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Revisiting the *Chorzów Factory* Standard of Reparation – Its Relevance in Contemporary International Law and Practice

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Abstract

The *Chorzów Factory* standard of reparation has been consolidated in the mind-set of international actors since the International Law Commission's Articles on State Responsibility were adopted in 2001. This article analyses to what extent the recent case law of the International Court of Justice and other international practice concerning injury to aliens and property rights, especially expropriations, reflect the *Chorzów Factory* standard. It does so by considering whether 'full reparation' is the central issue in international disputes that involve state responsibility, if *restitutio in integrum* prevails over other forms of redress, and if the amount of compensation is established in light of the principle of 'full reparation'. The interaction between the secondary rules of state responsibility and the primary rules of expropriation will be considered in investor-state disputes. In addressing these questions, the role that adjudicating bodies understand they play in international law and the interests pursued by stakeholders – states and private investors – are examined.

Keywords

reparations – *Chorzów Factory* – ARSIWA – expropriation – compensation – public international law – investment law

1 Introduction

In *Chorzów Factory*, the Permanent Court of International Justice (PCIJ) outlined a standard of reparation ('full reparation') that has for a long time occupied a central place whenever the consequences of an internationally wrongful act are dealt with in public international law:

> 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.[1]

This standard has been considered as "a source of wisdom" in cases involving expropriation,[2] with scholars and judges referring to it in a broader context as a matter of "legal logic",[3] a "principle of reasoning" not requiring any further confirmation.[4] Ever since the International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001, the *Chorzów* standard of reparation received additional support. Today it seems to consolidate itself in the mind-set of international law actors as never before, as suggested by its increasing use by the International Court of Justice (ICJ)[5] and arbitral tribunals in foreign investment disputes.[6]

Instead of taking the numerous quotations from this passage as a sign of confirmation of its good state of health, as René-Jean Dupuy suggests,[7] this article

1 *The Factory at Chorzow* (*Germany* v. *Poland*), 13 September 1928, PCIJ, Merits, p. 47, <www.icj-cij.org/en/pcij-series-a>, visited on 10 July 2020.

2 R. Baxter, 'Forward', in R. Lillich, (ed.), *The Valuation of Nationalized Property* (The University Press of Virginia, Charlottesville, 1973), Volume II, p. *vii*.

3 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunal*s (Stevens and Sons, London, 1953) p. 389.

4 *Texaco Overseas Petroleum Company and the Government of the Libyan Arab*, 19 January 1977, 17 I.L.M, Merits, para. 96.

5 *See below* Section 3.

6 *See below* Section 6.

7 *Texaco* v. *Libya*, *supra* note 4.

rather questions the extent to which the standard of reparation depicted in *Chorzów* and reshaped in the ARSIWA reflects international practice. After an internationally wrongful act takes place, is 'full reparation' the central issue in a dispute between states? When reparation is indeed invoked, does restitution prevail over other forms of redress? Acknowledging in advance that international violations are not likely to be cost-free, is the amount of compensation set according to the principle of 'full reparation'?

To answer these questions, this article is organised as follows. The second section briefly sketches the elements of *Chorzów Factory* relevant to this discussion and the way the ILC builds upon them in the ARSIWA and the *Commentaries*[8] to define the standard of 'full reparation'. The third and fourth sections analyse to what extent recent decisions of the ICJ are consistent with *Chorzów*, as well as other case law of claims commissions and arbitral tribunals in cases involving personal injury to aliens and expropriation. Since the award of compensation is often found at the interface between the secondary rules of state responsibility and the primary rules governing expropriation and other pecuniary damages, as is the case with other responsibility regimes,[9] the interaction between both sets of rules is analysed to determine the extent to which the standard of 'full reparation' is applied in these scenarios. On this basis, the fifth section assesses the inter-state practice of lump-sum agreements negotiation in cases concerning compensation for expropriation during the second half of the twentieth century. The sixth and final section explores the relationship between public international law and contemporary foreign investment law with respect to reparations.

This article contends that a full insight of the relevance of the *Chorzów Factory* standard of reparation in contemporary international law and practice requires examining the interests and strategies that stakeholders pursue when they make use of it, as well as the role that adjudicating bodies understand they play in the international community when they are dealing with reparation related claims.

8 *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (A/56/10), 2001, <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, visited on 10 July 2020.

9 *See* K. Creutz discussing the difficulty of speaking abstractly about state responsibility without resorting to primary norms and the risk of using them 'one-sidedly' to strengthen general rules. 'State Responsibility. The General Part, *written by James Crawford*', 84 *Nordic Journal of International Law* (2015) pp. 608–609.

2 The *Chorzów Factory* Standard of Reparation: From the PCIJ to the ILC Articles on State Responsibility

In *Chorzów Factory*, the PCIJ followed on a previous proceeding in which it examined whether a series of Polish legislative and administrative decisions that affected the property rights of certain German citizens and companies controlled by them, including a nitrate factory in Chorzów, breached Articles 6 to 22 of the 1922 Geneva Convention.[10] These Articles established a specific regime to legally expropriate only certain assets of German citizens (i.e. large industrial companies, large rural properties) provided that certain conditions were met (i.e. notification prior to expropriation). In the Court's view, "apart from these cases or if these conditions are absent", Article 6 stipulated that the rights and interests of German nationals could not be liquidated in Polish Upper Silesia.[11] The reason for these "exceptional" provisions, which established a stricter-than-ordinary expropriation regime under general international law, was the imperative to maintain the continuity of economic life in the region.[12] Since the Polish decisions by which it ended-up taking possession of the property of German citizens, including the factory at Chorzów,[13] were "not the application of articles 6 to 22 but of acts contrary to the provisions of those articles",[14] its international responsibility was triggered.[15]

In light of these findings the PCIJ was again seized to determine whether Poland had an obligation to make good the damage sustained by the German companies that owned the nitrate factory.[16] Since at that stage of the procedure the factory was no longer the same in economic and legal terms after more than five years of use by Poland, Germany dropped the initial request for restitution by considering it impossible and claimed damages instead. The reasoning of the PCIJ revolved therefore around the criteria to fix the amount of payable damages for "unlawful dispossessions" – as opposed to "lawful liquidations" – in cases in which restitution was no longer possible.[17]

10 *Case concerning certain German interests in Polish Upper Silesia*, 25 May 1926, PCIJ, Merits, <www.icj-cij.org/en/pcij-series-a>, visited on 10 July 2020.
11 *Ibid.*, p. 21.
12 *Ibid.*, p. 22.
13 *Ibid.*, p. 35.
14 *The Factory at Chorzow* (*Germany* v. *Poland*), 13 September 1928, PCIJ, Jurisdiction, p. 30, <www.icj-cij.org/en/pcij-series-a>, visited on 10 July 2020.
15 *German Interests* case, *supra* note 10, p. 24.
16 *Chorzów* case, *supra* note 1, p. 25.
17 *Ibid.,* p. 47.

In this context the PCIJ brought to the fore the well-known standard of 'full reparation' quoted at the outset of this article. In elaborating on this dictum, the Court stressed a distinction on the legality and illegality of expropriations that, as will be seen below, will be crucial in investor-state disputes. According to the Court, lawful expropriations only require the payment of 'fair' or 'adequate' compensation, which usually corresponds to the value of the undertaking *at the time of dispossession*. For its part, an illegal expropriation such as that affecting German companies in breach of the Geneva Convention requires payment of the value of the undertaking at the *time of the indemnification*, in addition to the loss sustained as a result of the seizure.[18] The adoption of this high standard of reparation was, according to Goodman and Parkhomenko, a novelty in public international law in response to the seriousness of the national interests at stake. In their view, the unique objective of maintaining the economic life in Upper Silesia on the basis of the respect for the status quo "appears to explain why the PCIJ was prepared to determine the value of property not at the time of the dispossession but at the time of the indemnification".[19]

This line of reasoning, however, was not at the heart of the final decision of the PCIJ, since it ordered Poland rather abstractly to pay "compensation corresponding to the damage sustained by the German companies".[20] Its exact amount would be set in a future judgment that never took place since both parties reached an agreement and withdrew the suit.

Yet the reasoning of the PCIJ deserves closer attention, as more recent attempts to codify the law of state responsibility, particularly the ARSIWA, derive their "basic architecture from the conceptual structure articulated in *Chorzów Factory*".[21] According to the ARSIWA, having breached an international obligation, the state incurs in a twofold general obligation to cease the wrongdoing (Article 30) and to make 'full reparation' (Article 31). Cessation is a future-oriented obligation concerned with ending an ongoing breach of international law to safeguard the validity and effectiveness of the underlying primary rule.[22] For its part, "the obligation placed on the responsible state by Article 31 is to make 'full reparation' in the *Chorzów Factory* sense".[23]

18 *Ibid.,* pp. 48–50.

19 R. Goodman and Y. Parkhomenko, 'Does the Chorzów Factory Standard Apply in Investment Arbitration? A Contextual Reappraisal', 32 *ICSID Review* (2017) p. 322.

20 *Chorzów* case, *supra* note 1, p. 63.

21 D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, Oxford, 2005) p. 85.

22 *Draft articles, supra* note 8, p. 89.

23 *Ibid.,* p. 91.

Accordingly, the ILC understands that reparation is an "umbrella concept" adopting different forms of redress following a certain sequence.[24] Article 35 grants primacy to restitution *strictu sensu* since its purpose to re-establish "the situation that existed prior to the occurrence of the wrongful act … most closely conforms" to the general principle of 'full reparation' as portrayed in *Chorzów Factory*.[25] Only if the obligation to make restitution "is not possible" – in the case at hand the impossibility to restore the nitrate factory to Germany – does the ARSIWA posit that the state can be discharged from the obligation to make 'full reparation' providing compensation.[26] However, compensation is also due for complementary reasons, that is to say, when restitution – or its equivalent – is effectively made but, nevertheless, it does not amount to the restoration of the situation that *would have existed* in the present had the wrongdoing not been committed. Article 36 specifies that the state is "under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution … including loss of profits as established". This article then follows up on the PCIJ's holding that the value of the compensation "is not necessarily limited to the value of the undertaking at the moment of dispossession" but must include, if needed, "damages for loss sustained which would not be covered by restitution in kind or payment in place of it".[27] Finally, measures of satisfaction are the residual form of reparations inasmuch as, under Article 37, they are subsidiary to restitution and compensation.

The way in which the umbrella concept of reparation is built is certainly sound from an abstract perspective – but is it really representative of the practice of adjudicating bodies and stakeholders?

3 Recent Case Law of the ICJ on Reparations

Rosalyn Higgins is of the opinion that already by 1995 states began to reconsider the clarification of an issue of law or the declaration of the substantive violation of a breach as the paramount objective of the proceedings before the ICJ.[28] Inasmuch as the parties are increasingly asking for a wider range

24 C. Brown, *A Common Law of International Adjudication* (Oxford University Press, Oxford, 2017) p. 186.

25 *Draft articles, supra* note 8, p. 96.

26 *Ibid.,* p. 97.

27 *Chorzów* case*, supra* note 1, p. 47.

28 R. Higgins, *Themes and Theories* (Oxford University Press, Oxford, 2009) p. 1353.

of remedies, the ICJ is progressively engaging in more complex holdings than mere declaratory judgments. An increasing number of cases has been brought before the ICJ in which states make explicit use of the standard of 'full reparation' when they frame their claims, a conceptualisation the Court seems willing to endorse to solve disputes and shape remedies.

3.1 *The Primacy of Restitution*

In some of the recent cases in which the ICJ dealt with reparation, particularly restitution, the subject matter and outcome of the dispute actually seem to revolve around the obligations of cessation and continued performance.[29] In *Gabčíkovo-Nagymaros Project*, for instance, the ICJ was seized to determine whether Hungary's decision to suspend and abandon the construction of a series of locks in the Danube River in Nagymaros, a commitment that was assumed under the 1997 Budapest Treaty ratified with the former Czechoslovakia, was lawful. The same issue was raised concerning the unilateral decision of the former Czechoslovakia to divert the Danube's waters in the bypass canal in Gabčíkovo following Hungary's inaction. In assessing the conduct of the parties and determining its legal consequences, including the obligation to make reparation, the Court held that both states committed an internationally wrongful act and owed mutual reparation. The ICJ knew very well that the "factual situation" in the Danube at the time of the judgment exceeded the literal application of the treaty, as well as the practical impossibility of the restitution of the states of affairs provided for in it.[30] Given the pragmatics of the case, the parties were encouraged to reach an agreement that better met the objectives of the treaty, with the ICJ stressing that the best way for them to discharge from the obligation to make reparation was through compliance with the treaty in force under the light of the rule of *pacta sunt servanda*.[31]

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29 The lack of clear boundaries between the obligation of restitution and cessation has attracted the attention of academics for a long time, at least since *Temple of Preah Vihear* (*Cambodia* v. *Thailand*), 15 June 1962, ICJ, Merits, para. 36, <www.icj-cij.org/files/case-related/45/045-19620615-JUD-01-00-EN.pdf>, visited on 17 December 2019. For a discussion, *see* C. Gray, 'Remedies', in C. Romano, K. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2014) p. 871.

30 "[I]t would be an administration of the law altogether out of touch with reality if it were to order those obligations *to be fully reinstated* .... when the objectives of the Treaty can be adequately served by the existing structures." *The Gabčíkovo-Nagymaros Project* (*Hungary* v. *Slovakia*), 25 September 1997, ICJ, para. 134. <www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>, visited on 17 December 2019.

31 *Ibid.,* para. 141–4, 150.

In other cases, distinctions between the obligations of cessation and reparation are boiled down when the ICJ shapes remedies. In *Jurisdictional Immunities* the ICJ examined whether Italy violated the jurisdictional immunity that Germany enjoys under international law by allowing, amongst other issues, to file claims against it in Italian courts, seeking reparations for violations of international humanitarian law perpetrated by the Third Reich during the Second World War.[32] The Court found that Italy violated customary obligations of state immunity and was therefore obliged to make full reparation for the damaged caused. Making explicit reference to the ARSIWA, the Court ruled the cessation of the wrongful act and "to reverse the effects which have already been produced" to re-establish "the situation which existed before the wrongful acts were committed".[33] However, the remedy ordered by the Court after the fifth submission of Germany, whether interpreted as "legal restitution"[34] or cessation, was one and the same, namely to ensure that all decisions of the defendant's judicial authorities that violated the immunity enjoyed by the claimant "cease to have effect".[35] In a similar vein, in *Arrest Warrant* the ICJ addressed a dispute between the Democratic Republic of the Congo (DRC) and Belgium over an international arrest warrant issued by the latter against the Congolese minister for foreign affairs at the time, Mr. Abdoulaye Yerodia. The ICJ found that Mr. Yerodia enjoyed full immunity from criminal jurisdiction and inviolability as titular minister of foreign affairs when the arrest warrant was issue and circulated internationally, compromising Belgium's international responsibility and making it responsible to make full reparation. In response to the claimant's request "to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered",[36] the ICJ ordered the defendant to put an end to the breach of international law, namely to cancel the warrant in question, to bring about full reparation.[37]

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32 *Jurisdictional Immunities of the State* (*Germany* v. *Italy: Greece intervening*), 3 February 2012, ICJ, para. 37. <www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>, visited on 17 December 2019.

33 *Ibid.,* para. 137.

34 J. McIntyre, 'The Declaratory Judgement in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?', 29 *Leiden Journal of International Law* (2016) p. 189. Legal restitution is understood as "the alteration or revocation of a legal measure taken in violation of international law, whether a judicial decision or an act of legislation or even a constitutional provision". C. Gray, 'The Different Forms of Reparation: Restitution', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) p. 591.

35 *Jurisdictional Immunities, supra* note 32, para. 139(4).

36 *Ibid.,* para. 31.

37 *Ibid.,* para. 76.

This lack of definitive borders can also be seen from another angle, where acts that can arguably be interpreted as restitution have been ruled under the heading of cessation. In *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand intervenin*g) Australia initiated proceedings against Japan alleging that it failed to comply with its international obligations for the preservation of marine mammals and the marine environment by implementing a whaling programme as part of a larger scientific research program in the Antarctic (JARPA II). The ICJ found that JARPA II could broadly be characterised as pursuing scientific research. However, the permits granted by Japan to kill, take and treat whales on a large scale could not be understood as reasonable in relation to the achievement of the legitimate research objectives set by the program.[38] Following Australia's submission, the Court ordered the defendant to revoke any permit authorising whaling activities and refrain from granting any license in the future in this regard.[39] Although this order is not very different from the remedy of "legal restitution" issued in *Jurisdictional Immunities*, as pointed out by Juliette McIntyre, "the Court did not suggest that the order was related to the undoing of consequences arising from the unlawful act, or that the order should be considered reparatory".[40]

The recent case law of the ICJ also questions the hierarchy that, according to the ARSIWA, informs the different means of redress. The figure of restitution, notwithstanding its legal primacy, is strongly dependent on the nature of the primary rule breached and the effects produced by the breach.[41] To be sure, there are cases in which the pre-eminence of restitution is hardly questionable, for example, those involving people's life or liberty.[42] Yet the growing number of pleadings related to restitution and the ICJ's most frequent use of it in the abstract, perhaps since the ARSIWA were adopted, cannot overlook the fact that restitution is very often unavailable or inadequate, a reason why "actual awards of restitution have been rare – and handed down cautiously".[43]

In dealing with the range of possibilities opened by the faculty of the states to specify what form reparation should take (ARSIWA, Article 43(2)), the ICJ

38 *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand intervening*), 31 March 2014, ICJ, para. 223–7, <www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf>, visited on 17 December 2019.

39 *Ibid.,* para. 245.

40 McIntyre, *supra* note 34, p. 190.

41 Gray, 'The Different Forms of Reparation: Restitution'*, supra* note 34, p. 594.

42 *United States Diplomatic and Consular Staff in Tehran* (*US* v. *Iran*), 24 May 1980, ICJ, para. 95(3), <www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf>, visited on 17 December 2019.

43 Gray, 'Remedies', *supra* note 29, p. 875.

does not grant any intrinsic primacy to restitution, nor allocate the means of redress following a sequence from the most important to the least important one. It rather frames the dictum and remedies according to what the parties have asked for, weighting each request flexibly and carefully. Therefore, the ICJ has ruled out restitution[44] or other material reparation[45] simply because the parties did not ask for them, confining its dictum to a principle-based assertion on the mutual obligations of each state instead of ordering the payment of compensation and damages.[46]

3.2 *The Award of Compensation*

Once the primacy of restitution and re-establishing the *status quo ante* has been questioned, it is important to consider whether the compensatory practice of the ICJ holds to the standard of 'full reparation'. Given that "many sovereign interests do not lend themselves to quantification", the existing case law is narrow and limited when it comes to granting compensation.[47] The first case in which the amount of compensation was fixed was *Corfu Channel*. The ICJ was called upon to establish, among other issues, whether Albania was responsible for the mine explosions that occurred in its waters in October 1946, which affected British vessels, and whether any duty to pay compensation arose due to the resulting damage and loss of human life.[48] Since the defendant failed to notify British warships of the existence of mines on its territory, the Court determined that Albania was responsible for breaches of customary international law and liable to pay compensation.[49] In estimating the award according to the replacement value of the ships "at the time of their loss",[50] the Court seems to distance itself from the 'full reparation' standard, which would have arguably required the payment of its value estimated at the time of the indemnification. Concerning crew deaths and injuries, the Court simply approved the proposal made by the United Kingdom without any justification

44 *Chorzów* case, *supra* note 1, para. 118, 208.

45 *LaGrand* (*Germany* v. *United States of America*), 27 June 2001, ICJ, para. 125, <www.icj-cij.org/files/case-related/104/104-20010627-JUD-01-00-EN.pdf>, visited on 17 December 2019.

46 *Gabčíkovo-Nagymaros* case, *supra* note 30, para. 152.

47 J. Barker, 'The Different Forms of Reparation: Compensation', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) p. 603.

48 *Corfu Channel* (*United Kingdom* v. *Albania*), 9 April 1949, ICJ, Merits, pp. 6, 15, <www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>, visited on 17 December 2019.

49 *Ibid.,* pp. 22–3.

50 *Corfu Channel Case* (*United Kingdom* v. *Albania*), 15 December 1949, ICJ, Indemnity, p. 249, <www.icj-cij.org/files/case-related/1/001-19491215-JUD-01-00-EN.pdf>, visited on 17 December 2019.

or additional consideration on how to repair cases that involve the payment of non-monetary losses.[51]

This limited approach varies in *Diallo*, a case in which the DRC was found responsible for illegally carrying out arrests, detentions and the expulsion from the state of Mr. Ahmadou Sadio Diallo, a Guinean national, and under obligation to make reparation, including compensation.[52] The Court first considered that cases involving human rights abuses involve the award of plural means of redress, not only satisfaction but also compensation.[53] Second, it acknowledged that 'full reparation' should also seek to make good all resulting material losses that follow human rights violations.[54] To the extent that there is "a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered", compensation includes different heads of damages, namely non-material damages, losses accrued and income lost.[55]

In *Diallo* the Court seems to restate that the existence of causality between the wrongdoing and the injury is the central issue that determines the full award of compensation, following upon the *Genocide* case. In this occasion, despite the fact that Serbia was found to have breached the 1948 Genocide Convention by failing to prevent and punish the massive killings of Bosnian Muslims in Srebrenica,[56] no compensation was ordered. In the Court's view, it was precisely the lack of a sufficiently direct and certain link between Serbia's unfulfilled obligation to prevent genocide and the injuries that justified denying any compensation claim and declaring that the ICJ's findings provided sufficient reparation.[57] Nevertheless, it is important to bear in mind that *Diallo* revolved around a relatively simple case of human rights abuses, one that did

51 *Ibid.*, pp. 249–250.

52 *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), 30 November 2010, ICJ, Merits, <www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>, visited on 17 December 2019.

53 *Ibid.*, para. 161.

54 *Ibid.*, para. 163.

55 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), 19 June 2012, ICJ, Compensation, para. 14, 18–55, <www.icj-cij.org/files/case-related/103/103-20120619-JUD-01-00-EN.pdf>, visited on 17 December 2019.

56 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), 26 February 2007, ICJ, para. 438, 449, 450, <www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>, visited on 17 December 2019.

57 According to the Court, it was not sufficiently clear that "the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations". *Ibid.*, para. 462–3. For a comment and critique, *see generally* M. Milanovic, 'State Responsibility for Genocide: A Follow-Up', 18 *European Journal of International Law* (2007) p. 669.

not involve widespread and more serious violations such as those that result from armed conflicts. It remains to be seen whether in these circumstances, as the pending judgement on reparations in *Armed Activities on the Territory of the Congo* anticipates,[58] the ICJ orders the payment of compensation under the 'full reparation' standard, as carefully applied in *Diallo*, or is guided by more flexible and pragmatic considerations as in *Genocide*. In the latter case, the remedy was, according to some views, a Solomon-like decision aiming at balancing the interests of both parties, therefore expressing its commitment to political constraints instead of addressing past wrongdoings.[59] The far-reaching statements about 'full reparation' thoroughly addressed with the ARSIWA as a background[60] were seemingly reduced to "mere symbolism, by setting aside any truly meaningful form of reparation".[61]

In any case, the recent remedial practice of the ICJ highlights some difficulties that may arise when it comes to defining the amount of compensation in light of 'full reparation'. These challenges will be addressed in the follow sections related to death and personal injury to aliens and contemporary investment law, but it may be useful to anticipate them as stated in the ICJ. First, when there are several actors who contribute to the same injury in a way that makes it difficult to extract precisely the degree of contribution of each one, the question arises of how compensation will be apportioned: "what portion of the injury caused to a third party the actors are responsible for?"[62] In a case

58 In addition to violations of international human rights law and international humanitarian law, Uganda was held responsible for illegal use of force, violation of sovereignty and territorial integrity, military intervention, looting, plunder and exploitation of DRC's natural resources. For its part, the DRC was declared responsible for mistreating Ugandan diplomats, not providing Ugandan Embassy and diplomats with effective protection, and to prevent Ugandan property from being seized from the Embassy. If the parties do not reach an agreement about the nature, form and amount of the reparation due, the case is expected to return to the ICJ to decide. *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgement of 19 December 2005, I.C.J. Reports 2005, para. 259–260, 342, 345 (11). In a communication issued on 13 November 2019, the ICJ decided to postpone the hearings that were to take place between Monday 18 and Friday 22 November 2019 to resolve the issue of reparations. The dates of the rescheduled oral procedures have not yet been announced. Press Release No. 2019/48, ICJ, <www.icj-cij.org/files/case-related/116/116-20191113-PRE-01-00-EN.pdf>, visited on 17 December 2019.

59 M. Schnetter, 'Remedies at the International Court of Justice. A new analytical approach', *Bucerius Law Journal* (2017) p. 88.

60 *Genocide* case, *supra* note 56, para. 459–466.

61 Milanovic, *supra* note 57, p. 694.

62 A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (2013) p. 391.

of shared responsibility, such as *Genocide*,[63] even if the causal link is demonstrated, it is questionable to hold Serbia responsible to pay full compensation. Arguably, the compensatory payment should be less when there is a finding of lack of prevention of genocide than the commission of genocide as such.[64] Second, when compensation is expected to address non-material damages, such as the claimant's feeling of grief, humiliation and shame, the standard of 'full reparation' offers little guidance; rather it ends up replaced by "adequate compensation" whose specific amount is determined according to equity considerations.[65] It is clear that when the award of compensation is based on equity, it does not conform to the concept of 'full reparation'.[66] Third, even when it comes to material damages, the same notion of restoring the situation that in all likelihood would have existed in the present had the wrongdoing not been committed, including the award of lost profits, is difficult to apply in practice since such a claim is affected by inherent speculative elements.[67] As the ICJ acknowledges, this is not an insurmountable obstacle: compensation for lost profits implies some reasonable uncertainty that should not be confused with pure speculation.[68] However, even in regimes with a clearer and stronger mandate in relation to the duty to grant compensation, namely investment law, accrued losses are often granted instead of lost profits, given the reluctance of tribunals to compensate claims with speculative elements.[69]

The most frequent recourse to the principle of 'full reparation' by the ICJ has been accompanied by increasing difficulties that are predictable to arise when such a principle is put into practice. However, challenges related to the exact valuation of damages, as stated, for example, in different methodologies for assessing environmental damages, have not prevented the Court from arranging compensation, nor renouncing the legal principles that underlie 'full reparation'. In *Certain Activities Carried out by Nicaragua in the Border Area*, the ICJ stressed that a "fair and reasonable interference" that leads to an "approximate" determination of the amount of damage is sufficient to order compensation.[70]

63 V. Bílková, 'Armed Opposition Groups and Shared Responsibility', 62 *Netherlands International Law Review* (2015) p. 71.

64 Milanovic, *supra* note 57, p. 691.

65 *Diallo* case, *supra* note 55, para. 24.

66 *Amoco International Finance Corporation* v. *Iran*, Partial Award, Iran-US Claims Tribunal, 27 I.L.M. 1320 (1988), para. 206.

67 *Diallo* case, *supra* note 55, para. 49.

68 *Ibid.*

69 *See below* Section 6.

70 *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), 2 February 2018, ICJ, Compensation, para. 35, <www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>, visited on 17 December 2019.

In so doing, the Court held that compensation should attempt to restore as far as possible the situation that would have existed in the present had the wrongdoing not been committed.[71]

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While the primacy of restitution and its purpose of restoring the *status quo ante* seem to be undermined by attempts to look forward, *cease* the violation and fulfil acquired commitments, when the dispute reaches the compensation phase the ICJ seems to hold a stronger grip on the standard of 'full reparation'. While technicalities related to the measurement and apportioning of damage have not prevented the ICJ from abstractly supporting the 'full reparation' standard, "the public nature of the interests at stake" may have played an important role in undermining its effective application,[72] as *Genocide* may suggest. It is notable that in the majority of cases where compensation was ordered, at the request of the parties, the Court allowed them to enter into previous negotiations to determine the amount and form that compensation should take. Therefore, the findings on state responsibility and reparations, instead of leading to the straightforward application of the relevant rules serve as negotiating instances that allow states to re-establish their mutual relation.[73] These decisions have allowed commentators to characterise the proceedings before the ICJ as a "moderate and institutionalized form of negotiation [that] must achieve a substantive consensual result".[74]

This conclusion can be grasped from another angle, by highlighting the distinctive mechanisms used by the Court when it deals with reparation related issues. The cases analysed above reflect the ICJ's emphasis on adhering to the *non-ultra petita* rule;[75] motivate the parties to resort to bilateral negotiations; safeguard the validity and effectiveness of the primary rule; and to assume that the principle of good faith is a sufficient criterion to resolve the dispute and to refrain from ordering specific measures of reparation. The Court also often respected the states' free choice of means to comply with the remedies

71 *Ibid.*, para. 41–42, 88–89.

72 Nollkaemper and Jacobs, *supra* note 62, p. 407.

73 *See*, for instance, *Gabčíkovo-Nagymaros* case, *supra* note 30, para. 151–2; *Fisheries Jurisdiction* (*United Kingdom v. Iceland*), 25 July 1974, ICJ, Merits, para. 76, <www.icj-cij.org/files/case-related/55/055-19740725-JUD-01-00-EN.pdf>, visited on 17 December 2019.

74 Schnetter, *supra* note 59, p. 86.

75 On the scope of the *non-ultra petita* rule, according to which it is the duty of the Court "to abstain from deciding points not included in submissions", *see Jurisdiction Immunities* case, *supra* note, para. 43.

ordered. This distinctive form of adjudicative procedure makes clear that the ICJ's judgments and remedies look more like vehicles to promote certain values of the international regime, such as the peaceful settlement of disputes or conflict prevention, instead of granting 'full reparation'.[76] Dinah Shelton is of the view that "settling a dispute in a manner that lessens the likelihood of future conflicts is a value that some international tribunals may consider as important as upholding the international rule of law, and more important than ensuring fulfilment of all claims of reparations".[77]

4 The *Chorzów* Standard in Arbitral Decisions on Injury to Aliens and Expropriations

Many of the claims endorsed by states during 'the golden period' of arbitration, which is traced back to the Jay Treaty of 1794 (1800–1939), were related to death or personal injury to aliens arising from civil rebellion, international conflict, and varied maritime disputes, while a smaller number of cases dealt with property controversies concerning expropriations and compensations.[78] However, claims related to injury to aliens, which figured prominently until the Second World War, decreased significantly thereafter and were mainly replaced by property rights disputes arising from nationalization and expropriation processes by developing countries.[79]

4.1 *Death and Personal Injury to Aliens in the Mexico-USA General Claims Commission*

From the case law concerning death or personal injury to aliens at the beginning of the 20th century, it is arguable that states paid damages according to the *Chorzów* standard. This can be illustrated with state responsibility for injury to aliens provoked by private actors since states are not held responsible for the wrongdoing as such but rather for the lack of due diligence – understood as "the failure to take such measures as to prevent, redress or inflict punishment

76 Schnetter, *supra* note 59, p. 88.

77 Shelton, *supra* note 21, pp. 94–5.

78 R. Lillich and B. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (University Press of Virginia, Charlottesville, 1975) pp. 27, 200.

79 F.V. García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation', 12 *University of Miami Inter-American Law Review* (1980) p. 45.

for acts causing the damage".[80] *Janes* is perhaps the paradigmatic case in this regard[81] and can be considered the prototype of more than 40 similar claims presented to the Mexico-USA General Claims Commission.[82]

In *Janes,* the Commission singled out that state duty to make reparation varied depending on whether it failed to prevent or punish private actors. Only in cases where it can be assumed that there is some kind of "complicity" between the state and the wrongdoer can the state be rendered responsible for the very consequences of the individual's harm and, therefore, be obliged to pay "full and total reparation".[83] When complicity is not involved, however, the Commission avoided assigning "too much responsibility" to the state by forcing it "to shoulder all the blame".[84] Thus, the state is not "directly responsible for making good all the damages caused by the crime itself" but for paying "reasonable indemnity" taking into account the claimant's grief and the mistrust and lack of safety resulting from the failure to prosecute and punish the offender.[85] This indemnity is due not because of an obligation to pay reparation *strictu sensu*, but as a means of "satisfaction for damages of the stamp of indignity, grief, and other similar wrongs".[86]

This analytical framework was applied in cases involving death or personal injury to aliens in many decisions made by other commissions in the early 20th century.[87] In most of them, 'full reparation' was never granted; instead, the partial amount of compensation recognised varied significantly and randomly according to different interpretations of what 'denial of justice' meant, ranging from failure to apprehend and prosecute, delays on the prosecution, improper trial procedures, to inadequate sentencing.[88] Already in 1957, Special Rapporteur F.V. García-Amador warned about the difficulties to establish any reference upon which it could be determined whether acts or omissions give rise to state responsibility and the extent to which reparation was due from

80 ILC, *Yearbook of the International Law Commission*, Volume II (Document A/CN.4/.), p. 3.
81 *Laura M. B. Janes et al* (*U.S.A*) v. *United Mexican States*. 16 November 1925, Mexico-USA General Claims Commission, *Report of International Arbitral Awards* (*R.I.A.A.*), Vol. IV, United Nations, 2006, paras. 19–26.
82 B. Jacobus, *The Jurisprudence of the General Claims Commission, United States and Mexico under the Convention of September 8, 1923* (Springer, The Hague, 1938), p. 159.
83 *Janes* case, *supra* note 81, para. 20, 25.
84 Nollkaemper and Jacobs, *supra* note 62, p. 392.
85 *Janes* case, *supra* note 81, para. 25.
86 *Ibid.*, para. 24.
87 *See generally* UN *R.I.A.A*, *supra* note 81.
88 Shelton, *supra* note 21, pp. 59–62, 68–70.

these conflicting arbitral decisions since they "do not yield any general and objective criteria".[89]

Furthermore, these cases involve additional challenges to those mentioned above concerning the apportioning of 'full reparation' in cases of shared responsibility. As to the difficulty of determining to what extent each actor will assume its share when delivering reparation, it should be added that very often non-state actors are not directly bound by any primary obligation. Therefore, non-state actors' responsibility for their contribution to the injury may remain in the twilight, outside the scope of state responsibility.[90]

4.2 *Expropriations and Other Property-Related Disputes in the Arbitral Tribunals of Libya and Iran: the Interplay between Primary and Secondary Rules*

4.2.1 On the Interplay between Primary and Secondary Rules in Expropriation Related Cases

So far, analysis has been made of *Chorzów* in the light of the law of state responsibility, that is, the "secondary rules" that apply whenever there is a breach of a "primary rule".[91] However, *Chorzów* has also been considered a source of wisdom regarding the definition of the content of the specific, primary rules of expropriation.[92] What stands out in the reasoning of the PCIJ is the differentiation between legal and illegal expropriations and the various consequences that arise from each. As mentioned, illegal expropriations, such as the taking of property by Poland, represent an internationally wrongful act whose consequences must be eliminated in accordance with state responsibility standards ('full reparation'). Compensation should aim, therefore, not only to replace *restitutio in integrum* but to re-establish the situation that in all likelihood would have existed in the present had the wrongdoing not been

89 F. V. Garcia Amador, *International Responsibility, Second report by the Special Rapporteur*, A/CN.4/106 (1957), p. 13.

90 J. d'Aspremont *et all*, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction', 62 *Netherlands International Law Review* (2015) pp. 54, 61.

91 On the distinction of primary/secondary rules, the ILC explained: "[I]t is one thing to define a rule and the content of the obligation it imposes [primary rules], and another to determine whether that obligation has been violated and what should be the consequences of the violation [secondary rules] ... The emphasis [of the ARSIWA] is on the secondary rules of state responsibility. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules." *Draft articles, supra* note 8, p. 31.

92 R. Baxter, *supra* note 2; *AMOCO* case, *supra* note 66, para. 191; *B.H. Funnekotter and others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (2009), para. 110, <www.italaw.com/cases/467>, visited on 3 July 2020.

committed (the value of the undertaking "at the time of the indemnification" plus "the compensation of loss sustained as the result of the seizure").[93] Had Poland's conduct been a legitimate expropriation, the PCIJ made it clear that "fair compensation" or the payment of "just price" was good enough to "render it lawful".[94] In so doing, the PCIJ reaffirmed the content of a fundamental norm that governs expropriation, not exempt from some controversy, often labelled as the 'Hull formula'. Accordingly, expropriation pursuing a public purpose is legitimate provided that it is followed by *prompt*, *adequate* and *effective* compensation.[95] Where the state does not pay "fair compensation" for what has been legitimately expropriated, this "mere wrongdoing" only amounts, according to the PCIJ, to "compensation limited to the value of the undertaking at *the moment of dispossession*, plus interest to the day of payment".[96] Hence, a cardinal distinction is emphasised between, on the one hand, "reparation of damage caused by a wrongful expropriation" and, on the other hand, "payment of [*prompt*, *adequate* and *effective*] compensation in case of lawful expropriation".[97] The former is a matter of "international law relating to international responsibility of states", while the second is "imposed by a specific rule of the international law of expropriation".[98]

What is not entirely clear in this reasoning is the interaction between primary and secondary rules in case of lack of compensatory payment due to legal expropriation. When the state fails to comply with its primary obligation to pay 'fair compensation' or 'just price' when it expropriates, should the consequent duty to pay compensation to be understood as cessation or reparation? Is there a secondary obligation to pay 'full reparation' for damages resulting

93 *Chorzów* case, *supra* note 1, p. 47.

94 *Ibid.*

95 In the context of the massive expropriation process of the Mexican government against United States investors, the minister of foreign affairs of Mexico and the secretary of state of the United States, Cordell Hull, held a diplomatic exchange on the right of states to expropriate for the purpose of implementing redistribution policies and whether compensation was required. The position of the Mexican government was that in international law there is no rule "which makes obligatory the payment of compensation for expropriations of a general and impersonal character like those which Mexico has carried out for the redistribution of land". The United States, while recognising "the right of a sovereign state to expropriate property for public purpose" replied nevertheless "no government is entitled to expropriate private property, for whatever purposes, without provision for *prompt*, *adequate* and *effective* compensation". M. M. Whiteman, *Digest of International Law: 1963–1973* (US Department of State, Government Printing Office, Washington D.C.), Vol VIII, p. 1020.

96 *Chorzów* case, *supra* note 1, para. 124.

97 *AMOCO* case, *supra* note 66, para. 193.

98 *Ibid.*

from breaching the primary obligation? How should 'full reparation' be understood in this case?

There are at least two ways to address these questions. On the one hand, it can be considered that a violation of the primary rule that establishes the duty to pay 'fair compensation' in case of legitimate expropriation requires, in addition to compensatory payment (measured against the value of the undertaking at the time of dispossession), the secondary obligation to pay 'full reparation'. Since the illegality is based on the lack of compensation, the compensatory payment must be considered as the act that complies with the *continuing* obligation *to cease* the wrongdoing, which aims to safeguard the effectiveness of the underlying primary rule – in this case, that the right to expropriate implies the duty to compensate. For its part, damages addressed by the secondary duty to provide 'full reparation' would be those resulting from the lack of compensatory payment, for example, injuries resulting from late payment – not the value of the undertaking, which is addressed by fulfilling the obligation of cessation. On the other hand, it can also be argued that the lack of compensatory payment should not be treated as continuous wrongdoing. The obligation to pay compensation after the wrongdoing, therefore, is not interpreted as cessation but reparation. Since the expropriation was legal, compensation should be measured against the value of the undertaking at the time of dispossession. Which means that compensatory payment is not intended to restore the situation that would have existed if the act had not been committed since this situation would imply the value of the undertaking at the time of the indemnification.

The case law discussed below is not clear in this regard. Tribunals seem to frame the compensatory payment as the act that fulfils the obligation *to cease* the wrongdoing and safeguards the effectiveness of the primary rule. Nevertheless, compensatory payment is understood as a reparation measure aiming at wiping out 'damages' caused by wrongdoing (that is, the lack of compensatory payment). In none of the cases arises a secondary obligation to pay 'full reparation' in addition to the primary obligation to deliver compensatory payment.

4.2.2 The Case Law of the Arbitral Tribunals in Libya and Iran

In *Texaco* v. *Libya*, the tribunal considered that, as a matter of customary international law, the state's right to expropriate or nationalise foreign assets is unquestionable if "reparation in one form or another" is granted.[99] This principle is limited when the state and the investor reach an international agreement

99 *Texaco* v. *Libya, supra* note 4, para. 59, 60.

in which "stabilization clauses" that cannot be altered for a particular period are granted.[100] Once these "irretraceable rights" are in force, in the absence of a risk that threatens its sovereignty, the state cannot expropriate unless mutual consent is achieved.[101] In other words, the tribunal considered that these contractual commitments prevailed over the right of the state to expropriate.[102] The illegal act, therefore, was the expropriation carried out by Libya as such, triggering its international responsibility. Making explicit reference to *Chorzów Factory*, the sole arbitrator made a literal application of the 'full reparation' standard and ordered *restitutio in integrum strictu sensu*.[103]

This line of reasoning, however, was not followed in the similar case *Libyan American Oil Co.* v. *Libya* (LIAMCO). The tribunal, while acknowledging the importance of the "sanctity of contracts" understood that the pursuit of public purpose triumphed over the commitments reached in the concession agreement.[104] Provided that compensation is paid, the decision to expropriate is lawful even in the absence of mutual consent.[105] The illegal act, therefore, was not the expropriation as such but the lack of prompt compensation.[106] Without making explicit reference to the obligation *to cease* the wrongful act, the tribunal seems to be clear that compensatory payment is intended to honour the primary rule.[107] In discussing *Chorzów*, the tribunal dismissed *restitutio in integrum* as well as 'full reparation' as the criterion to define the amount of compensation.[108] By discarding the payment of lost profits, it granted "damages" under the formula "equitable compensation".[109]

In *American International Group Inc.* v. *Iran*, the state was considered responsible, once again, not for the taking of property, but the lack of compensatory payment.[110] Although the tribunal considered that the state was obliged

100 *Ibid.,* para. 62.
101 *Ibid.,* para. 67–70.
102 *Ibid.,* para. 71.
103 *Ibid.,* para. 97–109, 114.
104 *Libyan American Oil Company* (*LIAMCO*) v. *Government of the Libyan Arab Republic*, Award, 20 I.L.M. 1 (1981), pp. 112–114.
105 *Ibid.,* pp. 114, 118.
106 *Ibid.*, pp. 118, 120, 125.
107 "The obligation to compensate a nationalized concessionaire is a necessary consequence of the right of nationalization … The nationalization measures complained off constitute a source of obligation, for which LIAMCO is entitled to." *Ibid.*, p. 130.
108 *Ibid.*, pp. 93–113, 125, 134–139.
109 *Ibid.*, p. 150.
110 *American International Group In.* (*AIG Inc.*) v. *Iran*, Award, Iran-US Claims Tribunal, 23 I.L.M. (1984), p. 8.

to comply with the primary rule,[111] the heading to fulfil the obligation breached was not *to cease* the unlawful act but to "compensate the claimants for damages for the taking of their shares".[112] Since, in the tribunal's opinion, there was an agreement between the parties on the duty to compensate, the issue under dispute was "the standard of compensation to be applied".[113] To define the amount of compensation to be granted, the tribunal adopted the standard depicted in *Chorzów* in case of lawful expropriation – although the amount finally granted fell short of that standard and was considered by Arbitrator Mosk in a concurring opinion a "compromise solution".[114]

In the previous cases, the legality of the expropriation as such was an important factor in determining the standard and amount of compensation. In cases involving small undertakings of property that were not considered to pursue public objectives, however, the debate over the legality or illegality of expropriation became secondary. In *INA Corporation* v. *Iran* and *Sedco Inc.* v. *NIOC*, the tribunal made the point that rules applying to large-scale nationalisations as part of processes of socio-economic reform are different from "a discrete expropriation of alien property".[115] The tribunal added that discrete expropriations are entitled to 'full compensation' "whether viewed as an application of the Treaty of Amity or customary international law and regardless of whether or not the expropriation was otherwise lawful".[116] Further cases involving smaller claims, characterised by some scholars as "limited" expropriations, were decided following the compensation standard as depicted in the Treaty of Amity, without the tribunal making any distinction.[117] While in some later expropriations, which can be interpreted as a part of the efforts made by the government to make socio-economic reform,[118] awards did not match the "full reparation" standard, such as *AMOCO*. After the tribunal thoroughly addressed the distinction made in *Chorzów* on the (il)legality of the undertaking and considered legal the expropriation, it discarded that this case was governed by the rules on state responsibility and reparations.[119] Since it was not

111 According to the Tribunal, "since compensation was not made after the date of nationalization, that would be legally required". *Ibid.*

112 *Ibid.*, p. 9.

113 *Ibid.*

114 *Ibid.*, para. 1, 20–2 (Arbiter Mosk, Concurring Opinion).

115 *Case Concerning SEDCO, Inc. and National Iranian Oil Company and Iran*, Interlocutory Award, Iran-US Claims Tribunal, 25 I.L.M. (1986), pp. 7, 11.

116 *Ibid.*, p. 13.

117 M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, Cambridge, 2017) pp. 435–437.

118 *Ibid.*

119 *AMOCO* case, *supra* note 66, para. 189–196.

even considered if the state failed to provide compensation given the claimant's lack of request, it was understood that the dispute revolved around the amount of 'fair compensation' according to the primary rule.[120] Consequently, the tribunal did not apply the 'full reparation' standard but instead ordered to pay an amount that corresponded to the value of the assets at the time of dispossession, "without the addition of future lost earnings".[121]

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Many reasons explain the different outcomes analysed here, among them, the role that tribunals understand they play in international law, whether protecting the claims of each state, the interests of private investors, or upholding values affecting the international community as a whole. The main difference, for example, between *Texaco* v. *Libya* and *LIAMCO*, lies in the variable weight that both tribunals granted to the principle of *pacta sunt servanda* and the protection of foreign investors. In considering that expropriation as such was illegal and the high standard of 'full reparation' was required, the sole arbitrator in *Texaco* sought primarily to endorse the 'sanctity' of the agreements and protect the investors by fully supporting reparation claims. While in *LIAMCO*, in maintaining that the respect of international commitments is not sacred scripture and the award of compensation must be 'tempered' when it comes to legal nationalisation, the tribunal protected a different set of values. In its view, 'partial compensation' was "justified by the necessity of taking into consideration not only the interest of the owner of the property nationalised but also those of the nationalising state".[122]

By the same token, a particular set of values that inspire the international order explains the compensatory practice of the Iran-US claims tribunal. In *AIG*, Arbitrator Mosk considered in support of his criticism of the final amount of the award, which was fixed below the standard of full compensation, that even in cases of legitimate expropriation 'partial compensation' "is incompatible with fundamental fairness and other public and international interests" – these interests meaning the encouragement of "the much-needed international investment in the developing countries".[123] This line of thought, which considers that the main function of international judicial bodies is to enforce the full compensation formula in expropriation cases, as a means to protect "international cooperation in the economic and financial fields" from "the

120 *Ibid.,* para. 134–7.

121 *Ibid.*, para. 341.

122 *LIAMCO* case, *supra* note 104, p. 145.

123 *AIG* case, *supra* note 110, pp. 18–19.

hazards of the legislation of developing countries in which [foreign] capital has been invested", has already taken root even in the ICJ.[124] While other substantial values are often pursued in the ICJ,[125] in the Iran-US claims tribunal Mosk's views seemed to prevail, particularly in arbitrators selected by the United States. This is in contrast to Iranian arbitrators who endorsed a tempered standard of compensation defending a different understanding of the international economic order.[126]

These different approaches were the expression of a deeper debate about the validity of the primary rule of paying prompt, adequate and effective compensation after expropriation since the Hull formula began to be seriously questioned from the Second World War.[127] This controversy rarely reached the tribunals; instead, it unfolded mainly in the state practice of dispute resolution. A closer look at the second part of the 20th century suggests that states resorted less and less to third party adjudication to evoke reparations.[128]

5 Inter-State Agreements and the Critique of the Hull formula during the Second Half of the Twentieth Century

For ideological reasons or because they were considered disproportionately affected, developing countries were quite reluctant to address expropriation related claims through third party adjudication, instead handling such disputes through bilateral negotiations that led to the so-called lump sum agreements.[129] Under these agreements, recovery was granted through *en bloc*

124 *Anglo-Iranian Oil Co. case* (*United Kingdom* v. *Iran*), 22 July I952, ICJ, Preliminary Objections, para. 14–6 (Judge Carneiro, Dissenting Opinion), <www.icj-cij.org/files/case-related/16/016-19520722-JUD-01-05-EN.pdf>, visited on 17 December 2019.

125 *See supra*, Section 3.

126 Sornarajah, *supra* note 117, p. 432. This is not to say that tribunals necessarily consider that the award of full compensation in expropriation cases is always the best option to protect the objectives of foreign investment. As will be discussed later in this article, contemporary investment law tribunals may have other views on what the objectives of investment law are and the best way to protect them, thus emphasising the importance of other remedies such as restitution to achieve those objectives. *See*, for instance, *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (2013), para. 570–1.

127 *SEDCO* case, *supra* note 115, p. 8.

128 Approximately 95 per cent of international claims have been channelled through lump sum agreements over the second half of the 20th century worldwide. Lillich and Weston, *International Claims*, *supra* note 78, pp. 3, 43.

129 R. Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens', In R. Lillich (ed.) *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia, Charlottesville, 1983) p. 8.

settlements in which the global sum the respondent agreed to pay usually did not cover the total value of the affected property – in many cases, the award only amounted to a 'partial compensation' of less than half of the estimate.[130]

While there was not much debate about this, a deep controversy emerged about the extent to which the practice of not paying 'adequate' compensation eroded the primary rules of compensation for expropriation.[131] This controversy was fuelled by the very nature of the agreements, largely negotiated for considerations of convenience (i.e. "resumption of diplomatic or trading relations"),[132] explicitly or implicitly incorporating a waiver bringing the dispute to an end[133] – indicating, for some, the recognition by states of the integrity of the primary rules on compensation from which they departed only under the circumstances.[134]

In *AIG*, Iran denied the existence of a binding rule of 'adequate' or 'full' compensation in customary international law – meaning in this context the *total* value of the property at the time of dispossession plus interests up to the date of the award – for it considered that "resolutions of United Nations and post-war settlement practice" reflected an international rule of 'partial compensation' *if any*.[135] *If* sovereign states decide to award compensation for expropriation, the 'non-binding' rule of 'partial' compensation should be followed, as reflected by the practice of lump-sum agreements negotiation.[136] Hence, according to this three-way argument, "lump-sum agreements constitute practice which involves the rejection of full compensation" without affecting the sovereign power of the states to unilaterally rule out the payment of any compensation.[137]

It could be considered that the UN General Assembly endorsed this position through a number of resolutions issued over the 1970s. In the most explicit one, *The Charter of Economic Rights and Duties of States* it advocates the absolute right of the states to expropriate foreign property without any restrictions imposed by international law. The duty to provide any redress, accordingly, is

130 F.V. García-Amador, 'International Economic Order', *supra* note 79, p. 45. Likewise, *see* Sornarajah, *The pursuit of Nationalized Property* (Martinus Nilhoff, Dordrecht, 1986) p. 235.

131 *Texaco* v. *Libya* case, *supra* note 4, para. 69; *LIAMCO* case, *supra* note 104, pp. 140–142; *AIG* case, *supra* note 110, pp. 18–19; *SEDCO* case, *supra* note 115, p. 8.

132 *SEDCO* case, *supra* note 115, p. 8.

133 Lillich and Weston, *International Claims*, Appendix B, *supra* note 78, pp. 284–327.

134 B. M. Clagett, 'The Expropriation Issue before the Iran-United States Claims Tribunal: Is Just Compensation Required by International Law or Not', 16 *Law and Policy in International Business* (1984) p. 871.

135 *AIG* case, *supra* note 110, pp. 6–7, 9.

136 *Ibid.*, p. 9.

137 Sornarajah, *supra* note 130, p. 216.

subject only to the "relevant laws and regulations and all circumstances that the [expropriating] State considers pertinent"[138] – a statement that, read alongside with contemporary resolutions,[139] has been interpreted as allowing states to determine if any redress is going to be issued at all.[140]

In contrast, many industrialised or capital-exporting states have insisted that expropriation or nationalisation of natural resources must be followed by the payment of *prompt*, *adequate* and *effective* compensation. Supporters of this view often interpret 'adequate' compensation under *Chorzów Factory* – "the leading public international law decision concerning the obligation to pay compensation for expropriation".[141] In addition, by resorting to the *Barcelona Traction Case*, they put the prevailing inter-state practice at the time of international dispute resolution in the background,[142] since the determination of the content of the agreements is not "thought by the states to be required by international law (i.e. *opinion juris*)"[143] but is the result of negotiated resolutions that should be deemed *sui generis*.[144] Thus, lump-sum agreements negotiated since the Second World War were not considered a source of international law somehow weakening or creating exceptions to the rule of 'adequate' or 'full' compensation,[145] to the same extent that an amicable solution achieved during a process in a tort or contract case does not undermine the rules of damages.[146]

While this 'dispute' remained open, the practice of both sides seemed to accept quietly and consistently the practice of awarding 'partial compensation'. In spite of their allegedly 'political' and 'casuistic' nature, extraordinary consistency has been found in the use of language, content and organization of the texts of the agreements.[147] As the tribunal in LIAMCO eloquently held,

138 UN General Assembly, *Charter of Economic Rights and Duties of States* (A/RES/29/3281), Art 2. 2(c).

139 UN General Assembly, *Declaration on the Establishment of a New International Economic Order* (A/RES/S-6/3201), Art. 4(e).

140 F.V. García-Amador, 'International Economic Order', *supra* note 79, p. 51; Clagett, *supra* note 134, pp. 830–1.

141 Clagett, *supra* note 134, p. 828.

142 *Barcelona Traction, Light and Power Company, Limited*, 5 February 1970, ICJ, para. 62, <www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>, visited on 17 December 2019.

143 *SEDCO* case, *supra* note 115, p.8.

144 *AIG* case, *supra* note 110, p.18.

145 *Ibid.*

146 *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, U.S. Court of Appeals, Second Circuit, 658 F.2d 875 (2d Cir. 1981), p. 892.

147 F. Dawson and B. Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation,' 27 *Fordham Law Review* (1961) pp. 750–1.

the Hull formula retained "only value of a technical rule for the assessment of compensation and a useful guide in reaching settlement agreement".[148]

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Lump-sum agreements contributed to shake the centrality of the Hull formula for reasons deeper than the usual acceptance of 'partial compensation'. These agreements are the product of horizontal decision-making nourished by a process of bargaining in which claim and counterclaim are balanced until reaching a satisfactory arrangement.[149] Under this negotiation, customary rules on compensation laid on the background as the point of departure upon which each party justifies its position, those same rules being appropriated as bargaining stances influencing the negotiation as constraints, inducements or pressures depending on the interests of each one.[150] The US Court of Appeals, for instance, underlined that in the absence of such rules there would be "no incentive for an expropriating state to negotiate a settlement".[151] However, seldom is this negotiation process about applying the fixed, predetermined and ultimately "metaphysical" standard of *prompt*, *adequate* and *effecti*ve compensation[152] but finding a pragmatic solution helping to restore "the previously cordial relations that is facilitated by the settlement of large numbers of claims on a once-and-for-all basis".[153]

Perhaps because the rules on reparations are instrumental for states in pursuit of their interests, developing states and those that went through decolonization processes, while rejecting the primary rules of compensation for expropriation, did not question the very notion of 'full reparation'. Rather, they demanded, for instance, the recognition of their right to restitution and full compensation for the exploitation of, and damages to, their natural resources.[154]

148 *LIAMCO* case, *supra* note 104, p. 143.

149 Dawson and Weston, *supra* note 147, pp. 754–5.

150 R. Bettauer, 'International Claims: Their Settlement by Lump Sum Agreements, 1975–1995 (Review)', 94 *American Journal of International Law* (2000) p. 812.

151 *Banco de Cuba* case*, supra* note 146.

152 Dawson and Weston, *supra* note 147, p. 749.

153 Lillich and Weston, *International Claims*, *supra* note 78, p. 34.

154 UN *Declaration on the Establishment of a New International Economic Order*, *supra* note 139, para. 4(f). R. C. A. White contends that Paragraph 4 (f) "elevates the notion of unjust enrichment often used to discount any compensation agreed to be paid by the expropriating state into a principle that such states have the right to restitution and full compensation" for the exploitation of their natural resources by former colonial powers.

Therefore, the interests of the state very often outweigh the actual materialization of reparation related claims. It is important not to forget the limited contours of diplomatic protection in which inter-state disputes for injury to aliens often unfold. John Dugard recalls that *if* a state decides to espouse any claim of reparation on behalf of its citizens "[i]t may agree to a partial settlement, which often happens".[155]

This issue touches an aspect whose absence both in the ARSIWA and the *Comments* has been criticised: "whether there is an obligation on the successful claimant state to pay over any compensation it may have received to the injured national".[156] It leads to the question of the position of the individual under public international law, in this case, the relevance, if any, of international rules on reparation regarding the protection of its interests. Since when states engage in diplomatic protection "international reparation is always owed to the state and not to the private person", it has been accepted that a rule of customary law limiting the absolute power of the state to deny the injured citizen the payment of the compensation received simply does not exist.[157]

While *Chorzów* indicates little about the interests of the affected person under traditional diplomatic protection,[158] there is still a place to explore when analysing the relevance of the standard of 'full reparation' in international law. At the historically neglected intersection in which the individual calls upon a foreign state to repair damages that result from international wrongdoing, the principle of 'full reparation' seems to return to the practice of international law through the back door of foreign investment. In this regard, the narrowing of inter-state interactions with globalisation made it increasingly difficult to maintain dichotomies that, particularly over the decade of 1970, radically differentiated developing and developed states concerning foreign investment.[159] Bilateral investment treaties (BITS) and multilateral investment treaties (MITS) including clear and enforceable rules regulating expropriation

See 'A New International Economic Order', 24 *The International and Comparative Law Quarterly* (1975) p. 546.

155 J. Dugard, *Seventh report on diplomatic protection*, 58th session of the ILC (A/CN.4/567), p. 102.

156 *Ibid.,* p. 93.

157 *Ibid.*, p. 102.

158 In *Chorzów* Germany was not defending the interests of its citizens but its own. However, the PCIJ underscored the marginal position of the individual under traditional public international law recalling that damage suffered by an individual "can only afford a convenient scale for the calculation of the reparation due to the state". *Chorzów* case, *supra* note 1, p. 28.

159 Clagett, *supra* note 134, p. 869.

and compensation thus began to be concluded.[160] The proliferation of these instruments is longstanding, but it has been increasing significantly since the last decade of the 20th century.[161] As the ICJ recognised in *Diallo*, given the widespread ratification of BITs and MITs "the role of diplomatic protection somewhat faded" in what regards the protection of the rights of foreign investors and the settlement of their disagreements.[162]

6 The *Chorzów* Standard and the Hull Formula in Foreign Investment Law

6.1 *The Applicability of (General) International Law to Investment Law*

The immediate applicability of the international law of state responsibility to investment law has been widely discussed. There are two main reasons that prevent "presuming" its application to investor-state disputes.[163] On the one hand, the law of state responsibility deals with inter-state disputes and not with the "the invocation by a non-state actor (i.e. investor) of a state's liability for breach of a treaty obligation".[164] It should not be forgotten that in *Certain German Interests* and *Chorzów Factory*, the PCIJ was clear that the case in question was "a dispute between governments and nothing but a dispute between governments", thus differentiating the secondary rules of state responsibility "governing the reparation" from "the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage".[165] As the Court further noted, the inter-state dispute in question was unfolding without prejudice to the avenues opened by the Versailles Treaty and the Geneva Convention for individuals to resort to arbitral tribunals to file claims against the state regarding the fixation of the compensation owed or the lack of prompt and adequate compensation after expropriation; that

160 *See generally* UN Conference on Trade and Development, *International Investment Instruments: A Compendium*, Vol. XII (UNCTAD/DITE/4.) and *Regional Integration, Bilateral and Non-governmental Instruments*, Vol. V (UNCTAD/DITE/2).

161 Today there are 2337 BITs and 389 treaties with investment provisions in force, <investmentpolicyhub.unctad.org/IIA>, visited on 17 December 2019.

162 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), 24 May 2007, ICJ, Preliminary Objections, para. 88, <www.icj-cij.org/files/case-related/103/103-20070524-JUD-01-00-EN.pdf>, visited on 17 December 2019.

163 Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' 74 *British Yearbook of International Law* (2003) pp. 186–193.

164 *Ibid*., p. 186.

165 *Chorzów* case, *supra* note 1, pp. 26- 28.

is, individual-state disputes related to the application of *primary rules*.[166] In addressing the two regimes the Court was wary to recall that although they apply simultaneously they do so "in a different plane" – meaning that "the damage suffered by an individual is never identical in kind with that which will be suffered by a State".[167]

On the other hand, Article 55 of the ARSIWA explicitly recognises the existence of self-contained regimes of state responsibility, special rules of international law governing "the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State". Since modern investment law establishes one of such sub-systems, the secondary rules of state responsibility do not apply under Article 55 in what concerns investor-state disputes.[168] Likewise, in the commentary to Article 28, the ILC made it clear that Part 2 of ARWISA "does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State".[169]

That said, the application of general international law to investment law disputes already appears to be "too entrenched and internalized",[170] with *Chorzów* becoming "the most frequently cited case in investment treaty arbitration".[171] This is especially true for ICSID cases, where arbitral tribunals' *ratione materiae* allows them to resort to international law whenever the treaty does not establish comprehensive rules on compensation for expropriation (i.e. illegal expropriations) or when the consequences of certain wrongdoings lack specific regulation (i.e. non-expropriation cases).[172]

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166 *German Interests* case, *supra* note 10, p. 33.

167 *Chorzów* case, *supra* note 1, p. 28.

168 Douglas, *supra* note 163, p. 187.

169 *Draft articles, supra* note 8, pp. 87–8.

170 D. A. Desierto, 'The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in Chorzow', 55 *Columbia Journal of Transnational Law* (2017) p. 395.

171 B. Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press, Oxford, 2011) p. 48.

172 Article 42(1) of the ICSID convention reads: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute and *such rules of international law as may be applicable*." Emphasis added. In interpreting this article, there is agreement that customary and general principles of international law play an important "supplementary" function "at least as to BIT obligations that are silent as to scope and content". *Accession Mezzanine Capital* et al v. *Hungary*, ICSID Case No. ARB/12/3, Award (2015), para. 68, <www.italaw.com/cases/1765>, visited on 3 July

6.1.1 The Interplay between Primary and Secondary Rules in Investment Law: Restating the Distinction of the (Un)lawfulness of Expropriation

Although modern investment treaties do not contain rules regarding how restitution should be granted in expropriation cases,[173] they do establish clear rules on compensation. According to the World Bank, most BIT s and pertinent multilateral instruments concluded to prompt foreign investment have comparable dispositions related to the duty to pay prompt, adequate and effective compensation due to expropriation.[174] In most of the BIT s, states decide that 'adequate' compensation shall be equivalent to the 'fair market value' of the investment immediately before the expropriation, including interests to the date of the final payment.[175]

Although investment treaties largely avoid the unresolved debate about the duty, if any, to pay 'partial' or 'full' compensation in cases related to nationalisation discussed above,[176] the current practice of tribunals has reshaped this issue under the distinction of the (un)lawfulness of expropriation drawn up in *Chorzów* and the difference between primary and secondary rules. In the renowned 2006 *ADC* v. *Hungary* case, the tribunal first made it clear that the standard for paying compensation in the BT refers to legal takings of property, meaning expropriations carried out in pursuit of the public interest, observing due process, without discrimination, and followed by adequate

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2020. Furthermore, it has been argued that international law may also have a "corrective" function of domestic law when the latter does not meet customary standards. *Autopista Concesionada de Venezuela, C.A.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (2003), para. 207, <www.italaw.com/cases/3458>, visited on 3 July 2020. Hence, unless parties "expressly and unequivocally" exclude international law from the applicable law to decide the dispute, which although possible, not very likely to occur, it is clear that international law applies even if the parties "simply choose an applicable national law". *Cambodia Power Company* v. *Kingdom of Cambodia*, ICSID. Case No. ARB/09/18, Jurisdiction (2011), para. 332–334, <www.italaw.com/cases/3445>, visited on 3 July 2020. For a further discussion, *see* K. Parlett, 'Claims under Customary International Law in ICSID Arbitration', 31 *ICSID Review* (2016) pp. 439, 440–7.

173 Sahabi, *supra* note 171, p. 63.

174 *World Bank. Legal Framework for the Treatment of Foreign Investment. Volume II*: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, 1992, para 39, <documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf>, visited on 17 December 2019.

175 *See generally*, *A Compendium*, *supra* note 160.

176 *S.D. Myers, Inc.* v. *Government of Canada*, UNCITRAL Case, Partial Award (2000), para. 307, <www.italaw.com/sites/default/files/case-documents/ita0747.pdf>, visited on 17 December 2019.

compensation.[177] However, when an expropriation is illegal, and in the absence of a compensation standard in the BT that foresees this situation, the tribunal held that the criteria established in the BT should be discarded to avoid conflating "compensation for a lawful expropriation with damages for an unlawful expropriation".[178] Therefore, instead of using the formula enshrined in the BT to determine the amount of 'adequate' compensation, the tribunal established that the state was under the obligation to make 'full reparation' for the expropriation – meaning the value of the investment not at the time of dispossession but on the date of the award "since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed".[179]

This line of reasoning has been followed several times in recent arbitration cases,[180] with tribunals awarding compensation in amounts that clearly exceed the value of the investment at the time of dispossession[181] but fall short of its hypothetical value at the time of the indemnification given the intrinsic speculative elements of such a calculation.[182]

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177 *ADC Affiliate Ltd and others* v. *Hungary*, ICSID Case No. ARB/03/16, Award (2006), para. 429–444, 482, <www.italaw.com/cases/1026>, visited on 3 July 2020.

178 *Ibid*., para. 481.

179 *ADC, supra* note 177, para. 497. Similarly, *see ConocoPhillips* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Jurisdiction and Merits (2013), para. 343, <www.italaw.com/cases/321>, visited on 3 July 2020; *Quiborax S.A. et al v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (2015), para. 370–7, <www.italaw.com/cases/855>, visited on 3 July 2020.

180 *Siemens AG* v. *Argentina*, ICSID Case No. ARB/02/8, Award (2007), para. 349–352, <www.italaw.com/cases/1026>, visited on 3 July 2020; *Compañía de Aguas SA* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Award (2000), para. 8.2.3-6, <www.italaw.com/cases/309>, visited on 3 July 2020; *ConocoPhillips* case, *supra* note 179, para. 342–343; *ConocoPhillips* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (2019), para. 226–8, <www.italaw.com/cases/321>, visited on 3 July 2020; *Quiborax S.A, supra* note 179, para. 326–330; *Yukos Universal Limited* v. *The Russian Federation*, PCA Case No. AA227, Award (2014), para. 1765, <www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>, visited on 3 July 2020.

181 *Siemens* case*, supra* note 180, para. 325; *Compañía de Aguas* case, *supra* note 180, para. 8.3.19–20; *Marion Unglaube* v. *Republic of Costa Rica*, ICSID Case No. ARB/08/1, para. 316–320, <www.italaw.com/cases/1134>, visited on 3 July 2020.

182 *See Draft articles, supra* note 8, p. 104; S. Ripinsky, 'Assessing Damages in Investment Disputes: Practice in Search of Perfect', 10 *Journal of World Investment and Trade* (2009), pp. 15–17; Sabahi, 'Compensation, Damages, and Restitution', in B. Sabahi, N. Rubins, D. Wallace, Jr. (eds.), *Investor-State Arbitration* (Oxford University Press, Oxford, 2019) para. 21.44–21.46 and 21.77–21.84. The latter recognising an increasing readiness of tribunals to award damages with greater speculative elements, for instance, under the heading of 'loss of chance'.

However, as the tribunal acknowledged itself, *ADC* was an extraordinary case in which the distinction of the legality of the expropriation had a direct impact on the definition of the compensatory payment. In this case, the value of the investment increased significantly from the time of the expropriation until the date of the award.[183] In most other cases, the value of the investment decreases after the decision to expropriate is made public. Due to this, claimants often advocate the application of the compensation standard enshrined in the BIT to recover the greatest amount of resources regardless of the expropriation's legality since said standard is "clear and would give them no less than would Chorzów".[184] Thus, the practical relevance of the distinction of the (un)lawfulness of expropriation has been questioned, especially when there is no increase in the property's value "between the date of the taking and the date of the judicial or arbitral decision awarding compensation".[185]

Given the importance for investors of recovering the greatest amount of resources after expropriation processes,[186] the *Chorzów* standard seems to be applied instrumentally for these purposes. In *Teinver S.A.*, the tribunal accepted the claimant's position that "in an unlawful expropriation scenario, they [are]entitled to the greater of the fair market value at the time of the taking [this is, BITs usual stipulation] and the fair market value at the date of the Award [this is, *Chorzów*'s 'full reparation']".[187] This position, in which "the claimant can have the best of both worlds"[188] was first suggested in *ADC* and clearly formulated in *Yukos*.[189] As such, it opens itself to criticism because the application of the primary rules on compensation and the secondary rules of state responsibility is biased in favour of investors.[190] When the value of the assets at the time of the award is greater than at the time of the expropriation, the *Chorzów* standard of 'full reparation' is called upon.[191] When this is not the case, the primary rule that sets the amount of 'adequate' compensation as the

183 *ADC* case, *supra* note 177, para. 496.

184 C. N. Brower and M. Ottolenghi, 'Damages in Investor-State Arbitration', 4 *Transnational Dispute Management* (2007) p. 9.

185 *Funnekotter* case, *supra* note 92, para. 110–2; *Teinver S.A.* et al v. *The Argentine Republic*, ICSID Case No. ARB/09/1, Award 2017, para. 1112–5, <www.italaw.com/sites/default/files/case-documents/italaw9235.pdf>, visited on 3 July 2020.

186 Desierto, *supra* note 170, p. 438; G. Stephens-Chu, 'Is it Always All About the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration', 30 *Arbitration International* (2014) p. 662.

187 *Teinver* case, *supra* note 185, para. 1115.

188 Brigitte Stern, Partially Dissenting Opinion, *Quiborax* case, *supra* note 179, para. 43–59.

189 *Yukos* case, *supra* note 180, para. 1763–9.

190 Stern, *supra* note 188, para. 43–59.

191 *See ADC* case, *supra* note 177; *ConocoPhillip* case (Award), *supra* note 180, para. 214–6, 226; *Quiborax* case, *supra* note 179, para 378.

fair market value of the investment before the expropriation applies, as a guarantee to avoid a decrease in the value of the investment.

6.1.2 The Secondary Rules of Reparations in Non-Expropriation Cases: What Place for Non-Compensatory Remedies?

Arbitral tribunals are increasingly resorting to the standard of 'full reparation' in non-expropriation cases involving non-equitable and fair treatment, lack of full protection and security and other breaches.[192] Contrary to lawful expropriation, these cases lack special rules governing compensation. In *S.D. Myers* the tribunal held that the drafters of the North American Free Trade Agreement (NAFTA), by not identifying any particular criteria for assessing compensation in cases that do not involve expropriation, left it open "to tribunals to determine a measure of compensation taking into account the principles of both international law and the provisions of the NAFTA".[193] The tribunal went further by stating that no matter what approach the parties take to measure compensation, it should reflect the *Chorzów Factory* standard interpreted alongside with the ARSIWA, even though cases submitted to arbitration under NAFTA are not an inter-state dispute.[194]

In non-expropriation cases the primacy of restitution is occasionally considered,[195] and monetary and legal restitution is seldom granted.[196] The same

192 *See*, for instance, *Myers* case, *supra* note 176, para. 309; *Marvin Feldman* v. *Mexico*, ICSID Case No. ARB (AF)/99/1, Award (2002), para. 195, 198, <www.italaw.com/sites/default/files/case-documents/ita0319.pdf >, visited on 17 December 2019; *Azurix Corp* v. *the Argentine Republic*, ICSID Case No. ARB/01/12, Award (2006), para. 421–422, <www.italaw.com/sites/default/files/case-documents/ita0061.pdf >, visited on 17 December 2019; *American Manufacturing and Trading* (*AMT*) *INC* v. *Republic of Zaire*, ICSID Case No. ARB/93/1, Award (1997), para. 7.03, 7.13, <www.italaw.com/sites/default/files/case-documents/ita0028.pdf>, visited on 17 December 2019; *Asian Agricultural Products* (*AAP*) *LTD* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (1990), para. 88, <www.italaw.com/sites/default/files/case-documents/ita1034.pdf >, visited on 17 December 2019. For a discussion, *see* Ripinsky, *supra* note 182, p. 5.

193 *Myers* case, *supra* note 176, para. 309; *Feldman* case, *supra* note 192, para. 195; *Azurix* case, *supra* note 192, para. 424; *LG&E Energy Corp and others* v. *Argentine Republic*, ICSID Case No. ARB/02/1, Award (2007), para. 40, <www.italaw.com/sites/default/files/case-documents/ita0462.pdf>, visited on 17 December 2019.

194 *Myers* case, *supra* note 176, para. 313–315.

195 *Petrobart v Kyrgyz Republic*, A.I.S.C.C., Award (2005), pp. 77–8, <www.italaw.com/sites/default/files/case-documents/ita0628.pdf>, visited on 17 December 2019; *CMS Gas Transmission Company* v. *the Argentine Republic*, ICSID Case No. ARB/01/08, Award (2005), paras. 399, 406, <www.italaw.com/sites/default/files/case-documents/ita0184.pdf>, visited on 17 December 2019; *Funnekotter* case, *supra* note 92, para. 47–8, 67–9, 82.

196 While material restitution of tangible property different than money has rarely been awarded, restitution of specific sums of money has been granted in a few cases. *See*, for

is true of other non-monetary remedies, such as specific performance and declaratory relief.[197] Compensation is clearly the most frequently awarded remedy, the amount of which is determined considering the existence of circumstances assimilable to those of an expropriation. When the breach has effects similar to those of an expropriation, tribunals have sought to restore the *status quo ante* or the situation that would have existed in the present in the absence of wrongdoing, resorting either to the primary rules of compensation or the secondary rules of 'full reparation'.[198] When circumstances are not assimilable to expropriation, however, tribunals have been more cautious, only awarding, for instance, accrued losses.[199]

Addressing compensation as the quintessential remedy in non-expropriation cases has raised certain concerns. Leaving aside some treaties that expressly limit the tribunals' power to select remedies and/or favour compensatory payment (i.e. Article 1135 of NAFTA), arbitral tribunals have to a large extent the authority to grant non-monetary resources, including restitution.[200] If this is so, in the absence of a clear stipulation establishing compensatory payment for non-expropriation cases, it is not evident why this remedy stands out so quickly in the practice of tribunals, despite the fact that restitution has a clear primacy in both *Chorzów* and the ARSIWA.[201] As the ARSIWA further made clear in Article 43(2), the parties have no absolute control over the

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instance, *E. A. Maffezini* v. *The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (2000), <jusmundi.com/en/document/decision/en-emilio-agustin-maffezini-v-the-kingdom-of-spain-award-Monday 13th-november-2000#decision_869>, visited on 17 December 2019; *Occidental Exploration and Production Company* v. *Republic of Ecuador*, UNCITRAL Case 3467, (Award) 2004, <www.italaw.com/cases/761>, visited on 3 July 2020. For its part, 'legal restitution', as defined in *supra* note 34, has been awarded more often. For a discussion, *see* Sabahi, *supra* note 171, pp. 72–73, 77–79 and Sahabi, *supra* note 182, para. 21.18–21.22.

197 *Mohammad Ammar Al-Bahloul* v. *The Republic of Tajikistan*, SCC Case No. V (064/2008), Final Award (2010), para. 47–63, <www.italaw.com/cases/68>, visited on 3 July 2020; *Biwater Gauff* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (2008), para. 807, <www.italaw.com/sites/default/files/case-documents/ita0095.pdf>, visited on 3 July 2020.

198 *CMS* case, *supra* note 195, para. 400–1, 409–410; *Azurix* case, *supra* note 192, para. 420, 424–7; *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, para. 676–9, <www.italaw.com/cases/2727>, visited on 3 July 2020.

199 *LG&E* case, *supra* note 193, para. 32–40; *Myers* case, *supra* note 176, para. 309; *Petrobart* case, *supra* note 195, para. 82–4; *Feldman* case, *supra* note 192, para. 194; *PSEG Global Inc.* v. *Republic of Turkey*, ICSID Case No. ARB/02/5, Award (2007), para. 308–315, 353, <www.italaw.com/cases/880>, visited on 3 July 2020. For a discussion, *see* S. Ripinsky, *supra* note 182, pp. 12–15.

200 Stephens-Chu, *supra* note 186, p. 663.

201 *See supra*, Section 2.

choice of remedies,[202] meaning in the case of investor-state arbitration that tribunals have something more to say about the adequacy of the remedy under consideration.[203] In *Mr Franck Charles Arif* v. *Republic of Moldova*, for example, the tribunal affirmatively answered the question on whether "restitution can be considered in circumstances where Claimant insists on damages".[204] One of the reasons that led to this conclusion was that, in the tribunal's opinion, "restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State".[205]

A more careful and deliberate selection of remedies may help allay concerns that certain interests that do not coincide with the objectives of investment law are increasingly influencing dispute resolution and the selection of means of redress. The existence of 'negative incentives' and other actors with a direct interest in a compensatory award may tend to favour the request for (large amounts of) compensation over non-monetary remedies, including restitution.[206]

6.2 *The Contribution of Investment Law to the Development of (General) International Law on Reparations*

The pervading practice surrounding the negotiation and dispute resolution of BITs and MITs does not entail an automatic transformation of the relevant customary norms. A succession of treaty provisions similar in content can only be presumed to give rise to a new customary rule embodying such content if it

202 *Draft articles, supra* note 8, p. 120.

203 Desierto, *supra* note 170, pp. 424–5.

204 *Charles Arif* case, *supra* note 126, para. 569–570.

205 *Ibid.*

206 By 'negative incentives' this article refers to the growing practice of third-party funding in international investor-state arbitration. *See generally*, E. De Brabandere and J. Lepeltak, *Third Party Funding in International Investment Arbitration*, Grotius Centre Working Paper N° 2012/1, Leiden University. Under this scheme, investors agree with a third party that the latter finances the procedure in exchange for a part of the compensation finally granted to the investor. The third-party funder has "no interest in the substantive issues of the arbitral proceedings, but instead invests in the proceedings hoping to make a considerable profit upon the settlement of the dispute". Brabandere and Lepeltak, p. 3. Owing to this, the procedure is likely to be influenced by the interests of the funder, discouraging the adoption of non-monetary remedies and/or reaching an agreement between the parties, making compensation the quintessential remedy to resolve the dispute. Desierto, *supra* note 170, p. 438. In addition, third-party funding may also "artificially inflate" the scope of the dispute since "the larger the amount of compensation received, the more the investor can keep as its own compensation". Brabandere and Lepeltak, p. 8.

can be established that states accept such provisions *outside the treaty framework* and follow them considering them to be settled law.[207]

Sornarajah considers that the failed attempts by developing and developed countries to reach a multilateral agreement on investment protection, including the standard of compensation, provide evidence of the lack of *opinio juris*.[208] The historical dispute between developing and developed countries discussed above further supports his view that "customary practice is not uniform as to the payment of full compensation on nationalisation".[209]

This conclusion, however, does not exclude the existence of rules prohibiting expropriations without giving any consideration to the rules of promptness, adequacy and effectiveness. If states, through BIT s consistently reaffirm the adequate compensation formula that was long believed to be required by international practice, then it seems problematic to reject it as a matter of customary law.[210] Campbell McLachlan takes this point one step further by noting that both developed and developing states have adopted the practice of promulgating model investment treaties.[211] As with lump-sum agreements,[212] the extraordinary uniformity of treaty language and the constant enshrinement of the Hull formula in cases of expropriation can be interpreted as a declaration of what states consider an acceptable and reasonable legal basis for bilateral negotiations and the protection of foreign investment.[213]

While 'partial' compensation ended up being recognised through lump-sum agreements, through international investment law this recognition seems to go beyond since the value of 'adequate' compensation is now framed in a temporality and conceptuality that seems to be widely accepted.

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Besides overcoming to a good extent the debate on 'partial' or 'full' compensation and establishing criteria for measuring compensation in a range of

207 ILA. Committee on Formation of Customary (General) International Law, *Final report of the Committee*. London Conference (2000), pp. 47–8, <www.ila-hq.org/index.php/committees>, visited on 14 July 2020.

208 Sornarajah, *Foreign Investment*, *supra* note 117, pp. 415–6.

209 *Ibid.,* p. 417.

210 F.A. Mann, *Further Studies in International Law* (Oxford University Press, Oxford, 1990) p. 245.

211 C. McLachlan, 'Investment Treaties and General International Law', 57 *International and Comparative Law Quarterly* (2008) p. 394.

212 *See supra* Section 5.

213 McLachlan, *supra* note 211.

scenarios not circumscribed to expropriation, international investment law brings with it important differences in the way the *Chorzów* standard of reparation is handled in international law. Most of them result from granting individuals direct access to jurisdiction over disputes that take place with a foreign state.

First, the central purpose of BIT s and MIT s is to "remove [investor] claims from the inter-State plane and to ensure that investors could assert rights directly against a host State".[214] Therefore, they confer to the investor the right to submit a claim for arbitration "on its own name" and "for its own benefit".[215] What this means is that BIT s and MIT s release the investor from the high level of discretion that allows a state under diplomatic protection to decide whether it espouses any claim of its citizens at all. Additionally, unlike lump sum agreements, direct application of the rules governing reparations can be requested, instead of witnessing how those same rules are manipulated as bargaining instances to influence the negotiation process between states. However, with the direct application of the *Chorzów* standard to investor-state disputes, the interaction between primary and secondary rules, as well as the sequence of the different means of redress in the latter case (restitution-compensation), have been greatly influenced by the stakeholders' interests. For some commentators, this use of *Chorzów* with the interests of private investors in mind is inappropriate as it is released from any consideration regarding the 'national interests' that may be at play.[216]

Second, damages are directly owed to the investor. This does not only imply the evident loss of the state's sovereign power to retain the compensation bestowed to its citizens. It also means, according to Kate Parlett, "damages are calculated solely on the basis of the harm caused to the interests of the investor".[217] Therefore, unlike lump-sum agreements, reparations can be delivered to the beneficiaries without any additional distributive consideration on how the cake is going to be split domestically.

214 *Corn Products International, INC.* v. *the United Mexican States*, ICSID Case No. ARB (AF)/04/05, Decision on Responsibility (2008), para. 161, <www.italaw.com/sites/default/files/case-documents/ita0244.pdf>, visited on 17 December 2019.

215 *Ibid.,* para. 169.

216 Goodman and Parkhomenko, *supra* note 19, p. 322.

217 K. Parlett, *The Individual in the International Legal System* (Cambridge University Press, Cambridge, 2011) p. 105.

7 Conclusion

The practice analysed here makes it clear that in international disputes involving state responsibility it is not paramount to undo the consequences of the illegal act and re-establish the situation which would have existed in the present had the wrongdoing not been committed. Finding a pragmatic solution to restore mutual relationships or move forward to perform the commitments acquired very often determine how state disputes are solved, with the rules on state responsibility and reparations laying in the background as negotiating instances. When reparations are indeed invoked, *restitutio in integrum* does not prevail over other forms of redress, insofar as compensation – and satisfaction – often outweigh restitution. The extent to which compensation is established in light of the Hull formula or the standard of 'full reparation' varies enormously considering a large number of factors. Amongst them, the position of the adjudicating bodies on the legality of expropriation and the role they understand they play in the international system, political and ideological differences between states, the interests pursued by stakeholders, and the existence of BIT s or MIT s that specifically address such issues.

Drawing these strands together, this article distances itself from the view of the *Chorzów* standard as a static set of uncontested rules that can be applied automatically and deductively in granting redress whenever an internationally wrongful act takes place. It is rather better to understand the position as a dynamic and disputed standard with different levels of legitimacy, constraining with varying strength international decision-making and dispute resolution whenever injuries, most of them property-related, arise. The accuracy with which international actors make use of that standard today increasingly moves away from the contours that shaped it originally, with considerations on the (i)legality of the expropriation, the differentiation of primary and secondary rules and the entity of the national interests becoming a secondary issue or adapting to the actors' interests.

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