



The European Arbitration Review

2019

**Limits to the Principle of 'Full
Compensation'**

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Limits to the Principle of 'Full Compensation'

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Summary

INTRODUCTION

THE DIFFICULT QUESTION OF THE EVOLUTION OF DAMAGES OVER TIME

INTRODUCTION

Submissions dealing with damages often start with a reference to the 1928 *Chorzów* ruling by the Permanent Court of International Justice and a rehearsal of the principle of reparation:

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.^[1]

When this cannot be achieved through restitution, a financial compensation is sought. However, the mechanisms for assessing claimants' economic harm are not always straightforward, for example, in situations where the amount that achieves this objective varies over time and where what might look like an appropriate compensation at a certain point in time does not look as appropriate a few years later, a difficulty that was raised already in the 1920s in the widely discussed decision relating to the illegal seizure of the Chorzów factory.

In this article, we identify how objectives not strictly related to the pursuit of a 'full compensation', such as the perceived necessity to create adequate economic incentives not to breach international laws or to only compensate foreseeable losses also often intrude in decisions. These principles sometimes result in awards that, for better or worse, can sometimes fail to achieve this aim.

THE DIFFICULT QUESTION OF THE EVOLUTION OF DAMAGES OVER TIME

The passage of time and the unfolding of the events can result in changes in the perceived magnitude of a loss. An oil field might look like a highly attractive investment opportunity with a barrel at US\$100 (as was the case in late-2014), or a much less exciting one with oil prices at US\$50 per barrel (as was the case a few months later). The financial consequences of the expropriation of an oil field in 2014 will therefore be very different depending on whether they are considered at the time of the taking, or a few years later in a hearing room.

Unsurprisingly, the question of the date on which damages are assessed has been an important consideration in commercial disputes. A landmark decision in that respect is, of course, the *Chorzów* decision relating to the unlawful seizure by Poland of a German nitrate factory after World War I. In this decision, the tribunal identified two main questions for expert enquiry^[2] leading observers to believe that it saw fit to award some sensible combination of the value of the factory at the date of the taking, the profits that the factory would have generated after the expropriation until the date of the indemnification, and the increases in the value of the factory after the illegal seizure.^[3] However, the tribunal never finally decided in this issue as the case settled before an award was made.^[4]

Starting in 2006 with the *ADC v Hungary* decision^[5] (identified by some authors as a turning point in that regard),^[6] several decisions to take of account developments postdating the expropriation were made.^[7] These decisions usually referred to the *Chorzów* decision, and to article 35 of the International Law Commission articles, according to which:

[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.

In 2014, in the dispute between shareholders of the energy company Yukos and the Russian Federation, the tribunal articulated more explicitly the circumstances in which it considered appropriate to account for developments post-dating the breach in assessing a claimant's compensation. In the view of the tribunal, in cases of unlawful expropriation, 'investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision', but should receive no less than the value of their investment at the date of the taking because '... in the absence of the expropriation the investor could have sold the asset at an earlier date at its previous higher value.'^[8]

Similarly, on the basis that a claimant could have sold its investment after the date of the taking, a tribunal (*Unglaube v Costa Rica*) opted for a valuation date that was neither the date of the unlawful measures nor of the award. In that case, the claimant was found to have been unlawfully expropriated from a plot of land in Costa Rica. The tribunal decided that an appropriate compensation should reflect the possibility that, absent the measures complained of, the claimant might have sold her property when the market conditions were most favourable, sometime after the expropriation, but before the date of the award.^[9]

While meeting important objectives (such as ensuring that the claimant is rightly compensated for the loss of an opportunity to sell the investment after the taking, or ensuring the absence of windfall for the expropriating state) some have argued that this kind of ex post approach to the choice of the valuation date does not fully meet the 'full compensation' criteria.^[10]

This reasoning is not unsupported by economic analysis: under this compensation regime and setting aside the pain, costs and uncertainty associated with arbitration proceedings, an unlawfully expropriated investor finds itself economically better off immediately after the expropriation than immediately before. After the expropriation, the investor holds, in addition to the market value of its investment (as would have been the case in the absence of expropriation), an option to potentially benefit from subsequent increases in the value of its investment without exposure to the risks until the date of the award. Arguably, the compensatory regime used by the *Yukos* tribunal therefore does not put back the claimant in the situation in which they would have been, but transports them into a more desirable economic situation.

The Value Of The Use Of Ex Post Information In The Yukos Case

In the *Yukos* decision, the tribunal held that, having been unlawfully expropriated, the claimants were entitled to the higher of the value of their shares in Yukos on the date of the expropriation or the date of the award.^[11] Following this principle, the tribunal performed two assessments of the claimants' losses: one on the date of expropriation, which the tribunal decided had taken place in December 2004, and one on the date of the award, in June 2014.^[12]

To do so, the tribunal identified a transaction in the shares of Yukos dating from 2007, which it decided provided a useful estimate of the value of the shares at that point (US\$61.1 billion). The tribunal decided to extrapolate this estimate using the value of a Russian oil and gas equity stock index, both to the date of expropriation in 2004 and to the date of the award.^[13]

Observing that the index stood at approximately 300 points in late 2007 when the relevant transaction took place, the tribunal was able to estimate the value of the shares in 2004 (when the index traded at approximately 125 points) at approximately US\$21.2 billion, and in mid-2014 (when the index traded around 200 points) at approximately US\$42.6 billion.

Accounting for the dividends and interest that the claimants would have received and taking into account the contributory breaches from the claimants, the tribunal concluded that damages were US\$16.5 billion if assessed in December 2004^[14] and US\$50 billion if assessed in June 2014.^[15] Consistent with the principles cited above, the tribunal awarded the higher of these figures, US\$50 billion.

This asymmetric right to benefit from increases in the value of an asset without bearing the downside risks is akin to a 'call option'. Options can be readily valued using standard financial models based on parameters such as the price at which the option can be exercised, the volatility of the underlying asset (which determines the likelihood that it will increase over the exercise price) and the time before the expiry of the option.

In the *Yukos* case, the option granted to the investors by this compensatory framework can be estimated using simple option valuation models and the characteristics of the stock index used by the tribunal to extrapolate its estimate of the value of the shares. Using the Black Scholes model, the option granted to the investors can be valued at approximately US\$11 billion at the date of the taking.^[16] By the time of the award, with the favourable movement of energy asset prices between 2004 and 2014, the claimant's option had become worth some US\$33.5 billion at expiry.^[17]

The figures in the *Yukos* case are somewhat dramatic because of the high value of the shares in the first place, but in all instances becoming immune to downside risks on the value of an asset will make an investor economically better off. Sometimes, significantly so.

Interestingly, this 'option' to rely on ex post information for valuation purposes has been found appropriate where expropriations are unlawful (on the basis that restitution should be seen as the preferred mean of compensation, making the current value of the investment a suitable measure of the loss).^[18] As a result, whereas some might argue that a claimant's loss is the same regardless of the legal qualification of the expropriation, an unlawfully expropriated investor will receive a greater compensation than a lawfully expropriated investor, all else being equal.

Transfer At Below-market Prices

Disconnects between the level of compensation awarded and the economic harm suffered by a claimant also sometimes arise where a claimant is contractually bound to transfer some of the economic wealth it creates to related entities that are not party to the dispute. This can be the case when a company is bound to sell its production under long-term contracts at prices below market.

For example, in the *Tenaris v Venezuela* case, the expropriated company had entered into below-market price agreements with affiliated companies, apparently to shift some of its profits to lower tax jurisdictions.^[19] The issue faced by the tribunal was whether the investment should be valued on the basis of the lower profits that the claimant would realise by selling its production at below-market prices (the respondent's position), or of the higher profits that it could realise under normal economic circumstances (the claimant's

position).^[20] Using market prices in a discounted cash flow analysis would have resulted in a materially higher estimate of the value of the investment.

Although the tribunal concluded that the issue was moot given that it had rejected the discounted cash flow approach, it noted that, had the approach been relevant, then the value of the investment should have been based on market prices rather than actual selling prices. The rationale provided was that using below-market prices in the valuation would result in a windfall to the state, which would be able to sell the expropriated plant's production at market prices.^[21] Here a tribunal was again prepared to address concerns of a potentially unjust enrichment from the respondent over what might be seen as a strict pursuit of full compensation.^[22]

The Case Of Not-for-profit Companies

Similar issues can arise where claimants are not-for-profit organisations or utilities bound to sell production at cost. In such cases, tribunals have to decide whether claimants should be compensated where damages are, in effect, ultimately incurred by other economic entities not party to the arbitration.

The *Areva v TVO* case provides an interesting example. In this case, the respondent and counter claimant, TVO, a Finnish law cooperative, was bound to sell its production to shareholders at cost.^[23] Yet the company reportedly brought a claim for lost profits against Areva.^[24] Undoubtedly, this situation will have raised the question of whether non-for-profit organisations can recover 'profits' that would not, in fact, have been generated, even if the alleged breaches had not occurred.

At around the same time, Israel Electric Corporation (IEC, the Israeli publicly owned electricity utility bound to sell its electricity at cost)^[25] brought a claim against Egypt's EGAS for the early termination of its gas supply under a long-term contract, which reportedly led IEC to purchase alternative, more expensive, fuels for its power plants.^[26]

In that context, questions can arise as to whether companies selling at cost can suffer losses from higher costs as these higher costs would in principle simply translate into (and be automatically recovered in the form of) higher sales prices. At the same time, a finding of a breach, but an absence of remedy for the claimant, could be seen as unsatisfactory, because it would leave uncompensated those ultimately suffering the harm and not punish those having wrongly caused it. In this particular case, the tribunal decided to award damages to the IEC.^[27]

'Passing On' Defence

Similar dilemmas regularly arise in antitrust cases, where claimants affected by overcharges resulting from anticompetitive behaviours (eg, a cartel) sometimes recoup some of it by increasing their own selling prices.

In several jurisdictions across the world, courts have had to decide whether damages claimed by purchasers of overcharged goods should be reduced to account for the overcharge passed on to the claimant's own customers.

In Europe, a strict application of the 'full compensation' criteria has generally prevailed and courts will seek to ensure that a claimant receives no more than was lost, even if that results (as it frequently does) in a windfall for the respondent.^[28] On the other hand, courts in the United States have applied a diametrically opposite approach to damages and

usually award damages corresponding to the full overcharge, without consideration for any passing-on, thereby favouring the restitution of the unjust enrichment of the respondent, over the principle of full compensation of the claimant.[\[29\]](#)

Restitution Of Undue Profits

Preventing unjust enrichment is often regarded as a general principle of international law.[\[30\]](#) In many cases, it has been found to give a party a right of restitution of what has been taken or received by a respondent without legal justification. Where this gain is higher than what the claimant has lost, damages based on disgorgement will lead to disconnects between the level of compensation awarded and the economic harm suffered by a claimant.

While tribunals can be reluctant to award damages on the basis of the respondent's financial gains where the resulting compensation is seen to constitute a source of undue enrichment for the claimant,[\[31\]](#) this measure of damages is not uncommon where the harm to a claimant is significantly harder to assess than the gain of the respondent. This can, for example, be the case in relation to infringement on intellectual property rights or counterfeits, where certain national courts award damages based on the gains of the infringer rather than on the loss actually suffered by the claimant.[\[32\]](#)

Limitation Of Compensation To A Claimant's Foreseeable Harm

Several jurisdictions limit the available remedy from contractual breaches to the foreseeable financial consequences of the breach, which can sometimes prevent the full recovery of damages when the breach has caused losses unforeseeable at the time of the breach.[\[33\]](#) Interestingly, French law provides for exceptions to this principle where breaches are deemed particularly wrongful as in findings of 'dol'.[\[34\]](#) Under French law, which at the same time prohibits punitive damages, compensation can therefore differ depending on the severity of the breach.

In investment arbitrations, some have argued that unforeseeable developments post-dating the breach should be regarded as incidental causes of harm not directly flowing from the illegal act itself and, therefore, should not be taken into account in the assessment of the compensation.[\[35\]](#) However, as explained above, the question of the date on which damages should be assessed and the underlying tension between the desire to limit damages to the predictable harm, and that of 'fully compensating' a claimant by relying on the ex post knowledge of the actual consequences of the breach, has not yet been finally resolved in relation to arbitration proceedings.[\[36\]](#)

Contractual Limitation Of Damages

Liquidated damages are yet another obvious example of potential disconnect between damages and the compensation provided by courts and tribunals. However, a number of national laws provide for provisions aimed at ensuring that the level of disconnect between liquidated damages and the actual harm suffered as a result of the breach is not excessively high.[\[37\]](#)

Remedies Determined By National Laws Or Investment Treaties

The full compensation criterion can sometimes also conflict with treaty provisions or national legislation.

Many bilateral investment treaties provide that, in cases of expropriation, compensation should be assessed by reference to the 'market value' of the expropriated investment.[\[38\]](#)

However, there can sometimes be disconnects between the market value of an investment and the harm actually suffered by an investor. This can arise, for example, where the investor is subject to specific tax liabilities – for example, on dividends by virtue of its citizenship (eg, US citizens) – which would not apply to a potential purchaser of the asset. In this situation, the expropriated investor, who was deprived of an after-tax stream of dividends, could be argued to have suffered a lower loss than the market value of the expropriated asset, which might not reflect that liability if the purchaser of the asset is not subject to this tax.

In all these situations, tribunals have had to decide which principles should prevail and whether the provisions of treaties of national law should be favoured over the general principle of full compensation under international law. Not all tribunals confronted with these issues have taken the same view, which has led to a variety of approaches and decisions where, for better or worse, full compensation sometimes appears as a second-order priority in the decisions that they render.

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Notes
[1] This principle was set out in the *Chorzów* decision: 1928 PCIJ, Merits, Series A, No. 17, paragraph 124: 'The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.' This principle is also expressed in article 35 of the International Law Commission articles according to which '[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible and (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.'

[2] The questions for expert enquiry were (1) what was the market value of the factory at the date of the taking and what were the profits it would have generated had it been normally operated until the date of the award, and (2) what would be the present value of the plant today, had it remained in the hands of its previous owner?

[3] *Factory at Chorzów (Germany v Poland)*, Merits, 1928 PCIJ, Series A, No. 17, page 51.

The latter is identified as 'lucrum cessans' in the decision, probably best described in this context as a loss of opportunity for the claimant to benefit from a potential increase in the value of the factory after the taking.

[4] *Factory at Chorzów (Germany v Poland)*, Merits, 1928 PCIJ, Series A, No. 17 'As regards the *lucrum cessans*, in relation to question II, etc.'

[5] *Factory at Chorzów (Germany v Poland)*, Merits, 1928 PCIJ, Series A, No. 17, pages 53–54: 'In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.'

[6] *ABC v Hungary*, Award, ICSID Case No. ARB/03/16, 2 October 2006, see paragraphs 499 and 514.

See Floriane Lavaud and Guilherme Recena Costa in *The Journal of Damages in International Arbitration*: 'Valuation Date in Investment Arbitration: A Fundamental Examination of Chorzów's Principle'.

[7] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/09/30, Decision on Jurisdiction and the Merits of 3 September 2013, paragraph 343, Award, ICSID Case No. ARB/06/2, 16 September 2015, paragraphs 370 to 374, *Quiborax v Bolivia*, Award, ICSID Case No. ARB/10/15, 28 July 2015, (see paragraphs 761 to 764), *Zimbabwe v Zimbabwe*, Award, ICSID Case No. ARB/03/16, 2 October 2006 (see paragraphs 499 and 514).

See *Yukos v Russian Federation*, Final Award, PCA Case No. AA 227, 18 July 2014: 1767 and 1768.

See *Marion Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award paragraphs 305–396.

See, for example, the Partially Dissenting Opinion of Prof. Brigitte Stern dated 7 September 2015, paragraph 56, who considered that: '... the solution suggested by ADC and Yukos is biased in favor of the investors and that the solution which systematically applies the harshest damages on the Respondent State resembles punitive damages, which are excluded in international law. A legal solution cannot just be based on what is more favourable to one of the parties.'

[11] *Yukos v Russian Federation*, Final Award, PCA Case No. AA 227, 18 July 2014, paragraph 1763. The tribunal also holds that, in the case of an unlawful expropriation, as in the present case, Claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation.'

[12] *Hulley Enterprises Limited v Russian Federation*, Final Award, PCA Case No. AA 226, 18 July 2014, pages 543–504. As the claimants' valuation evidence had been largely rejected by the tribunal, and the respondents had not put forward any alternative valuation of the shares, the tribunal came up with its own assessments.

[13] *Hulley Enterprises Limited v Russian Federation*, Final Award, PCA Case No. AA 226, 18 July 2014, paragraphs 1783, 1788 and 1789.

[14] Comprising 70.5 per cent of US\$2.4 billion (dividends) plus US\$21.2 billion (value of Yukos shares) plus US\$7.6 billion (interest) equals US\$22.0 billion. After a 25 per cent reduction for the claimants' contributory fault, the tribunal concluded on losses of US\$16.5 billion with a valuation in December 2004. See paragraph 1819.

[15] Comprising 70.5 per cent of US\$45 billion (dividends) plus US\$42.6 billion (value of Yukos shares) plus US\$7.0 billion (interest) equals US\$22.0 billion. After a 25 per cent reduction for the claimants' contributory fault, the tribunal concluded on losses of US\$50 billion with a valuation in June 2014.

[16] Estimate based on the Black Scholes model assuming an exercise price equal to the value of the investment at the date of expropriation (US\$21.2 billion), using the volatility of the index used by the tribunal to extrapolate the value of Yukos at different dates (37.5 per cent), assuming for the purpose of this exercise a time to expiry of 10 years consistent with the lag between the expropriation date and the date on which the award was made, and assuming an interest rate of 3 per cent. Note that this estimate assumes perfect hindsight on these parameters, which are here used as proxies for their estimated value as at the expropriation date.

[17] Corresponding to the difference between the amount awarded of US\$50 billion and the value of the shares at the time of their expropriation of US\$16.5 billion.

[18] See *Damages in International Investment Law*, Ripinsky and Williams, BIICL 2008, section 4.1.3 (c), 'Differences in compensation for lawful and unlawful expropriation'.

[19] *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraph 535.

[20] *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraphs 500 and 506.

[21] *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraphs 547 and 548.

[22] *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraph 566.

[23] TVO Interim Report, January–September 2016, page 2: ‘TVO operates on a cost-price principle (Mankala principle). TVO’s goal is not to make profit or pay dividends. The shareholders are charged incurred costs on the price of electricity and thus in principle the profit/loss for the period under review is zero, unless specific circumstances dictate otherwise.’

[24] See, eg, ‘TVO Gets Good News in Ongoing Dispute with Areva’, *PowerMag*, 1 September 2017.

[25] See, eg, the 2017 Financial Reports of IEC, page 163: ‘In accordance with the Electricity Sector Law, the electricity charge rates and manners of update are determined exclusively by the Electricity Authority As a rule, the charge rate is determined in accordance with a mechanism of recognition of the costs that are required for fulfilling the duties of the Company as an essential service supplier, such as: fuels, operation and maintenance costs and capital costs (depreciation, financing and return on capital).’ The case settled before the final award.

[26] See, eg, ‘Israel wins gas supply claim against Egypt’, *Global Arbitration Review*, 7 December 2015: ‘Israel Electric argued that the termination had forced it to resort to more expensive fuels and increase consumer electricity rates by as much as 30 per cent to cover the cost.’

[27] ‘Israel wins gas supply claim against Egypt’, *Global Arbitration Review*, 7 December 2015: The award, announced on 6 December, requires Egyptian General Petroleum Corporation and Egyptian Natural Gas to pay US\$1.7 billion to Israeli state-owned Israel Electric Corporation.’

[28] Directive 2014/104/EU of the European Parliament and of the Council, 26 November 2014, Chapter 1, article 3 (Right to full compensation): ‘1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. 2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. 3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.’

[29] See, eg, ‘Study on the Passing-on of Overcharges, European Commission’, 2016, paragraph 48: ‘On policy grounds, and as early as in 1968 and 1977, the US Supreme Court declared the allegation of pass-on inadmissible as a matter of Federal US antitrust law.’ The Supreme Court has also reasoned that, as a matter of practicability, it would be too difficult to apportion damages down the distribution chain, a finding with which few economic experts confronted with these issues will disagree.

[30] See, eg, Rutsel Silvestre J Martha, *The Financial Obligation in International Law*, Oxford University Press, 2015 edition, pages 434–435.

[31] See, eg, *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, 20 May 1992, paragraph 247. Moreover, although unjust enrichment has on infrequent occasion been used by international tribunals as a basis for awarding compensation, it is generally accepted that the measure of compensation should reflect the claimant’s loss rather than the defendant’s gain. The question of whether the claimant was enriched by the project . . . is not, in the Tribunal’s view, relevant to the amount of compensation to be awarded in the present case.’

[32] See for instance *Guide to Damages in International Arbitration*, *Global Arbitration Review*, 2016 about *Quest Technologies v SARL Distrisud*. Recent cases have, however, shown the French courts, when assessing the level of financial recovery on the basis of the profits of the infringer, doing so without any reference to the actual loss suffered by the patentee.’

[33] This is generally the case under English and French law. Article 1231–3 of the French civil codes provides that: ‘A debtor is liable only of damages which were either foreseen or which could have been foreseen at the time of entering into the contract, except where non-performance was due to a gross or dishonest fault.’ See also *Hadley v Baxendale* case, [1854] EWHC Exch J70,: ‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie. according to the usual course of things, from such breach of contract itself, or such as

may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

Article 1231–4 of the French civil Code.

^[34] See, eg, the Partially Dissenting Opinion of Prof. Brigitte Stern dated 7 September 2015, ^[35] paragraphs 83 to 101.

^[36] This question has often been raised and debated in expropriation cases (cf *supra*), but much less so in relation to other breaches of international law (such as breaches of the fair and equitable treatment standard) where a variety of approaches has been retained by tribunals (with valuation dates at the date of the breaches and at the date of the award, sometimes relying on *ex post* information, and sometimes not).

^[37] See, eg, article 1231–5: 'Where a contract stipulates that the person who fails to perform shall pay a certain sum of money by way of damages, the other party may be awarded neither a higher nor a lower sum. Nevertheless, a court may, even of its own initiative, moderate or increase the penalty so agreed if it is manifestly excessive or derisory . . . '.

^[38] Market value is commonly defined as the price at which well-informed buyers and sellers would transact in a notional sale of the asset.



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