

# The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in *Chorzów*

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*Is compensation always the appropriate form of reparations when States breach non-expropriation provisions of their investment treaties? If so, what is the authoritative methodology for determining the quantum of compensation, when the non-expropriation investment treaty standard breached is silent on the issue of compensation for these kinds of treaty breaches? Thus far, many investor-State arbitral tribunals deem breaches of non-expropriation investment treaty standards sufficient to justify investor claims for reparations under the general international law of responsibility. Applying the Permanent Court of International Justice's definition of reparations in Chorzów that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed,"<sup>1</sup>*

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1. *Factory at Chorzów (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47

*tribunals routinely award compensation as the mode of reparations for breaches of non-expropriation provisions of investment treaties. Compensation is often awarded at a scale that closely approximates the fair market value of the loss incurred by the investor as a result of the State's breach of the non-expropriation investment treaty standard. However, these kinds of compensation awards stand in stark contrast to the less frequent (and much lower levels of) compensation that the International Court of Justice awards in cases involving treaty breaches causing economic injuries to States or their nationals. This disparity in international jurisprudential practice exists, I submit, due to investment arbitral tribunals' imperfect application of the Chorzów standard of reparations. Investment arbitral awards rarely elaborate full, if any, reasoning on various critical issues.*

*In Part I (Compensability of States' Treaty Breaches: Automatic or Discretionary?) I discuss the threshold legal question of the compensability of non-expropriation investment treaty breaches, arguing that these breaches cannot be assumed, by and large, to be fully compensable in each and every case. In Part II (Reinstating the Principle of Proportionality when Applying the Chorzów Standard of Reparations), I contend that once tribunals are satisfied that the investor-claimant has proven the compensability of the breach of the non-expropriation investment treaty provision and the applicability of the Chorzów standard of reparations, it is critical to ensure that the compensation awarded as reparations in these cases meets the critical requirement of proportionality. In Part III (Inter-State and Investor-State Claims: The Applicability of Chorzów to Reparations Claims for International Economic Injury), I examine the possible counterargument that the Chorzów standard of reparations might also not necessarily be applicable to investor-State claims for compensation in cases of breach of non-expropriation investment treaty provisions. In the Conclusion (Restoring Limits to Home States' Delegation of Rights to Investors), I stress that*

*the application of the Chorzów standard of reparations to breaches of non-expropriation provisions in investment treaties must be subject to the same rigorous tests on the propriety of the choice of the mode of reparations sought, as well as the manner of internalization of the principle of proportionality in different forms of reparations, as part of the “outer limits” of adequate, equitable, and just reparations in international law.*

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INTRODUCTION: A HISTORY OF THE INTERNATIONAL COURT OF  
JUSTICE'S JURISPRUDENCE ON COMPENSATION AS  
REPARATIONS FOR INTERNATIONAL ECONOMIC DAMAGE

*“There could be a problem with the thesis that public international law applies. That problem is that companies that are parties to State contracts are not subjects of public international law. Companies, like private persons, would not have rights or duties of their own under public international law.”*<sup>2</sup>

*“In general, international tribunals have calculated compensation due for losses and injuries based on existing general international law. Many of them, however, have dealt with unusual losses heretofore not considered by the International Court [of Justice] . . . [where] market values for the particular losses could not be determined easily . . . . Certainly, this has been a contentious area of international law.”*<sup>3</sup>

*“The paucity of law on reparations may also discourage reasoned development of claims for remedies or reasoned responses by judges or arbitrators, leaving litigating parties and tribunals to treat these as equitable matters within the decision-maker’s discretion rather than as a matter of international obligation.”*<sup>4</sup>

Compensation as a mode of reparations for a State’s violation of foreign nationals’ private property rights, breach of contract or deprivation of their economic expectations, or any other commission of injury against foreign nationals, has had an unsettled genesis in general public international law.<sup>5</sup> The International Court of Justice

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2. A.V.M. Struycken, *Arbitration and State Contracts*, in 374 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 37 (2014).

3. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, in 271 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 101, 282–83 (1998).

4. Dinah Shelton, *Righting Wrongs: Reparations in the Articles of State Responsibility*, 96 AM. J. INT’L L. 833, 837 (2002).

5. For the historical contours of reparations in various contexts under international law, see generally CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 31–43 (2012) (examining compensation as a mode of reparations in various human rights treaties); CONOR MCCARTHY, *REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT* 225–96 (2012) (discussing Court-ordered compensatory victim support facilitated through the ICC Trust Fund); Richard M. Buxbaum,

has rarely issued a decision ordering payment of compensation.<sup>6</sup> The Court more often declares its:

findings of the existence in principle of a duty to make reparation and on one occasion, has given directions for specific reparation. These have however been treated as matters logically subordinate to the establishment of the existence of the breach of an international obligation, and indeed, where appropriate, to the declaration of an obligation to cease an unlawful activity.<sup>7</sup>

The International Court of Justice judgments are thus more often declaratory in nature as to the existence of any breach of international law, without always and automatically providing for a reparative remedy such as compensation.

Thus, notwithstanding the standard of reparations established by the Court's predecessor, the Permanent Court of International Justice ("PCIJ"),<sup>8</sup> in the *Chorzów Factory* case (which also declared restitution and compensation acceptable forms of such reparations),<sup>9</sup> the Court has been remarkably reticent in issuing awards for monetary compensation to States injured by fellow States' breaches of interna-

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*A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314 (2005); Andrea Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13 EUR. J. INT'L L. 161 (2002); Christine Gray, *The Choice Between Restitution and Compensation*, 10 EUR. J. INT'L L. 413 (1999); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in 269 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 251, 389–411 (1997).

6. See Dapo Akande, *Award of Compensation by International Tribunals in Inter-State Cases: ICJ Decision in Diallo Case—UPDATED*, EJIL: TALK! (June 21, 2012), <http://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case/>.

7. 1 HUGH THIRLWAY, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE* 622 (2013).

8. See MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 20–22 (2003).

9. *Factory at Chorzów (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which would serve to determine the amount of compensation due for an act contrary to international law.").

tional law.<sup>10</sup> In its Advisory Opinion in *Questions Relating to Settlers of German Origin in Poland*, the PCIJ speculated, without elaborating further, that “equitable compensation must be accorded under certain conditions” to inhabitants of Alsace-Lorraine if France (invoking its acquisition of the territory under a Treaty of Peace with Germany) were to unilaterally terminate private contract rights that had formerly subsisted between Alsace-Lorraine inhabitants and German authorities.<sup>11</sup>

#### A. Compensation Determinations by the International Court of Justice

Nearly two decades later, the International Court of Justice issued its Judgment on Compensation in *Corfu Channel (United Kingdom v. Albania)*, which disregarded the reports of expert assessors that put forward higher estimates of compensation and instead declared that the “true measure of compensation . . . [is] the replacement cost” of British warships that were damaged from mining explosions in Albanian waters.<sup>12</sup> In that case, the Court accepted the expert assessors’ estimate of £50,048 representing the cost of pensions and other grants made by the UK to victims and their dependents, and for costs of administration, medical treatment, among other things.<sup>13</sup>

Even when the Court finds that compensation is due, it will not announce the award without detailed evidence. In its Judgment on the Merits in *Fisheries Jurisdiction (Germany v. Iceland)*, the Court declined to issue an award of compensation sought by Germany absent any presentation of specific evidence:

In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on the precise grounds and

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10. See JUAN JOSÉ QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE 1135–36 (2015) (enumerating the few ICJ judgments that dealt with the issue of monetary compensation and even fewer that awarded such compensation); Carla Ferstman, *The International Court of Justice and the Question of Reparations*, REGARDING RIGHTS (July 17, 2015), <http://asiapacific.anu.edu.au/regarding-rights/2015/07/17/the-international-court-of-justice-and-the-question-of-reparations>.

11. *Questions Relating to Settlers of German Origin in Poland*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 19 (Sept. 10).

12. *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 244, 249 (Dec. 15).

13. *Id.* at 249–50.

detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law.<sup>14</sup>

Likewise lacking the same kind of specific evidence, the Court merely affirmed the right of the United States to reparations from Iran in *United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*),<sup>15</sup> subject to a subsequent proceeding (which was never convened)<sup>16</sup> on the form and amount of reparations due. The Court likewise bifurcated its determinations on the rights to reparations of injured States, and the necessity for subsequent proceedings to determine compensation as a mode of reparations—explicitly in its judgments in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*);<sup>17</sup> *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*);<sup>18</sup> and most recently in December 2015, *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica Along the San Juan River* (*Nicaragua v. Costa Rica*);<sup>19</sup> as well as implicitly in *Gabčíko-*

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14. Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. Rep. 175, ¶ 76 (July 25).

15. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 95 (May 24).

16. Subsequent proceedings at the Court were not conducted, after the United States moved to withdraw and discontinue the case on May 1, 1981. See JUAN JOSÉ QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE 504–08 (2015). Instead, the reparations mechanism was jointly created by the United States and Iran by constituting the Iran-United States Claims Tribunal. See HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS 189–94 (2002); Mark Feldman, *The United States as an International Litigant*, in LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 106, 117–18 (Natalie Klein ed., 2014).

17. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 292 (June 27). Proceedings on the determination of compensation as reparations were discontinued upon motion of the parties, and by order of the Court, in 1991. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Order, 1991 I.C.J. Rep. 47 (Sept. 26).

18. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 345 (Dec. 19). The Court resumed subsequent proceedings on the issue of reparations due only ten years after its Judgment on the Merits. By Order dated July 1, 2015, the Court required the parties to submit written pleadings on the issue of reparations. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Order, (July 1, 2015), <http://www.icj-cij.org/docket/files/116/18720.pdf>.

*vo-Nagymaros Project (Hungary v. Slovakia)*.<sup>20</sup>

Significantly, the Court has also ruled *against* the propriety of compensation as the form of reparations for certain State breaches of treaty provisions that do not, in themselves, contain any clause or stipulation awarding compensation for breach of such provisions. In its 2004 Judgment on Jurisdiction, Admissibility, and Merits in *Avena and Other Mexican Nationals (Mexico v. United States)*, the Court stressed the importance of a contextual assessment of the adequacy of reparations, through the examination of the actual causation between the breach of the international obligation and the injury resulting from such breach:

What constitutes “reparation in an adequate form” clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the “reparation in an adequate form” that corresponds to the injury. . . .

. . . .

[T]he remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts . . . .

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article

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19. *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica)*, Judgment, ¶¶ 137–44, 224–29 (Dec. 16, 2015), <http://www.icj-cij.org/docket/files/150/18848.pdf>.

20. *Gabčíkovo-Nagymaros Project (Hung. v. Slovk.)*, Judgment, 1997 I.C.J. Rep. 7, ¶¶ 152–53 (Sept. 25) (noting that “the Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid . . . [g]iven the fact . . . that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims”); *id.* ¶ 155 (“*Finds* that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the ‘provisional solution’ by Czechoslovakia and its maintenance in service by Slovakia.”).



36, paragraph 1, are to be regarded as having, *in the causal sequence of events*, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.<sup>21</sup>

Where sufficient causation cannot be established between the treaty breach and the resultant injury, financial compensation may prove to be an inappropriate form of reparations. In its 2007 Judgment on the Merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*,<sup>22</sup> the Court rejected Bosnia's claim for reparations in the form of compensation. Serbia was responsible for loss of human life and other damage to property because of Serbia's continuing violation of the obligation to prevent genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, and for breach of the Court's April 8 and September 13, 1993 provisional orders ordering Serbia to take measures to prevent the commission of genocide.<sup>23</sup> The Court found that, as regards these breaches, "the case is not one in which an order for payment of compensation . . . would be appropriate."<sup>24</sup>

The Court again noted the critical importance of establishing a causal nexus between the treaty breach and damage for which compensation is sought. It found that since it could not "regard as proven a causal nexus between [Serbia's] violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide."<sup>25</sup> The Court also denied Bosnia and Herzegovina's plea for "symbolic compensation" through monetary damages that the Court would solely determine for Serbia's non-compliance with the Court's 1993 provisional measures, which had required Serbia to prevent the commission of the crime of

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21. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶¶ 119, 121–22 (Mar. 31) (emphasis added).

22. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bozn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

23. *Id.* ¶¶ 459, 467.

24. *Id.* ¶ 471(9).

25. *Id.* ¶ 462.

genocide and to take certain measures to that end.<sup>26</sup> The Court explained that:

for purposes of reparation, [Serbia's] non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to [Bosnia's] request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that [Serbia] has failed to comply with the Court's Orders indicating provisional measures.<sup>27</sup>

Even when reparations are due, the Court has strictly required injured States to show, before invoking any other alternative mode of reparations, that restitution is indeed "materially impossible" for the responsible State, or that restitution would create a disproportional burden for the responsible State.<sup>28</sup> In its 2012 Judgment on Compensation in the *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*—a case involving Guinea's claims of injury to its investor-national committed by the Democratic Republic of Congo—the Court emphasized that "[q]uantification of compensation for non-material injury necessarily rests on equitable considerations . . . which above all involves flexibility and an objective consideration of what is just, fair, and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred."<sup>29</sup>

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26. *Id.* ¶ 458.

27. *Id.* ¶ 469.

28. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 137 (Feb. 3) ("[T]he Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.").

29. *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, 2012 I.C.J. Rep.

Finally, it should also be stressed that in other cases where a State's unlawful acts resulted in property damage, economic deprivation, natural resource destruction or some form of international economic damage to the injured State, the Court generally does not order compensation or any other alternative form of restitution as the "appropriate" mode of reparations.<sup>30</sup>

One possible exception is the Court's 2011 provisional measures orders in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* where, with respect to Costa Rica's claim of property and environmental damage in its territory caused by acts of occupation and other illegal acts by Nicaragua's agents, the Court issued provisional measures orders to *both* States to cooperate in conducting joint environmental monitoring to protect against further environmental damage,<sup>31</sup> a remedial modality for inter-State cooperation that the Court again affirmed in its 2015 Judgment on the Merits in the same case.<sup>32</sup> Importantly, in this 2015 Judgment, while the Court declared the liability of Nicaragua for compensation for material damage caused to Costa Rica, the Court specifically advised the parties to:

engage in negotiation in order to reach an agreement [on the issues of relevant material damage and the amount of compensation that may be assessed and] . . . if they fail to reach such an agreement within 12 months of the date of the present Judgment, the Court will, at the request of either party, determine the amount of compensation on the basis of further written pleadings limited to this issue.<sup>33</sup>

Ultimately, while the Court declared Costa Rica to have violated its obligation to conduct an environmental impact assessment ("EIA"), it

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324, ¶ 24 (June 19) (quoting *Al-Jedda v. United Kingdom*, 2011-IV Eur. Ct. H.R. 305, 378).

30. See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order, 1996 I.C.J. Rep. 13 (Mar. 15); *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 I.C.J. Rep. 3 (Dec. 19); *Right of Passage over Indian Territory (Port. v. India)*, Judgment, 1960 I.C.J. Rep. 6 (Apr. 12). The Court declined to grant compensation for Uruguay's breach of procedural (and not substantive) obligations under its 1975 treaty with Argentina. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶¶ 271-76 (Apr. 20).

31. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Order, 2011 I.C.J. Rep. 6, ¶¶ 86(1)-(2) (Mar. 8).

32. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Judgment, ¶ 226 (Dec. 16, 2015), <http://www.icj-cij.org/docket/files/150/18848.pdf>.

33. *Id.* ¶ 142.

did not order the award of compensation as Nicaragua alternatively requested.<sup>34</sup> The Court found that the absence of an EIA was not compensable where harm to Nicaragua had not been established in the first place.<sup>35</sup>

The foregoing survey of the jurisprudence of the International Court of Justice on compensation as a mode of reparations for international economic damage is instructive on many points. First, where a right to reparations is established through breach of international law, the injured State's assertion of *form* of reparations it seeks for such breach is not at all decisive or binding upon the Court. The Court will scrutinize the *propriety* of the form of reparations sought to redress the breach of international law by the responsible State, including requiring the injured State to prove the "material impossibility" of restitution in order to justify seeking alternative forms of reparations such as compensation.<sup>36</sup>

Second, as shown in its 2012 *Diallo* Judgment,<sup>37</sup> the Court stringently requires the injured State to prove the *proportionality* of its claim of reparations, ensuring that the reparations sought will not cause a disproportionate burden to the responsible State, and also giving due regard to "equitable considerations" affecting both the injured State and the responsible State.<sup>38</sup>

Third, in designing *adequate and suitable* reparations for breaches of international law resulting in economic injury, the Court is not necessarily hamstrung by the limited confines of financial compensation, even in cases involving property, environmental, and other economic damage. The Court has seen fit to order other forms of reparations, such as inter-State cooperation, to mitigate and monitor environmental damage,<sup>39</sup> and declaratory relief or satisfaction when the injured State fails to specifically and preponderantly establish *causation* between the responsible State's international breach

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34. *Id.* ¶ 229.

35. *See id.* ¶ 226.

36. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 512–15 (2013).

37. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324, 325 (June 19).

38. *Id.* ¶ 24

39. *See* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, ¶ 228 (Dec. 16, 2015), <http://www.icj-cij.org/docket/files/150/18848.pdf>; Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶¶ 244–46, 247(7) (Mar. 31) (requiring Japan to refrain from granting any future whaling permits under its JARPA II program); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Order, 2011 I.C.J. Rep. 6, ¶ 86(2) (Mar. 8).

and the damage asserted by the injured State.<sup>40</sup>

Fourth, even when the Court declares that the injured State is entitled to compensation, it is capable of structuring or bifurcating its own procedures to enable the injured State and the responsible State to negotiate on the terms of compensation for breaches declared by the Court, subject to the Court conducting its own subsequent proceedings to determine compensation—including resorting *motu proprio* to the use of valuation, scientific, and other financial experts<sup>41</sup>—should negotiations later prove unsuccessful for the States Parties to the dispute.

Finally, as seen in the 1974 *Fisheries Jurisdiction* Judgment on the Merits and subsequent cases,<sup>42</sup> in the select few instances where the Court did issue an order for compensation in favor of the injured State, the Court first required the injured State to produce considerable evidence to substantiate its claims of compensation for material injury as well as non-material injury.

### *B. Divergent Approaches by Other Tribunals*

One would think that the careful rigor and circumspection of the International Court of Justice in issuing compensation awards for various forms of international economic damage to injured States, arising from the illegal acts of responsible States, would be a useful comparative guide for all other international economic tribunals. However, international investor-State arbitral tribunals have not, thus far, emulated the Court's holistic approach when assessing investor claims for compensation arising from host State breaches of non-expropriation provisions of international investment treaties,<sup>43</sup> such

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40. See Juliette McIntyre, *Declaratory Judgments of the International Court of Justice*, 25 HAGUE Y.B. INT'L L. 107 (2012).

41. See JAMES GERARD DEVANEY, *FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE* 157 (2016) (providing relevant survey of ICJ case law it enumerates in footnote 949).

42. See *supra* notes 14–20 and accompanying text.

43. See W. Michael Reisman & Rocío Digón, *Eclipse of Expropriation?*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS: 2008*, at 27, 46 (Arthur W. Rovine ed., 2008) (“The finding of indirect expropriation and the subsequent determination of compensation may not be an easy task for tribunals, but we question whether the solution to the difficulty is the expansion of the fair and equitable treatment standard apparent in some recent case law. The immediate effects of the law, some of which are already visible, include the following: (1) a lack of coherent reasons for expanding the standard, (2) a departure from finding expropriation—either direct or indirect, and (3) *the misappropriation of the measure of damages expressly reserved for expropriation in most BITs to breaches of fair and equitable investment*. Together, these

as the fair and equitable treatment (“FET”) standard of protection.<sup>44</sup>

Admittedly, however, it is important to be mindful of necessary limits when transposing and comparing the jurisprudence of the International Court of Justice and that of investor-State arbitral tribunals. There are fundamental structural differences between the international adjudication of disputes involving economic damage, as framed in the inter-State claims centrally decided by the International Court of Justice, as against the nature of investor-State claims decided by the diffuse constellation of investment arbitral tribunals.<sup>45</sup> As Alain Pellet pointed out, these crystal differences include, among others, matters of: 1) *jurisdictional competence* (e.g. the ICJ is a court of general jurisdiction,<sup>46</sup> while ICSID merely facilitates and supports case-by-case limited jurisdiction in disputes submitted before individually constituted arbitral tribunals); 2) *institutional development* (e.g. the ICJ as the United Nations’ “principal judicial organ”<sup>47</sup> has a permanently organized structure, whereas investment arbitral tribunals are diversely supported by a proliferation of institutions from ICSID, to the Permanent Court of Arbitration, to all other arbitral centers that can host investor-State arbitrations); and 3) *the precedential effect of decisions* (e.g., which is very strong for the ICJ, but not for investment arbitral awards where there is no hard and fast *jurisprudence constante*).<sup>48</sup>

Investment treaty arbitration is, of course, in no sense equivalent to, or synonymous with, the kind of institutionalized and centralized international adjudication of a common set of multilateral treaty sources pleaded before the World Court or other standing international economic tribunals such as the World Trade Organization Ap-

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threaten to destabilize the investment law regime in this area.” (emphasis added)).

44. I have argued this in detail in Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises*, 44 GEO. WASH. INT’L L. REV. 473 (2012).

45. Investment tribunals include those primarily administered by the International Centre for Settlement of Investment Disputes (ICSID) under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, as well as those administered by other arbitral institutions under the rules such as the UNCITRAL Arbitration Rules. For a detailed comparison of different mechanisms for resolving disputes involving claims of foreign nationals/investors, see JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 392–424 (2d ed. 2015).

46. See Int’l Court of Justice, Rep. on the Work of Its Sixty-Fifth Session, ¶ 7, U.N. Doc. A/65/4 (2010) (“The International Court of Justice is the only international court of a universal character with general jurisdiction.”).

47. U.N. Charter art. 92.

48. See Alain Pellet, Lalive Lecture, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 227–29 (2013).

pellate Body.<sup>49</sup> It is deeply rooted in international law<sup>50</sup> largely because thousands of bilateral and plurilateral investment treaties are themselves individual sources of international law and, accordingly, become subject to international law rules of treaty interpretation.<sup>51</sup> Likewise, investment treaty arbitration is also anchored in international law because, in the absence of any agreement of disputing parties, the investor-State arbitral tribunal “shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and *such rules of international law as may be applicable*.”<sup>52</sup> For this reason, it is not at all surprising that the law of state responsibility, as codified in the International Law Commission’s (“ILC”) 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“ILC Articles on State Responsibility”),<sup>53</sup> has long been a staple source of law in investor-State jurisprudence.<sup>54</sup>

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49. See Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012).

50. See ERIC DE BRABANDERE, *INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS* 17–64 (2014).

51. J. ROMESH WEERAMANTRY, *TREATY INTERPRETATION IN INVESTMENT ARBITRATION* 153–204 (2012).

52. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (emphasis added); see also Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 191 (Katia Yannica-Small ed., 2010).

53. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter ILC Draft Articles].

54. For the applicability of the ILC Draft Articles to investment treaty arbitration, see Kaj Hobér, *State Responsibility and Attribution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 549, 554–82 (Peter T. Muchlinski et al. eds., 2008). Note that the principal arguments against the applicability of the ILC Articles to investment treaty arbitration have been stated as:

First, the Articles on State Responsibility deal with obligations owed between states, and do not purport to deal with the obligations of states to non-state entities . . . .

. . . .

The second argument against the applicability of the Articles on State Responsibility to investment treaties relies on Article 55 of the Articles on State Responsibility, which provides that the Articles will not apply “where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law [*lex specialis*]”.

Preeti Bhagnani, *Revisiting the Countermeasures Defense in Investor-State Disputes: Approach and Analogies*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY* 2013–2014, at 437, 441–442 (Andrea K. Bjorklund ed., 2015).

While Chapter II (Reparation for Injury) of the ILC Articles on State Responsibility codifies and implements the *Chorzów* standard of reparations,<sup>55</sup> as the next Sections will show, it is often imperfectly or incompletely applied in cases of compensation as reparations for breaches of non-expropriation provisions in investment treaties.

### C. Questions Raised on Reparations in Investment Law

Against the foregoing backdrop on ICJ jurisprudential practices on compensation as reparations, the primary question this Article seeks to bring to the forefront of our contemporary international legal analysis is ultimately a thematic one: is compensation *always* the appropriate form of reparations when States breach non-expropriation provisions of their investment treaties?<sup>56</sup> If so, what is a reasonably authoritative methodology for determining the quantum of compensation<sup>57</sup> when the non-expropriation investment treaty standard breached is silent on the issue of compensation for these kinds of treaty breaches? Thus far, many investor-State arbitral tribunals deem breaches of non-expropriation investment treaty standards sufficient to justify investor claims for reparations under the general international law of responsibility.<sup>58</sup> Applying the Permanent Court of International Justice's definition of reparations in *Chorzów* that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed",<sup>59</sup> tribunals routinely award compensation as the mode of reparations for breaches of non-expropriation provisions of investment treaties.

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55. ILC Draft Articles, *supra* note 53, ch. II (Reparation for Injury); *see also* CRAWFORD, *supra* note 36, at 481.

56. Martin Endicott, *Remedies in Investor-State Arbitration: Restitution, Specific Performance, and Declaratory Relief*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 517, 517–19 (Phillippe Kahn & Thomas E. Walde eds., 2007) (pointing out problems in quantification of loss and inadequacy of compensation).

57. *See* Charney, *supra* note 3, at 283–84.

58. *See, e.g.*, *Ah-Bahloul v. Republic of Taj.*, SCC Case No. 064/2008, Final Award, ¶¶ 42–44 (June 8, 2010); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 226–98 (Feb. 6, 2008); *Archer Daniels Midland Comp. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 278–86, 304 (Sept. 26, 2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 131–37, 146–48, 263–366 (Oct. 3, 2006); *BG Grp. Plc. v. Argentine Republic*, UNCITRAL (ad hoc), Final Award, ¶¶ 419–29 (Dec. 24, 2007); *CME Czech B.V. v. Czech Republic*, UNCITRAL (ad hoc), Partial Award, ¶¶ 615–18 (Sept. 13, 2001).

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



Compensation is often awarded at a scale that closely approximates the fair market value of the loss incurred by the investor as a result of the State's breach of the non-expropriation investment treaty standard.<sup>60</sup> These kinds of compensation awards in investor-State arbitration for non-expropriation investment treaty breaches stand in stark contrast to the less frequent (and much lower levels of) compensation that the International Court of Justice awards in cases involving treaty breaches causing economic injuries to States or their nationals.

The disparity in international jurisprudential practice exists, I submit, due to investment arbitral tribunals' imperfect application of the *Chorzów* standard of reparations. Investment arbitral awards rarely provide full, if any, elaboration on various critical issues in the application of this standard. In Part I (Compensability of States' Treaty Breaches: Automatic or Discretionary?), I discuss the threshold legal question of the compensability of non-expropriation investment treaty breaches, arguing that these breaches cannot be assumed, by and large, to be fully compensable in each and every case. Where the treaty standard itself is silent on the legal consequences of its breach, it is only the right to reparations *ipso facto* that arises for the claimant-investor under the law of international responsibility, and not automatically a right *eo nomine* to a specific form or type of reparations, such as financial compensation.<sup>61</sup> As with claimant States asserting claims to compensation as their preferred mode of reparations, the burden should likewise fall on the claimant-investor to prove that it is materially impossible to reconstitute the damage

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60. The conventional logic behind the application of this reparation standard is succinctly described in *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 359–60 (May 22, 2007):

359. The Treaty does not specify the damages to which the investor is entitled in case of breach of the standards of treatment different from expropriation, *i.e.*, fair and equitable treatment or the breach of the umbrella clause. Absent an agreed form of restitution by means of renegotiation of contracts or otherwise, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party, as was established by the Permanent Court of International Justice in the *Chorzów Case* . . . .

360. Various tribunals have applied this principle in deciding damages for breach of "fair and equitable treatment." As noted by *SD Myers*, the silence of the treaties, in that case of NAFTA, indicates the intention of the drafters "to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case." The Tribunal added that: "whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."

*Id.* (quoting *S.D. Myers, Inc. v. Canada*, UNCITRAL (ad hoc), Partial Award, ¶¶ 311–15 (Nov. 13, 2000)).

61. See John Barker, *The Different Forms of Reparation: Compensation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 599, 599–600 (James Crawford et al. eds., 2010).

caused by the breach of the non-expropriation treaty standard, *before* the tribunal can consider awarding any other form of reparations, such as compensation.<sup>62</sup>

Considering that the claimant-investor only asserts “delegated rights” from its home State to sue the host State for investment treaty breaches,<sup>63</sup> the delegation must be construed strictly in favor of the interpretation that most accords with the extraordinary nature of the consent of the actual States Parties to the investment treaty.<sup>64</sup> Where it is ambiguous or inconclusive that States actually expected the breach of non-expropriation treaty standards (such as the fair and equitable treatment standard) to be compensable,<sup>65</sup> I argue that the investment tribunal cannot automatically assume the compensability of these standards against the host State and accordingly, should not be passively deferential to claimant-investors’ choice of compensation as the mode of reparations. After all, with respect to inter-State claims under the law of international responsibility implementing the *Chorzów* standard, the injured State does not have an absolute and unlimited right to elect the mode of reparations available to it under international law.<sup>66</sup> Rather, as shown in the jurisprudence of the International Court of Justice, the demands for international justice

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62. As Borzu Sabahi rightly points out, restitution pursuant to treaties may take the form of “material” restitution (including restitution of property and money) and “juridical” restitution (including the remedy of specific performance). BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 61 (2011).

63. Martins Paparinskis, *Analogies and Other Regimes of International Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 73, 83–84 (Zachary Douglas et al. eds., 2014).

64. I recognize that arguments could also be made that investors should be characterized as “direct subjects of international rights” in the Kelsenian sense. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 347 (Anders Wedberg trans., 2007) (1945) (“Individuals can have international rights only if there is an international court before which they can appear as plaintiffs.”). However, this characterization does not, in my view, reflect the nature of the extraordinary historical compromises made by home States and host States concluding investment treaties, which permitted the unusual relaxation of the orthodox immunities of States. See ANTONIO R. PARRA, THE HISTORY OF ICSID 21–26 (2012); Carolyn B. Lamm, *Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration*, in 354 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 29–31 (2011); Sacerdoti, *supra* note 5, at 412–15 (on the balance of considerations taken in the evolution towards investor-State arbitration).

65. See U.N. Conference on Trade and Development, *Fair and Equitable Treatment: A Sequel*, at 88–89, U.N. Sales No. E.11.II.D.15 (2012), [http://unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf).

66. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 44 (2002).

through reparations are examined through the lens of both the injured State and the offending State to ensure that reparations imposed do not acquire a punitive character that would threaten peace and stability in the international system.<sup>67</sup>

Turning to Part II (Reinstating the Principle of Proportionality when Applying the *Chorzów* Standard of Reparations), I contend that once tribunals are satisfied that the investor-claimant has proven the compensability of the breach of the non-expropriation investment treaty provision and the applicability of the *Chorzów* standard of reparations, it is critical to ensure that the compensation awarded as reparations in these cases meet the critical requirement of proportionality.<sup>68</sup> To date, tribunals neglect to include in arbitral reasoning how they operationalize the principle of proportionality, which is inherent to the concept of reparations under the international law of responsibility. Proportionality in the law of inter-State claims behooves an international tribunal to examine the relative situations of the injured State, as well as the offending State,<sup>69</sup> applying “equitable considerations”<sup>70</sup> as necessary to ensure that reparations are not oppressive or punitive. Proportionality also mandates that the injured State establish strict causation between the offending State’s internationally wrongful acts and the ensuing damage incurred by the injured State flowing from such acts.<sup>71</sup> Finally, proportionality is also reflected in the valuation measure chosen to estimate the “financially assessable damage” to the injured State,<sup>72</sup> which does not always equate to the

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67. See F.V. Garcia Amador, *State Responsibility: Some New Problems*, in 94 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 365, 478 (1958); Eduardo Jiménez De Aréchaga, *International Law in the Past Third of a Century*, in 159 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 286 (1978).

68. See, e.g., MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 51 (2014); Sondra Faccio, *The Application of the Principle of Proportionality to Assess Compensation: Some Reflections Arising from the Case of Joseph Charles Lemire v. Ukraine*, 13 L. & PRACS. INT’L CTS. & TRIBUNALS 199 (2014); Dale R. Weigel, *Community Goals to be Served by Compensation Standards in International Law*, 66 AM. SOC’Y INT’L L. PROC. 220 (1972); see also TARCÍSIO HARDMAN REIS, COMPENSATION FOR ENVIRONMENTAL DAMAGES UNDER INTERNATIONAL LAW: THE ROLE OF THE INTERNATIONAL JUDGE 115–56 (2011) (discussing elements of fair compensation in international law and referencing “equity, proportionality and reasonableness”).

69. ILC Draft Articles, *supra* note 53, art. 34 cmt. ¶ 5.

70. See SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 127–28 (2008).

71. SABAHI, *supra* note 62, at 171.

72. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 387 (2d ed. 2010) (internal quotations omitted); Barker, *supra* note 61, at 600.

fair market value of the asserted economic loss.

In Part III (Inter-State and Investor-State Claims: The Applicability of *Chorzów* to Reparations Claims for International Economic Injury), I examine the possible counterargument that the *Chorzów* standard of reparations may not necessarily be applicable to investor-State claims for compensation in cases of breach of non-expropriation investment treaty provisions. While some scholars have pointed out that international law does not automatically or sweepingly apply to investment law,<sup>73</sup> I show that the applicability of general international law in investment law is far too deeply embedded and internalized in this legal regime,<sup>74</sup> not just as a matter of arbitral practice but also as a matter of arbitral tribunals' *ratione materiae* competence to decide investor-State disputes. ICSID Convention Article 41 purposely includes general international law as part of the applicable law to any dispute.<sup>75</sup> For that reason, tribunals must either apply general international law in its entirety (which includes the *Chorzów* standard of reparations), or not at all.<sup>76</sup>

In the Conclusion (Restoring Limits to Home States' Delegation of Rights to Investors), I stress that the application of the *Chorzów* standard of reparations to breaches of non-expropriation provisions in investment treaties must be subject to the same rigorous tests on the propriety of the choice of the mode of reparations sought, as well as the manner of internalization of the principle of proportionality in different forms of reparations, as part of the "outer limits" of

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73. Patrick Dumberry & Jacob Stone, *International Law, Whether You Like it or Not: An Analysis of Arbitral Tribunal Practice Regarding the Applicable Law in Deciding State Contracts Disputes Under the ICSID Convention in the Twenty-First Century*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2012–2013, at 477, 512 (Andrea Bjorklund ed., 2014) (identifying scholars who take the view that international law should be restrictively, if sparingly, used, as applicable law in investor-State arbitration).

74. See RIPINSKY & WILLIAMS, *supra* note 70, at 48 ("Where the treaty does not set out rules on compensation that would apply in the case at hand, or its provisions are insufficiently complete or precise, the tribunal will refer to international custom, unless the treaty provides for the subsidiary application of a different law, such as the law of the host State."); HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 213–72 (2013).

75. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 52, art. 41.

76. 1 ICSID REPORTS: REPORTS OF CASES DECIDED UNDER THE CONVENTION ON THE SETTLEMENT OF DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, 1965, at 31 (R. Rayfuse ed., 1993) (where the Report of the Executive Directors on this Convention clarified that, insofar as Article 42(1) of the ICSID Convention, "the term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes")

adequate, equitable, and just reparations in international law. The appropriateness of the choice of the form of reparations, and the proportionality of such reparations, are important outer limits to internationally lawful reparations that have thus far been obscured in investor-State arbitral jurisprudence, to the detriment of many host States that continue to face multiple compensation claims on the basis of these non-expropriation treaty breaches.

#### I. COMPENSABILITY OF STATES' TREATY BREACHES: AUTOMATIC OR DISCRETIONARY?

When a State breaches a treaty obligation, it commits an internationally wrongful act that automatically triggers several duties for the breaching State—such as to observe its continuing duty to comply with the said treaty obligation, to immediately cease the internationally wrongful act, as well as to offer appropriate assurances and guarantees of non-repetition if required under the circumstances.<sup>77</sup> Most critically, the State's treaty breach activates the State's international obligation to make reparations towards the party injured by this internationally wrongful act.<sup>78</sup> The obligation to make reparations was first recognized by the Permanent Court of International Justice in the *Chorzów* case, where the Court emphasized that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>79</sup>

However, the obligation to make reparation is not wedded to any particular form of reparations (e.g. restitution, compensation, satisfaction), but rather must be conceptualized with reference to the nature of the international legal obligation breached. In his Hague Academy lectures, Professor Bernhard Graefrath rightly observed that the content of State responsibility “is oriented primarily not towards indemnification, but towards protection, guarantee, and observance of international obligations. Forms and degrees of these legal consequences are essentially determined by the character of the violation.”<sup>80</sup> In this sense, while the obligation to make reparation is

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77. ILC Draft Articles, *supra* note 53, arts. 29–30; *see also* Brigitte Stern, *The Obligation to Make Reparation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 61, at 563, 564–65.

78. *See* ILC Draft Articles, *supra* note 53, art. 31(1).

79. *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

80. Bernhard Graefrath, *Responsibility and Damages Caused: Relationship Between*

automatic when a State breaches a treaty obligation, the State is not automatically required to provide compensation when this particular form of reparations does not “as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed,” for that particular treaty breach.<sup>81</sup>

What does this mean for tribunals tasked with designing reparations for proven breaches of non-expropriation provisions of investment treaties? Much depends on the substantive content of the treaty provision breached, the nature of the injury caused by the breach, and the tribunal’s assessment of what would properly restore the injured claimant as closely as possible to the pre-breach situation.<sup>82</sup> In the case of *expropriation* provisions in investment treaties, the economic injury (property loss or taking by the State) is readily amenable to an equivalent compensatory mechanism as the mode of reparations.<sup>83</sup> On the other hand, however, identifying the injury—and corresponding appropriate mode of reparations—for *non-expropriation* provisions of investment treaties is in no way an easy exercise. Injury caused by a State’s breach of the controversial “fair and equitable treatment”<sup>84</sup> standard of protection—a standard which has drawn such a multitude of views as to its proper interpretation, drawing equivalences with concepts such as breach of the “legitimate expectations,”<sup>85</sup> “minimum standard of treatment,”<sup>86</sup> up to breach of “specific government assurances”<sup>87</sup>—has been generally character-

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*Responsibility and Damages*, in 185 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 62 (1984).

81. *Ger. v. Pol.*, P.C.I.J. (ser. A) no. 17, at 47.

82. See Abby Cohen Smutny, *Compensation Due in the Event of an Unlawful Expropriation: The ‘Simple Scheme’ Presented by Chorzów Factory and its Relevance to Investment Treaty Disputes*, in PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 626, 630 (David D. Caron et al. eds., 2015).

83. U.N. Conference on Trade and Development, *Expropriation: A Sequel*, U.N. Sales No. E.12.2.D.7 (2012), [http://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf) (discussing compensation for lawful expropriation and reparation for unlawful expropriation).

84. For different formulations of the fair and equitable treatment standard in investment treaty practices around the world, see *id.* at 17–38.

85. See *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 348 (Oct. 31, 2011).

86. See *R.R. Dev. Corp. v. Republic of Guat.*, ICSID Case No. ARB/07/23, Award, ¶¶ 212–19 (June 29, 2012).

87. See *AES Summit Generation Ltd. v. Republic of Hung.*, ICSID Case No. ARB/07/22, Decision on the Application for Annulment, ¶¶ 95–96 (June 29, 2012); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶¶ 313–18 (Dec. 7, 2011).

ized as *economic* injury. To the extent that causation is proven between the exact State acts that violate the treaty-based obligation of “fair and equitable treatment” legally owed to investors, as well as the causation between such State acts and the adverse economic impact *resulting from* such acts, it is not unreasonable to expect a tribunal to determine that compensation to the investor for the adverse economic impacts of State actions is an appropriate mode of reparations.

However, in actual investor-State arbitration practice it is much more difficult to establish the causation between State actions that violate the fair and equitable treatment standard, and the adverse economic impacts supposedly suffered by the investor as a result of such State actions.<sup>88</sup> As the tribunal in *Biwater Gauff (Tanzania) v. Tanzania* famously explained when it found breaches of the applicable bilateral investment treaty (“BIT”):

782. It follows that the requirement of causation needs to be considered here with respect to each of BGT’s claims for compensation, both for expropriation and non-expropriatory breaches of the treaty. . . .

. . . .

784. There is little guidance as a matter of international law on the precise test of causation to be applied (there being a number of different possible formulations). Accordingly, many international tribunals have had recourse to private law analyses in their application of this requirement, and a number of commentators have recommended this approach.

785. The requirement of causation comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote. . . .

. . . .

787. The Arbitral Tribunal considers that in order to succeed in its claims for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminu-

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88. See IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 137–38 (2008).

tion in, or elimination of, value.<sup>89</sup>

The Tribunal ultimately found that the claimant investor did not prove the causation requirement for establishing damages.<sup>90</sup>

#### A. A Case Study in Tribunal Discretion: Causation and Reparations Ambiguities in Non-Expropriation Treaty Breaches

While *Biwater Gauff v. Tanzania* and several other arbitrations have elucidated the requirements for causation, the element of causation between the breach of the non-expropriation investment treaty provision, and the assessed economic injury allegedly resulting from such breach, is rarely discussed in detail in arbitral awards that grant compensation as the mode of reparations for these kinds of treaty breaches.<sup>91</sup> Many awards of damages that turn on breaches of the FET standard, for example, rarely, if at all, contain discrete portions that demonstrate the *exact* financial damage or economic injury that flows from specifically attributed State actions held to violate the FET standard.<sup>92</sup> With respect to an investor claim for lost profits

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89. *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶¶ 782, 784–85, 787 (July 24, 2008) (emphasis added) (footnotes omitted).

90. *Id.* ¶¶ 779–87.

91. For an example of an asserted breach of a non-expropriation investment treaty provision and the claimant's failure to prove the element of causation, see the tribunal's rejection of the breach of transparency obligations under the applicable BIT in *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, ¶¶ 161–64 (Oct. 27, 2006).

92. See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶¶ 491, 566–75 (Oct. 31, 2012) (finding that there was a breach of the FET standard, as well as other provisions of the investment treaty, but failing to differentiate its assessment of the specific damages flowing from the FET breach in its brief discussion of compensation arising from “all BIT breaches”); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 284–331, 361–81 (June 21, 2011) (finding that Argentina's actions breached the FET standard, but omitting to identify or differentiate how the specific acts of Argentina caused damage to the value of the capital contribution made by the investor); *Gemplus S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, ¶¶ 42–61, 75–94 (June 16, 2010) (setting out the applicability of *Chorzów Factory's* standard of reparations to breaches of the FET standard, but in awarding a damages lump sum, failing to delineate which of Mexico's actions breached the FET standard and how each action resulted in precise financial damage). It might also be the case that it is just much too difficult for tribunals to reasonably apply the principle of reparations in the form of compensation for breaches of the fair and equitable treatment standard. See Kaj Hobér, *Compensation: A Closer Look at Cases Awarding Compensation for Violation of Fair and Equitable Treatment Standard*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES*, *supra* note 52, at 573, 574.



supposedly flowing from a State's breaches, for example, the tribunal in *Gemplus v. Mexico* took a more discretionary evidentiary position on causation, and did not even discuss the precise or specific attribution of injury and the lost profits purportedly arising from such breaches, simply observing that:

the Tribunal is mindful of the fact that the Claimant's evidential difficulties in proving their claim for loss of future profits are directly caused by the breaches of the BITs by the Respondent responsible for such loss. If there had been no such breaches, the Concessionaire would have had an opportunity to restore the project, as originally envisaged; and it could then have been seen, as actual facts, whether and, if so, to what extent the restored project would have been profitable for the Concessionaire and, indirectly, the Claimants . . . as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation—as was indicated in the *Sapphire* award regarding the "behaviour of the author of the damage" (see above). At this point, confronted by evidential difficulties created by the respondent's own wrongs, the tribunal considers that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise.<sup>93</sup>

Another example is the award on damages in *Pope & Talbot Inc. v. Canada*, which omitted any full discussion on the causation between the established breach of NAFTA Article 1105 (providing for a minimum standard of treatment that includes fair and equitable treatment, full protection and security),<sup>94</sup> and the amount of \$407,646 that the tribunal determined as the principal amount of damages.<sup>95</sup> The *Pope & Talbot* tribunal allocated one short paragraph to declar-

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93. *Gemplus S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, ¶¶ 13–92 (June 16, 2010).

94. North American Free Trade Agreement art. 1105(1), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

95. See *Pope & Talbot Inc. v. Gov't of Can.*, UNCITRAL (ad hoc), Award in Respect to Damages, ¶ 88 (May 31, 2002).

ing the heads of damages that they deemed to be recoverable,<sup>96</sup> and one paragraph to excluding other heads of damages,<sup>97</sup> without specifying *why* these damages were recoverable as a result of Canada's breach of the fair and equitable treatment standard in NAFTA Article 1105.

In the case of *Hochtief Aktiengesellschaft v. Argentina*, while the tribunal found that Argentina had indeed breached the fair and equitable treatment standard through concrete acts,<sup>98</sup> the *Hochtief* tribunal was also forced to acknowledge the difficulty of disaggregating the actual quantum of economic injury flowing from the non-expropriation investment treaty provision, and the economic injury flowing from other factors such as Argentina's deteriorating financial conditions.<sup>99</sup> All that the tribunal ultimately could do was to come up with a set of general guidelines—none of which appeared to be anchored on definitive legal bases or damages valuation methodologies—for a subsequent proceeding that would measure the actual quantum by which the investor's twenty-six percent shareholding in the local concessionaire was reduced by Argentina's conduct violating the FET standard.<sup>100</sup> Specifically, the tribunal laid out four components of a FET-based claim: "(1) the failure to pay the Subsidy on time; (2) the 'pesification process'; (3) the 'Emergency Loan'; and (4) the failed renegotiation attempts."<sup>101</sup>

The tribunal found that Argentina's failures to meet various contractually-set payment dates for the subsidy did not rise to the level of an FET violation.<sup>102</sup> While Argentina's policy of pesifying what had been originally dollar-denominated debts was not *per se* an inherently unfair or inequitable governmental policy that could give rise to an FET violation,<sup>103</sup> when applied to the specific terms of the claimant's contract, which called for the deduction of dollar-denominated operation and maintenance expenses of the investment project, the tribunal declared that the FET standard had been violated.<sup>104</sup> The tribunal further concluded that Argentina's failure to

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96. *Id.* ¶ 85.

97. *Id.* ¶ 81.

98. *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, ¶ 288 (Dec. 29, 2014).

99. *Id.* ¶¶ 211, 216, 225–26, 241–44, 267–68, 287, 311–15, 324–25.

100. *Id.*

101. *Id.* ¶ 211.

102. *Id.* ¶¶ 216, 225–26.

103. *Id.* ¶¶ 241–44.

104. *Id.* ¶¶ 267–68.

reach a renegotiation agreement to address the commercial imbalance resulting from the pesification policy likewise violated the FET standard.<sup>105</sup> When it came to determining the quantum of loss flowing from these FET violations, however, the tribunal struggled with the different assumptions and methodologies presented by the parties' respective valuation experts, in a manner that diminished their usefulness to the tribunal. Instead, the tribunal parsimoniously focused on identifying loss from FET violations through the decline in value of the claimant's shareholdings in the local project operating entity.<sup>106</sup>

Notably, the arbitral tribunal in *Hochtief* set its parameters for compensation as reparations for FET and other violations, without any clear reference in the award to legal, policy, or accounting valuation justifications that could ultimately differentiate the extent of damages flowing from each of the different BIT breaches involved. In contrast to this amorphous approach, some arbitral awards (which attempt more clarity in arbitral reasoning on compensation) demonstrate that the success or failure of a compensation claim ultimately depends on the claimant's ability to prove the *specific* causation nexus between the governmental measure creating the specific treaty breach and the specific damage to the claimant flowing from such breach. The tribunal in *GAMI Investments v. Mexico*, for example, declined to find a breach of the fair and equitable treatment standard under NAFTA Article 1105 due to failure to prove this specific causation, declaring:

[T]he regulatory regime was structured on the premise of broad consultations and cooperation. The intervention of the private sector was explicitly called for. An explicit role was reserved for the unions. The Mexican government was not the only actor in important aspects of the Sugar Program. GAMI says the Government could have forced the issue to ensure that the consultations took place. GAMI's closing oral arguments sought to build on a declaration by the *Secretaría de Agricultura* to the effect that the industry "*debe estar adecuadamente supervisada por el Estado*." But the argument turns against GAMI. The distinction between "adequate supervision" and "effective implementation" is hardly subtle. There are certainly arguments on both sides. The debate is complex. For an international tribunal, the relevant conclusion is simp-

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105. *Id.* ¶ 287.

106. *Id.* ¶¶ 211, 216, 225–26, 241–42, 244, 267–68, 287, 311–15, 324–25.

ly that GAMI has not shown that the government's self-assigned duty in the regulatory regime was simple and unequivocal. It is impossible to conclude that the failures in the Sugar Program were both directly attributable to the government and directly causative of GAMI's alleged injury.<sup>107</sup>

Similarly, the tribunal in *Electrabel S.A. v. Hungary* rejected the investor's FET claim under the Energy Charter Treaty (ECT), due to the investor's failure to prove causation with regard to the economic loss asserted to flow from such breach:

[E]ven if there were a breach of the FET standard, the Tribunal does not consider that Electrabel has established any sufficient causation for its alleged loss resulting from the PPA's termination by Hungary, following the Final Decision. These two subsequent events were new acts, causally unrelated to events before the Final Decision invoked by Electrabel. In the Tribunal's view, whatever Hungary did or did not do before 4 June 2008 had no material influence on the Commission's Final Decision and (as explained below) Hungary's subsequent termination of Dunamenti's PPA consequent upon that Final Decision. The Tribunal notes Electrabel's necessarily qualified allegation as regards causation in its Reply (paragraph 396): "By not notifying the PPAs as an 'existing aid' and/or withdrawing the original notification from the interim procedure, [Hungary] was not defending the interests of the generators. If either of those options had been pursued, it may have resulted in a different outcome." . . . Such a mere possibility, even at its highest, does not establish the necessary causative link required for Electrabel's claim under the ECT.<sup>108</sup>

As seen above, tribunals can strictly scrutinize how a claimant establishes the causal nexus between the challenged governmental measure from the host State, and how it produces the asserted economic damage on the investor. Causation is not an easy threshold to hurdle.

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107. GAMI Invs. Inc. v. United Mexican States, UNCITRAL (ad hoc), Final Award, ¶ 110 (Nov. 15, 2004).

108. *Electrabel S.A. v. Republic of Hung.*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability, ¶ 6.68 (Nov. 30, 2012).

*B. Scrutinizing Tribunals' Use of Discretion in Crafting Damages Awards*

The foregoing analysis of breaches of one type of non-expropriation provision in an investment treaty (e.g., the FET standard), and the corresponding damages awarded as the mode of reparations for these breaches, serves to illustrate the point that arbitral tribunals assume extensive discretion over the type of reparations they confer for breaches of investment treaty provisions that do not explicitly contain any compensation standard. This considerable space for arbitral discretion over the compensability of breaches of non-expropriation investment treaty standards requires careful scrutiny.

In the first place, in general international law, when a treaty standard is silent on the legal consequences of its breach, it is only the right to reparations *ipso facto* that arises for the injured party against the responsible State, and not a right *eo nomine* to a specific form of reparations such as compensation.<sup>109</sup> The International Law Commission stressed in its Commentary to the Articles on State Responsibility that the injured State's right to elect the form of reparation is by no means an absolute right:

(6) Subparagraph 2(b) ["The injured State may specify in particular what form reparation should take in accordance with the provisions of Part Two"] deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case, or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case. Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those

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109. See CRAWFORD, *supra* note 66, at 44 ("[T]he [injured State's] right to elect [the mode of reparations] is not unqualified: this is recognized by a combination of the provisions on invocation (article 43(2)) and on waiver (article 45(a)).").

States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.<sup>110</sup>

Similarly, investor-State arbitral tribunals relying on general international law on reparations—as initiated under the *Chorzów* case and later codified in the Articles on State Responsibility—cannot assume that the claimant-investor’s election of the particular form of reparations, such as compensation, is an absolute choice immune from arbitral review. The burden should fall on the claimant-investor to prove that its chosen form of reparations for non-expropriation investment treaty breaches that do not contain an explicit compensation standard, is indeed in accordance with Part Two of the Articles on State Responsibility (Content of the International Responsibility of a State), as required in Article 43(2)(b) of the Articles on State Responsibility.<sup>111</sup> The applicability of Part Two of the Articles on State Responsibility to the assessment of the propriety of the chosen form of reparations thus triggers for the claimant duties to satisfy various limitations and concomitant obligations in Part Two of the Articles on State Responsibility before it can rightfully claim that compensation is a justified mode of reparations for non-expropriation investment treaty breaches, such as:

- 1) the duty, under Article 35(a), to show that restitution is not materially impossible;<sup>112</sup>
- 2) the requirement in Article 35(b) that restitution “does not involve a burden out of all proportion to the benefit deriving from restitution, instead of compensation”;<sup>113</sup>
- 3) the extent to which compensation can address damage that cannot

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110. ILC Draft Articles, *supra* note 53, art. 43 cmt. ¶¶ 6–7 (emphasis added).

111. *Id.* art. 43(2)(b) (“The injured State may specify in particular . . . what form reparation should take in accordance with the provisions of Part Two.”)

112. *Id.* art. 35(a).

113. *Id.* art. 35(b).

- be made good by restitution, as required in Article 36(1);<sup>114</sup>
- 4) claimant is not barred from invoking State responsibility under the rules on admissibility of claims in Article 44;<sup>115</sup> and
  - 5) claimant has not validly waived its claim, or by reason of its conduct, validly acquiesced in the lapse of the claim,” under Article 45.<sup>116</sup>

For an arbitral tribunal to be passively deferential towards the claimant-investor’s choice of compensation as the mode of reparations for breaches of non-expropriation investment treaty provisions, *without establishing that these five elements have been met*, would be an unjustifiable (and arguably abusive) exercise of arbitral discretion.<sup>117</sup>

Admittedly, the ability of foreign investors to obtain financial compensation from host States that breach investment treaty protective obligations—using investor-State arbitration—has been central to the current design of the international investment dispute settlement system.<sup>118</sup> The pivotal importance of compensation as the mode of reparations in this system appears understandable when one considers the early genesis in international law of foreign nationals’ right to compensation for illegal expropriations.<sup>119</sup> The notion of providing compensation for the totality of sovereign conduct—encompassing all acts that cause some injury to the investor, not just direct or indirect expropriation—was implicit from the famous 1930 *Lena Goldfields* Arbitration against the Soviet Government, where the arbitral tribunal held the Soviet Government liable to pay £8.5 million plus twelve percent interest for all of its acts injuring the concession.<sup>120</sup> The tribunal declared:

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114. *Id.* art. 36(1).

115. *Id.* art. 44.

116. *Id.* art. 45.

117. For arbitral discretion, see Susan D. Franck, *Managing Expectations: Beyond Formal Adjudication*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY: WORLD TRADE FORUM 371, 382 (Roberto Echandi & Pierre Sauvé eds., 2013).

118. See AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW 34 (2014).

119. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 1–12 (2d ed. 2012); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL 17–69 (2013); see generally O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, in YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011, at 649, 649 (Karl P. Sauvant ed., 2012).

120. Arthur Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the*

[T]he conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations thereunder and to be compensated in money for the value of benefits of which it had been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the [tribunal] prefers to base its award on the principle of “unjust enrichment,” although in its opinion the money result is the same.<sup>121</sup>

International investment arbitral jurisprudence has since evolved to allow investors to recover compensation (albeit in varying degrees) for both lawful and unlawful government acts.<sup>122</sup>

Under the modern international investment system driven by international investment treaties, however, one has to note the marked textual differentiation between clauses that do contain compensation standards and those that do not. Clauses on *expropriation* generally include a requirement to pay compensation,<sup>123</sup> while other investment treaty standards (e.g., guarantees of non-discriminatory treatment such as most favored nation treatment (“MFN treatment”), national treatment, and fair and equitable treatment) are often silent on the issue of compensation.<sup>124</sup> Tribunals ought not to ignore or take lightly how States’ treaty drafters differentiated between these treaty clauses and should not immediately assume that those lacking explicit compensation standards, or that are altogether silent on the consequences of their breach, were somehow *automatically* intended to be redressed only by compensation as the mode of reparations for breaches of these treaty clauses.

After all, the compensability of these non-expropriation investment treaty provisions has been contested ever since the very first bilateral investment treaty award rendered by an arbitral tribunal. In *Asian Agricultural Products Ltd. v. Sri Lanka*, the dissenting arbitrator Dr. Samuel Asante strongly protested the finding of the tribunal majority that the breach of the UK-Sri Lanka BIT’s “war clause” (e.g., granting national treatment or most favored nation treatment to investors for losses suffered owing to war or other armed conflict, revolution, state of national emergency, revolt, resurrection, or riot in

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*Soviet Government*, 36 CORNELL L.Q. 31, 52–53 (1950).

121. See *id.* at 51.

122. SABAH, *supra* note 62, at 95.

123. See U.N. Conference on Trade and Development, *supra* note 83, at 40–50, 111–15.

124. See U.N. CONF. ON TRADE & DEV., *supra* note 65, at 88–89.



the territory of the host State)—which was altogether silent on the issue of compensation or remedies for the breach of this clause—would result in an award of compensation as the appropriate mode of reparations, especially when Sri Lanka had not granted any such compensation to either its nationals or third State nationals for losses arising under the same emergency situation that gave rise to AAPL’s losses.<sup>125</sup>

### *C. The Idiosyncrasies of Compensation for Non-Expropriation Breaches*

Where investors assert a claim for compensation arising from the host State’s breach of a non-expropriation investment treaty provision, tribunals thus far have often glossed over the threshold question of the suitability of compensation to redress the non-expropriation breach.<sup>126</sup> For example, in *Chevron Corp. & Texaco Petroleum Corp. v. Ecuador*, the claimants asserted that Ecuador committed a denial of justice under international law for its conduct or inaction in relation to their cases pending before Ecuadorian courts, arguing:

[U]nder both their BIT and their [contract] claims, [the] Tribunal must ultimately award compensation based on the merits of TexPet’s underlying cases. . . . [T]he underlying breaches of contract are themselves a part of the internationally wrongful act, and the Tribunal may therefore adjudicate those breaches directly since denial of justice has occurred under customary international law either by refusals of the Ecuadorian judiciary to decide those cases or by decisions taken incompetently or in bad faith, in manifest disregard of Ecuadorian law or a manifest misapplication of the law.<sup>127</sup>

The Tribunal focused its analysis on Article II(7) of the US-Ecuador

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125. *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, ¶¶ 38–42, 53 (June 15, 1990).

126. Note the position taken by some scholars that “the absence of explicit standards of compensation for non-expropriatory breaches of international investment law does not preclude the use of standards applicable in case of expropriation.” Pierre-Yves Tschanz & Jorge E. Viñuales, *Compensation for Non-Expropriatory Breaches of International Investment Law: The Contribution of the Argentine Awards*, 26 J. INT’L ARB. 729, 735 (2009).

127. *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on Merits, ¶ 237 (Mar. 30, 2010).

BIT, which states that “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”<sup>128</sup> The Tribunal found that there was a breach of this provision of the BIT:

[T]he facts demonstrate that the Ecuadorian courts have failed to act with reasonable dispatch. . . .

. . . .

. . . [T]he Ecuadorian courts have had ample time to render a judgment in each of the [claimants’] seven cases and have failed to do so. . . .

. . . .

. . . [A] breach of Article II(7) of the BIT was completed by reason of undue delay at the date of claimants’ Notice of Arbitration, December 21, 2006. At that time, the Claimants’ cases had been pending in the Ecuadorian courts for 13 to 15 years.<sup>129</sup>

In determining the reparations for breach of Article II(7) of the BIT, the Tribunal surprisingly engaged in its own highly speculative assessment on whether claimants would have prevailed in those cases before Ecuadorian courts, and what compensation they would have been entitled to under those cases, to determine the measure of “compensation” as the reparative mechanism for breach of Article II(7) of the BIT.<sup>130</sup> The Tribunal did not, however, consider *the propriety of awarding compensation* to redress this particular kind of treaty breach in the first place, instead assuming that it could decide the merits of these cases on their own and with no deference or consideration whatsoever for any judgment that could be issued by Ecuadorian courts.<sup>131</sup> The Tribunal reasoned that given the supposed nature of the treaty breach as a failure by Ecuador to provide to the claimants the required effective means of asserting their claims and enforcing their rights, then, “as a matter of causation, [it must] decide on the merits of the underlying seven Ecuadorian court cases.”<sup>132</sup>

It is completely baffling that the *Chevron* Tribunal came to conclusions that: 1) a breach of Article II(7) of the U.S.-Ecuador

128. *Id.* ¶ 241 (quoting Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., art. II, ¶ 7, Aug. 27, 1993, S. TREATY DOC. NO. 103-15).

129. *Id.* ¶¶ 256, 262, 270.

130. *Id.* ¶¶ 374–77, 383–84.

131. *Id.*

132. *Id.* ¶ 384.

BIT—essentially the failure of Ecuador to provide “effective means” for investors to assert claims—would be properly redressed through an attempt to reconstruct an artificial *status quo ante* simulating how an Ecuadorian court *would* have ruled; and 2) under Ecuadorian law, evidence marshaled by the claimants in the seven cases would have somehow resulted in decisions in their favor, including the actual *quantum* of damages for such favorable decisions.<sup>133</sup> The Tribunal’s discussion of these cases from the supposed standpoint of Ecuadorian law is altogether silent on the authoritative nature of their pronouncements of Ecuadorian law and rules of evidence.<sup>134</sup> In the dispositive part of the award, the *Chevron* Tribunal set the determination of the quantum of compensation that Ecuador would be liable for to a separate Procedural Order.<sup>135</sup>

While one can well understand that a State’s inability to provide foreign investors with “effective means” to assert claims gives rise to a duty to make reparations for this breach, one wonders whether it would have behooved the *Chevron* Tribunal to consider whether an appropriate measure of restitution could have been imposed on Ecuador. For example, could the tribunal have instead issued an order immediately obligating Ecuador to ensure the swift and immediate resolution and/or court prioritization of the seven cases, combined with some measure of damages for the time value of the undue delay in affording justice to the investors’ economic claims? For the *Chevron* Tribunal to simply have arrogated to itself the authority to decide those seven cases under Ecuadorian law could arguably be said to have generated an impression of arbitral overreach.

In contrast, the International Court of Justice has tended to be careful about superimposing its judgment over that of domestic judicial authorities’ interpretation of local law. For example, in its Judgment on Jurisdiction, Admissibility and Merits in *Avena and other Mexican Nationals (Mexico v. United States)*, while the International Court of Justice found that the United States breached consular notification duties, rights to representation and other due process rights under the Vienna Convention on Consular Relations throughout its entire conduct towards Mexican nationals that had

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133. *Id.* ¶¶ 389–498.

134. *See id.* ¶¶ 389–498.

135. *Id.* at *dispositif* ¶ 5 (“As a result of the Tribunal’s decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.”).

been convicted and sentenced by U.S. courts, the International Court of Justice held that “the appropriate reparation in this case consists in the obligation of the United States of America to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the Mexican nationals.”<sup>136</sup> Unlike the *Chevron* Tribunal, the International Court of Justice did not presume to resolve the cases pending before U.S. domestic courts. The Court did not reengineer how U.S. courts would or should have determined the guilt or innocence of the Mexican nationals, the appropriate sentence, or whatever measure of compensation such nationals would have been entitled to for any alleged delay or wrongful process observed by U.S. authorities in individual cases.

The question of the suitability of compensation as the mode of reparations also arises vividly when *causation* (between the alleged infringing host State acts and the asserted damage to foreign investors) appears to be inadequately established or discussed in an investor-State award.<sup>137</sup> Two cases against the Czech Republic lodged by different foreign investors—over essentially the same governmental actions and inactions—well illustrate this phenomenon. In *Lauder v. Czech Republic*,<sup>138</sup> the arbitral tribunal found that the acts of the Czech Media Council in reversing its initial position that a direct investment in a Czech company was permitted to operate a media license (instead requiring the foreign investor to create a local joint venture company) amounted to a “discriminatory and arbitrary measure” in breach of the bilateral investment treaty between the United States and the Czech Republic.<sup>139</sup> Despite the finding of breach, however, the arbitral tribunal held that such breach “was too remote to qualify as a relevant cause for the harm caused. A finding on damages due to the Claimant by the Respondent would therefore not be appropriate.”<sup>140</sup> The *Lauder* tribunal reasoned:

Even if the breach therefore constitutes one of several

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136. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶ 153(9) (Mar. 31) (emphasis added).

137. *See Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 807 (July 24, 2008) (finding that declaratory relief could be appropriate rather than damages when causation is not proven, “[g]iven that none of the Republic’s violations of the BIT caused the loss and damage for which BGT now claims compensation, it follows that each of BGT’s claims for damages must be dismissed, and that the only appropriate remedies for the Republic’s conduct can be declaratory in nature”).

138. *Ronald S. Lauder v. Czech Republic*, UNCITRAL (ad hoc), Final Award (Sept. 3, 2001).

139. *Id.* ¶ 222.

140. *Id.* ¶ 235.

“*sine qua non*” acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause, namely the termination by CET 21 on 5 August 1999 . . . did not become a superseding cause and thereby the proximate cause. In other words, the Claimant has to show that the acts of CET 21 were so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm. This the Claimant has not shown. First of all, the Claimant itself in 1993 did not protest against the change imposed by the Media Council. Furthermore, it was completely impossible at that time to envisage that the Claimant itself would actively participate in all those later steps which allowed Mr. Železný to disengage himself from CNTS and to acquire control of CET 21 in order to be able to pursue his own interests without having to rely on CME. These acts of CET 21, and through it by Mr. Železný, are the real cause for the damage which apparently has been inflicted to the Claimant.<sup>141</sup>

In contrast, the tribunal majority in *CME Czech Republic v. Czech Republic*<sup>142</sup> did not elaborate on the issue of causation in awarding compensation to the claimant for the same actions of the Czech Media Council. The *CME* majority in the tribunal reached a factual conclusion on causation in one paragraph (where nine previous paragraphs simply restated the ILC Articles on State Responsibility principles on damages).<sup>143</sup> Without further factual discussion, it held that the “Media Council, when coercing CNTS in 1996 to amend its MOA and to implement the Service Agreement *must have understood the foreseeable consequences of its actions*, depriving CME of the legal safety net for its investment in the Czech Republic.”<sup>144</sup> Thus, the *CME* tribunal majority ultimately awarded \$270 million in damages for the *exact* same actions of the Czech Media Council—Council actions that the Lauder tribunal had already found

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141. *Id.* ¶ 234.

142. *CME Czech B.V. v. Czech Republic*, UNCITRAL (ad hoc), Partial Award (Sept. 13, 2001).

143. *Id.* ¶ 585.

144. *Id.* (emphasis added).

not to have created any compensable harm.<sup>145</sup> The *CME* tribunal insisted thereafter in its Final Award that it dealt with the factual issues on causation:

Respondent's attempt to relitigate causation is, therefore, unacceptable. The Tribunal quite clearly addressed causation in the Partial Award para. 527, 575–585 and decided upon it. Neither Respondent's exposition on the international law of joint tortfeasors nor its diverse efforts to include arguments under new labels (such as contribution and mitigation) can change the fact that these points all relate to the previously answered question of its responsibility for all of Claimant's loss.<sup>146</sup>

The contradictions between the *CME* majority and the *Lauder* tribunal on whether the exact same governmental acts caused compensable harm demonstrate how different tribunals can reach opposite conclusions on the causation requirement to prove damages, despite involving identical governmental acts.

The analysis in *CME Czech Republic v. Czech Republic* certainly contrasts starkly with the significance that the International Court of Justice attaches to properly establishing causation for claims of compensation for material and non-material injuries. In its Judgment on Compensation in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*,<sup>147</sup> the Court found that non-material injuries caused by the Democratic Republic of the Congo to businessman Mr. Diallo for his arrest and detention were compensable, but noted qualifications based on equity.<sup>148</sup> The Court also recognized equitable considerations as part of its assessment of compensation due for material injury caused to Mr. Diallo by the Democratic Republic of the Congo's actions against his businesses or properties, while requiring specific evidence for each asserted claim of compensation:

33. Despite the shortcomings in the evidence related to the property listed on the inventory, the Court recalls that Mr. Diallo lived and worked in the territory of the DRC for over thirty years, during which time he

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145. *CME Czech B.V. v. Czech Republic*, UNCITRAL (ad hoc), Final Award, pt. IX (Mar. 14, 2003).

146. *Id.* ¶ 447.

147. *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, 2012 I.C.J. Rep. 324 (June 19).

148. *Id.* ¶¶ 24–25.

surely accumulated personal property. Even assuming that the DRC is correct in its contention that Guinean officials and Mr. Diallo's relatives were in a position to dispose of that personal property after Mr. Diallo's expulsion, the Court considers that, at a minimum, Mr. Diallo would have had to transport his personal property to Guinea or to arrange for its disposition in the DRC. Thus, the Court is satisfied that the DRC's unlawful conduct caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived, although it would not be reasonable to accept the very large sum claimed by Guinea for this head of damage. In such a situation, the Court considers it appropriate to award an amount of compensation based on equitable considerations (see paragraph 36 below). . . .

. . . .

36. The Court therefore awards no compensation in respect of the high-value items and bank account assets described in paragraphs 34 and 35 above. However, in view of the Court's conclusions above (see paragraph 33) regarding the personal property of Mr. Diallo and on the basis of equitable considerations, the Court awards the sum of US\$10,000 under this head of damage.<sup>149</sup>

As seen from the above, the International Court of Justice will strictly reject a claim for compensatory damage when evidence of causation is not adequately established. The court also tempers its assessment of compensation based on its own appreciation of equitable considerations applicable in the case before it.

#### *D. Valuation of Compensation for Non-Expropriation Treaty Breaches*

Apart from issues on the suitability of compensation as a mode of reparations for non-expropriation breaches, it should also be stressed that the appropriate valuation methodology is elusive and unsettled. While the fair market value standard often appears to be the valuation measure of choice used for breaches of non-expropriation investment treaty standards such as the fair and equita-

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149. *Id.* ¶¶ 33, 36.

ble treatment standard,<sup>150</sup> it should be stressed that this measure is not necessarily controlling in all cases. For example, in *PSEG Global Inc. v. Turkey*,<sup>151</sup> the arbitral tribunal found that Turkey breached the fair and equitable treatment standard by its “failure to conduct negotiations in a proper way and other forms of interference . . . [t]he appropriate remedies thus do not relate to a compensation for the market value of those assets but to a different objective.”<sup>152</sup> The *PSEG* tribunal declared that “fair market value shall not be retained as the measure for compensation in this case,”<sup>153</sup> and neither would it apply “the lost profits heading of claim as the measure of compensation because it cannot be justified from a legal or economic point of view in the circumstances of the case.”<sup>154</sup> Instead, the tribunal ordered Turkey to pay compensation in the amount of \$9 million, representing the cost of PSEG’s proven investment expenditures, plus interest from the date of injury.<sup>155</sup> Similarly, the tribunal in *Lemire v. Ukraine* awarded almost \$9 million in damages,<sup>156</sup> finding that “in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT.”<sup>157</sup> The *Lemire* tribunal stressed:

[T]he actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, “but for” the State’s breach.<sup>158</sup>

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150. See, e.g., *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 403 (Sept. 28, 2007); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 363 (May 22, 2007); *CMS Gas Transmission Co. v. Republic of Arg.*, ICSID Case No. ARB/01/8, Award, ¶¶ 409–10 (May 12, 2005); *MTD Equity Sdn Bhd v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 253 (May 25, 2004); *S.D. Myers, Inc. v. Gov’t of Can.*, UNCITRAL (ad hoc), Second Partial Award, ¶ 311 (Oct. 21, 2002).

151. *PSEG Global Inc. v. Republic of Turk.*, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007).

152. *Id.* ¶ 308.

153. *Id.* ¶ 309.

154. *Id.* ¶ 315.

155. *Id.* ¶ 353.

156. *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, ¶ 381 (Mar. 28, 2011).

157. *Id.* ¶ 149.

158. *Id.* ¶ 152.



The tribunal pragmatically articulated the difficulties and intricacies of an armchair reconstruction of these pre-breach and post-breach values:

249. The issues surrounding the measure of compensation for breaches of the FET standard are—as the Tribunal in *LG & E* said—“*particularly thorny*”. To estimate the damages, the Tribunal will inevitably have to accept certain assumptions. These assumptions can and must be checked, applying tests of reasonableness. But in the end, there is no denying that the calculation of damages in a case like this, inevitably requires a certain amount of conjecture as to how things would have evolved “but for” the actual behaviour of the parties. This difficulty in calculation cannot, however, deprive an investor, who has suffered injury, from his fundamental right to see his losses redressed.<sup>159</sup>

It was surprising, to say the least, for the *Lemire* tribunal to admit in the above that it was engaging in conjecture as it tried to fathom the financial situation that would have occurred for the investors, were it not for the actual respective behavior of the host State and the investor.<sup>160</sup>

The *PSEG* and *Lemire* cases both demonstrate the absence of a settled valuation method. The tribunals in both of these cases did not question the suitability of compensation as the mode of reparation for the asserted breaches of non-expropriation investment treaty provisions, although both tribunals ultimately whittled down the investors’ compensation claims considerably by rejecting the automatic applicability of the fair market value standard.

#### *E. Non-Compensation Reparations for Non-Expropriation Treaty Breaches*

While compensation appears to be the dominant mode of reparations favored by tribunals for host-State breaches of non-expropriation investment treaty provisions,<sup>161</sup> there are a few, how-

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159. *Id.* ¶ 249 (footnotes omitted).

160. *Id.* ¶¶ 243–48.

161. See Ian A. Laird et al., *International Investment Law and Arbitration: 2013 in Review*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY: 2013–2014, *supra* note 54, at 69, 123–24; Guiguo Wang, *Issues of Compensation for Non-Expropriatory Breaches of International Investment Law*, 11 MANCHESTER J. INT’L ECON. L. 156 (2014).

ever, who do recognize that other modes of reparations may also be appropriate. The tribunal in *Al-Baloul v. Tajikistan*, for example, found that Article 26 of the Energy Charter Treaty (“ECT”) did not rule out the possibility for the tribunal to order specific performance (e.g. such as the issuance of licenses sought by the claimant),<sup>162</sup> even if the claimant was thereafter not able to present evidence to substantiate its right to this form of relief.

However, as to claims for compensatory damages, the *Al-Baloul* tribunal simply followed the methods prescribed by other tribunals, concluding that since the ECT did not provide guidance on the standard of compensation for non-expropriation breaches:

it need not decide which of the various standards and methodologies applied in other cases by other tribunals might be suitable in this case. The Claimant has chosen its own methodology. The Claimant has submitted a valuation based on the *difference in the value* of the licenses in the [hypothetical scenario in 2001, had there been no breach and Tajikistan issued the licenses; and the hypothetical scenario in 2009]. The Tribunal notes that a value-based approach has been applied by a number of investment tribunals for treaty breaches other than expropriation.<sup>163</sup>

Rather than taking its own fresh approach to articulate an appropriate test for compensatory damages for non-expropriatory breaches in the particular case before it, the *Al-Baloul* tribunal refrained from exercising its arbitral discretion on the matter and deferred to the methodologies accepted by some other investment tribunals.

Notably, restitution is also a preferable mode of reparations as opposed to compensation. In *Arif v. Republic of Moldova*, the arbitral tribunal explicitly acknowledged that “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.”<sup>164</sup> The *Arif* tribunal sequentially approached the modes of reparation possible—restitution and compensation—and held the latter in abeyance until parties could demonstrate that restitution was impossible:

569. The first issue that the Tribunal needs to con-

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162. *Al-Baloul v. Republic of Taj.*, SCC Case No. V (064/2008), Final Award, ¶¶ 47–63 (June 8, 2010).

163. *Id.* ¶ 68.

164. *Arif v. Republic of Mold.*, ICSID Case No. ARB/11/23, Award, ¶ 570 (Apr. 8, 2013).

sider is whether restitution can be considered in circumstances where Claimant insists on damages. Respondent argues that it should have the opportunity to provide restitution as an alternative to damages, as this remedy would restore Claimant to the position he would have been in without any violation of the BIT, and also avoids the uncertainties of the calculation of damages, including the possibility of risk free windfall profits.

570. The Tribunal notes that the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution. On the other hand, 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.

571. The Tribunal considers restitution to be the preferable remedy, but as in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy, the best course is to order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days. This provides Respondent with the opportunity, in light of the findings of this award, to formulate and propose to Claimant the exact mechanism of restitution. If restitution is not possible, or the terms of restitution proposed by Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment. This solution provides a final opportunity to preserve the investment, while also preserving Claimant's right to damages if a satisfactory restitutionary solution cannot be found.<sup>165</sup>

A tribunal's power to order restitution may exist both as a matter of its inherent authority to order pecuniary and non-pecuniary remedies under the ICSID Convention, as well as when such mode of reparation is not precluded under a BIT.<sup>166</sup> While restitution is "rare-

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165. *Id.* ¶¶ 569–71 (footnotes omitted).

166. *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 166–68 (Sept. 24, 2008).

ly ordered”<sup>167</sup> by tribunals, it remains a mode of reparation that should not be easily discarded. With the emerging phenomenon of third-party funding of investor claims against host States, it is even more urgent to assess, in a preliminary test, the suitability of reparations sought by the injured party-claimant.<sup>168</sup> Where third-party funding of investor claims is present, the investor’s choice of its preferred mode of reparations against the host State may no longer be driven solely by its own consideration and assessment of sufficient redress particular to the circumstances of the investor, but rather by the profit incentives of third-party funders. The third-party funder will likely have no economic interest in negotiated non-pecuniary modes of reparations, and thus would probably disfavor other possible non-compensatory reparative settlement configurations between the investor and the host State.

The possible presence of third-party funders in investor-State arbitrations makes it all the more crucial that arbitral tribunals subject investors’ claims for compensation to a threshold or preliminary test that determines the suitability, propriety, and/or adequacy of compensation as a mode of reparations for established host State violations of non-expropriation investment treaty provisions. In the same manner that the International Court of Justice rigorously scrutinizes the propriety of the injured State’s chosen mode of reparations, investor-State arbitral tribunals cannot, and should not, automatically defer to investor claims for compensation as their preferred mode of reparations, unless the investor first establishes that such compensation claims are indeed suitable to redress the nature and content of non-expropriation investment treaty breaches proven against the host State. After the claimant meets this threshold question, the claimant must also meet the critical requirement of proportionality as to the amount of compensation sought.

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167. *Id.* ¶ 166.

168. See Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27 ICSID REV. 379, 384 (2012); see, e.g., *Muhamat Çap & Şehil İnşaat Endüstri ve Ticaret Ltd. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015); *Giovanni Alemanni v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov. 17, 2014); *KT Inv. Grp. B.V. v. Republic of Kaz.*, ICSID Case No. ARB/09/8, Award (Oct. 17, 2013); *Teinver S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (Dec. 21, 2012).

## II. REINSTATING THE PRINCIPLE OF PROPORTIONALITY WHEN APPLYING THE *CHORZÓW* STANDARD OF REPARATIONS

The *Chorzów* standard of reparations internalized the concept of proportionality. In estimating the damage that may arise from an unlawful act, the Permanent Court of International Justice held in *Chorzów* that, based on the jurisprudence of arbitral tribunals:

only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible.<sup>169</sup>

The PCIJ found that Poland had violated its obligations to Germany under the Geneva Convention relating to Upper Silesia, by committing a “seizure of property, rights and interests which could not be expropriated even against compensation,”<sup>170</sup> and differentiated between reparations due for *unlawful acts* as opposed to compensation due for *lawful expropriation*.<sup>171</sup> The PCIJ drew a distinction between the lawful liquidation of such property, rights, and interests pursuant to expropriation, and the inherently illegal nature of the seizure of such assets and the dispossession that was committed by the Polish Government against German nationals.<sup>172</sup> While lawful liquidation gives rise to the claimants’ right to compensation ordinarily constituting the “just price of what was expropriated,” the inherently illegal dispossession and seizure gave the claimants the right to reparations that should:

as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. . . .

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169. *Factory at Chorzów (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 31 (Sept. 13).

170. *Id.* at 46.

171. *Id.* at 47–48.

172. *Id.*

. . . [This] involves the obligation to restore the [industrial undertaking seized] and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation . . . must be added that of compensating loss sustained as the result of the seizure.<sup>173</sup>

The PCIJ contemplated restitution of the entire property seized, plus compensation for any other further losses that may have been sustained as a result of the seizure. This was proportional in the view of the Court, since this restored the injured State (Germany) to the *status quo ante* before the breach was committed by the responsible State (Poland).<sup>174</sup>

Investor-State arbitral tribunals do not mandatorily conduct proportionality analysis when determining the quantum of compensation due to an investor.<sup>175</sup> Article 36 of the International Law Commission's 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts defines:

compensation for damage caused by an internationally wrongful act, to the extent such damage is not made good by restitution . . . . [C]ompensation shall cover any financially assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State . . . .<sup>176</sup>

Compensation is not intended to be punitive, nor to have an expressive or exemplary character.<sup>177</sup> The appropriate heads of compensation as damage would depend upon "the content of particular primary obligations, an evaluation of the respective behavior of the parties, and, more generally, a concern to reach an equitable and acceptable outcome."<sup>178</sup> These specific attributes of compensation—e.g. the content of the primary obligation breached, the evaluation of parties' respective behavior, and reaching equitable and acceptable outcomes to both parties—for breach of non-expropriation provisions in in-

173. *Id.*

174. For a more extensive discussion of restitution and compensation in the *Chorzów* case, see SABAH, *supra* note 62, at 47–53.

175. See Faccio, *supra* note 68, at 199.

176. ILC Draft Articles, *supra* note 53, art. 36, cmt. ¶ 1.

177. *Id.* art. 36, cmt. ¶ 4.

178. *Id.* art. 36, cmt. ¶ 7.

vestment treaties are often omitted in the discussions on compensation quantum adjudged in investor-State arbitration awards.

For example, in its Award in *Enron Corp. v. Argentine Republic*, the arbitral tribunal proceeded to examine compensation as the mode of reparations for breaches of investment treaty provisions on the fair and equitable treatment standard and the umbrella clause, assuming that the parties could not agree on any form of restitution such as renegotiation of contracts.<sup>179</sup> It also cumulated the effect of breaches of both these treaty provisions to justify ultimately assigning the fair market value standard of compensation used in the investment treaty's expropriation provision.<sup>180</sup> The tribunal's reasoning did not expressly contain a discussion showing that the tribunal considered the content of the primary obligations breached, the conduct of the respective parties, or the concern to reach an equitable and acceptable outcome, as required in the ILC Commentary to the Articles on State Responsibility. The tribunal found that "[g]iven the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination."<sup>181</sup> It was ultimately left to the empirical imagination of the parties (or any reader of the award, for that matter) to establish any testable correlative or causative nexus between cumulated breaches and the "appropriateness" of using the fair market value as the valuation standard.

A similar approach was adopted by the arbitral tribunal in *Siemens AG v. Argentina*, where Argentina was ordered to pay damages amounting to the full value of the investment plus consequential damages, as a result of breaches of the investment treaty's provisions on expropriation, fair and equitable treatment, and full protection and security.<sup>182</sup> Likewise in *National Grid Public Limited Co. v. Argentina*, the arbitral tribunal ordered compensation as the mode of reparations for breaches of the investment treaty's provisions on the fair and equitable treatment standard and the protection and security clause.<sup>183</sup> The *National Grid* tribunal attempted to incorporate its consideration of the relative situations of the parties in its determination of the quantum of compensation due, but did not factor in the

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179. *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 359–63 (May 22, 2007).

180. *Id.* ¶ 363.

181. *Id.*

182. *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award and Separate Opinion, ¶¶ 271, 291, 301–03, 308, 403 (Jan. 17, 2007).

183. *Nat'l Grid Plc. v. Argentine Republic*, UNCITRAL (ad hoc), Award, ¶¶ 275–90 (Nov. 3, 2008).

concern for reaching an equitable outcome or the nature of reparation owed given the primary obligation breached.<sup>184</sup> Instead, it proceeded directly to select the Discounted Cash Flow (“DCF”) method among different valuation methodologies, without examining the availability of restitution as the primary form of reparation.<sup>185</sup> The Tribunal chose the DCF method for its utility in “realistically assessing the economic value of a going concern by relying on the stream of value that it can generate over its operative life,” but also noted drawbacks to this method, such as the importance of showing that there is a “history of profitable operation . . . [and that] the DCF methodology necessarily involves projecting future cash flows—calling for considerable latitude for creativity and speculation as evidenced by the conflicting views of the experts engaged by the Parties and the Tribunal.”<sup>186</sup> The Tribunal stressed that it also compared expert reports with available comparable market information, “to carefully evaluate the reasonableness of its conclusions,” finding that while “none of the proposed approaches is perfect . . . [, its adopted approach] appropriately reflects the impact of the [challenged Argentine governmental] [m]easures, while still recognizing that, because of the economic and social crisis, the situation of the Argentine economy was definitely not ‘business as usual.’”<sup>187</sup>

Many other arbitral awards exhibit a similar pattern of reasoning as *National Grid*: 1) proceeding directly to valuation issues in assessing compensation due for breach of non-expropriation investment treaty provisions; 2) not distinguishing between compensation for expropriation and reparations for breach of non-expropriation standards such as the FET standard; and 3) omitting any substantive discussion of the proportionality of compensation determined, specifically with reference to the basis of the primary content of the obligation breached, the relative behavior of the parties, and the concern to reach an equitable and acceptable outcome.<sup>188</sup>

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184. *Id.* ¶¶ 274–76, 284–85, 289–90.

185. *Id.*

186. *Id.* ¶ 276.

187. *Id.* ¶¶ 289–90.

188. *See, e.g.*, *Achmea B.V. v. Slovak Republic*, PCA Case No. 2008-13, Final Award, ¶¶ 321–34 (Dec. 7, 2012); *R.R. Dev. Corp. v. Republic of Guat.*, ICSID Case No. ARB/07/23, Award, ¶¶ 259–77 (June 29, 2012); *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶¶ 700–05 (Oct. 31, 2011); *Gemplus S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3, Award, ¶¶ 52–59 (June 16, 2010); *Siag and Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, ¶¶ 532–41 (June 1, 2009) (applying compensation defined in the BIT for expropriation where there was a total loss of the investment arising from breach of the BIT provisions on expropriation, FET, and full protection); *Rumeli Telekom A.S. v. Republic of Kaz.*, ICSID Case No.



Arbitral tribunals may also find that other measures of restitution, such as orders for specific performance, no longer be practical or possible for the parties by the time arbitral proceedings are terminated,<sup>189</sup> or might have been ruled out altogether upon the agreement of both parties.<sup>190</sup> Restitution measures as reparations may also be unnecessary where the arbitral tribunal issues prompt and timely interim measures of protection. For example, in *Paushok v. Mongolia*, a case that involved challenges to the host State's passage of a Windfall Profit Tax Law, the arbitral tribunal timely issued an order against Mongolia to refrain from seizing or obtaining any lien on the investor's assets, and simultaneously, an order requiring the investor not to move its assets out of Mongolia and to periodically furnish Mongolia with a list of complete assets.<sup>191</sup> Because a State seizure of existing investor assets was expeditiously prevented in the course of the arbitration proceedings, it would not have been necessary for the claimant to seek reparations in the form of restitution *in integrum*.

In sum, several points stand out from trends in arbitral reasoning in determining reparations due for host State breaches of non-expropriation investment treaty provisions. Firstly, few, if any, arbitral awards discuss the factual bases for tribunals' conclusions that measures of restitution are no longer practical or are impossible to implement between the parties. When it does not appear that parties agree on any measure of restitution, some tribunals proceed directly to the assessment of compensation as an alternative mode of reparations.<sup>192</sup> This is problematic, since the silence of the arbitral awards

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ARB/05/16, Award, ¶¶ 789–818 (July 29, 2008); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 299–300, 311–14, 482–85 (Sept. 28, 2007); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 425–30 (July 14, 2006) (using the fair market value standard of compensation for non-expropriation BIT valuations); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 183–88 (May 29, 2003) (applying compensation as defined in the BIT for the expropriation as the standard for all violations of the BIT).

189. See *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, ¶¶ 433–36 (Mar. 29, 2005).

190. *Bernardus Henricus Funnekotter v. Republic of Zim.*, ICSID Case No. ARB/05/6, Award, ¶¶ 109–12 (Apr. 22, 2009).

191. *Paushok v. Gov't of Mong.*, UNCITRAL (ad hoc), Order on Interim Measures, ¶¶ 2, 3, 4, 9 (Sept. 2, 2008); see also *Paushok v. Gov't of Mong.*, UNCITRAL (ad hoc), Award on Jurisdiction and Liability, ¶¶ 9(2)–(4), 9(6)–(10) (Apr. 28, 2011) (rejecting investors' claims for compensation).

192. See, e.g., *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶¶ 476–514 (Nov. 8, 2010); *Ceskoslovenka Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, ¶¶ 219–374 (Dec. 29, 2004); see also Michelle Bradfield & J.C. Thomas, *Non-Pecuniary Remedies: A Missed Opportunity?*, 30 ICSID REV. 635 (2015); Gisele Stephens-Chu, *Is It Always About the Money? The Appropriateness*

themselves cannot show whether the arbitral tribunal undertook any specific fact-finding on other possible alternative measures of restitution that could have been well-suited to provide reasonable redress to the foreign investor. The omission of this analysis means that there is not a great deal of guidance for future disputing parties and other arbitral tribunals on the proper substantiation necessary, before fixing on compensation as the feasible *alternative* measure of reparations rather than restitution.<sup>193</sup>

Secondly, many tribunals do not directly or purposely engage in proportionality analysis when determining the amount of compensation or choosing the particular valuation methodology. They do not consider the nature and content of the primary obligations breached (e.g., fair and equitable treatment standard, MFN treatment standard, full protection and security standard), and likewise omit to discuss or elaborate how compensation functions as the appropriate reparative mechanism for the breach of these particular obligations. They do not always consider the respective conduct of the parties, and certainly do not set out as their explicit objective in determining reparations, the concern to reach an “equitable and acceptable outcome” as mandated by the International Law Commission’s Commentary to the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>194</sup> As scholars have observed, “Investment tribunals have not discussed the question of whether international law empowers them to rely on equity, and what limits it poses as regards the use of this concept.”<sup>195</sup>

Thirdly, and most importantly, while arbitral tribunals retain tremendous discretion to devise and determine the mode of reparations appropriate for breaches of non-expropriation provisions in investment treaties, they have tended to rely almost inevitably on compensation (and its valuation methods) taken from either the definition of compensation for expropriation as expressly indicated in the investment treaty, or from the definition of compensation as financially assessable damage defined in Article 31(2) of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>196</sup>

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*of Non-Pecuniary Remedies in Investment Treaty Arbitration*, 30 *ARB. INT’L* 661 (2014).

193. See Christoph Schreuer, *Alternative Remedies in Investment Arbitration*, 3 *J. DAMAGES INT’L ARB.* 1 (2016); Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 721 (Stephan W. Schill ed., 2010).

194. CRAWFORD, *supra* note 66, at 220.

195. RIPINSKY & WILLIAMS, *supra* note 70, at 127.

196. CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION:*

To justify relying on the investment treaty's definition of compensation as envisaged for expropriation—as the measure of compensation supposedly due for breaches of non-expropriation provisions in the investment treaty—tribunals purposely engage in interesting, but quite untested, correlations. For example, tribunals consider the “cumulative effects”<sup>197</sup> of multiple breaches that somehow warrant imposing this form of compensation, or the total loss of the investment somehow amounting to the effect of an indirect expropriation, even if the tribunal expressly finds that indirect expropriation did not occur.<sup>198</sup>

From a plainly textual standpoint, the absence of any compensation mechanism attached to non-expropriation provisions should ordinarily be read as the demonstrated intent of treaty drafters *not* to immediately or automatically require compensation in case of breach of these provisions. The fact that the compensation definition was exclusively set for expropriation and nowhere else in the treaty should likewise signal that treaty drafters did not contemplate this standard operating in any other part of the treaty either. But to date, these fictive leaps of arbitral imagination or discretion remain largely unchallenged in the practices of many other tribunals.

The breach of non-expropriation provisions in investment treaties should indeed give rise to the host State's international responsibility under general international law rules. But more careful thought must be given to the nature of reparations that the arbitral tribunal deems appropriate to redress these kinds of breaches. Designing the reparative solution will, to some extent, depend on eliciting “the common intention of the parties”<sup>199</sup> on the desired mode of reparation: restitution, compensation, or satisfaction. The tribunal has specific duties:

The international judge, having been seized of a dispute as to the form of reparation or with a claim requesting him to indicate a form of reparation for the damage (without specifying the form of reparation), can base his decision on two (alleged) rules of interna-

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SUBSTANTIVE PRINCIPLES ¶ 9.86 (2007); *see* ILC Draft Articles, *supra* note 53, art. 31(2).

197. *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 244 (May 22, 2007); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 283 (Sept. 28, 2007).

198. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 264, 281 (May 12, 2005); *id. dispositif* (found at pages 139–40 of the award opinion).

199. Yann Kerbrat, *Interaction Between Forms of Reparation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 61, at 573, 574.

tional law of responsibility. These are: first, the rule according to which reparation must be adequate, and second, the rule according to which reparation in kind takes priority over reparation by equivalent.<sup>200</sup>

Compensation is merely a secondary form of reparations to restitution,<sup>201</sup> and is strictly circumscribed under the 2001 Articles on State Responsibility to various proportionality measures—its sufficiency to redress the particular content of the primary obligation breached; its consideration of the relative conduct of the parties; and its regard for reaching an equitable and acceptable outcome to the parties.<sup>202</sup> The fact that arbitral reasoning to date in investor-State disputes largely bypasses these key features of proportionality inherent in the concept of compensation as a measure of reparations under general international law speaks volumes of a seeming lack of arbitral control over the compensation quantum phases of arbitral proceedings.

Applying proportionality—as internalized in the mainstream of the law of reparations to the law of inter-State claims—to investor-State disputes will certainly require tribunals to discharge their arbitral functions, and deploy their arbitral discretion, under more strenuous controls than have been demonstrated from the pattern of investor-State arbitral awards examined here. For one, it would be mandatory for investor-State tribunals to examine the relative situations of the injured party claimant, as well as the responsible State, in order to apply equitable considerations, as necessary, to ensure that reparations in the form of compensation would not be oppressive or punitive.<sup>203</sup> Punitive damages are understood to be those paid:

in addition to actual (compensatory) damages when the [respondent] acted with recklessness, malice, deceit, or other reprehensible conduct (eg violence, oppression, fraud). . . .

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200. *Id.* at 579.

201. SABAHI, *supra* note 62, at 61. For early arbitral cases affirming restitution as the primary mode of reparation, see, for example, BP Exploration Co. v. Gov't of the Libyan Arab Republic, 53 I.L.R. 297 (Oct. 10, 1973), and the LIAMCO Arbitration, discussed in E.I. Nwogugu, *Legal Problems in Foreign Investment*, in 153 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 167, 221–22 (1976).

202. ILC Draft Articles, *supra* note 53, art. 36 cmt. ¶7.

203. A local court's award of punitive damages was unsuccessfully challenged by an investor to constitute treaty breaches of investment protection treatment standards. See Loewen Grp. Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

. . . [But] there is no clear authority for punitive damages in international law, and [the] scarcity of practice evidences that, at present, punitive damages are certainly not a generally accepted remedy in international law.<sup>204</sup>

The injured party claimant must be able to establish the specific causation between the responsible State's internationally wrongful actions (e.g. the actions that violate the non-expropriation investment treaty provisions, in particular), and the specific resultant damage suffered by the claimant from those actions of the responsible State. Finally, the tribunal can further ensure the proportionality of compensation awarded through its scrutiny of valuation measures chosen to determine the "financially assessable damage" to the injured party claimant, which should not automatically be assumed to equate to the fair market value of the asserted economic loss.

The financial assumptions used by the claimant in estimating its loss must also be empirically tested and scientifically validated against general accounting principles, and tribunals should be cautious enough to "triangulate" their valuation methodologies (comparing results from the primary valuation method as opposed to other methods chosen), acknowledging the full spectrum of errors often associated with company valuation methods.<sup>205</sup> While investment arbitrators might say that these practices are indeed already being done within the confines of the hearing room, the lack of uniformity between tribunals' arbitral awards (e.g. on the threshold examination of the appropriateness of the claimant's chosen mode of reparation, such as compensation; and the proportionality of the compensation ultimately awarded), suggests that investor-State arbitral practices remain very nascent and undeveloped on these crucial issues. There appears little that constrains arbitral discretion thus far when it comes to the choice and proportionality of compensation awarded for non-expropriation breaches of investment treaties.

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204. Stephan Wittich, *Punitive Damages*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 61, at 667, 667, 674; *see also* Clyde Eagleton, *Measure of Damages in International Law*, 39 YALE L.J. 52 (1929).

205. *See* Rumeli Telekom A.S. v. Republic of Kaz., ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee on the Application for Annulment, ¶¶ 141–51 (Mar. 25, 2010); RIPINSKY & WILLIAMS, *supra* note 70, at 235; Pablo Fernández, *Company Valuation Methods: The Most Common Errors in Valuations* (Int'l Ctr. for Fin. Research, Working Paper No. 449, 2007), <http://www.iese.edu/research/pdfs/di-0449-e.pdf>.

### III. INTER-STATE AND INVESTOR-STATE CLAIMS: THE APPLICABILITY OF *CHORZÓW* TO REPARATIONS CLAIMS FOR INTERNATIONAL ECONOMIC INJURY

One can also expect the counterargument that the *Chorzów* standard of reparations may, ultimately, not be applicable when determining compensation for breaches of non-expropriation investment treaty provisions, especially when one closely examines the spaces for limited applicability of international law in investor-State disputes. Admittedly, Article 42(1) of the ICSID Convention gives primacy to the parties' chosen applicable law and appears to give a subordinate or subsidiary role to international law:

(1) 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 (including its rules on the conflict of laws) *and such rules of international law as may be applicable.*<sup>206</sup>

It might be futile, therefore, to insist that claimants prove that their choice of compensation as the mode of reparations is justified, and that such compensation sought is proportional, if *Chorzów* is not, in the first place, part of the applicable law to an investor-State dispute. Under this hypothetical, the tribunal would thus assume wide discretion to adjudicate reparations for the breach of the non-expropriation investment treaty provision, not necessarily limited to the concept of compensation as a mode of reparations under the Articles on State Responsibility, but considering all possible heads of damage that can be proven to flow from the non-expropriation investment treaty breach (possibly including punitive or exemplary damages). This anticipated counterargument is not at all far-fetched, noting positions taken by other scholars cautioning against the wide applicability of the Articles on State Responsibility to investor-State disputes<sup>207</sup> and emphasizing the "specific" nature of investor-State

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206. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 52, art. 42(1) (emphasis added).

207. See R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 797 (2005) ("The ILC Articles are . . . general in their scope; they are also in a sense parasitic upon the specific obligations of the state which are in issue. Thus, where a specific obligation deals with the framework issues (e.g. with the scope of reparation to be made for a breach), it excludes the general framework rule. The secondary law of state responsibility is thus a residual law, a law of the gaps.").

disputes.<sup>208</sup>

However, in the particular case of non-expropriation investment treaty provisions which do not contain any indication of the consequences of their breach, the applicability of international law should not be too controversial. In the first place, the substantive provision in question (e.g., the non-expropriation provision such as the FET standard or other treaty standards) exists in a treaty—a source of international law that must, in turn, be interpreted in accordance with the Article 31 rule of interpretation in the Vienna Convention on the Law of Treaties.<sup>209</sup> The applicable law for determining the appropriate reparations for the breach of this source of obligation (and international law obligation created under the investment treaty) is reasonably expected to be, in the absence of contrary stipulation by the States Parties to the same treaty, likewise international law.<sup>210</sup> In the absence of a bright-line treaty provision explicit-

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208. See RIPINSKY & WILLIAMS, *supra* note 70, at 28 (“The scope of application of Part One of the ILC Articles is not expressly limited, and thus the rules contained in that part apply to all cases where a State may have committed an internationally wrongful act. With respect to Part Two, Article 33(1) states that the provisions in that Part apply only in relation to injuries caused by the wrongful act of a State to another State, several States, or the international community as a whole. Thus, on its face, Part Two does not apply to natural or legal persons. This means that formally the rules of Part Two cannot be relied on by private parties, including foreign investors, in their disputes with States.”); Thomas W. Wälde, *The Specific Nature of Investment Arbitration*, in NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW, *supra* note 56, at 43, 94 (“A more modulated and realistic view should come to the conclusion that international law remains a relevant source of applicable law governing investment disputes, but only with the caveat that the situation of investor-State arbitration is now distinct, in significant aspects, from the law for and by the States. That would also mean that customary international law would remain authoritative, but rather as a ‘strong analogy’ rather than automatically—with the same principle to apply to such modern instruments of customary international law as in particular the ILC Articles of State Responsibility and the Vienna Convention on Treaties.”). Note the asymmetry observed in the invocation of the ILC Articles by claimant-investors, as that made by respondent States. See ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 140 (2012).

209. For the customary nature of the Vienna Convention on the Law of Treaties, see I SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1999–2001, at 193 (2002); Enzo Cannizzaro, *The Law of Treaties Through the Interplay of Its Different Sources*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES 16, 17–19 (Christian J. Tams et al. eds., 2014).

210. See *Bosh Int’l Inc. v. Ukraine*, ICSID Case No. ARB/08/11, Award, ¶ 113 (Oct. 25, 2012) (“The Tribunal observes that the Claimants’ claims are expressed by reference to the substantive standards of protection in the BIT, and that the Respondent has defended those claims on this basis. In this respect, the Tribunal considers that the applicable law consists, for the most part, of the BIT, as interpreted in accordance with international law.”); Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

ly specifying the reparations available for breaches of non-expropriation provisions in investment treaties, under ICSID Convention Article 42(1), tribunals can apply “rules of international law as may be applicable,” including, possibly, the *Chorzów* standard of reparations.<sup>211</sup> Investor-State tribunals have in fact repeatedly invoked the *Chorzów* concept of reparations,<sup>212</sup> even if, as previously shown in Parts I and II of this Article, they have incompletely or imperfectly done so, by failing, first, to require arbitral scrutiny into the claimant’s choice of compensation as the mode of reparations, and second, to scrutinize the proportionality of compensation awarded as reparations. Investor-State arbitral awards have also recognized the ILC Articles on State Responsibility<sup>213</sup> (and/or its various parts) as authoritative codifications of modern customary international law, including the law of countermeasures in Part Two of the ILC Articles on State Responsibility<sup>214</sup> and the rules of attribution in Part One of the same Articles.<sup>215</sup>

It would thus be inconceivable that the application of international law—including the modern law of reparations initiated in the *Chorzów* case and subsequently developed and codified in the ILC Articles on State Responsibility—to investor-State disputes under Article 42(1) of the ICSID Convention would selectively omit the analytical parameters under which scrutiny would ordinarily be extended to the injured party claimant’s choice of the form of reparations (e.g., compensation) and the proportionality of such reparations.

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211. ICSID Convention, *supra* note 52, art. 42(1); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW ¶¶ 7.04–7.06 (2009).

212. See, e.g., Mobil Invs. Can. Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (redacted), ¶¶ 414–30 (May 22, 2012); Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, ¶¶ 307–08 (May 16, 2012); ATA Constr., Indus. & Trading Co. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, ¶¶ 129–31 (May 18, 2010); Bernardus Henricus Funnekotter v. Republic of Zim., ICSID Case No. ARB/05/6, Award, ¶¶ 108–12 (Apr. 22, 2009); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, ¶¶ 31–32 (July 25, 2007); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 359–63 (May 22, 2007); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 349–53 (Jan. 17, 2007); ADC Affiliate Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award of the Tribunal, ¶¶ 480–99 (Oct. 2, 2006); Khan Res. Inc. v. Gov’t of Mong., PCA Case No. 2011-09, Award on the Merits, ¶¶ 368–82 (Mar. 2, 2015).

213. See generally James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility*, 25 ICSID REV. 127 (2010).

214. Corn Prods. Int’l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (redacted version), ¶¶ 145–49 (Jan. 15, 2008).

215. Tulip Real Estate & Dev. Neth. B.V. v. Republic of Turk., ICSID Case No. ARB/11/28, Award, ¶ 281 (Mar. 10, 2014); Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, ¶¶ 155–57 (Nov. 6, 2008).



One cannot, on the one hand, agree that in the absence of any express stipulation by the treaty parties, the law of reparations applies to breaches of non-expropriation investment treaty provisions that are silent on the consequences of their breach, and on the other hand, engage in cherry-picking over the bedrock international practices and doctrines that would ordinarily apply to test the validity and legitimacy of the choice of compensation as the form of reparations, and the proportionality of such compensation when awarded as reparations for these breaches.

If injured State claimants are subject to this degree of scrutiny over their chosen form of reparations and the proportionality of those reparations sought against respondent States, there is no legitimate (and legal) reason why investor-State claimants should be insulated from such scrutiny by arbitral tribunals that apply the law of reparations. As discussed in the Introduction, claimant investors are, at best, delegates and/or beneficiaries of their home State's right to directly sue host States without the usual shield of sovereign immunities against such suits. It is hard to fathom how investors, as delegates and/or third-party beneficiaries of investment treaties, could possibly be immunized from the international legal controls on the choice of reparations and the proportionality of such reparations. Unless otherwise ruled out by the States Parties to the investment treaty themselves by explicit language in the investment treaty, tribunals cannot act in *excés de pouvoir*<sup>216</sup> to arbitrarily separate these elements of choice and proportionality inherent in the law of reparations after they deem the *Chorzów* principle of full reparation applicable to breaches of non-expropriation provisions of investment treaties. Doing so would otherwise make arbitral awards vulnerable to possible partial annulment under Article 52(1) of the ICSID Convention, on the grounds of the tribunals' manifest excess of powers.<sup>217</sup>

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216. See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 6 (1992) ("An arbitral control mechanism facilitates their economical resolution without more general disruption and without direct cost to the community. The doctrine of *excés de pouvoir* is supposed to function as the control mechanism in this theory. Without it, *whatever* an arbitrator did, no matter how inconsistent it might have been with his instructions, would have produced a binding award. The arbitrator would become absolute decision-maker and arbitration would lose its character of restrictive delegation. *Excés de pouvoir* is the conceptual foundation of control for arbitration.").

217. See TAIDA BEGIC, APPLICABLE LAW IN INTERNATIONAL INVESTMENT DISPUTES 168 (2005); Gabriela Alvarez-Avila, *ICSID Annulment Procedure: A Balancing Exercise Between Correctness and Finality*, in ARBITRATION ADVOCACY IN CHANGING TIMES 289 (Albert Jan van den Berg ed., 2011); Christoph Schreuer, *From ICSID Annulment to Appeal*

CONCLUSION: RESTORING LIMITS TO HOME STATES' DELEGATION OF RIGHTS TO INVESTORS

*“First, in the sphere of interstate reparations, there is a confusing association of ‘reparations’ in language and policy both with a largely discredited process of imposing collective punishment upon a defeated state and its civilian population, and as seeking to give the victims of illegal and criminal conduct on behalf of a state a meaningful remedy for harm sustained in the form of substantial monetary compensation. Second, there is a flexible capacity for international law to provide a legal imprimatur, either by treaty or Security Council decision that ratifies a mechanism for the award of ‘reparations’, and gives legal expression to the geopolitical relationship that exists at the end of a war, without regard to whether the motivations for reparations are punitive or compensatory, or a mixture of the two. If the outcome of the war is ‘just’, and the victors are ‘prudent’, then the reparations imposed may contribute to global justice, but if not, not. International law provides at this point no substantive guidelines as to these assessments, and its main role is to provide victorious powers with a flexible instrument by which to give a peace process in accord with their goals and values an authoritative status.”<sup>218</sup>*

Reparations in international law fulfill many purposes—deterrence, redistribution, rehabilitation, moral justice, peace, and reconciliation.<sup>219</sup> Under the *Chorzów* standard, it is meant to ensure that the injured State is returned to the situation that most closely approximates its situation before the responsible State committed the breach of international law.<sup>220</sup> This *post hoc* reconstruction of reality, in the view of this author, should take place under the just limits of international peace, stability, and justice. Inter-State reparations under modern international law are not intended to hearken to the

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*Half Way Down the Slippery Slope*, 10 L. & PRAC. INT’L CTS. & TRIBUNALS 211 (2011). ICSID reports that as of 2012, “the failure to apply the proper law has been invoked in 26 out of 30 annulment decisions. It led to one partial and 3 full annulments.” INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID ¶ 95 (Aug. 10, 2012), <http://documents.worldbank.org/curated/en/476921468092664604/pdf/726620WP0Box370d0Paper0on0Annulment.pdf>.

218. Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS 478, 487 (Pablo de Greiff ed., 2006).

219. Carla Ferstman, *Reparations*, OXFORD BIBLIOGRAPHY (2012) <http://oxfordindex.oup.com/view/10.1093/obo/9780199796953-0003>.

220. Stern, *supra* note 77, at 564.

punitive nature of the Versailles Treaty reparations imposed on vanquished States.<sup>221</sup> Neither are they intended to altogether destroy the capacities of States to serve their respective populations, since modern international law purposely recognizes a social protection baseline that should be observed by all States.<sup>222</sup> Reparations must also conform to international law, which is precisely why international tribunals are mandated to take into account the relative situations of both the injured State and the responsible State when designing the appropriate form of reparations to address the harmful consequences of the internationally wrongful act committed.<sup>223</sup>

It is interesting to see how the above premises change when the claim for reparations is advanced by an investor—a private entity and non-state actor—against a sovereign State. The status of investors is much debated in academic literature, whether as third-party beneficiaries in investment treaties, independent rights-holders, or agents.<sup>224</sup> One cannot deny, however, that at least at the *origins* of international investment law, home States of investors purposely conferred their rights to seek reparations against host States under the investor-State dispute settlement mechanism.<sup>225</sup> As this Article has shown, investor-State arbitral tribunals have not fully translated the delegation of these home State rights to investors, especially in the particular dimensions of scrutinizing the investor's chosen form of reparation, and testing the proportionality and adequacy of the investor's asserted form of reparation to the nature of the injury caused from the host State's breach of non-expropriation provisions in investment treaties. By obscuring these aspects of the international tribunal's examination of the injured party's claims, it is arguable that the investor-State arbitration system might have unduly privileged investors' claims, at the expense of the overall equitable and acceptable functioning of the international investment system.

The imperfect translation of controls on injured parties' international claims against States in the case of investor-State arbitration is highlighted even further when one takes a cursory sweep of the nature of reparations for international economic damage in other realms of international law. When States commit internationally wrongful

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221. ILC Draft Articles, *supra* note 53, art. 36 cmt. ¶ 4; *see also* Falk, *supra* note 218, at 486.

222. International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.

223. ILC Draft Articles, *supra* note 53, art. 36 cmt. ¶ 7.

224. Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT'L L. 617, 622–27 (2013).

225. CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 11–49 (2008).

acts that breach their treaty commitments, customary international law norms, or general principles of international law, with such breaches causing international economic injury upon fellow States or non-state actors (such as individuals, protected groups, foreign investors and private associations, among others), international law provides that reparations are owed to these injured States and non-state actors. Under its 2001 Articles on State Responsibility, the ILC created three exclusive forms of reparations that the offending State can make towards the injured State: 1) restitution or *restitutio in integrum*, and in case of the latter's insufficiency or impossibility; 2) compensation; and/or 3) satisfaction or apology.<sup>226</sup> By so doing, the ILC seems to suggest that these forms of reparations of restitution, compensation, and satisfaction adequately implement the *Chorzów* standard that international reparations "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."<sup>227</sup> Most critically, the ILC also assumed that "proportionality is [inherently] addressed" in the design of these forms of international reparations.<sup>228</sup> This assumption, however, no longer holds true as easily in modern situations of international economic injury during times of war and times of peace.

While international humanitarian law prohibits parties to an armed conflict from causing widespread, long-term, or severe environmental damage;<sup>229</sup> destroying or interfering with culturally protected property;<sup>230</sup> or otherwise committing unlawful takings or destruction of private property during armed conflict or belligerent occupation;<sup>231</sup> at present, reparations for these serious breaches still do not order or take into account the parallel demands of environmental remediation, monitoring, and mitigation that may be owed to affected civilian populations and local communities.<sup>232</sup> Reparations

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226. ILC Draft Articles, *supra* note 53, arts. 35–37.

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

228. ILC Draft Articles, *supra* note 53, art. 34 cmt. ¶ 5.

229. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 35(3), June 8, 1977, 1125 U.N.T.S. 90.

230. Rome Statute of the International Criminal Court arts. 8(2)(b)(ix), 8(2)(e)(iv), July 17, 1998, 2187 U.N.T.S. 3.

231. YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 195 (2009).

232. See Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529 (2003); see also ELIZABETH MREMA ET

in these armed conflict or post-conflict contexts also do not call for measures ensuring protection of cultural property and/or the imposition of civil penalties for breaching enhanced protection owed to cultural properties purposely immune from attack or targeting.<sup>233</sup> Neither do reparations in these cases provide for group or individualized redress for the economic, social, and cultural violations that individuals suffer from unjustified destruction or taking of private properties during armed conflicts. Instead, international tribunals tend to narrowly construe their jurisdictional remit and confine themselves to ordering reparations in the form of restitution, compensation, and/or satisfaction, without considering the possibility of ordering the offending party to take appropriate steps (whether individually or in cooperation with the injured parties) to ensure continuing environmental, cultural, economic, and social protection of other stakeholders, such as the local communities, affected groups, and indigenous peoples that depend on the damaged natural resources and environmental goods, use culturally protected objects and sites for their practice and/or worship; and depend on private property as their means of livelihood and basis of subsistence.

In contrast to the limited compensatory and/or socialized redress available for devastations caused by armed conflicts, modern economic injuries caused by States in peacetime to foreign investors have been almost exclusively redressed according to (often) fair market value-based monetary compensation.<sup>234</sup> Under investor-State arbitration, foreign investors have the greater potential to receive full financial restoration (often in multimillion and multibillion dollar compensation amounts) for breach of their “legitimate expectations” than local civilian populations that suffer complete property destruction; long-term environmental damage; or economic, cultural, and social devastation in wartime.<sup>235</sup> The vast scale of financial compensation sought and awarded in investor-State cases has been of such magnitude as to permanently impact States’ future fiscal, monetary, and economic development planning capabilities. This may be so, possibly, because tribunals might not have considered the possible

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AL., PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT: AN INVENTORY AND ANALYSIS OF INTERNATIONAL LAW 10 (2009).

233. ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 188–89 (2006).

234. Schreuer, *supra* note 193, at 4 (“In the practice of investment tribunals, compensation is so dominant that it often eclipses other remedies.”)

235. Juan Felipe Merizalde Urdaneta, *Proportionality, Contributory Negligence and Other Equity Considerations in Investment Arbitration*, in 8 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 301, 303 (Ian A. Laird et al. eds., 2015).

role of alternative remedies, such as inter-State cooperation between the host State and the home State to reach negotiated solutions in kind (e.g. correcting governmental measures to give commercial preferences to the injured investor) rather than resorting to the mechanism of fair market value compensation. The continuing barrage of investment disputes against countries that have suffered economic crises only makes it all the more urgent to re-examine the just design of international reparations for State responsibility for international economic damage.

I contend that the application of the *Chorzów* standard of reparations to breaches of non-expropriation provisions in investment treaties must likewise be subject to the same rigorous tests on the propriety of the choice of the mode of reparations sought, as well as the manner of internalization of the principle of proportionality in different forms of reparations, as part of the “outer limits” of adequate, equitable, and just reparations in international law. In the greater policy interests of dispute settlement, the injured party’s choice of the mode or form of reparations is not a matter for automatic deference, but a delicate matter for calibration by modern international courts and tribunals that ought to recognize the broader function of reparations in preserving peace and stability in international relations. Investors cannot be any more immune to these outer limits than their home States are.