in their understanding of the details of unjust enrichment. Unlike English law, U.S. law explicitly requires a connection between loss and gain. If

23. France is one such example. Id. at 113-15.
24. 66 AM. JUR. 2D, supra note 16, § 1 ("The word 'restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner and returning to the status quo, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.").
25. ICJ Statute, supra note 4.
26. Four stages of analysis guide most English lawmakers: (1) Was the defendant enriched? (2) Was the enrichment at the expense of the claimant? (3) Was the enrichment unjust? (4) Does the defendant have a defense? Each stage presents complications domestically, not to mention internationally. Enrichment, for example, could be both tangible (monetary) and intangible (use of nature reserve). And who determines when enrichment is "unjust," particularly since it does not require wrongdoing or illegality? English law relies on the following factors to determine unjust enrichment: mistake of fact, mistake of law, duress, undue influence, total failure of consideration, and miscellaneous policy-based unjust factors such as "withdrawal in the locus poenitentiae." English law also relies on ignorance or powerlessness, unconscionability, partial failure of consideration, and absence of consideration. These last four, however, are more controversial. See generally Peter Birks, The English Recognition of Unjust Enrichment, L.M.C.L.Q. 473 (1991).
27. The United States bases its legal framework on the Restatement (3d) of Restitution. In practice, courts look to satisfy five components: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4)
interpreted like French civil law, that connection must be direct. 28
Another distinction is that English law asks what remedies should
be applied, whereas U.S. law seeks "an absence of a remedy." 29
The implication is that, in contrast to English courts, U.S. courts
(and French courts 30) use unjust enrichment only where no other
claim can be made.

Lastly, where U.S. courts increasingly use "absence of
justification for enrichment" standard, England employs, "was the
enrichment unjust?" 31 Again, U.S. usage parallels the civil law
approach. The "enrichment unjust" approach requires the claimant
to identify at least one specific factor legally recognized as
rendering the defendant's enrichment unjust. 32 On the contrary,
the U.S. "absence of justification" approach identifies enrichments
with no legitimate explanatory basis, without looking to black-
letter legal factors. 33 Scholars, however, remark that there is
actually very little difference between the two approaches. 34

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

1. the plaintiff's loss must be a direct or indirect consequence of
   the defendant's enrichment, though the defendant can be
   required to pay only the lesser of the plaintiff's loss or the
   defendant's own enrichment;
2. the plaintiff must not have been at fault;

absence of a justification for the enrichment and impoverishment (also known as "was the
enrichment unjust?"), and (5) absence of a remedy provided by law. Schroeder v.

28. "A connection between loss and impoverishment" resembles French law's "the
plaintiff's loss must be a direct or indirect consequence of the defendant's enrichment."
See infra Part II.A.1.
29. Schroeder, 2001 ND 32.
30. Dickson, supra note 10, at 113.
31. ANDREW BURROWS, ESSAYS ON THE LAW OF RESTITUTION 7 (CLARENDON
32. See Mindy Chen-Wishart, In Defence of Unjust Factors: A Study of Rescission for
Duress, Fraud and Exploitation, in UNJUSTIFIED ENRICHMENT: KEY ISSUES IN
COMPARATIVE PERSPECTIVE, 159, 159-60 (David Johnston & Reinhard Zimmermann
eds., 2002) (comparing the German and English laws, and remarking that there is actually
very little difference between the two approaches).
33. Id.
34. Id. (comparing German law, which the U.S. approach approximates, and English
law, and remarking that there is actually very little difference between the two
approaches).
3. the plaintiff must not have acted in his or her own interest;
4. neither the enrichment nor the related impoverishment must be legally justifiable . . . ;
5. no other remedy than the action de in rem verso must be available in law for the kind of loss in question.  

French courts allow the plaintiff “only the lesser of the plaintiff’s loss or defendant’s own enrichment.” Hence, the award is capped at the amount of the plaintiff’s loss. This means that French parameters do not allow for disgorgement of profits. Conversely, U.S. law, while requiring some loss, does not limit the quantum of the award to the plaintiff’s loss, but rather uses the defendant’s gain to set the quantum limit. This distinction has substantial practical implications, as the quantum under each approach may vary wildly. Thus, a choice must be made as to which country’s standard to follow, the more limited award or the more expansive.

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

35. Dickson, supra note 10, at 113 (first emphasis added).
36. Id. at 114.
37. In addition, the French preclude any cases where the plaintiff benefited or was at fault. Consequently, this prima facie excludes any case involving illegal activity or gain by the plaintiff. Dickson explains that the French notion of faute (fault) “is wider than the notion of negligence in English law. It embraces intentional as well as merely careless conduct. . . . A plaintiff who is in breach of contract cannot therefore claim restitution against the other contracting party and a plaintiff who compromises an honest claim cannot later try to get out of the arrangement by claiming restitution of benefits conferred.” Id. at 114-15. In the context of prerequisite (3), “the plaintiff must not have acted in his or her own interest,” Dickson continues, exploring the wide notion of faute. “[A] plaintiff who undertakes work for his or her own benefit cannot claim restitution from a defendant who also happens, whether accidentally or not, to benefit from the work.” Id. at 115.
38. See Schroeder, 2001 ND 32, ¶ 14 (“The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value.” (internal quotations and citation omitted)).
39. Dickson, supra note 10 at 118 (“[T]here must be a causal nexus between the plaintiff’s impoverishment and the defendant’s enrichment, as well as absence of any good legal reason for either phenomenon. . . . The defendant cannot claim an allowance for payments he or she has had to make by virtue of receiving the enrichment, nor can the defendant claim compensation for improvements. The defendant is liable even if he or she
The German code for unjust enrichment, however, nearly parallels the Anglo-American code. German scholars identify two types of unjust enrichment claims: *Eingriffskondiktionen* (unlawful interference) and *Leistungskondiktionen* (performance derived). Each type elicits different legal treatment. *Leistungskondiktionen* applies to frustrated/defective contracts. The law requires that restitution occur even when a "legal justification existed for the enrichment at the time of its occurrence but has later disappeared or when an anticipated purpose to be fulfilled but the performance does not materialise." More importantly, *Eingriffskondiktionen* does not "presuppose that the plaintiff suffers a loss . . . . A person who uses a machine, which otherwise would have been lying idle, is therefore liable under this head." The German conception of unjust enrichment compensation must mirror the Anglo-American idea of disgorgement—if no loss is required to find unjust enrichment, it follows that loss cannot limit the award.

2. International Unjust Enrichment: Creating Universal Parameters

Exploring national parameters leaves us at a stalemate regarding disgorgement. Because the amount awarded under disgorgement could be markedly greater than that reflected solely in the plaintiff’s loss, leaving the matter open would breed inconsistencies, as explored later, inconsistency undermines expectations, and weakens the concept itself. As well, participants should know which remedy is appropriate. As international law expands, precision in awards acquires utmost importance, and national conceptions of a concept should not impact quantum.

Thus, some determination must be made *ex ante*. Past practice provides minimal guidance on the matter. The Iran-U.S. Claims Tribunal employs U.S. parameters, lending some small support to

---

is an indirect beneficiary of enrichment . . . and even if the plaintiff, in paying money that was not due the defendant, made no mistake." (internal citations omitted); *see also CODICE CIVILE* [C.c.] arts. 2041-42 (Italy).

41. *Id.* at 120.
42. *Id*. at 120.
43. *Id*.
44. *Id*. at 121.
the idea of disgorgement. All of the cases therein, however, could be considered to reflect the overlap between the plaintiff's loss and defendant's gain.

The civil law option is the consensus option—all countries agree that unjust enrichment includes the overlap between plaintiff's loss and defendants gain. Nevertheless, international tribunals are currently awarding disgorgement without using the language of unjust enrichment. This indicates that tribunals see a necessity for disgorgement in set circumstances and may award disgorgement whether or not it is expressly permitted.

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

As explored below, the area in which unjust enrichment has real utility is intellectual property dispute resolution. In intellectual property cases, the amount gained often far surpasses the amount lost. Unjust enrichment is, therefore, an apt remedy because it allows for the disgorgement of profits. Know-how is very difficult to price, and an idea without action may be worthless. Thus, limiting the amount awarded to the plaintiff's loss would cripple the utility of unjust enrichment, and make determining the quantum extremely difficult. For intellectual property cases, then, there will be an efficiency loss, as plaintiffs must prove both the elusive quantum of the loss and of the gain. If a significant loss occurred, a tribunal could, of course, cap the award at that amount. A tribunal should not, however, be limited in such a manner.

45. The Iran-United States Claims Tribunal is an international arbitral tribunal established January 19, 1981 between the United States and the Islamic Republic of Iran. The tribunal's cases are located in the Iran-U.S. CTR Reports (28 volumes). Background Information: Iran-United States Claims Tribunal, http://www.iusct.org/background-english.html (last visited Dec. 21, 2009). Some of the cases are explored infra Part II.B.5.

46. See infra Part III.

47. The International Court of Justice's "takings cases," such as Papamichalopoulos v. Greece, 21 Eur. H.R. Rep. 439, ¶¶ 36-45 (1996), are one example.
Thus, this Article assumes that unjust enrichment includes the possibility of disgorgement of profits above and beyond the loss suffered. Although making an admittedly arbitrary decision invites discomfort, having a single, universally applied conception of unjust enrichment is critical. International investment disputes are sufficiently confusing without the added contributions of ambiguous tenets of legal concepts.

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

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

There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched. 48

Thus, there are five requirements in an unjust enrichment claim: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) absence of a justification for the enrichment and the impoverishment (this has also been stated as “was the enrichment unjust?” 49), and (5) absence of a remedy provided by the law. 50


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

50. Schroeder, 2001 ND 32, ¶15. These tenets have been explored and upheld in other Iran-U.S. Claims Tribunal cases, such as Future Trading, Inc. v. Khuzestan Water & Power Auth., 9 Iran-U.S. Cl. Trib. Rep. 46 (1985) and Schlegel Corp. v. Nat’l Iranian Copper Indus., 14 Iran-U.S. Cl. Trib. Rep. 176 (1981).
There are a number of defenses to unjust enrichment claims. Complete defenses defeat the whole claim, whereas partial defenses reduce the value of the claim. Defenses include: change of position, agency/ministerial receipt, bona fide purchase for value without notice (not available to defendants who were enriched directly from the claimant), counter-restitution, and illegality. Each of these defenses will be briefly defined, in turn.

"Change of position" reduces the value of the claim against the defendant where the defendant shows he changed his position in good faith reliance on the enrichment. "Agency/ministerial receipt" applies where the defendant received the enrichment as an agent and handed it over without notice of the plaintiff's claim. "Bona fide purchase for value without notice" may be raised through a third party by parties who received the claimant's property indirectly. "Counter-restitution" applies if the claimant's claim would leave the claimant unjustly enriched at the expense of the defendant. "Illegality" prevents the claimant from relying on evidence of his own illegal acts to show that he has a claim against the defendant. In such cases, the court may refuse to help him.

If the five components of an unjust enrichment claim are satisfied and no defense succeeds, then the claimant is entitled to a gains-based remedy, often equated with restitution. Restitution

---

52. Birks, supra note 51 at 410.
53. Burrows et al., supra note 19, at 824.
54. Birks, supra note 51 at 439.
55. Id. at 415.
56. Id. at 424-25.
57. See e.g., id. at 417-18 for an abstract description of the way in which restitution and unjust enrichment "quadrate"; see also Dickson, supra note 10, at 113 (This is a common law oriented exploration of unjust enrichment, in keeping with Bank Isaiah. Knowing the law of the Respondent country is key. Dickson explores German, French, Italian, Dutch, English, and U.S. laws on unjust enrichment. French law introduces new limitations to unjust enrichment claims. First, it is a last resort, since "no other remedy...must be available". Secondly, unjust enrichment as a measure of damages is also a last resort if the rules are followed to its logical conclusion. Notice that French courts allow the plaintiff "only the lesser of the plaintiff's loss or defendant's own enrichment." This means that given the option, a plaintiff will never opt for unjust enrichment-if another remedy is available. Again, like the United States, an unjust enrichment claim is an exclusive cause of action, useful where nothing else is available. In addition, the French preclude any cases where the plaintiff benefited or was at fault.).
may require returning property or awarding equivalent compensation. 58

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

My proposition is that the law of restitution be defined exclusively in terms of its core idea, the law of unjust enrichment. By this definition it would be axiomatic (i) that no liability could be asserted in restitution other than one referable to the unjust enrichment of the defendant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant's unjust enrichment. 59

Kull's argument is summed up well in the Restatement (Third) of Restitution: "A person who is unjustly enriched at the expense of another is liable in restitution to the other." 60 The comments further note that the "law of restitution is the law of unjust enrichment." 61 Even if the claimant brought a case under a different cause of action, where a court awards restitution, there is an acknowledgement of and reliance upon unjust enrichment. 62

Prominent scholars like Peter Birks disagree, preferring to divide the two concepts. 63 Birks distinguishes unjust enrichment from wrongful enrichment, and claims that restitution can follow either; therefore restitution and unjust enrichment can be unrelated. 64 In wrongful enrichment, according to Birks, there is already a breach or wrong of some kind, and thus the remedy

58. 66 AM. JUR. 2d § 1, supra note 16 ("The word 'restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner and returning to the status quo, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.").


60. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (Discussion Draft 2000).

61. Id. § 1 cmt. b.


64. Id. at 1771-72, 1776-77.
(restitution) is not founded on unjust enrichment. Only where there is no "wrong" can one find unjust enrichment. Birks is right on a practical level, as demonstrated in instances where the Iran-U.S. Claims Tribunal required that no other available cause of action exist before allowing an unjust enrichment claim. Hence, unjust enrichment only applied where no legal wrong could be found. This threshold requirement recognizes Birks' distinction as a functional limitation on unjust enrichment claims.

Theoretically, however, restitution is a gains-based remedy, and to provide a gains-based remedy, the court must justify it on grounds that the gain was inappropriate. Therefore, the better view belongs to Kull and Stephen A. Smith, in his work, The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy, which recognizes that courts may apply practical limitations to protect the integrity of contract and other policy interests. Thus, while for clarity of thought and in keeping with divisions created by courts this Article explores unjust enrichment and restitution separately, the two are nevertheless considered indivisible. This non-distinction is particularly salient later in the Article, as assuming interchangeability allows the transition from remedial unjust enrichment within Chorzów to using unjust enrichment as a cause of action in an intellectual property case. Having sketched unjust enrichment, its development and role in international law is now explored.

B. Unjust Enrichment in International Law

Many consider unjust enrichment a general principle of law. Some, like the Saluka Tribunal, see it as a general principle of international law. Others, like Georg Schwarzenberger, fall somewhere in between. "On the fringes of international law, the principle [of unjust enrichment] tends already to be accepted as a general principle of law, recognised by civilised nations."

65. Id. at 1783.
66. Id. at 1793.
67. See infra Part II.B.5 for a full explanation.
69. 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 580, 655 (1957).
Most legal systems recognize unjust enrichment. The Statute of the International Court of Justice, Article 38(1)(c), states that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply... the general principles of law recognized by civilized nations." According to early Permanent Court of International Justice ("PCIJ") judge Manley O. Hudson and echoed by Marjorie Whiteman, two influential international law scholars:

Article 38 of the Statute also directs to Court to apply 'the general principles of law recognized by civilized nations.' As all nations are civilized, as 'law implies civilization,' the reference to 'civilized nations' can serve only to exclude from consideration primitive systems of law. It empowers the Court to go outside the field in which States have expressed their will to accept certain principles of law as governing their relations inter se, and to draw upon principles common to various systems of municipal law or generally agreed upon among interpreters of municipal law. It authorizes use to be made of analogies found in the national law of the various States.

Under Hudson's analysis, Article 38(1)(c) permits international courts to use unjust enrichment because it is one of the "general principles of law recognized in civilized nations." This statement is not merely my derivative logic. In Whiteman's

---

71. ICJ Statute, supra note 4.
73. See also 1 OPPENHEIM'S INTERNATIONAL LAW 29, 173 (Robert Jennings & Arthur Watts eds., Longman 9th ed. 1992) ("The meaning of that phrase [Art. 38] has been the subject of much discussion. The intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular private law, in so far as they are applicable to relations of States." According to Oppenheim, "Paragraph 3 of Art. 38 nevertheless constitutes an important landmark in the history of international law inasmuch as the States parties to the Statute did expressly recognize the existence of a 3rd source of international law, independent of, although merely supplementary to, custom or treaty. This was in fact the practice of international arbitration before the establishment of the Court, in its establishment a number of international tribunals, although not bound by the Statute, have treated x as declaratory of existing law." Oppenheim cites Lena and others. Citing Bin Cheng at page 173, "It would seem therefore that an act is internationally unlawful whether it violates a treaty, a rule of customary international law, or a general principle of law recognized by civilized nations.").
Digest on International Law, she quotes Lord McNair, another early scholar of international law:

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

The above quote supports the idea that a concept becomes part of international law through multinational recognition coupled with use by subsequent tribunals. Lord McNair and Whiteman use unjust enrichment as the example of this phenomenon. In support of Lord McNair, widespread recognition of unjust enrichment was demonstrated above in the exploration of domestic law; international tribunals’ use of unjust enrichment is also demonstrable. In Damages in International Law, volume 3, Whiteman explores quasi-contractual damages. In case after case, she finds that:

International law includes within its compass a large body of equity. Accordingly the extent to which claimants have been allowed to recover damages in international cases on grounds of equity apart from legal rights under existing contracts constitutes an important phase of the subject under discussion [damages]. There are numerous cases where damages have

75. 3 Marjorie M. Whiteman, Damages in International Law 1732-60 (1943) [hereinafter Whiteman, Damages in International Law].
been allowed in situations resembling, more or less closely, an implied or quasi-contractual relation. Various reasons are given for the allowance of damages on such cases. At other times the reason is stated in the familiar terms of “equity” and, at other times, merely on the ground that international law allows recovery in such a situation. Whatever the reason given in the decision, the important point is that damages are allowed in situations where it might be difficult to explain the decision on grounds of either the wrongful breach of or interference with an express contract.”

Whiteman lists dozens of international arbitrations employing some type of unjust enrichment. She closes with two cases, both of which house language supporting the idea that unjust enrichment is a general principle of international law.

Even given this wealth of evidence, the current status of unjust enrichment remains unclear. This may be due both to Cristoph Schreurer’s 1974 work cautioning against using unjust enrichment liberally and to the resulting sloppiness and embarrassment surrounding its application. As well, although most countries accept unjust enrichment claims, it remains an amorphous and open-ended legal area because it lacks a universal conception.

76. Id. at 1732.
77. See id. at 1734-61. Whiteman discusses cases that involve payment of excessive taxes, use, or benefit enjoyed; quantum meruit; supplies furnished; services performed; work and labor done; expenses incurred “in good faith reliance upon acts of the respondent government”; and advances made.
78. See id. at 1760. For instance:

[T]he extinction of the contractual obligation leaves in existence, however, the pecuniary obligations resulting from the acts performed before the extinction, as this latter should not result in the illegal enrichment of one of the parties to the detriment of the other; as there is no reason to presume that the Treaty intended to set aside this fundamental principle, so much in conformity with the rules of equity, but just the opposite, since the Treaty orders the Mixed Arbitral Tribunal to be guided by justice, equity, and good faith, and as to the application of the rules of equity is required in particular when it comes to disputes arising from the interpretation of contracts, we should therefore assume that it is the duty of the Tribunal to decide whether and to what degree the defendants have benefited by an ungrounded enrichment at the expense of the claimants.


79. See generally Christoph Schreurer, Unjustified Enrichment in International Law, 22 Am. J. Comp. L. 281 (1974).
The tentative standing and open-ended parameters of unjust enrichment are further complicated by its inherently moral nature. Determining who deserves to be enriched is a loaded policy decision. Judges dealing with countries and investors are balancing very complicated economic interests, and thus prefer to circumvent any accusations of bias. Some might argue that only in cases where the morality is clearer than the panel’s legal legitimacy, as in *Lena Goldfields*, would employing unjust enrichment behoove the tribunal. If the act is not *per se* illegal, adjudging the enrichment unjust to one party requires selecting a deserving party. Indeed, according to Andrew Burrows, an English unjust enrichment scholar, “in some areas the law is best explained as responding to policy constraints on the pure principle of unjust enrichment.” The tentative standing and open-ended parameters of unjust enrichment, however, should not and have not deterred courts from relying on unjust enrichment. If anything, these caveats explain why courts are not always explicit about their reliance upon unjust enrichment. Often, if another legal remedy or cause of action is available, arbitral panels choose the more established remedy or cause of action. More importantly, claimants only raise unjust enrichment as a subsidiary cause of action, or where it offers greater benefits, as a remedy. Neither motive likely elicits favorable treatment from tribunals. These complications may explain why ICSID tribunals have not yet explicitly relied on unjust enrichment, but are not enough to keep international tribunals from using it.

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

1. Early Tribunals

From the 1890’s onward, tribunals relied on unjust enrichment. *Lena Goldfields* is perhaps the fountainhead of all unjust enrichment claims in investment disputes. There, the USSR breached a concession contract with the Lena Goldfields mining company by creating circumstances fatal to Lena’s business. Lena claimed damages for contract breach, or alternatively “restitution to the company of the full present value of the company’s properties, by which in the result the Government had become ‘unjustly enriched.’” The ad hoc arbitral panel, having only a day to debate and faced with the novel and politically charged task of ruling against a country, awarded damages for unjust enrichment. Relying on Soviet and Continental European law, the panel determined:

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

Other cases also relied on remedial unjust enrichment, including *Thomas C. Baker’s Case*, *Sucrerie de Rustchouk v. Etat hongrais*, *The Edna*, *Spanish Zone Morocco Case*. General

---

86. *The Lena Case*, supra note 81; see also Veeder, supra note 82.
88. Id. ¶ 24. See Veeder, supra note 82.
90. 4 THOMAS C. BAKER ET AL., INTERNATIONAL ARBITRATION 3668 (1898).
Finance Corporation v United Mexican States,94 William A Parker v United Mexican States,95 and the Landreau Arbitration.96 The Landreau Arbitration, for example, involved two brothers with a concession to find guano in Peru. In keeping with the contract’s terms, they provided the Peruvian government with information identifying guano deposits.97 The United States sued on one brother’s behalf after Peru refused to make the stipulated payments and repudiated the contract.98 After finding Peru’s rescission legal, the tribunal held that Peru was “bound to pay on a quantum meruit for the discoveries which they appropriated for their own benefit.”99

As well, in both William A. Parker v. United Mexican States and General Finance Corporation v. United Mexican States, the tribunals awarded restitution where contracts were considered void.100 In General Finance, the tribunal required Mexico to “reimburse claimant to the extent it has been unjustly enriched” for water concession contracts considered void for delegating sovereign authority.101

Additionally, the Peace Treaties following World War I employed unjust enrichment to compensate companies whose business contracts had been dissolved during the war. According to Professor Schreurer, these mixed arbitral tribunals frequently applied “restitutionary techniques based on considerations of

97. Id. at 354.
98. Id. at 358.
99. Id. at 364. See Schreuer, supra note 79, at 293-94. Interestingly, Schreurer used this case and others to argue that unjust enrichment was primarily a remedy, and should remain thus until a more uniform standard for unjust enrichment is set. There are two possible responses to Schreurer. First, examining the Landreu Arbitration makes clear that the Tribunal allowed a claim for unjust enrichment. The Tribunal’s statement that the rescission was legal means there was no illegal wrong to be remedied. Thus, in awarding a remedy, they must have admitted a claim of unjust enrichment to justify any award whatsoever. That is, perhaps, an inconsequential argument. More importantly, and addressing Schreuer’s valid concern about lacking “a precise range of application,” Schreurer’s argument should no longer prevent tribunals from using unjust enrichment, as the Iran-U.S. Claims Tribunal has laid the groundwork for this “precise range.” Indeed, the inconsistency ICSID cases show is unjustified given the precedent set by the Iran-U.S. Claims Tribunal, and the relative ease that tribunal experienced in applying them.
100. See Schreuer, supra note 79, at 295-96.
101. ARBITRATION SERIES 9, supra note 94 546, 548.
unjust enrichment” where uncompleted business dealings had lost their contractual basis.

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

2. The Chorzów Factory Case

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

Germany won the case. The PCIJ found that since the seizure did not comply with treaty regulations, it was not a legal expropriation, but rather an illegal seizure. The Geneva Convention prescribed restitution as the remedy for expropriation. Using restitution as its baseline, the Chorzów Tribunal laid out a menu of award calculations. The case settled, so the expert never chose the best calculation method. Before
settlement, however, the tribunal presented the following questions to the expert:

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

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

II.—What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?  

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

Under the first interpretation, Part B of the award is based on hypothetical profits/losses.  If so, what constitutes the basis for

112. Id. ("What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by
these profits/losses? In Question II the tribunal mentioned using data from a similar company to approximate Chorzów's profits/losses. But analogous company data is mentioned explicitly in reference to calculating damages for Question II, current fair market value.

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

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

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

The above statement, with its use of “probable profit” supports the first interpretation. And yet, a later statement seems to support the second interpretation.

As regards the lucrums cessans, in relation to question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, real or supposed, of the

the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

113. Id. (“What would be the value . . . had [it] been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?”).

114. Id.

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

116. Id. at 52.
undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts to question I.B should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.117

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

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

Interestingly, the mention of using “real” profits to calculate “lucrums cessans” (lost profits) in Question II118 also introduces a gains-based remedy to Question II. Calculating the fair market value ("FMV") including the future flow of profits, involves evaluating the value at taking and then projecting a growth rate comparable to that of a like company and estimating the resulting potential profits. This calculation leaves no space for real profits. Hence, repeated referrals to real profits when presenting Question II mean that the tribunal also wanted to assess the current value of the factory in determining the remedy. Having both the hypothetical future value and the current value of Chorzów allowed the tribunal additional remedy options. As awarding the claimant the current value of the factory is a gains-based recovery

117. Id. at 53 (emphasis added).
118. Id.
119. Id. at 51.
(the claimant walks away with the value-added by the respondent),
the tribunal clearly intended to include the unjust enrichment
award option.

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

   It must be stated that the Chorzów factory to be valued by the
   experts includes also the chemical factory.
   Besides the arguments which, in the Polish Government’s
   opinion, tend to show that the working of the said factory was
   not established on a profitable basis—arguments which it will
   be for the experts to consider—that Government has claimed
   that the working depended on a special authorization, which the
   Polish authorities were entitled to refuse. But the Court is of
   opinion that this argument is not well-founded. 120

The tribunal based its opinion that the argument was “not well-
founded” on the German company’s plans, and on the fact that
chemical factories are normal in that type of business. 121 It is worth
noting, however, that the German companies are getting the
benefit of the Polish government’s work and expansion.

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

   The essential principle contained in the actual notion of an
   illegal act—a principle which seems to be established by
   international practice and in particular by the decisions of
   arbitral tribunals—is that reparation must, as far as possible,
   wipe out all the consequences of the illegal act and 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. 122

120. Id. at 54.
121. Id.
122. Id. at 47.
In short, restitution underlies the decision in Chorzów. The tribunal introduced damages to augment restitution, and gave the expert a range of options for calculating the additional damages. “[T]he Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit [sic] a comparison and if necessary of [sic] completing the results of the one by those of the others.” One method the tribunal proposed is what we today would deem expectation damage calculations—calculating FMV with future flow of profits by finding the value of the company at taking and then projecting a rate of growth comparable to a like company. Another method was restitution plus hypothetical lost profits up until the award. In yet another alternative, the expert could have based the award on the disgorgement of the current real value of the factory, which would be unjust enrichment, as it would be based on what the Polish state owned at the time (including future value). Lastly, the award might be based on another unjust enrichment calculation, restoring the value of the factory upon seizure plus disgorgement of any real profits the Polish state accrued while it possessed the factory.

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

123. Id. at 53.
124. d. at 51-52.
127. Id.
128. Id.
129. Id. at 47.
130. U.N. GAOR, 56th Sess., Sup. no. 10 at 91, U.N. Doc. A/56/10 [hereinafter Draft Articles]. In accordance with the PCIJ: [R]eparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible,
Some tribunals, however, have combined the *Chorzów* award possibilities. The general trend of giving judicial leeway on award calculations may support these creative combinations. These cases, including *Azurix Corp. v. Argentina* and *LG&E Corp. v. Argentina*, cite *SD Myers, Inc. v. Canada*. According to *Azurix*:

[T]he lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to the tribunals to determine it in light of the circumstances of the case taking into account the principles of both international law and the provisions of NAFTA.

Older cases, while more restrained, did blend *Chorzów* remedy options, at least in dicta. For example, the resubmitted *Amco Asia Corp. v. Indonesia* Tribunal invoked *Chorzów* and then, in dicta, blended unjust enrichment and damages—using one party's enrichment to approximate the other's sustained damage:

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 payment of a sum corresponding to the value which a restitution in kind would bear.

---

131. *See Azurix*, ICSID (W. Bank) Case No. ARB/01/12 ¶ 422; *LG&E Capital Corp. v. Argentina*, ICSID (W. Bank) Case No. ARB/02/1 (U.S.-Arg. 2004) (Decision of the Arbitral Tribunal on Objections to Jurisdiction), available at http://icsid.worldbank.org/ (follow “cases”; then follow “search cases”; then follow ARB/02/1 hyperlink; then follow “Decisions & Awards”; then follow “English (Original)” hyperlink under “Decision of the Arbitral Tribunal on Objections to Jurisdiction (April 30, 2004)”).
132. *Azurix*, ICSID (W. Bank) Case No. ARB/01/12.
133. *LG&E*, ICSID (W. Bank) Case No. ARB/02/1.
135. *Azurix*, ICSID (W. Bank) Case No. ARB/01/12 ¶ 422.
137. *Id.* ¶ 184.
The above blending, read in conjunction with the following statement, creates a situation wherein the respondent is responsible for the downside risk of lost value due to expropriation and for the upside possibility of increasing the value of the investment. "The only subsequent known factors relevant to value which are not to be relied on are those attributable to the illegality itself." Read closely, if the value of the taking drops because of respondent, the drop will be excluded. If, however, the respondent increased the property value, this can be included since it is known data. The successful claimant would get the greater of the actual value (through restitution approximation) or the hypothetical value if the actual investment underperformed.

Then, in "ADC v. Hungary," the tribunal used Chorzów to justify an award that is clearly remedial unjust enrichment.

3. ADC v. Hungary

ADC had a concession to build a new terminal in the Budapest airport. The contract included the right to operate the entrepreneurial shops at the terminal, handle the baggage, and train and manage employees. The management-training agreement provided that the Hungarian government would pay ADC a fixed fee each year for training airport personnel and management. After ADC completed the new terminal, the Hungarian government passed a law preventing ADC from operating the terminal—effectively edging them out. A few years later, after the airport became a major international hub, the Hungarian government sold the airport to a British company (BAA) for $1.2 billion dollars. ADC brought a claim for expropriation under ICSID.
The Tribunal found for ADC. Since the BIT requirements for a “legal” expropriation weren’t met, the tribunal decided that the BIT-prescribed expropriation remedy, restitution of the value of the property at taking, did not apply. Instead, the Tribunal decided to use what it deemed the *Chorzów* customary international law standard for “illegal” expropriation. Relying on *Chorzów*, the ADC Tribunal awarded restitution of the value of the property at the time of the award, rather than at the time of expropriation. This reflects one of the options granted in *Chorzów* Question II, explored above. Thus, the tribunal awarded the claimant’s portion of the increased value of the terminal. This is not the hypothetical value of what claimant would have earned, nor in any way approximates claimant’s loss. Rather, the award was based on disgorgement of what Hungary gained unjustly from claimant’s investment.

In dicta, the Tribunal focused on Hungary’s gain from ADC’s know-how (i.e. the management contract). For example, “[t]he management fee of 3% payable in each calendar year commencing on and after the Operations Commencement Date... was designed in large part to compensate the claimants for the services

---

147. See *id.* ¶¶ 475-476. The BIT provides:
1. Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) The measures are taken in the public interest and under due process of law; (b) The measures are not discriminatory; (c) The measures are accompanied by provision for the payment of just compensation. 2. The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation. 3. The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made. 4. The compensation must be paid without undue delay upon completion of the legal expropriation procedure, but not later than three months upon completion of this procedure and shall be transferred in the currency in which the investment is made. In the event of delays beyond the three-months’ period, the Contracting Party concerned shall be liable to the payment of interest based on prevailing rates.

Agreement Between the Government of the Republic of Cyprus and the Government of the Hungarian People’s Republic on Mutual Promotion and Protection of Investments, Cyprus-Hung., art. 4, May 24, 1989, available at http://www.unctad.org/sections/dite/iia/docs/bits/hungary_cyprus.pdf [hereinafter Cyprus Agreement] (emphasis added). There is a query whether the standard implies that all expropriations that come to court are inherently illegal, as, if the criteria were met, the claimant would already have received the fair market value of their expropriation.

148. See *ADC Affiliate*, Case No. ARB/03/16.

149. See *id.* ¶ 520.

150. See *id.* ¶¶ 148-149.
that had been rendered by the Terminal Manager... before the Operations Commencement Date." 151 In addition, after the Operations Commencement Date, ADC management provided "on-going supervision and knowledge transfer." 152 The management contract paid a fixed annual rate. Therefore, higher passenger volume would not have increased the amount claimant received. Indeed, the management contract was the piece that least supported an award of the respondent's disgorgement of profits, unless the award was intended to reflect the benefit Hungary received from "know-how." These fees, however, were awarded independently of (and on top of) the restitution award. Other operational elements, were given a fixed percentage—so here again, the tribunal may have awarded a remedy exceeding the value of claimant's possible loss. 153 This is not to say the tribunal was wrong, just that as a damages remedy the result is untenable.

The tribunal discussed Chorzów and its applications at length. First, the tribunal recognized Chorzów's primacy: "The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the Chorzów Factory case." 154 The Tribunal continued, quoting Chorzów, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." 155 After using Chorzów to justify awarding a remedy other than the BIT mandated one, the Tribunal stated:

151. Id. ¶ 148.
152. Id. ¶ 149.
153. See id. ¶ 509 ("The Respondent further criticises the IRR used by LECG. Schedule C to the Agreement establishes a target IRR of 15.4% with an upper limit of 17.5%. In the Tribunal's view, LECG was justified in using the upper limit. As it is shown by the Claimants and it is borne out by the events subsequent to the expropriation, the Budapest Airport is indeed one of the fastest growing airports in the world. That increase in traffic would certainly have caused an IRR superior to the contractual cap of 17.5%. Furthermore, the fact that the 2002 Business Plan forecast substantially increased projected dividends in 2010 and 2011 is due to the fact that the Project Loan was scheduled to be repaid by the beginning of 2009, thereby decreasing the costs of the Project Company and increasing the revenues that were available for distribution as dividend in 2010 and 2011."). Note that the contract may have included a clause with "two alternative responses to better-than-expected Project Company performance (i.e., tariff adjustment and dividend waiver)," which refutes my statement, but does not challenge the idea that unjust enrichment is the underlying justification for the Tribunal's award. See id. ¶ 508.
154. Id. ¶ 484.
The PCIJ considered that the principles to determine the amount of compensation for an act contrary to international law are:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it. 156

The tribunal continued with an exploration of the current role of Chorzów in international investment disputes. 157 In its discussion, the tribunal listed a wide range of ICSID cases, 158 Oppenheim’s International Law, 159 the ILC draft articles, 160 and recent ICJ cases, 161 all of which cite Chorzów as accepted customary international law. After its arsenal of evidence, the tribunal decided that “[t]he remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place.” 162 Thus, “it is, in the words of the Chorzów Factory decision, ‘payment of a sum corresponding to the value which a restitution in kind would bear’, which is the matter to be decided.” 163 The Tribunal explained:

The present case is almost unique among decided cases concerning the expropriation by States of foreign owned

---

156. Id. ¶ 485 (quoting Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17 at 47) (emphasis omitted).
157. See id. ¶¶ 487-493.
159. OPPENHEIM’S INTERNATIONAL LAW, supra note 73.
160. Draft Articles, supra note 130.
162. ADC Affiliate, Case No. ARB/03/16 ¶ 495.
163. Id.
property, since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably while other arbitrations that apply the Chorzów Factory standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages.

However, in the present, sui generis, type of case the application of the Chorzów Factory standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed. ¹⁶⁴

Here, in response to an actual increase in value under Hungary, the tribunal did not award restitution of the value of the property at the time of expropriation. ¹⁶⁵ Rather, the tribunal awarded the claimant the current value of the property—reflecting developments within Hungary and by the Hungarian government—by awarding restitution at the date of the award. ¹⁶⁶ The amount awarded then is the amount that Hungary gained through possession—or disgorgement of respondent’s unjust enrichment. The unspoken theoretical basis of the Tribunal’s award became more apparent with the example it chose to support its remedy:

This kind of approach is not without support. The PCIJ in the Chorzów Factory case stated that damages are not necessarily limited to the value of the undertaking at the moment of dispossession.... It is noteworthy that the European Court of Human Rights has applied Chorzów Factory in circumstances comparable to the instant case to compensate the expropriated party the higher value the property enjoyed at the moment of the Court’s judgment rather than the considerably lesser value it had had at the earlier date of dispossession. ¹⁶⁷

The statement emphasized is both the crux of the ADC award and definitively an unjust enrichment award. Indeed, invoking

¹⁶⁴. Id. ¶¶ 496-497.
¹⁶⁵. Id. ¶ 497.
¹⁶⁶. Id.
¹⁶⁷. Id. (emphasis added) (internal quotations and citations omitted).
enjoyment by the respondent signals a gains-based evaluation and justification.

Also interesting, the case that the ADC Tribunal relied on to support their interpretation of Chorzów, Papamichalopoulos v. Greece, clearly employs unjust enrichment.\textsuperscript{16} Papamichalopoulos, however, is an ICJ takings decision, and therefore might not be considered persuasive for ICSID cases.

The ADC Tribunal also noted the Papamichalopoulos Tribunal’s reliance on Chorzów’s standard for illegality.\textsuperscript{169} As a consequence of illegality, “international case law, of courts or arbitration tribunals, affords the Court a precious source of inspiration. . . . In particular, the Permanent Court of International Justice held as follows in its judgment of 13 September 1928 in the case concerning the factory at Chorzów . . . .”\textsuperscript{170}

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

The ADC Tribunal concluded:

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

\textsuperscript{168} See Papamichalopoulos, 21 Eur. H.R. Rep. \textsuperscript{,} 36-45. In the ADC Tribunal’s words:

[T]he Court ordered restitution of the land, including all of the buildings and other improvements made over the intervening years by the Greek Navy, and further (para. 39), that if restitution would not be made:

[T]he Court holds that [Greece] is to pay the applicants, for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence of the buildings and the construction costs of the latter.

ADC Affiliate, Case No. ARB/03/16 \textsuperscript{,} 497 (quoting Papamichalopoulos, 21 Eur. H.R. Rep. \textsuperscript{,} 39). Restitution would be the value of the land at the time of expropriation. Restitution of the current value is no longer restitution based on a claim of damages, but is now a gains-based award restoring Respondent’s ill-gotten gains.

\textsuperscript{169} ADC Affiliate, Case No. ARB/03/16, \textsuperscript{,} 497.

\textsuperscript{170} Papamichalopoulos, 21 Eur. H.R. Rep., \textsuperscript{,} 36.
The Tribunal’s rather novel interpretation of the Chorzów Factory standard is not incorrect. It simply relies on a relatively unexploited option in the Chorzów remedy menu. What is novel is the introduction of the Chorzów unjust enrichment option into the ICSID tool kit.

The ADC Tribunal’s silence regarding its reliance on unjust enrichment remains problematic. As shown, the remedy was unjust enrichment. The tribunal’s belief that Hungary did not deserve to be enriched at ADC’s expense also influenced the remedy. The tribunal, however, outright rejected unjust enrichment. “Consequently, the Tribunal rejects the claimants’ claim for damages under the unjust enrichment approach, which, in the Tribunal’s opinion, has not been substantiated by the claimants with either sufficient facts or law.” The ADC Affiliate, Case No. ARB/03/16, ¶ 499.

An exploration of the discounted cash flow calculation method and other related calculation details directly preceded the Tribunal’s rejection of unjust enrichment. There was no segue. In fact, one wonders how the tribunal happened upon this statement. Awarding restitution of the value of the property, including Hungary’s added value, would seem to discourage casually discarding unjust enrichment. As well, when relying on restitution, a remedy based on unjust enrichment, the tribunal might spend some time differentiating the two. They are not the same, but are similar enough that casual disregard is problematic, especially when reading between the lines of the decision demonstrates the tribunal’s reliance on unjust enrichment.

In the tribunal’s defense, the claimant’s calculations inexplicably resulted in markedly different amounts under the unjust enrichment approach and the restitution approach. Restitution is the remedy for an unjust enrichment claim, so the $23 million difference was mysterious. But the claimant’s calculations may explain why the tribunal rejected the “unjust enrichment” calculation method. Rejecting the elevated

---

171. ADC Affiliate, Case No. ARB/03/16, ¶ 499.
172. Id. ¶ 500.
173. See DCF, supra note 125.
174. ADC Affiliate, Case No. ARB/03/16, ¶ 243.
175. Id. Damages under the Restitution approach equal $76 million and damages under the Unjust Enrichment approach equal $99 million.
176. Id. ¶ 500.
calculation measure, however, only served to further complicate the issue by creating a false dichotomy between restitution and unjust enrichment. Tribunals' silence regarding unjust enrichment makes awards like that of ADC awkward—as it used damage calculation measures and language for an award that was gains-based. One unexpected negative outcome is that mixing and matching gains-based awards with damages can lead to duplicative awards and windfalls. If a tribunal awards the claimant the gains accrued by the respondent, the claimant cannot then get the damages they suffered, as those damages would most likely be subsumed within the outlay costs necessary for the actual gains.\textsuperscript{177}

Chorzów and ADC are not alone in relying on unjust enrichment. As Whiteman demonstrates in her treatise, older cases frequently relied on unjust enrichment.\textsuperscript{178} Later ICSID cases have done so to a lesser degree, often in a manner that resembles ADC's unmeasured treatment.\textsuperscript{179}

\section*{4. Unjust Enrichment in ICSID}

ICSID tribunals have touched briefly on issues of unjust enrichment. Both lawyers and tribunals have used unjust enrichment frivolously, thereby weakening the concept. For example, in\textit{ Repsol v. Ecuador},\textsuperscript{180} the respondent used unjust

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
177. The Tribunal may have awarded a partially duplicative remedy, given that they awarded both the current value of the Claimant's interests (including the assets' future value) and unpaid dividends for the time between the expropriation and the award. The award would only be duplicative, however, if Hungary used the money from the unpaid dividends to invest in increasing the Terminal's profitability. Simply awarding "the estimated value of the Claimant's stake in the Project company as of the Award date" would allow the Company to get the profits Hungary earned (without any input costs from the Company), while avoiding the possibility of a duplicative award, as one might assume a good chunk of the payments received from dividends would have been reinvested to achieve the sort of growth the airport realized under Hungary. \textit{See id.} \textsuperscript{177} ¶ 518.
178. \textit{Whiteman, Damages in International Law, supra} note 75, at 1732-60.
\end{tabular}
\end{table}
enrichment to shame the tribunal. The "Committee was morally obligated to avoid any illegal and unjust enrichment." 181 In Siemens v. Argentina, Argentina used the concept to contest compound interest saying, "this element of the Claim amounts to an attempt by the claimant to unjustly enrich itself in the circumstances of this case." 182 As well, unjust enrichment arose as a cause of action in a few cases where claimants tossed everything possible at the respondents. 183 In these cases, arbitral panels were able to avoid employing unjust enrichment by relying on other, more traditional causes of action. Alternatively, in Enron and Azurix, claimants invoked unjust enrichment as a remedial measure with no reference to respondent's enrichment. 184 Then in CMS, LG&E, AME v. Zaire, Southern Pacific Properties, and others, respondents invoked the possibility of the award unjustly enriching the claimant as a defense to reduce damages. In addition, cases like Inceysa v. Ecuador employed unjust enrichment as a successful jurisdictional defense. 185 Lastly, in Santa Helena, the

181. Id. ¶ 23 (This appeal had no impact, as the annulment committee sustained the award.).
182. Siemens, ICSID (W. Bank) Case No. ARB/02/8 ¶ 125.
183. See, e.g., Amco, ICSID (W. Bank) Case No. ARB/81/1; Saluka Investments BV v. Czech Republic (Partial Award, registered with Perm Ct. Arb. Mar. 17, 2006).
184. See Azurix, ICSID (W. Bank) Case No. ARB/01/12 ¶ 422; Enron, ICSID (W. Bank) Case No. ARB/01/3 ¶¶ 349, 383-449 (Enron suggested the unjust enrichment of Argentina as one measure of compensation. According to Enron, the unjust enrichment approach results in amounts for December 31, 2001, ranging from U.S. $579,475,694 to U.S. $582,018,216, depending on whether a "purchase price" or a "wealth transfer" variant is adopted. The Tribunal probably dismissed this claim because the claimant made no good argument for the increased award value under unjust enrichment.).
186. See LG&E, ICSID (W. Bank) Case No. ARB/02/1. See also Enron, ICSID (W. Bank) Case No. ARB/01/3 ¶ 238 (wherein Respondent, Argentina makes a very similar claim.). In LG&E, Respondent Argentina accuses Claimant, LG&E, of attempting to unjustly enrich itself. "They are not only trying to use the Bilateral Treaty as an insurance policy against the general economic crisis, but also desire to enrich themselves illegitimately in such a context." LG&E, ICSID (W. Bank) Case No. ARB/02/1 at ¶108. The Tribunal here was sympathetic, forgiving Argentina for some of the loss on "state of necessity" grounds. Id. at ¶¶ 33-35, 59-62, 90-98.
187. See American Manufacturing & Trading, ICSID (W. Bank) Case No. ARB/93/1.
188. See Southern Pacific Properties v. Egypt, ICSID (W. Bank) Case No. ARB/84/3 (1992) (The Tribunal uses unjust enrichment as a mitigating factor that "should be taken into account in the event that any compensation is awarded in this case.").
189. In Inceysa v. El Salvador, El Salvador used local courts to get out of a contract. The other party, Inceysa, sued under ICSID for enforcement or compensation. The Tribunal denied jurisdiction on grounds of unjust enrichment to Claimant if the contract
tribunal used unjust enrichment in dicta to support compound interest.¹⁹⁰

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

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

i. Saluka (Cause of Action)

Saluka v. The Czech Republic¹⁹¹ represents one of the few instances where a claimant (Saluka) in a recent investor-State

was performed. Claimant, Inceysa, defrauded El Salvador to obtain the contract, and thus any enrichment was unjust. Specifically, the Tribunal found:

The acts committed by Inceysa during the bidding process are in violation of the legal principle that prohibits unlawful enrichment.

The written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.

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


190. See Santa Elena S.A. v. Rep. of Costa Rica, ICSID (W. Bank) Case No. ARB/96/1 ¶ 101 (2000) (The tribunal used unjust enrichment in dicta to justify awarding compound interest. In discussing appropriate damages the Santa Elena Tribunal stated, "the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.").

dispute employed unjust enrichment as a cause of action (albeit subsidiary) under a bilateral investment treaty. In *Saluka*, CSOB and IPB were State-owned banks that the Czech Republic was attempting to privatize. Saluka was a minority shareholder in IPB. The Czech Republic, through the Czech National Bank, forced a transfer of IPB to CSOB. Saluka contended that the Czech Republic violated BIT Article 3’s “fair and equitable treatment” clause by “fail[ing] to prevent the unjust enrichment of CSOB at the expense of the IPB shareholders, including Saluka, upon the transfer of IPB’s business to CSOB and the aforementioned State aid following the forced administration.”

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

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

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

In the case before the Tribunal, the question would be whether the Czech State has, by means of the transfer of IPB’s business to CSOB and the provision of the aforementioned State aid following the forced administration, taken or received anything of value at the expense of Saluka. For the reasons set out below, the Tribunal would answer this question in the negative.

192. *Id.* ¶¶ 75, 77.
193. *Id.* ¶ 121.
194. *Id.* ¶¶ 142-43.
195. *Id.* ¶ 310.
196. *Id.* ¶ 449.
197. *Id.*
198. *Id.* ¶ 450 (emphasis added).
199. *Id.* ¶ 456.
200. *Id.* ¶ 451.
The Tribunal began by maintaining that actions that enrich a company cannot be considered to enrich a shareholder.\(^{201}\) Following, the tribunal drew a conclusion that may dissuade investors from making unjust enrichment claims:

\[\text{[I]t was IPB's and not the Claimant's banking business that was transferred to CSOB. IPB's assets were owned by IPB itself, not by its shareholders. Again, the concept of the separateness of the company from its shareholders prevents the Tribunal from equating IPB and Saluka. Consequently, CSOB did not receive anything at the expense of Saluka.}\(^{202}\)

This was a particularly odd argument given that in cases like *Enron v. Argentina*, shareholders were awarded damages for expropriation owing to lost share value.\(^{203}\)

Subsequently, the Tribunal rejected Saluka's argument that "for the Czech Republic to become liable towards Saluka it is sufficient to establish that the Czech Republic actively participated in a conspiracy to enrich one private party at the expense of another by using regulatory powers to effect an illegal transfer of ownership in IPB's business."\(^{204}\) Finding the argument "legally not well founded,"\(^{205}\) the tribunal explained that "[i]t stretches the principle of unjust enrichment beyond its proper scope."\(^{206}\) In delimiting the scope of unjust enrichment the tribunal stated, "The notion of one party being an accessory to an unjustified transfer between two other parties is not part of the concept of unjust enrichment."\(^{207}\)

This was a valid interpretation of unjust enrichment parameters, as the State must be enriched at the expense of the claimant. The Tribunal did not, however, adequately distinguish expropriation from unjust enrichment. Although there is substantial overlap between unjust enrichment and expropriation, as explored below, the lack of necessity for one party to be an accessory to an unjustified transfer between two other parties is one of a few key differences that make investors prefer

---

201. Id. ¶ 452.
202. Id. ¶ 453.
204. *Saluka Investments BV*, Partial Award, ¶ 454.
205. Id. ¶ 455.
206. Id.
207. Id.
expropriation to unjust enrichment when choosing causes of action (the others being a better assortment of damages and a set of specific rules outlining expropriation).

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

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

ii. Azurix v. Argentina (Remedy)

In Azurix v Argentina, an ICSID case whose applicable law was the lex specialis of the BIT and international law, the claimant, Azurix, alleged that Argentina violated obligations in respect to Azurix's investment in an Argentine water treatment utility. Azurix requested that compensation be based on "unjust enrichment." Azurix provided the tribunal with a variety of compensation methods without preference, and the value each would yield. First was the "actual investment" method, $449 million when it acquired the Concession plus $102.4 million in additional capital contributions to ABA and $15 million in consequential costs. Second was the "book value" method, which provided $516.9, $484.6, $483.9, or $482.2 million, depending on the date. Lastly, Azurix asked for compensation based on unjust enrichment:
Azurix submits the possibility for the Tribunal to consider compensation based on unjust enrichment - on the benefits received by the Province. On this basis, the Province was enriched by the Canon, the further investment of $102.4 million, and the time value - interest - of the funds. In the case of the Canon, Azurix submits that in accordance with the NERA report, the consideration of the time value would raise it to $450.5 million.

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

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

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

Of interest is the Tribunal's reference to civil law regimes' limitation on restitution for unjust enrichment—it must be the minimum amount given, as it is "the lower amount contributed by the impoverished or the gain made by the enriched." If this principle is applied, investors will only want to employ unjust

---

218. Id.
219. Id. ¶ 436.
221. Azurix, ICSID (W. Bank) Case No. ARB/01/12 ¶ 436.
enrichment damages where no other damages are available, as unjust enrichment will always, by law, be the smallest award.

Also useful is the tribunal's recycling of the Iran-U.S. Claims Tribunal definition invoked by Saluka. 222 "The Iran-US Tribunal, which has dealt with claims based on the principle of unjust enrichment on several occasions, defined the principle of unjust enrichment and its applicability as follows . . . ." 223 This may signal the beginning of universal parameters and acknowledgement of the Iran-U.S. Claims Tribunal as a source of expertise.

After perhaps the most thoughtful and holistic discussion of unjust enrichment in an ICSID tribunal, the arbitrators offhandedly dismissed unjust enrichment. 224 The dismissal probably reflected the claimant’s failure to argue the case in terms of enrichment. The tribunal instead awarded the claimant $165,240,753 dollars plus compound interest based on the actual value of the investment. 225 Of the approximately $165 million award, $60 million represented the fair market value of the initial investment 226 and $102 million represented additional capital contributions. 227 Interestingly, the $60 million was only a fraction of Azurix’s initial investment, which it calculated at around $450 million. 228 The amount was reduced because "no well-informed investor . . . would have paid for the Concession the price . . . paid by Azurix." 229 The tribunal qualified this statement, however. "[T]he Province accepted the price paid by Azurix . . . and benefited from the alleged aggressive price paid." 230 This sentiment was repeated a paragraph later. "The Tribunal cannot ignore the fact that . . . the Province benefited from the alleged aggressive price paid." 231 While this was mentioned in the paragraph just before awarding the $60 million, it is unclear how the tribunal factored in the Province’s benefit. All that is known is that the

222. Id. ¶ 437; see also Saluka Investments BV v. Czech Republic, ¶ 449 (Partial Award, registered with Perm Ct. Arb. Mar. 17, 2006).
223. Azurix, ICSID (W. Bank) Case No. ARB/01/12 ¶ 437.
224. See id. ¶ 438.
225. Id. 442.
226. Id 429.
227. Id 430.
228. Id.
229. Id. 426.
230. Id.
231. Id. 428.
tribunal did consider the benefit to the Province, and therefore the award hints at unjust enrichment.

*Azurix* was one of the first ICSID cases to explicitly explore unjust enrichment as a compensation tool. Earlier cases, like *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*,

"MINE v. Guinea"


(232)

(233)

(234)

(235)

(236)

iii. *MINE v. Guinea*

The *MINE v. Guinea* proceedings provide an interesting, if confusing, portrayal of unjust enrichment principles. In this case, a dispute arose from an alleged breach by Guinea of a contractual relationship between the parties. The parties agreed to submit to ICSID jurisdiction and the contract provided for Guinean law as the applicable law if the agreement provided no solution for the dispute.

An award rendered by a tribunal was partially annulled by a subsequent Ad Hoc Committee. In partially annulling the award, the Committee blamed the Tribunal’s failure to state reasons for its damages calculation. The Committee “finds that to the extent that the Tribunal purported to state the reasons for its decision, they were inconsistent and in contradiction with its analysis of damages theories.” Specifically, the Committee contended:

[T]he damages calculation by the Tribunal... [does] not purport to estimate profits that SOTRAMAR [Claimant’s company] would have made, but rather take as a base either the actual or hypothesized profits under the substitute Afrobulk/Guinomar arrangements. The theory underlying this approach, which was not articulated either by the parties or by the Tribunal, may have been that for Guinea to keep the fruits of the substitute arrangements, which according to the Tribunal’s ruling on breach of contract it had concluded in violation of the Agreement, would have constituted unjust enrichment, and that MINE should therefore be awarded the same share of those profits as it was entitled to receive if they...
had been SOTRAMAR profits. 237

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

The Tribunal finds that MINE's loss of profits may be measured adequately by the AFROBULK agreement: the 50 cents per ton which Guinea received from AFROBULK for the right to carry bauxite under Art. 9 during a two-year period rightfully belongs to SOTRAMAR. In addition, it seems fair to conclude that such an arrangement could have been extended, or negotiated with others, to a total period of 10 years. . . .
The quantity of bauxite carried during the 10-year period under such an arrangement is 38,437,127 tons; and this tonnage, multiplied by 50 cents per ton, produces the total due SOTRAMAR of US$ 19,218,563. Under Art. 9(B) of the Convention, SOTRAMAR's net profits were to be taxed 30% by Guinea, and the remaining 70% was to be divided equally between MINE and Guinea. Therefore MINE is entitled to 35% of the total, producing the principal sum of US$ 6,726,497. 238

The original award, shown above, was restitution of ill-gotten gains. The Committee annulled it simply because the Tribunal had not justified its award. 239 Notice that the Committee did not question employing unjust enrichment as justification, only its undisclosed use. Thus, had the Tribunal employed unjust enrichment explicitly, rather than simply discarding other options and calculating an award using no legal explanation, it may not have been overruled.

iv. Conclusion

These cases show that ICSID tribunals do entertain the notion that unjust enrichment is a general principle of international law. ICSID cases are complex both because they rely on BITs or contracts, and because they are not purely contractual or off-contract cases. Rather, they combine tort law, property law,

237. Id. ¶ 6.106.
contract law, and frustrated contracts. If anything, ICSID cases need off-contract remedies. Non-ICSID cases involving international business and frustrated contracts demonstrate the utility of unjust enrichment for international investment disputes, relying on unjust enrichment through rules like the Vienna Convention on Contracts for the International Sale of Goods.

While an entryway remains for unjust enrichment as a cause of action and a measure of damages, ICSID Tribunals have not employed it. Expropriation’s primacy, unjust enrichment’s complex prerequisites, and unjust enrichment’s exclusivity may be explanatory. Also, the inherently moral nature of an unjust enrichment decision may dissuade tribunals from invoking it. Regardless, even under ICSID, the door is open—and one might see a claim with speculative losses employ unjust enrichment to calculate damages.

The Iran-U.S. Claims Tribunal also dealt with investment disputes and effectively incorporated unjust enrichment. 242 Indeed, as later ICSID cases demonstrate when citing Iran-U.S. Claims Tribunal parameters, the Iran-U.S. Claims Tribunal cemented universal parameters. 243

Standardization prevented the cherry picking that equitable concepts can introduce. If anything, the Iran-U.S. Claims Tribunal shows the effectiveness of considered application of unjust enrichment. Exploring the Iran-U.S. Claims Tribunal case law introduces the universal parameters for unjust enrichment in international investment disputes.


241. This is especially true given recent decisions in which the tribunal assumes a great deal of leeway on award calculations. These cases, including Azurix and LG&E, cite S.D. Myers. According to Azurix, “in S.D. Myers the tribunal considered that the lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to the tribunals to determine it in light of the circumstances of the case taking into account the principles of international law and the provisions of NAFTA.” Azurix, ICSID (W. Bank) Case No. ARB/01/12 ¶ 422 (citing S.D. Myers, ¶¶ 303-319 (2000) (Award)).

242. See infra Part II.B.5 for full exploration.

243. Id.
5. Iran-U.S. Claims Tribunal

The Iran-U.S. Claims Tribunal was created in the wake of the 1979-1981 hostage crisis. The tribunal aimed to settle contract, property, and debt claims of U.S. nationals against Iran, and vice versa, as well as contractual disputes between the two states. The Iran-U.S. Claims Tribunal is a mixed tribunal, composed of nine judges: three Iranian, three American, and three others. While the Tribunal relies on international law, it employs Iranian and U.S. law to fill voids.

The Iran-U.S. Claims Tribunal solidified and fleshed out unjust enrichment as a cause of action in the international arena. If Professor Kull's argument that unjust enrichment and restitution are inseparable is convincing, then the distinction between unjust enrichment as a cause of action and as a remedy is merely semantic. Nevertheless, a practical framework for allowing unjust enrichment as a cause of action is vital in limiting abuse. The Iran-U.S. Claims Tribunal was very careful in creating boundaries for its application. As cited in Saluka, Isaiah v. Bank Mellat recognized five prerequisites, which later cases elaborated on and fine-tuned, ultimately creating a solid set of transplantable unjust enrichment parameters. These requirements, summarized in Sea-Land Service, Inc. v. Iran, set unjust enrichment apart from other remedies that could also independently form a cause of action.

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

244. See Background Information: Iran-United States Claims Tribunal, supra note 45.
245. Id.
247. See id. at 105-07.
248. Id. at 212-16. But see id. at 211 (explaining that other international arbiters have not understood unjust enrichment as an independent cause of action). Unlike western legal systems, Shari'ah law does not embrace the concept of interest. Interest is money made without work. Shari'ah law forbids money thus made. See Al-Rifaee, supra note 70, at 20. The resurgence of Shari'ah law in Muslim countries complicates international business transactions—particularly given this concept. In fact, Iran-US Tribunal's acceptance of unjust enrichment claims might be motivated by their need to balance international with national laws. Balancing U.S. common law with Iranian Shari'ah law may have demanded creativity and reliance on less common general principles—such as unjust enrichment.
249. See supra Part II.A.2.
250. See supra Part II.A.2, at note 47.
justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.²²³

According to Wayne Mapp, in The Iran-United States Claim Tribunal: the First Ten Years:

The Sealand claim also included expropriation as a cause of action, and apart from the duty to compensate, expropriation is not necessarily a breach of international law. Although there is a close relationship between causes of action founded on expropriation and unjust enrichment they have been perceived by the Tribunal as quite separate. Thus the Tribunal has awarded compensation to claimants if the respondent state has been enriched at the expense of the claimant, whether or not the respondent state has committed any act of expropriation.²²³

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

What distinguishes unjust enrichment claims from expropriation, then, is probably the nature of the respondent State’s gain, as well as the type of property the claimant possessed. It is unclear whether intellectual property can be expropriated. If so, then in some intellectual property cases, property rights may be established where there is a patent or copyright, allowing for expropriation. In other cases, know-how or other benefits may not have a legal property right attached, so unjust enrichment would be the only cause of action, as unjust enrichment requires no illegal action. If intellectual property cannot be expropriated, then all intellectual property disputes must be brought as unjust

²⁵³. MAPP, supra note 220, at 214.
enrichment claims. As will be explored in Part III, using unjust enrichment as a cause of action will allow the claimant to get through jurisdictional thresholds where expropriation may not. In addition, unjust enrichment claims are not limited to restitution at the time of the taking, unlike most BIT remedies for legal expropriation.

Regarding unjust enrichment and contracts, *Lockheed Corporation v. Iran*[^254] confirmed earlier decisions[^255] forbidding unjust enrichment where a contract existed:

First, as the Tribunal has held in other cases, the Claimant must establish that there is no valid and enforceable contract on which an action for damages could be based. . . . Second, the Claimant must establish that the Respondent has been enriched at the Claimant's expense, the extent of such enrichment and that it would be unfair for the Respondent not to pay for the benefits it has received.[^256]

Mapp adds:

The doctrine of unjust enrichment as an independent cause of action has been progressively developed by the Tribunal. . . . [In *Schlegel Corporation v National Iranian Copper Industries Company*], the Tribunal . . . observed that the rule against unjust enrichment represents a principle based on justice and equity and therefore makes it necessary to take into account all the circumstances of each specific situation.[^257]

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

In addition to setting clear parameters for bringing unjust enrichment claims, Iran-U.S. Claims Tribunal cases by default also explore unjust enrichment award calculations. These calculations vary significantly according to the factual circumstances of the case. As well, there is general judicial debate over correct computation. The tribunal in *Sea-Land* pointed out:

Opinions differ as to the basis of computation of damages. The

[^254]: Lockheed Corp. v. Iran, 18 Iran-U.S. Cl. Trib. Rep. 292 (1988). Unjust enrichment was found inapplicable in this case because there was an existing contract.


[^256]: Lockheed, 18 Iran-U.S. Cl. Trib. Rep. at 309 (internal citation omitted).

predominant view seems to be that damages should be assessed to reflect the extent by which the state has been enriched. Judge Jimenez de Aréchaga considers that where the "enriched" state has obtained no benefit, no compensation should be payable at all. 258

This limits both where unjust enrichment is applicable and the amount awarded. The *Sea-Land* Tribunal continued exploring award calculations, stating:

Equity clearly requires that cognisance be taken of the *de facto* situation, and this explains why there is no discernible uniformity in the practice of international tribunals in this respect. Important factual circumstances to be taken into account are the level of investment; the period during which the foreign investor has been able to make a profit; and the benefit actually derived by the host country from its acquisition. 259

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

Compensation for unjust enrichment cannot encompass damages for loss of future profits. The Tribunal must aim instead to place a monetary value on the extent to which PSO [Iranian Ports and Shipping Organization] was enriched by its premature acquisition of the facility.

The Tribunal must establish whether PSO did in fact avail itself of the facility after *Sea-Land*'s departure. PSO in its Statement of Defence denies having used the installations and facilities at the terminal but there is some evidence that it did make use of them. 260

The tribunal here estimated that premature use of the *Sea-Land* facility enriched the PSO by approximately $750,000. 261 This figure comes from the tribunal’s projected gain—based on PSO documents discussing what PSO could have gained during the 611-day period that *Sea-Land* remained unexploited (which the tribunal used to estimate the profits that occurred when PSO later began exploitation), coupled with documents showing that there was in fact a subsequent exploitation. 262

259. *Id.* at 170.
260. *Id.* at 170-71.
261. *Id.* at 175.
262. *Id.* at 171-72.
The Sea-Land Tribunal, however, did not allow recovery for lost moveable property in the instant case. The Sea-Land Tribunal explained:

[U]njust enrichment requires that Sea-Land be compensated for those items and assets left in Iran of which PSO or the Government obtained the use and benefit. It does not permit the Tribunal to compensate Sea-Land for the loss of unpaid debts, freight charges, and termination expenses, none of which resulted in the enrichment of PSO or the Government. 263

In this case, the tribunal found no evidence that Iran had used the property left by Sea-Land. Compensation for garage inventory and other equipment was similarly denied. 264

The tribunal concluded that “[t]he Ports and Shipping Organization [PSO] is obligated to pay Sea-Land Service, Inc. Seven Hundred Fifty Thousand United States Dollars (US $750,000.00).” 265 This award reflected only the value of the estimated early use of the property, and did not give any money for lost equipment or lost future profits.

In contrast, the Schlegel Tribunal based its award on quantum meruit. 266 There, Schlegel was a subcontractor and wanted to be paid for building a reservoir lining for the Copper Company, with whom it had no contract. 267 Schlegel’s contract was between Schlegel and another contractor. 268 Because no contract existed between the Copper Company and Schlegel, the case was considered off-contract, allowing for an unjust enrichment claim: 269

When Schlegel had performed its work, the result was that the Copper Company had acquired a reservoir lining to its specifications provided by a company it had effectively nominated to do work supervised and approved by its own engineers.

The Tribunal finds that the enrichment was and remains unjust. The evidence is clear that the Copper Company has never paid the balance due for Schlegel’s work. Nor is there any doubt, given Binnie’s issuance of the Maintenance Certificate, that Schlegel’s work had been satisfactorily completed. ... The

263. Id. at 172.
264. Id. at 173.
265. Id. at 175.
266. See generally Schlegel Corp., 14 Iran-U.S. Cl. Trib. Rep. at 176.
267. See id. ¶ 5.
268. See id. ¶¶ 5-8.
269. See id. ¶¶ 10-14.
Tribunal concludes under the circumstances that, once the work had been completed by the sub-contractor Schlegel, and it had for good and valid reasons appealed to the Copper Company for payment directly, it was manifestly unjust for the Copper Company to deny payment to Schlegel under Article 59(2), particularly when it would not have incurred any loss to itself by doing so. The Tribunal holds, consequently, that the Copper Company has been unjustly enriched and must therefore pay Schlegel the balance due of 12,934,124 rials.

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

In Isaiah v. Bank Mellat, the claimant, Benjamin Isaiah, sought relief from Bank Mellat in the payment of $380,000 - the amount of a dishonored check drawn by Bank Mellat's predecessor. Isaiah "asserted that the check was not paid because of expropriation of the assets and properties of the Bank by the Government of Iran." The tribunal here "believe[d] that it would be inequitable for such a bank to be able to escape liability to the beneficial owner of the funds represented by such a dishonored check and retain the funds to which the bank has no claim." Consequently, "the Tribunal h[eld] that the Respondent Bank Mellat has wrongfully detained Mr. Isaiah's $380,000 since 10 January 1979 and that Isaiah is entitled to an award in that amount." The tribunal, however, declined to award interest:

270. Id. ¶¶ 16-17 (footnote omitted).
271. Id. ¶ 20.
272. See, e.g., Bradkin v. Leverton, 257 N.E.2d 643 (N.Y. 1970) (holding that if plaintiff's allegations were true, he would be entitled to recover as damages the amount that the defendant had contractually obligated itself to pay).
274. Id. at 233.
275. Id. at 237.
276. Id. at 239.
The award of interest is certainly permissible in the discretion of the Tribunal. In this case there is no evidence that the International Bank of Iran or its successor, Bank Mellat, deliberately deprived the Claimant of his money; on the contrary, the evidence indicates that the Bank made unsuccessful efforts to restore its credit facilities with Chase Manhattan Bank so that the check could be paid. In view of the special circumstances in this case, the Tribunal declines to award interest. 277

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

The Iran-U.S. Claims Tribunal set out clear tenets for unjust enrichment as a cause of action. 278 The most important tenet is that unjust enrichment can only be brought where no other cause of action is available. 279 Thus, claimants cannot bypass contracts to get better results through an off-contract cause of action. This both protects the integrity of the contract and confines unjust enrichment claims.

In addition, unjust enrichment claims house internal restrictions. By law, unjust enrichment claims only get restitution (monetary or otherwise). 280 Restitution occurs only where the respondent actually gained something, and thus, the respondent will never pay more than they have profited, unlike damages claims. This ensures that the remedy corresponds to the violation. If the violation is not necessarily illegal, a damages award might deliver unjust results.

277. Id.
278. When taken together, Sea-Land Serv., Inc. v. Iran, Schlegel Corp. v. Nat'l Iranian Copper Indus., and Isaiah v. Bank Mellat set forth distinct parameters.
279. Lockheed, 18 Iran-U.S. Cl. Trib. Rep. at 309 (“First, as the Tribunal has held in other cases, the Claimant must establish that there is no valid and enforceable contract on which an action for damages could be based. . . . Second, the Claimant must establish that the Respondent has been enriched at the Claimant's expense, the extent of such enrichment and that it would be unfair for the Respondent not to pay for the benefits it has received.”) (citation omitted).
280. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (Discussion Draft 2000).
ICSID tribunals should employ the detailed parameters set out by the Iran-U.S. Claims Tribunal. Some additional issues, however, require addressing. First, is unjust enrichment an acceptable cause of action under ICSID rules? If so, how would one bring it and what barriers need to be confronted? Last, what are the tenets of unjust enrichment within ICSID cases?

III. HYPOTHETICALS: UNJUST ENRICHMENT APPLIED

A small subset of cases would benefit from unjust enrichment claims—cases that otherwise might not fall within a tribunal’s jurisdiction or cases where damages would not appropriately redress the grievance. This Part refers specifically to off-contract intellectual property disputes, where the value of the respondent country’s benefit exceeds the claimant’s loss.

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

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

A successful claim under unjust enrichment takes the following form. First, there must a dispute. Second, the dispute must be legal. As explored below, this requires finding a clause in the BIT that the respondent violated. Here, I argue that the applicable clause is the “fair and equitable treatment standard.” The “fair and equitable treatment standard” requires that signatory nations not violate customary international law with respect to investors from contracting states. If unjust enrichment is part of customary international law, then it is protected under the fair and equitable treatment standard. This requires two steps: (1) the claimant must show that unjust enrichment is a part of customary international law, and (2) the claimant must show that


282. See Kreindler, supra note 9.
unjust enrichment, as understood by international law, occurred. Thus, the claimant must have a case that fulfills the Iran-U.S. Claims Tribunal tenets for unjust enrichment:

1. There must be an enrichment;
2. With a corresponding loss;
3. Close causal connection between the loss and the enrichment;
4. No justification for the enrichment; and,
5. No other available cause of action.

A contract claim, however, cannot rely on unjust enrichment; unjust enrichment can only be brought in isolation.283

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

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

As well, the Iran-U.S. Claims Tribunal unjust enrichment requirement that there be a “corresponding loss” addresses a concern particular to NAFTA. NAFTA Article 1116: Claim by an Investor of a Party on Its Own Behalf, states that: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”284 Here, NAFTA requires that the investor “incur loss or damage” to bring a claim. Put simply, this NAFTA requirement is satisfied because it is intrinsic to unjust enrichment, as a valid claim requires that the investor suffer a “corresponding loss.”

---

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

The argument outlined above is explored in detail below. To illustrate how the limitations listed above and others will interact with ICSID requirements, I present a series of hypotheticals based on Mihaly International Corp. v. Democratic Republic of Sri Lanka.

A. Mihaly

Mihaly International Corporation brought a claim against Sri Lanka for violation of the United States-Sri Lanka BIT. Mihaly sought compensation for its pre-contractual investment made during negotiations to build a new power plant on a Build-Own Transfer (“BOT”) basis. In 1992, Sri Lanka solicited bids for the project, eventually selecting Mihaly. During the negotiations Mihaly engaged in extensive planning and projections including the plant design and financial projections. Mihaly valued its pre-contractual efforts to design and plan the plant at two to four

285. Mihaly, 6 ICSID (W. Bank) 310.
286. Id. ¶ 1.
287. Id. ¶ 11. According to the World Bank in the context of water utility contracts, Build-Own-Transfer (BOT) Contracts are “Typically used for water supply or wastewater treatment plants. An operator finances, builds, owns, and operates the facilities for a specific period of time, after which ownership is transferred back to the contracting authority. BOT payments are typically based on the volume of water treated at the plant.” GREG J. BROWDER ET AL., STEPPING UP: IMPROVING THE PERFORMANCE OF CHINA’S URBAN WATER FACILITIES 118 (The World Bank 2007).
288. Mihaly, 6 ICSID (W. Bank) 310 at ¶¶ 38-42.
Mihaly claimed that Sri Lanka violated the BIT requirement of fair and equitable treatment because it was never compensated for its pre-contractual expenditures, which it considered an investment. The Tribunal, however, found that pre-contractual expenses were not an "investment" protected by the BIT, as defined by the Washington Convention. Since Sri Lanka never signed a contract, it never agreed to ICSID jurisdiction. "The operation of SAEC [South Asia Electricity Company] was contingent upon the final conclusion of the contract with Sri Lanka, thus the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka."

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

**B. Mihaly 1**

Assume that all the Mihaly case facts remain, save one. In the new hypothetical Mihaly, "Mihaly 1," Sri Lanka used Mihaly 1's plans to build the power plant—without compensating Mihaly 1. The substantive case is as follows.

Sri Lanka was unjustly enriched at the expense of Mihaly 1 because Sri Lanka benefited from Mihaly 1's property without compensation. Mihaly 1 suffered a corresponding loss of both potential profits from the plant and more importantly from the two to four percent costs of their uncompensated outlay in creating the plan. In addition, there was significant causal connection between Mihaly 1's loss and Sri Lanka's gain, as Sri Lanka was able to use Mihaly 1's work and outlay to create a

289. Id. ¶¶ 34, 41.
290. Id. ¶ 47.
291. Id. ¶¶ 34, 53.
292. Id. ¶ 59; See generally Washington Convention, supra note 281. The Washington Convention of 1965 established ICSID as a dispute resolution forum for investor-State disputes.
293. Mihaly, 6 ICSID (W. Bank) 310 at ¶ 48.
power plant benefiting Sri Lanka. As well, given the facts of Mihaly, none of the defenses apply (illegal activity, duress, etc.), since Sri Lanka had a public bid for the project. Last, claimant has no other cause of action, as the claim was not based on a contract, and was not illegal.

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

Jurisdiction presents a series of obstacles, one of which is inconsistency. Arbitral panels are still debating whether the Washington Convention provides additional limitations to BITs’ lex specialis. Accordingly, jurisdictional thresholds must be examined under both the Washington Convention and the lex specialis of the applicable BIT. In many instances where the two overlap or one is silent, they can be considered as a unitary threshold for jurisdiction.

The Washington Convention, Article 25, states that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting state.” The underlined phrase contains the constitutive elements of the basis for subject-matter jurisdiction. The Mihaly Tribunal found that Mihaly was “a national of another Contracting state” and therefore the only relevant jurisdictional issue in the hypothetical is subject-matter jurisdiction. To get subject-matter jurisdiction, the claimant must show:

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

294. Washington Convention, supra note 281, at art. 25(1) (emphasis added).
295. Mihaly, 6 ICSID (W. Bank) 310 at ¶ 29.
296. See id. ¶¶ 11-27.
297. Id. ¶ 31.
1. Jurisdiction

In exploring jurisdiction, three concepts must be examined: (1) the Washington Convention Article 25 definition of investment, (2) the BIT *lex specialis* definition of investment, and (3) the scope of the “fair and equitable treatment” standard.

i. Washington Convention Requirements: Investment

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

The most crucial and controversial contentions of the Parties were concentrated upon the existence *vel non* of an “investment”... *A fortiorissime,* without proof of an “investment” under Article 25(1), neither Party need to argue further, for without such an “investment”, there can be no dispute, legal or otherwise, arising directly or indirectly out of it, which could be submitted to the jurisdiction of the Centre and the Tribunal. 298

As discussed above, the fact that the tribunal did not consider a pre-contractual expense without benefit an “investment” motivated the tribunal’s refusal to give Mihaly jurisdiction. 299 In *Mihaly 1*, however, Sri Lanka benefiting unjustly from the pre-contractual expense transforms the nature of the claim to include the requisite “investment.” Indeed, the Washington Convention lets the parties determine what constitutes an “investment,” leading to amorphous requirements. 300 The reading in *Mihaly*, broadly referred to as the “Salini Test,” is perhaps the most demanding reading of Washington Convention requirements. 301 Although recent tribunals have reduced these requirements, 302 the most rigid understanding is arguably the best starting point.

298. Id. ¶ 32.
299. See id.
300. See Washington Convention, supra note 281, at Part B Art. 27 (“No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).”). Many scholars think that BIT definitions of investment govern. The *Mihaly* Tribunal thought otherwise, as will be explored later.
302. Id.
The tribunal in Helnan International Hotels A/S v. Egypt explained "that to be characterized as an investment a project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development." In sum, the unmodified "Salini Test" requires that an investment must (1) have a certain duration, (2) have risk (3) have regularity of profit and return, (4) be a substantial commitment, and (5) contribute to the host State's development.

Mitchell v. Congo provides a more nuanced reading of these requirements:

There are four characteristics of investment identified by ICSID case law and commented on by legal doctrine, but in reality they are interdependent and are consequently examined comprehensively. The first characteristic of investment is the commitment of the investor, which may be financial or through work; indeed, in several ICSID cases the investor's commitment mainly consisted in its know-how.

Many pre-contractual investments, such as obtaining industrial designs and specialized knowledge, might be considered intellectual property such as trade secrets or "know-how." The Mitchell Tribunal's broad reference to "know-how" in defining "work" and its flexible reading of the four investment characteristics provide an opening for unjust enrichment claims in cases where the BIT does not explicitly recognize intellectual property, and/or where the intellectual property rights were not patented.

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


305. Id.
Note that the location of the investment and the amount actually invested in the project are not listed criteria. While they may help a claim, a claim can succeed with little financial investment and where that investment is primarily made in a country other than the respondent country.\(^{306}\)

The *Mitchell* Tribunal emphasized the importance of the "contribution to the economic development of the host state."\(^{307}\) In support, the tribunal pointed to *Fedax v. Venezuela*,\(^ {308}\) "which involved promissory notes issued by the Republic of Venezuela," and *CSOB v. Slovakia*,\(^ {309}\) which involved a loan.\(^ {310}\) In *CSOB*, the tribunal found that "under certain circumstances a loan may contribute substantially to a State's economic development."\(^ {311}\) As well, the *Mitchell* Tribunal held that "the contribution," though "essential," does not have to be "sizeable or successful."\(^ {312}\) In addition:

[O]f course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.\(^ {313}\)

Returning to the hypothetical, if the *Mihaly I* Tribunal relied on the aforementioned reading of the Washington Convention criteria, it would find that an "investment" had occurred because the relevant criteria have been satisfied:

---


313. *Id.*
(1) Investment. At its most demanding, the commitment must be "substantial." Substantial investment occurred over the course of the negotiations. Mihaly 1’s expert calculated that two to four percent of its expenditures occurred in the planning phase. As well, “it is standard practice accepted by host governments, lenders and other equity investment to include the sponsors’ development expenditures in the investment cost.” Even if the monetary expenditure did not suffice, the Mitchell Tribunal highlights many cases that consider “work” and/or “know-how” to constitute "investment.” The extensive planning, financial projections, and plant design appropriated by the government from Mihaly 1 certainly fit the Mitchell know-how description.

(2) Duration. The one to two years that Mihaly 1 spent developing the plans for a power plant should suffice in terms of duration, especially considering their long-term goals. As the Mitchell Tribunal stated, “ICSID tribunals do not have to evaluate the real contribution of the operation in question.”

(3) Risk. Investments, particularly in the BOT format, present a significant risk to the initial investor, who bears the risk of unforeseeable events, such as natural disasters and war, which would increase the project’s costs.

(4) Contribution to economic development of host State. According to Mitchell, economic development is a broad concept. Mihaly 1, however, does not require a broad reading of economic development. Economic development occurred prima facie in Mihaly 1—the entire case surrounds the host State’s enjoyment of an enrichment. Sri Lanka utilizing Mihaly 1’s plans clearly contributed to its economic development, even if the contribution by Mihaly 1 was involuntary. Of course, Mihaly 1’s initial intent was to do the same. It is precisely this actual contribution to Sri Lanka’s economic development coupled with Mihaly 1’s know-how investment that separates Mihaly from Mihaly 1. In Mihaly there is no economic contribution and no contract. In Mihaly 1, there is a provable and substantial economic contribution.

314. Helnan v. Egypt, ICSID (W. Bank) Case No. ARB/05/19 ¶ 77.
315. See Mihaly, 6 ICSID (W. Bank) 310 ¶ 34.
316. Id.
318. See id.
Fulfilling the Washington Convention requirements is vital for Mihaly 1's case, even if the BIT includes provisions for know-how or business "interests." Although some tribunals have held that BIT definitions of investment preempt the Washington Convention, the tribunal in Mihaly found that the BIT language did not apply because a contract had not been entered into. This is because in addition to the Washington Convention requirements, a claimant must demonstrate that the State's action breached a requirement within the BIT. Thus, Mihaly 1 must find a hook for unjust enrichment within the BIT.

In sum, once Mihaly 1 proves that its pre-contractual expenses meet the Washington Convention components for "investment" (whether the tribunal uses the "Salini Test" or not), the tribunal must determine whether the work completed by Mihaly 1 falls under the BIT's definition of "investment."

ii. BIT Definitions of Investment

Typically, BITs offer generous definitions of "investment." In CSOB v. Slovakia, for example, the BIT defined "investment" as "any asset" including: "monetary receivables or claims to any performance related to an investment." The CSOB Tribunal held that the BIT terms were broad enough to encompass loans, but that not "any loan" meets the requirement of an investment under the Washington Convention. Additionally, in Helnan, the tribunal found that broad language such as 'asset', 'any other rights', 'any similar rights', 'pursuant to a contract having an economic value'... shows that Article 1 [of the Egypt BIT] encompass[es] wide concepts." Hence, if the Mihaly 1 Tribunal believed that lex specialis governed, the claimant would have an easier case to make.

The BIT in SGS v. Pakistan also boasted a broad definition of investment. "'Investment' is defined so as to... include every kind of asset and particularly... claims to money or to any performance having economic value... as well as all other rights given by law, by contract or by decision of the authority in

319. See Mihaly, 6 ICSID (W. Bank) 310 ¶¶ 47, 59-61.
321. Id.
accordance with the law.” This “non-exhaustive” definition was, according to the tribunal, “sufficiently broad to encompass the PSI agreement.” As well, relying on *lex specialis*, the SGS Tribunal found for the claimant, even though SGS invested very little in Pakistan itself.

Likewise, the **PSEG Global v. Turkey** Tribunal stated in dicta that “[a]n investment can take many forms before actually reaching the construction stage, including more notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre-investment expenditures.” While the tribunal recognized that a valid contract was signed, as distinguished from *Mihaly* where one was not, it nevertheless pointed out that “in *Mihaly* the decision did in fact consider that it might well be the case in other investments that the moneys spent or expenses incurred in their preparation can be swept under the umbrella of such investment.”

In **PSEG**, the tribunal found jurisdiction even though no work had been done. This decision was likely correct, given the BIT’s definition of investment:

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

---

324. Id. ¶ 135.
325. See id. ¶¶ 134-135, 140.
327. Id. ¶ 302.
returns, and of principal and interest payments arising under loan agreements.\textsuperscript{328}

The above example of BIT language provides a number of options for Mihaly 1. Mihaly 1’s building and financial plans are “industrial designs” and “know-how” that fit squarely within the definition of “intellectual property.” As well, the right to compensation where one profits from another’s design is “a right conferred by law” in many countries.\textsuperscript{329} Last, an industrial design or a company’s outlay, from which another company benefited, could be considered both “interests in the assets of a company” and “a claim to money or to performance having economic value.” These options do not apply to the original Mihaly because the host country did not use the designs. Therefore, there was no “intellectual property right,” “know-how,” or “assets” in a going concern. The actual use of the investment is the lynchpin to be deemed an “investment.”

Having found that Mihaly 1’s building and financial plans qualify as a protected “investment,” both under the Washington Convention and under typical BIT language, the plans must next be examined under the Washington Convention jurisdictional requirements. The first requirements explored are that the dispute arises directly out of an investment, and that the dispute was a legal one.\textsuperscript{330} Fulfilling this requirement necessitates analyzing the “fair and equitable treatment standard.”

\textsuperscript{328} Id. ¶ 66 (citing Article I(1)(c) of the BIT).

\textsuperscript{329} This is certainly true for any country that is a member of the WTO. Article 25(1) of the TRIPS Agreement obliges Members to provide for the protection of independently created industrial designs that are new or original. General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, art. 25(1), Dec. 15, 1993, 33 I.L.M. 81 (1994). As well, the TRIPS Agreement requires undisclosed information -- trade secrets or know-how -- to benefit from protection. Id. at art. 39(2). Furthermore, Article 45 stipulates: “(1) The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity. (2) The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney’s fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.” Id. at art. 45.

\textsuperscript{330} See Washington Convention, supra note 281, at art. 25(1).
iii. Washington Convention Requirements: That the Dispute Arises Directly and Not Indirectly out of an Investment.

In the current hypothetical, the dispute arises out of Sri Lanka’s direct benefit from Mihaly 1’s investment. Thus, a causal connection is established. Indeed, unjust enrichment claims per se require a causal connection between the claimant’s loss and the unjustified enrichment. The necessity that a dispute arise directly out of an investment complicates cases where a third party benefits from the investment, as “Mihaly 2” will explore.


A violation of local law or even a general principle of law is not enough to get jurisdiction under ICSID. The respondent country must violate something that a tribunal understands to be contained within an article of the BIT. Investors, then, must find a hook to hang their unjust enrichment claim on within the BIT. For Mihaly 1, a violation of the “fair and equitable treatment” standard is the simplest.

Fair and equitable treatment is a provision in BITs, requiring, at a minimum, that a signatory State not violate principles of customary international law with respect to investors from another signatory State. Application of the “fair and equitable treatment” standard varies between tribunals. In general, the varied application can be viewed under three categories: broad, moderate, and narrow. The narrowest reading is that “the obligation to treat an investment fairly and equitably refers to the minimum standard of treatment of aliens under customary

331. See e.g., R. DOAK BISHOP, JAMES CRAWFORD, WILLIAM REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY, at 344 (Kluwer Law International 2005) (“In answering this question the Tribunal believes that it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention”).


333. See, e.g., Kreindler, supra note 9.
international law.” 334 The moderate reading would be that “fair and equitable” requires “a higher standard of conduct more in consonance with the objective of the treaty.” 335 Tecmed v. Mexico 336 sets forth the broadest reading of the “fair and equitable treatment” standard, which requires that states not violate investor expectations. 337

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

In their ordinary meaning, the terms “fair” and “equitable” mean “just,” “even-handed,” “unbiased,” and “legitimate”… It follows from the ordinary meaning of “fair” and “equitable” and the purpose and object of the Treaty [to intensify economic cooperation and create favorable conditions for investments] that these terms denote treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative…. Terms such as “promote” or “stimulate” are action words that indicate that it is the intention of the parties to adhere to conduct in accordance with such purposes. 338

“Just” is the first word used to define the ordinary meaning of “fair and equitable treatment.” “[J]ust manner” only strengthens this connection. Unjust enrichment is based on the idea of “just.” By definition, the enrichment must be unjust to qualify in the merits stage. The “fair and equitable treatment” standard, if nothing else, seeks to ensure that the host State treats the investment in a “just manner.” Benefiting unjustly from the investment, then, must violate the “fair and equitable treatment” standard. Consequently, if the standard is violated literally, there must be a legitimate cause of action for unjust enrichment contained within the standard.

Furthermore, this definitional approach is bolstered by the argument that unjust enrichment violates customary international law. The Siemens Tribunal continued:

There is no reference to international law or to a minimum standard [in definition of fair and equitable in the BIT].

335. Id.
336. Tecnicas Medioambientales Tecmed SA v Mexico, ICSID Case No ARB(AF)/00/2, IIC 247 ¶ 154 (2003) (Award).
337. See Siemens, ICSID (W. Bank) Case No. ARB/02/8 ¶ 299.
338. Id. ¶ 290 (footnote omitted) (emphasis added).
However, in applying the Treaty, the Tribunal is bound to find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used.

The Tribunal added:

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

The Siemens Tribunal also described a narrow reading in another case where “an international minimum standard . . . could only be breached by ‘a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.’”

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

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

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly

339. Id. ¶ 291.
340. Id. ¶ 293.
341. Id. ¶ 294 (quoting Genin v. Republic of Estonia, ICSID (W. Bank) Case No. ARB/99/2, ¶ 367 (2001) (Award)).
342. Id. ¶ 295 (quoting Mondev Int’l Ltd. v. United States, ICSID (W. Bank) Case No. ARB(AF)/99/2, ¶ 123 (2002) (Award)).
unfair, unjust or idiosyncratic, is discriminatory and exposes the
claimant to sectional or racial prejudice, or involves a lack of
due process leading to an outcome which offends judicial
propriety—as might be the case with a manifest failure of
natural justice in judicial proceedings or a complete lack of
transparency and candour in the administrative process. In
applying this standard it is relevant that the treatment is in
breach of representations made by the host State which were
reasonably relied on by the claimant. 340

*Tecmed v. Mexico* reflects this new standard, describing "just and
equitable treatment" as requiring "treatment that does not affect
the basic expectations that were taken into account by the foreign
investor to make the investment." 344

Mihaly 1's unjust enrichment claim fits into the moderate and
broad "fair and equitable treatment" standards. The narrow
standard, based on customary international law from the 1920s, is
a more difficult case.

Under the broad "investor's expectations" standard, "fair and
equitable treatment" becomes a catchall clause within the BIT.
This interpretation allows broad judicial discretion, as investor
expectations are myriad and subjective. Thus, an unjust
enrichment claim fits effortlessly. Mihaly 1's expectations that its
project plans not be exploited by Sri Lanka without compensation
would place unjust enrichment within the ambit of "fair and
equitable" standard. Also, as most countries allow some type of
cause of action to prevent unjust enrichment, 345 Mihaly 1 could
point to its expectation that local laws prohibiting unjust
enrichment be followed. Consequently, Mihaly 1 had the BIT
supported right to expect that Sri Lanka not be enriched at its
expense. Mihaly 1's expectations as an investor coupled with the
definitional argument regarding "just" standards and "unjust"
enrichment give Mihaly 1 a solid claim.

Over and above the preceding arguments, the moderate,
"modern" fair and equitable treatment standard requires
demonstrating that unjust enrichment violates customary
international law. Here, referencing instances where the Iran-U.S.

---

343. *Id.* ¶ 297 (quoting Waste Mgmt., Inc. v. Mexico, ICSID (W. Bank) Case No.
ARB(AF)/00/3, ¶ 98 (2004) (Award)).
344. *Id.* ¶ 298 (quoting Tecnicas Medioambientales Tecmed SA v Mexico, ICSID (W.
Bank) Case No ARB(AF)/00/2, ¶ 154 (2003) (Award)).
345. See Section II(A)(1) on Domestic Legal Codes at page 106 for examples.
Claims Tribunal and current ICSID tribunals employ unjust enrichment is key. First, Mihaly 1 could highlight the treatment of unjust enrichment by tribunals like *Enron* \(^{346}\) and *CME*, \(^{347}\) including the ambiguities employed to avoid applying unjust enrichment ICSID. Mihaly 1 can then easily point to *ADC v. Hungary* \(^{348}\) as an example of an ICSID tribunal using unjust enrichment—both by awarding restitution and in its unspoken reliance on unjust enrichment. Last, Mihaly 1 claimants could point to the options granted by *Chorzów*, \(^{349}\) so often cited as customary international law, as grounds for accepting a claim of unjust enrichment under a BIT. Once the tribunal accepts that unjust enrichment is a violation of customary international law, Mihaly 1 can move on to proving that unjust enrichment in fact occurred.

Mihaly 1 stumbles, however, under the narrow "bad faith" reading of the fair and equitable treatment standard. Here, Mihaly 1 must show bad faith on the part of Sri Lanka. An example might be Sri Lanka intentionally sabotaging the contract in order to keep the power plant profits. This would be a breach of good faith, which might bar an unjust enrichment claim as any other available cause of action preempts unjust enrichment. Alternatively, if Sri Lanka had no intention of creating the plant, or a new government subsequently decided to use the plans, Mihaly 1 would most likely fail to get jurisdiction under the narrow "fair and equitable treatment" standard because Sri Lanka had not acted in bad faith.

Assuming that the tribunal applied the moderate or broad interpretation of the fair and equitable treatment standard, Mihaly 1 will succeed in getting jurisdiction as: (1) the initial outlay for the power plant design was an investment under the Washington Convention customary standards and the BIT language; (2) there was a dispute (3) arising directly from the investment (Sri Lanka’s enrichment resulted from its utilization of Mihaly 1’s plans); and (4) the dispute was legal, as Mihaly 1 was able to point to a violation of the “fair and equitable treatment” standard in the relevant BIT.

---

2. Merits

Because obtaining jurisdiction requires an exploration of the "fair and equitable treatment" standard, the merits of the unjust enrichment claim would, perforce, have to be decided in the jurisdictional analysis. Here, the concern of Mihaly 1 is to provide evidence of the unjust gain and not the loss it suffered. Mihaly 1's loss is relevant only insofar as it was directly connected to Sri Lanka's gain. Mihaly 1 must prove:

An enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.\(^\text{350}\)

In the instant case, Mihaly 1 can show that Sri Lanka was enriched to Mihaly 1's detriment. First, Sri Lanka did not have to pay for the power plant design and is now benefiting from more power and the profits there from. Mihaly 1 can then show that it created the plant designs, which were subsequently appropriated without compensation, and it thus suffered a loss. It need not show that the loss was sizeable or comparable to the remedy requested—since a gains-based remedy is employed. Mihaly 1 will then demonstrate that there was no justification for the enrichment (such as fraud on its part, state of necessity, or some other legal defense or reason given by Sri Lanka). Last, Mihaly 1 will show that no other remedy is available. This can accomplished by pointing out that no contract exists, and therefore the integrity of the contract is not undermined. Mihaly 1 may have to distinguish its claim from an expropriation claim. This is possible by noting the attenuated nature of an expropriation claim of purely (unpatented) intellectual property, rather than a contract or physical asset, the majority of which was created in an unrelated country.

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

3. Remedy

The real advantage of an unjust enrichment case in an intellectual property context is the remedy available. Often, gains from intellectual property ("IP") far exceed the initial outlay—particularly in contributions of know-how. A remedy based on the other party's gain, then, is ideal for the claimant. Some scholars, as well as the U.S. government, see restitution of the defendant’s gain as the best way to award remedies in IP disputes. Indeed, The U.S. Department of Justice asserts that restitution is mandated for a number of IP violations. 351 James W. Hill, author of Trade Secrets, Unjust Enrichment, and the Classification of Obligations, argues that trade secret law, a type of intellectual property, should be based on unjust enrichment. 352 He argues that damages are insufficient because of the difficulty in approximating the claimant's loss and because the claimant often suffers little loss relative to the defendant’s undeserved gain. 353

Restitution provides a range of options that vary with the facts of the case and judicial discretion. For example, in Mihaly I the tribunal could award Mihaly 1 a percentage of the profits from the Sri Lankan power plant. This percentage might correspond to the value of the plans relative to the power plant’s total value, including future profits. 354 The foregoing remedy would reflect the ADC v. Hungary award, 355 less the amount awarded for dividends and the unpaid management contract fees. It is preferable that the tribunal limit the award to the percentage of real profits for two reasons. First, Mihaly 1 did not expend anything building the plant whereas Sri Lanka did. Second, future profits are speculative. The author of Restitution for Wrongs: The Measure of Recovery, Daniel Friedmann, suggests that where a defendant’s contribution entails a loss or expenditure while constituting a major element that led to the benefit, the defendant’s expenditures should be considered. 356
Since restitution of profits does not entitle the plaintiff to recover the defendant’s gross revenue, awarding a percentage of the profits allows the defendant to deduct his expenses in producing the gain. \(^{357}\) Even awarding all profits is better for a defendant than awarding the entire value of the investment.

Awarding a percentage of profits is consistent with the restitution award in *ADC* \(^{358}\) and encourages development while minimizing waste. Awarding the entire profit has precedents both in *Snepp v. United States* \(^{359}\) and perhaps in Question II of *Chorzów*. \(^{360}\) In *Snepp*, a CIA agent published a book without getting permission from the CIA. \(^{361}\) The Supreme Court of the United States held that the agent had to disgorge all profits realized from the publication of the book, even though he had contributed much of the work. \(^{362}\) Friedmann explained:

> [T]here is a venerable line of equity cases that have allowed recovery of profits for breach of fiduciary duty even where the defendant acted innocently and was unaware of the fact that his conduct was wrongful. In these cases, once the defendant’s conduct was characterized as a breach of fiduciary duty, his good faith, as well as his contribution, were often disregarded, and he was held liable to hand over all his profits despite the fact that these were mostly the result of his efforts and skill. \(^{363}\)

More recent cases explored by Friedmann, however, such as *Boardman v. Phipps*, mitigate earlier decisions requiring disgorgement of all profits. \(^{364}\)

Friedmann concludes that there are four options for unjust enrichment awards:

1. The plaintiff will receive all profits, subject only to a deduction of the defendant’s investment in money or property. \(^{365}\) —Such a result has often been reached in cases of

---

357. Id. at 1890.
361. Snepp, 444 U.S. at 507.
362. Id. at 515-516.
363. FRIEDMANN, supra note 356, at 1897.
364. Boardman v. Phipps, [1966] 2 A.C. 46 (H.L. 1967) (appeal taken from Court of Appeal) (holding that defendants were required to disgorge their profits but were entitled to quantum meruit “on a liberal scale” for their work and skills).
365. FRIEDMANN, supra note 356.
breach of fiduciary duty.

(2) The same result as under (1) except that the defendant will be remunerated for his skill, ingenuity, risks undertaken, and labor (quantum meruit).—This remuneration is based on the market value of his contribution. The defendant will similarly be paid for the use of any other resources that he invested. 366

(3) The profits will be divided between the plaintiff and the defendant in accordance with their relative contribution.—This is a common solution in the “mixed fund” situation (monies of both parties were used in a successful venture). It is, however, submitted that such a result might be warranted in appropriate circumstances for certain cases in which the defendant’s contribution was through labor, ingenuity, risk undertaken, and skill.

(4) The plaintiff will receive the market value of that which was taken from him.—Profits in excess of this amount will remain in the hands of the defendant. Such a result is the opposite of that reached under (1). 367

Moreover, the option granted in the award may depend on the defendant’s innocence:

Section 10 of the ALI Draft [of the Restatement (3d) of Restitution and Unjust Enrichment] adopts a very liberal approach towards the mistaken improver subject so that the remedy given to the improver will not unduly prejudice the owner. This approach is, however, confined to the mistaken improver. The lot of the conscious wrongdoer is apparently much harsher. His whole investment is forfeited.

Thus, suppose that D enters P’s land, removes timber, causes it to be cut, hauled, and sawn, thus producing lumber that is much more valuable than the standing timber. If D was a conscious trespasser, then under the ALI Draft he has no claim for the benefit officiously conferred on P. 368

The award granted Mihaly 1, therefore, will vary according to Sri Lanka’s innocence and contribution. Suppose, for the sake of analysis, that Mihaly 1’s power plant design was worth $1 million, the power plant cost Sri Lanka $399 million to build, and the operation of the plant generates annual profits of $5 million.

Under the first of Friedmann’s options, Mihaly 1 receives all profits after reimbursing Sri Lanka for the monetary amount it

366. Id.
367. Id. at 1925.
368. Id. at 1907 (footnotes omitted).
invested. This option may occur where Sri Lanka intentionally avoids entering into the contract in order to exploit Mihaly 1's plans. It is not a good option, however, as it provides a windfall to the plaintiff. As well, under this option, unjust enrichment as understood by Birks and the Iran-U.S. Claims Tribunal would not apply because there is a breach of good faith. This breach allows for an alternative cause of action—wrongful enrichment—thus foreclosing an unjust enrichment claim.

Under the second option, Mihaly 1 receives the $5 million dollars and future profits, and will reimburse Sri Lanka for all of its expenses in building the power plant (money, property, "skill, ingenuity, risks undertaken, and labor"). Sri Lanka will thus get its $399 million back, but not share in any of the profits.

Under the third option, Mihaly 1 and Sri Lanka split the profits in proportion to their respective investments. Thus, Mihaly 1 receives 1/400 of the profits. Considering the difficulty in valuing intellectual property, the Tribunal may find that Mihaly’s design was worth more than its market value and award Mihaly 1 a larger percentage of the profits.

The fourth option is the most favorable to Sri Lanka. Sri Lanka retains the $5 million in annual profits after compensating Mihaly 1 the $1 million market value for the plant design. This solution might be desirable where Sri Lanka was unaware that the design was not theirs to keep. An example might be where a new government comes in and innocently uses the design.

Friedmann accurately summarizes the matrix a court should employ:

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

Understanding the incentives that remedies create is important. For example, in Mihaly, the investor's costs are sunk

369. See supra Part II.A.2.
370. FRIEDMANN, supra note 356, at 1909 (footnote omitted).
371. Mihaly, 6 ICSID (W. Bank) 310.
unless Sri Lanka builds the plant. If disgorgement of all profits was an available remedy, Sri Lanka would be dissuaded from building the plant, potentially leaving a complete loss the country. If, however, the remedy available limited the amount of restitution to a proportional interest, it would encourage building while not dissuading investors from pre-contractual expenses. Sri Lanka would also be less inclined to avoid signing contracts. This situation is beneficial to both country and investor. On the other hand, awards that are too low provide dangerous incentives for countries to misappropriate the investor’s money and skill, paying only if the project succeeds. 372 This point is moot, however, if the country lacks the funds to develop the project.

C. Other Hypotheticals: Finer Points

Having explored the most straightforward case, the second hypothetical, “Mihaly 2,” considers complicating factors. Assume the same facts except that a third party, not Sri Lanka, built the power plant. Four potential third-party beneficiary scenarios require exploration:

(a) The third party paid a large sum to Sri Lanka to obtain the power plant plans and knew that the plans were Mihaly 2’s.
(b) The third party paid a large sum to Sri Lanka to obtain the power plant plans but did not know that the plans were Mihaly 2’s.
(c) The third party obtained the plans for free and knew that the plans were Mihaly 2’s.
(d) The third party obtained the plans for free but did not know that the plans were Mihaly 2’s.

In scenarios (a) and (b), a claim for unjust enrichment should prevail against Sri Lanka for the amount Sri Lanka received in

372. The availability of a restitutonary remedy may encourage persons to, for example, make licensing agreements with trade-secret owners, instead of the remedy serving as a substitute for such market transactions. In fact, in intellectual property, the restitution of benefits conferred may be regarded as a “more fundamental” right than the liability for harm done to a creator. See Wendy J. Gordon, Of Harms and Benefits: Torts, Restitution, and Intellectual Property, 21 J. LEGAL STUD. 449, 472 (1992) (“[I]n the intellectual property setting, giving creators restitutionary rights tends to encourage consensual markets.”); See also Weitzenkorn v. Lesser, 256 P.2d 947, 959 (Cal. 1953) (“Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.”).
exchange for the plans.\textsuperscript{373} In both cases, the seller, Sri Lanka, benefited directly from Mihaly 2's plans. If, however, the buyer profited exponentially after purchasing the plans, it is unlikely that Mihaly 2 would be able to recover any of the buyer's profits. An innocent third party has the "bona fide purchase for value without notice" defense.\textsuperscript{374} As well, Mihaly 2 would struggle to find jurisdiction for such a claim, as the causal connection between the dispute and the investment required under the Washington Convention would be stretched. Moreover, the third party is most likely not a signatory to the BIT. This problem is explored in an auxiliary manner in \textit{Saluka}. There, the tribunal held that an unjust enrichment claim failed because the entity directly enriched was a company, leaving the country only indirectly enriched from its interests in the company.\textsuperscript{375} \textit{Saluka} may impose interesting limitations on unjust enrichment claims because it could require future tribunals to decide both whether claims may be levied against State companies and how much interest the respondent State must have in the enriched company to be considered directly enriched.

Scenario (c) is a company in which the State has some interests. Under \textit{Saluka}, the amount of Sri Lanka's interest in the company will be the determinative factor for both the jurisdiction and the merits. For example, a purely State-owned company resembles the facts in \textit{Mihaly 1}, where an unjust enrichment claim would easily gain jurisdiction and win on the merits.

If the company is not wholly owned by the state, the other shareholders may not know of the enrichment. A successful unjust enrichment claim, however, does not require that the defendant know of the unjust enrichment. In this instance, an unjust enrichment claim may succeed. Even under \textit{Saluka}, a controlling interest should be enough to prove that the State was a direct beneficiary—although this may lead to problems of piercing the corporate veil.

If Sri Lanka has minority interests in the company that receives and develops the Mihaly 2 designs, Mihaly 2 bleeds. In this instance, the \textit{Saluka} precedent prevents an unjust enrichment

\textsuperscript{373} See ADC Affiliate Ltd. v. The Republic of Hungary (Cyprus v. Hung.) (W. Bank) ICSID Case No. ARB/03/16 (2006) (Award); \textit{supra} Part II.B.3.

\textsuperscript{374} See \textit{supra} Part II.A.2.

claim. This is a hard call, particularly given that unlike Saluka, recent ICSID decisions refuse to separate entitlement to share value for shareholders from the amount of damage that the company suffered directly. Cases like Gami, Enron, and CMS liken a drop in company share value to expropriation and allow the shareholder to recover the loss. True, these decisions arise in contexts other than unjust enrichment. Nevertheless, they present an interesting counter-point to Saluka. It would be odd to say that an increase in the value of a company's shares, wherein Sri Lanka receives a portion of the profits, is not an enrichment to Sri Lanka. This is especially so when other cases have awarded minority shareholders company lost profits. Perhaps, then, Mihaly could get a portion of the dividends or some of Sri Lanka's shares in the beneficiary company. Since unjust enrichment doesn't require intent, the same would apply to scenario (d).

Mihaly designed the power plant specifically for Sri Lanka. What if Mihaly had designed a fungible product? Assume that "Mihaly 3" had an option to sell the design to another country. Assuming we use the Iran-U.S. Claims Tribunal unjust enrichment requirements, for Mihaly 3 to have an unjust enrichment claim against Sri Lanka, Mihaly 3 must suffer some loss. While not all countries require a corresponding loss, a correlated loss serves to exclude claims for perfectly fungible intellectual property, such as computer programs, which belong under the WTO regime.

In the instant case, it would be up to judicial discretion as to whether Mihaly 3 sustained a loss, either because it did not find a replacement buyer or because there were losses incurred in finding a new client.

Should the fact that "Mihaly 4" patented their design influence the outcome? Because using a patent without permission violates property laws, the claimant may not even need an unjust

376. See GAMI Invs. Inc. v. Mexico, 13 ICSID (W. Bank) 147, 175 (2004). (claiming that Mexico's conduct impaired the value of its shareholdings to such an extent that it must be deemed tantamount to an expropriation).


enrichment cause of action. Rather, Mihaly 4 may sue under an expropriation claim. Indeed, under the Iran-U.S. Claims Tribunal standards, the claimant would be barred from bringing an unjust enrichment claim because another cause of action is available, expropriation. Using intellectual property in isolation, however, may not constitute expropriation. Regardless, Mihaly 4 could ask for the award to be based on unjust enrichment—relying on ADC and Chorzów.

A subtler problem arises during negotiations. At what point is the information gleaned from an extended negotiation considered unjust enrichment to the State if the State later capitalizes on the information without entering into a contract? States might use negotiations to gratuitously derive the necessary know-how and intellectual legwork for a new project. Allowing unjust enrichment claims in this scenario might prevent blatant information mining and preserve good faith and openness in negotiations.

Timing is another area requiring exploration. The ad hoc committee in Amco held that res judicata limitations do not apply to subsequent unjust enrichment actions. Thus, if Mihaly failed under the 2006 claim, it could sue a few years later under unjust enrichment once Sri Lanka developed the power plant based on Mihaly designs. This is an area that will require fine-tuning because repeat claims are an inefficient use of judicial resources.

382. See Amco Asia Corp. v. Indonesia, ICSID (W. Bank) Case No. ARB/81/1 (U.S.-Indon. 1990) (Resubmitted Case: Decision on Jurisdiction). (“The Tribunal here refers also to Indonesia’s contention . . . that no unjust enrichment claim may be advanced by AMCO because this would create ‘a seemingly new argument to evade the legal force of res judicata.’ But unjust enrichment was never the subject matter of a finding by the first Tribunal, as although the issue had been advanced before that body, it reached its pertinent findings on other grounds. Even if the present Tribunal had found that the statement of the ad hoc Committee on the lawfulness of the license revocation was res judicata, the claim of unjust enrichment could still be advanced in the present proceedings.”) This raises a number of issues. For instance, tribunals must explore unjust enrichment claims and dismiss them with valid justifications, or risk retrying cases. If unjust enrichment escapes res judicata, and is considered a valid cause of action, then countries risk retrial or lengthened trials, and claimants should be exploiting this opportunity.
IV. CONCLUSION

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

The international legal community should achieve a level of comfort with the use of unjust enrichment as a cause of action. Unjust enrichment will soon reemerge in international investment disputes, and when it does, it will be far better for the community at large if the claim has universally applicable tenets. Indeed, *ADC v. Hungary* has already opened the door. As *Chorzow, Lena Goldfields*, the Iran-U.S. Claims Tribunal, recent ICSID cases, and scholarly treatises show, unjust enrichment is a general principle of international law and has been since the early twentieth century. Further, the fair and equitable treatment standard, which most BITs contain, protects customary international law. Thus, unjust enrichment is protected by the “fair and equitable treatment” standard in BITs. As the *Mihaly* hypothetical series shows, unjust enrichment meets ICSID jurisdictional thresholds, and meets a legal need inherent in increasingly prevalent intellectual property cases.

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

---