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Part Two, Chapters I and II of the ARSIWA: Remedies

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Part Two, Chapters I and II of the ARSIWA

Remedies

Geraldo Vidigal and Stephanie Forrest

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A. General provisions

I. Judicial remedies and the consequences of State responsibility [Article 28]

Article 28: Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

This entry covers the first two chapters of Part Two of the International Law Commission's **1** Articles on Responsibility of States for International Wrongful Acts (ARSIWA), devoted to what the International Law Commission (ILC) has referred to as the 'content of the international responsibility of a state'¹ or the 'consequences of an internationally wrongful act'.² International courts and tribunals frequently refer to these provisions when determining the

¹ ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' YILC 2001, Vol II, Part Two, 31, Part Two (hereafter ARSIWA Commentaries).

² *ibid* Article 28.

appropriate remedies following a finding of breach.³ While the ILC notes that Part Two ‘does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State’,⁴ international courts and tribunals have, by and large, treated these articles as authoritative statements of customary international law and applied them outside of the inter-State dispute context as well.⁵

- 2 The starting point for Part Two is Article 28, which largely reflects the statement by the Permanent Court of International Justice (PCIJ) in *Chorzów Factory* that ‘[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.’⁶ Under the ARSIWA, responsibility creates prospective obligations as well as a retrospective duty to make reparation. Prospectively, a State that breaches an international obligation must cease its unlawful conduct and, in certain cases, provide assurances of non-repetition. Retrospectively, the State must provide reparation for injury caused by its violation, in one of three forms: restitution, compensation, or satisfaction.⁷
- 3 As the present entry will show, there are significant differences between the practice of international courts and tribunals established under general international law and those under investment law when determining the appropriate remedies. This entry explores several of those differences for each modality of reparation, as well as with respect to specific issues, including interest and contribution to injury.
- 4 This entry also considers one of the most significant discrepancies that has been identified between general international law and investment law, that being the difference in the forms of remedies most commonly ordered. While the ARSIWA dictate that a violation of international law should typically lead to both prospective performance obligations and retrospective reparation obligations, investment tribunals tend to focus only on the retrospective duty of reparation and, in particular, compensation. This entry will explore that discrepancy and consider how, in the absence of express treaty limitations, investment tribunals may resort to general international law, as codified in the ARSIWA, and go beyond awards for compensation to demand cessations of breach and guarantees of non-repetition, award legal or material restitution, or issue declarations of satisfaction.

³ While the Articles do not use the term ‘remedies’, this term is used interchangeably with ‘consequences of internationally wrongful acts’ in the official ILC Commentary and in subsequent jurisprudence and scholarship. See, eg, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 298 (hereafter *Whaling in the Antarctic*); J Crawford, *State Responsibility—The General Part* (CUP 2013) 506 (hereafter Crawford, *State Responsibility*).

⁴ ARSIWA Commentaries (n 1) Article 28 para 2; See also Article 33(2).

⁵ See, eg, *ADM v Mexico*, ICSID Case No ARB(AF)/04/5, Award, 21 November 2007, para 177; *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, para 691 (hereafter *von Pezold v Zimbabwe*). For critique of the application of the ILC Articles to a non-inter-State case, see EACJ, *Zziwa v EAC Secretary General*, Judgment, Appeal No 2 of 2017 (EACJ, 25 May 2018), para 42 (hereafter *Zziwa v EAC Secretary General*). See also Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 BYIL 151, 186–93; M Paparinskis, ‘Investment Treaty Arbitration and the (New) Law of State Responsibility’ (2013) 24 EJIL 617; R Volterra, ‘ILC Articles on State Responsibility and Investor-State Arbitration: Do Investors Have Rights?’ (2010) 25 ICSID Rev 218, 222.

⁶ *Case Concerning the Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Jurisdiction) [1928] PCIJ Rep Series A No 9, 21 (hereafter *Chorzów Jurisdiction*). In *Vinter v United Kingdom*, ECtHR Judge Ziemele in her concurring opinion cited Article 28 to argue that, by stating that a finding of violation ‘constitutes just satisfaction’, the ECtHR had blurred the ‘distinction that one draws between an internationally wrongful act and its consequences’. *Vinter and others v United Kingdom* App Nos 66069/09, 130/10, and 3896/10 [2016] III ECHR 317 (9 July 2013), 51 (Concurring Opinion of Judge Ziemele).

⁷ Importantly, the entitlement to adopt countermeasures is not among these automatic consequences of responsibility but arises only where the responsible State has refused to comply with this new set of obligations. See in this Commentary: Martins Paparinskis, ‘Articles 49–54 of the ARSIWA’.

II. Prospective elements of responsibility: The continued obligation to perform and the duties of cessation and non-repetition [Articles 29 and 30]

Article 29: Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30: Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Articles 29 and 30 refer to the prospective elements of responsibility, namely, the duties of cessation and non-repetition. Article 29 confirms that a breach does not affect the continuance of the State's duty to respect the violated obligation or connected obligations,⁸ while Article 30 codifies the new obligations that arise for a violating State with respect to its future conduct.

The primary obligation that arises for the responsible State is the duty of cessation, requiring the State to put an end to conduct that violates its international obligations. In *Navigational and Related Rights*, the International Court of Justice (ICJ) observed that, following a finding of breach, the 'obligation to cease wrongful conduct derives both from the general obligation of each State to conduct itself in accordance with international law and from the specific obligation upon States parties to disputes before the Court to comply with its judgments.'⁹ In some cases, courts have gone one step further and specified the conduct required to ensure cessation.¹⁰

The second obligation that arises as a consequence of breach, to provide guarantees of non-repetition, has been mentioned as an available remedy by the ICJ but never fleshed out.¹¹ The Inter-American Court of Human Rights (IACtHR) has filled this gap, giving the obligation content in its orders that responsible States set up specific policies to prevent the recurrence of human rights violations similar to the ones brought before it. As the IACtHR put it in *Gutiérrez Soler*, these are 'positive measures that the State must adopt to prevent repetition of the harmful events such as those that occurred' in the individual case judged.¹²

In the investment context, little attention has been paid to the prospective elements of responsibility in Articles 29 and 30. For example, in *Mobil v Canada*, the tribunal recognized

⁸ Consequences for the obligation may also arise under the law of treaties. See B Simma and CJ Tams, 'Reacting against Treaty Breaches' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2020).

⁹ Dispute regarding Navigational and Related Rights (*Costa Rica v Nicaragua*) (Judgment) [2009] ICJ Rep 213, 267.

¹⁰ *Whaling in the Antarctic* (n 3) para 247(7); ECtHR, *Assanidze v Georgia (Merits and Just Satisfaction)*, App No 71503/01, 8 April 2004, paras 195–207; ECtHR, *Ivanțoc v Moldova and Russia (Merits and Just Satisfaction)*, App No 23687/05, 4 April 2012, paras 146–56.

¹¹ *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 485 (hereafter *LaGrand*); *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004], ICJ Rep 12, 69 (hereafter *Avena*).

¹² IACtHR, *Gutiérrez-Soler v Colombia (Merits, Reparation and Costs)* Judgment, 12 September 2005, para 63; IACtHR, *Aloboetoe v Suriname (Reparation and Costs)*, 10 September 1993, Series C No 11, paras 96, 99–108.

that Canada was in ‘continuing breach resulting in ongoing damage to the Claimants’ interests’, but inferred from this solely a right of the claimant to file subsequent claims to request reparation by way of compensation.¹³ Claimants in investment arbitration typically focus their claims on reparation for injury, possibly because claims are brought most often when there has been a breakdown in relations with the State and the claimant is uninterested in the State’s continued performance of breached obligations.¹⁴ Even in the rare circumstance when investors request the return of property or the reversal of administrative acts, these requests are usually framed as requests for restitution—one of the three forms of reparation—rather than cessation of the breach.¹⁵

- 9 Moreover, even in circumstances where tribunals conclude that a State’s overall policy is in continuing breach of international obligations broader than those owed to a specific investor, they have refrained from requiring the State to put an end to the relevant policy or measure. Instead, they typically limit their remedial order to the request for individual reparation brought by the claimant. This was the case in *von Pezold v Zimbabwe*, in which the tribunal found that Zimbabwe’s ‘discriminat[ion] against the landowners on the basis of their skin-color and foreign ancestral heritage’ amounted to a ‘breach of an obligation *erga omnes* by Zimbabwe [. . .] an impairment to the international community as a whole.’¹⁶ Despite this, the tribunal focused entirely on the requests for individual reparation put forward by the claimant.¹⁷ This may be a consequence of the expansive interpretation of the limitations on investor–State tribunals’ remedial jurisdiction where, for example, measures of restitution demanding a State to alter its legislative measures may be seen as an undue interference on State sovereignty.¹⁸
- 10 Occasionally, claimants in investment arbitration have requested tribunals consider cessation as a remedy. Absent a treaty or other limitation, investment tribunals are empowered under general international law to affirm a State’s duty to cease the unlawful conduct and may even specify what is required for this purpose.¹⁹ This was recognized by the tribunal in *Chevron v Ecuador*. After concluding that a domestic judgment had been tainted by corruption, the tribunal referred to Articles 28–38 in support of its finding that ‘the reinstatement of the Claimants’ rights under international law requires of the Respondent the immediate suspension of the enforceability of the *Lago Agrio* Judgment.’²⁰ Other than in highly specific situations, however, investment tribunals are far less likely to order cessation than their counterparts in other international fora, and have occasionally questioned their entitlement to do so.²¹

¹³ *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Award, 29 February 2015, para 429 and para 478.

¹⁴ See, referring to attempts at resolving disputes through means other than ISDS, RL Wellhausen, ‘International Investment Law and Foreign Direct Reinvestment’ (2019) 73 *Int Organ* 839; L Johns and RL Wellhausen, ‘The Price of Doing Business: Why Replaceable Foreign Firms Get Worse Government Treatment’ (2021) 33 *Econ Politics* 209. We thank Michael Waibel for this point.

¹⁵ *Arif v Moldova*, ICSID Case No ARB/11/23, Award, 8 April 2013, paras 570–72 (hereafter *Arif v Moldova*); *Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic* (1979) 53 *ILR* 389, paras 507–11.

¹⁶ *von Pezold v Zimbabwe* (n 5) para 657.

¹⁷ It should be noted that the SADC tribunal, though addressing the human rights violation directly, adopted the same remedies. See *Campbell and Others v Zimbabwe*, SADCT Case No 2/2007, Judgment, 28 November 2008, para 92.

¹⁸ See Section B.I below.

¹⁹ This is without prejudice to the State’s right, explicitly recognized in many investment treaties, to expropriate investments against compensation.

²⁰ *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador* (II), PCA Case No 2009-23, Second Partial Award on Track II, 30 August 2018, paras 9.9, 9.17 (hereafter *Chevron v Ecuador*).

²¹ The tribunal in *Glencore v Colombia* set aside the claimant’s request for a determination that Colombia was required to ‘continue to perform and observe’ the investor–State contract, finding that it did not need to address

III. The duty of reparation and the primacy of restitution [Articles 31 and 34]

Article 31: Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 34: Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

International courts and tribunals often refer to the first paragraph of Article 31, usually together with the PCIJ's Judgment in *Chorzów Factory*, as authority for the customary status of the obligation to provide full reparation for injury caused by a breach.²² Article 31(1) is also invoked as authority for the requirement of a causal relationship between injury and wrongful conduct.²³ Article 31(2) is commonly cited as authority for the obligation to provide reparation for moral damage—an issue examined in detail in Section B.II.3 below. **11**

In the absence of any express treaty provisions addressing compensation and damages, investment tribunals frequently rely on Article 31(1) and adopt the *Chorzów Factory* standard. This approach has been criticized by some commentators, primarily because the rules of inter-State responsibility assume equality between State parties and may not be transposable to investment disputes between a sovereign State and a private party.²⁴ Despite **12**

the 'theoretical question' whether it was 'authorized to issue an order of this type to a sovereign State', see *Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia*, ICSID Case No ARB/16/6, Award, 27 August 2019, paras 1665–67 (hereafter *Glencore v Colombia*).

²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43, 233 (hereafter *Bosnian Genocide*); ITLOS, *M/G 'Virginia' (Panama/Guinea Bissau)*, Judgment, 14 April 2014, 110, para 430; ITLOS Seabed Disputes Chamber, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, 10, para 194. *Zongo v Burkina Faso, Judgment on Reparations*, 013/2011 (ACtHPR, 5 June 2015), para 21 (hereafter *Zongo v Burkina Faso*); Eritrea–Ethiopia Claims Commission, Eritrea's Damages Claims, *Eritrea v Ethiopia*, Award, 17 August 2009, para 24; Eritrea–Ethiopia Claims Commission, Ethiopia's Damages Claims, *Ethiopia v Eritrea*, Award, 17 August 2009, para 24; *Murphy Exploration & Production Company International v The Republic of Ecuador*, PCA Case No 2012-16, Partial Final Award, 6 May 2016, paras 424–25; *British Caribbean Bank v Belize*, PCA Case No 2010-18, Award, 19 December 2014, para 289; *Chevron v Ecuador* (n 20) para 10.13(vi); *Glencore v Colombia* (n 21) paras 1570–71.

²³ *Hulley v Russia*, PCA Case No AA 226, Final Award, 18 July 2014, para 1774; *Yukos v Russia*, PCA Case No AA 227, Final Award, 18 July 2014, paras 1589 (hereafter *Yukos v Russia*); *Veteran Petroleum v Russia*, PCA Case No AA 228, Final Award, 18 July 2014, paras 1597–99; *Clayton v Canada*, PCA Case No 2009-04, Award on Damages, 10 January 2019, paras 108–10.

²⁴ See, eg, REM Goodman and Y Parkhomenko, 'Does the Chorzów Factory Standard Apply in Investment Arbitration? A Contextual Reappraisal' (2017) 32 ICSID Rev 304; C Verburg, 'Damages and Reparation in Energy Related Investment Treaty Arbitrations' (2021) 23 ICLR 5. Consider also the statements of the PCIJ in *Chorzów Factory*, observing that the case in question was 'a dispute between governments and nothing but a dispute between governments' and 'the damage suffered by an individual is never identical in kind with that which will be suffered by a State'. See *Chorzów Jurisdiction* (n 6) 26–28.

this, *Chorzów Factory* remains ‘the most frequently cited case in investment treaty arbitration’,²⁵ and the *Chorzów Factory* standard is undeniably part and parcel of international investment law.

- 13 In addition to Article 31(1) and *Chorzów Factory*, investment tribunals often refer to the ICJ’s statement in *Bosnian Genocide* that a request for reparation requires a ‘sufficiently direct and certain causal nexus between the wrongful act [...] and the injury suffered by the Applicant’ in the sense that the injury ‘would in fact have been averted if the Respondent had acted in compliance with its legal obligations.’²⁶ For example, in *Pey Casado Foundation v Chile (Resubmission)*, the tribunal affirmed that the determination of a duty of reparation ‘depends upon injury, and that injury in turn depends on causation.’²⁷ In *Bilcon v Canada*, the tribunal stated that it ‘must be convinced that the Investors’ alleged injury would, “in all probability”, not have occurred if the NAFTA violation had not been committed.’²⁸
- 14 Separately, Article 34 is generally invoked in support of two principles: (i) that injury caused by an internationally wrongful act requires full reparation and (ii) that this reparation may take the three forms established in the Articles—restitution, compensation, and satisfaction—either singly or in combination.²⁹ Although Article 34 does not set out an order of priority between the three forms, international courts and tribunals have often referred to this provision, in combination with *Chorzów Factory*,³⁰ to support the view that restitution is the primary form of reparation.
- 15 This primacy in principle does not necessarily translate into primacy in practice.³¹ Like other international courts and tribunals, investment tribunals frequently refer to restitution as the primary remedy in passing, only to find it inappropriate for the case at hand, using the right to restitution instead as a parameter for determining the amount of compensation.³² The tribunal in *Teinver v Argentina* went so far as to find that it was incumbent on the claimant requesting restitution ‘to establish that right in the circumstances of this case and demonstrate that such an award was reasonable and proportionate.’³³

²⁵ B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP 2011) 48 (hereafter Sabahi, *Compensation*). See also TG Nelson, ‘A Factory in Chorzow: The Silesian Dispute that Continues to Influence International Law and Expropriation Damages Almost a Century Later’ (2014) 1(1) *J Damages Int’l Arb* 77; J Paulsson, ‘Ghosts of Chorzow: Maha Nunez Schultz v Republic of the Americas’ in T Weiler (ed), *International Investment Law and Arbitration* (Cameron May Ltd 2009).

²⁶ *Bosnian Genocide* (n 22) 234.

²⁷ *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2204, Award, 13 September 2016, para 204 (hereafter *Pey Casado v Chile*).

²⁸ *Clayton v Canada*, PCA Case No 2009-04, Award on Damages, 10 January 2019, para 114 (referring to *Chorzów Factory*).

²⁹ ITLOS, THE M/V ‘Saiga’ (No 2) Case, *Saint Vincent v Guinea*, Judgment, Case No 2 (ITLOS, 1 July 1999), para 171 (hereafter *Saiga*); *Zongo v Burkina Faso* (n 22); *Zziwa v EAC Secretary General* (n 5) para 40.

³⁰ *Case Concerning the Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Merits) 1928] PCIJ Rep Series A No 12, 47, 48 (hereafter *Chorzów Merits*).

³¹ Gray, ‘The Different Forms’ (n 39) 589.

³² *Chorzów Merits* (n 30) 47; *Bosnian Genocide* (n 22) 233; ECtHR, *Papamichalopoulos and others v Greece* (Article 50), App No 14556/89, 31 October 1995, para 36; IACtHR, *Salvador Chiriboga v Ecuador (Reparation and Costs)*, 3 March 2011, para 59; *S.D. Myers, Inc v Canada*, UNCITRAL Arbitration Proceeding, Partial Award, 13 November 2000, paras 311–15; *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para 122; *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, SCC, Award, 16 December 2003, para 154.

³³ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No ARB/09/1, Award, 21 July 2017, para 1097 (hereafter *Teinver v Argentina*).

B. Modalities of reparation

I. Restitution [Article 35]

Article 35: Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

1. Concept

The ARSIWA treat restitution as the primary form of reparation for unlawful acts,³⁴ unless a rule of *lex specialis* derogates from this primacy.³⁵ The Commentary contemplates two categories of restitution: (i) ‘material’, typically involving the return of territory or property unlawfully seized, or release of persons wrongly detained; and (ii) ‘juridical’, usually requiring the revocation, annulment, or amendment by the responsible State of the legislative or administrative measure which violated international law.³⁶ **16**

Under Article 35, restitution requires a party in breach ‘to re-establish the situation which existed before the wrongful act was committed’. This implies a narrow definition of restitution, focusing on re-establishing the *status quo ante*. The definition of restitution put forward by the PCIJ in *Chorzów Factory* is broader and involves a duty to ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’³⁷ For the ILC, the narrow definition ‘has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed’. At the same time, as the ILC noted, ‘[r]estitution in this narrow sense may have to be completed by compensation to ensure full reparation for the damage caused.’³⁸ **17**

Only rarely has the ICJ explicitly referred to a duty of restitution. However, any such order may be seen as superfluous when the duty to reverse unlawful acts (requiring, for example, return of territory or release of imprisoned persons) also arises from declaratory remedies or determinations of cessation. In cases where restitution has been awarded, the ICJ usually adopts a flexible approach and affords the parties considerable deference in determining **18**

³⁴ A distinction must be drawn between lawful and unlawful expropriation. As observed by the PCIJ in *Chorzów Factory*, lawful expropriation is not an unlawful act under international law but an exercise of a State’s right to nationalize foreign property (subject to certain conditions, including compensation) and therefore restitution is not the primary remedy in such circumstances (*Chorzów Merits* (n 30) 46).

³⁵ Some investment treaties include express provisions which prohibit tribunals from awarding any relief other than monetary damages and interest or restitution of property. Under these treaty provisions, even where restitution is awarded by a tribunal, the responsible State reserves the right to pay ‘monetary damages and any applicable interest in lieu of restitution’. See, eg, Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 10 (ECT), Article 26(8); North American Free Trade Agreement (1994) Article 1135.1; CPTPP Article 9.29/USMCA, Article 14.D.13.

³⁶ ARSIWA Commentaries (n 1) Article 35 para 5; The first Central American Court of Justice determined that, as restitution, the wrongdoing party was required to terminate a treaty that conflicted with the violated treaty, Corte de Justicia Centroamericana, *Anales* (1917) AJIL 696.

³⁷ *Chorzów Merits* (n 30) 47.9; ARSIWA Commentaries (n 1) Article 31 paras 1–3.

³⁸ ARSIWA Commentaries (n 1) Article 35 para 2.

the specific modality for achieving restitution.³⁹ In *Jurisdictional Immunities of the State*, the Court ordered Italy to reverse the effects of the decisions of its domestic courts that violated Germany's jurisdictional immunity. The ICJ held that 'the Respondent has the right to choose the means it considers best suited to achieve the required result'.⁴⁰ In other cases, the Court has been more specific. These include *Arrest Warrant*, in which the Court awarded juridical restitution,⁴¹ as well as the 'order' in *Whaling in the Antarctic* 'that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales [issued unlawfully]'.⁴² In the *Wall* Advisory Opinion, the ICJ stated that Israel was obligated, as far as materially possible, 'to return the land, orchards, olive grove and other immovable property seized from any natural of legal person' during the construction of a wall in the Occupied Palestinian Territory.⁴³

- 19 Under investment law, there has been some suggestion that, in the absence of specific provisions allowing an order of restitution, investment tribunals lack the jurisdiction to make such an order, mainly due to the practical difficulties of enforcement or potential infringement on State sovereignty.⁴⁴ The majority view is that restitution is, in principle, available.⁴⁵

2. Material impossibility

- 20 Article 35 describes restitution as the primary remedy, required unless it is either 'materially impossible' or 'a burden out of all proportion to the benefit deriving from restitution instead of compensation'.⁴⁶ With regard to the first exception, the ILC Commentary suggests that impossibility arises when performance is materially impossible, such as 'where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to

³⁹ See, for discussion, Crawford, *State Responsibility* (n 3) 515; C Gray, 'The Different Forms of Reparation: Restitution' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 593 (hereafter Gray, 'The Different Forms').

⁴⁰ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, (Judgment) [2012] ICJ Rep 99, 434 (hereafter *Jurisdictional Immunities*).

⁴¹ *Arrest Warrant* of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 3, 32. Belgium was obliged to cancel the arrest warrant issued against the then Foreign Minister of the Democratic Republic of the Congo. In cases of condemnations marked by procedural irregularities, the ICJ found that the appropriate remedy was for the wrongdoing State to provide 'effective review and reconsideration of the conviction and sentence', correcting the relevant irregularities, see *LaGrand* (n 11) para 125; *Avena* (n 11) paras 138–40, 153; *Jadhav (India v Pakistan)* (Judgment) [2019] ICJ Rep 418, 456.

⁴² *Whaling in the Antarctic* (n 3) para 247(7); Some commentators have queried whether this order should fall under the heading of legal restitution or cessation, or if there is any material difference between the two. See, eg, J McIntyre, 'The Declaratory Judgement in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?' (2016) 29 LJIL 177, 190; F Torres, 'Revisiting the Chorzów Factory Standard of Reparation—Its Relevance in Contemporary International Law and Practice' (2021) 90(2) Nord J Int'l L 190.

⁴³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 198.

⁴⁴ Z Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 815, 829; A Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 209. See also *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 359 (hereafter *Enron v Argentina*); *CME Czech Republic BV v Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para 501 (hereafter *CME v Czech Republic*); *Libyan American Oil Company (LIAMCO) v Libya*, Award (12 April 1977) 62 ILR 140, 196.

⁴⁵ See, eg, *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Award, 25 July 2007, para 32 (hereafter *LG&E v Argentina*); *Occidental Petroleum Corp and Occidental Exploration and Production Co v Republic of Ecuador* (II), ICSID Case No ARB/06/11, Decision on Provisional Measures, 17 August 2007, para 75 (hereafter *Occidental Provisional Measures*); *Burlington Resources, Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Procedural Order No 1, 29 June 2009, para 70. See also HP Aust, 'Investment Protection and Sustainable Development' in S Hindelang and M Krajewski (eds), *Shifting Paradigms in International Investment Law* (OUP 2016) 218.

⁴⁶ The phrase 'provided and to the extent that' suggests that restitution may be partial, available 'to the extent that this is neither impossible nor disproportionate'; ARSIWA Commentaries (n 1) Article 35 para 6.

be valueless.⁴⁷ Restitution is not impossible due to legal or practical difficulties, even if these might entail 'special efforts' on the part of the responsible State, since a State may not rely on provisions of its domestic law as justification for avoiding its international obligations.⁴⁸ The Commentary also explains that restitution is not appropriate where the benefit to be gained from restitution is 'wholly disproportionate' to the cost to the responsible State.⁴⁹ In practice, these limitations operate to materially restrict its application both in general international law and in international investment law.⁵⁰

A number of treaties, including the Energy Charter Treaty⁵¹ and the European Convention 21 on Human Rights,⁵² deviate from the position under Article 35 and explicitly foresee that legal obstacles under domestic law may preclude the award of restitution. Legal difficulties were taken into account in *Forests of Central Rhodopia*, where the arbitrator held that restitution was not 'practical' because, among other things, detailed enquiries would be required to determine the condition of the forests, which were not in the same condition as at the time of their taking, and where third parties had acquired rights in since the State's wrongful act.⁵³ In *Gabčíkovo-Nagymaros Project*, the ICJ held that the 'possible' manner of wiping out the consequences of the wrongful acts of both parties was for them 'to re-establish co-operative administration of what remains of the Project.'⁵⁴

In the context of investment arbitration, tribunals have on several occasions declined to 22 order restitution on the basis that such an order would be 'impossible', while pointing to a lack of practicality rather than material impossibility.⁵⁵ In *Bahloul v Tajikistan*, the tribunal was persuaded that restitution was not materially possible, given the length of time that had passed since the breach in question, the lack of cooperation on the part of the respondent State authorities in the arbitration proceedings, and the existence of third-party rights.⁵⁶ Similarly, in *Teinver v Argentina*, the tribunal rejected restitution on grounds that the restoration of corporate rights in an expropriated airline was 'neither practical nor practicable' given the claimant's insolvency and the fact that the airlines had been operated by the respondent State for a number of years.⁵⁷

Some investment tribunals have deviated from the rule and exceptions set out in Article 23 35(a) and refused restitution on grounds that such an order would unduly interfere with State sovereignty. Earlier tribunals have, as in the *LIAMCO* arbitration, held that it 'is impossible to compel a State to make restitution [as] this would constitute in fact an intolerable interference in the internal sovereignty of a State.'⁵⁸ Christine Gray has criticized these decisions on the basis that they contradict the rule that restitution operates as an international

⁴⁷ ARSIWA Commentaries (n 1) Article 35 para 8.

⁴⁸ *ibid* para 8.

⁴⁹ *ibid* para 11.

⁵⁰ C Gray, 'The Choice between Restitution and Compensation' (1999) 10 EJIL 413–23.

⁵¹ ECT Article 26(8).

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222, Article 41.

⁵³ *Forests of Central Rhodopia (Merits)* (1933) 3 RIAA 1405, 1432.

⁵⁴ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 150.

⁵⁵ See, eg, *AGIP S.p.A. v People's Republic of the Congo*, ICSID Case No ARB/77/1, Award, 30 November 1979, paras 86–88 (hereafter *AGIP v Congo*); *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 407 (hereafter *CMS v Argentina*).

⁵⁶ *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No V (064/2008), Final Award, 8 June 2010, para 63.

⁵⁷ *Teinver v Argentina* (n 33) para 1098.

⁵⁸ *LIAMCO v Libya*, Award, 12 April 1977, 125 (hereafter *LIAMCO v Libya*); See also *BP v Libya* (1979), 53 ILR at 353; *AGIP v Congo* (n 55); *Amoco International Finance Corporation v Islamic Republic of Iran, National Iranian Oil Company*, IUSCT Case No 56, Partial Award, 14 July 1987, para 178.

obligation, which a State cannot evade by relying on its domestic law.⁵⁹ This approach has nevertheless been extended, by a handful of investment tribunals, to unlawful administrative regulations. The tribunal in *LG&E* stated that it ‘[could] not compel’ Argentina to provide juridical restitution, annulling and enacting legislative and administrative measures, ‘without a sentiment of undue interference with its sovereignty’.⁶⁰ The *CMS* tribunal stated that it was ‘utterly unrealistic for the [t]ribunal to order the Respondent to turn back to the regulatory framework existing before the emergency measures were adopted’.⁶¹

3. Lack of proportionality

- 24** The second exception in Article 35(b) applies where there is ‘a burden out of all proportion to the benefit deriving from restitution instead of compensation’.⁶² This was intended to be a narrow exception, where it is proven that a ‘grave disproportionality’ exists between the burden imposed on the State and the benefit to the injured party. The Commentary to the ILC Articles states that considerations of equity and reasonableness should be taken into account ‘with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation’.⁶³
- 25** Before the ICJ, the disproportionality of restitution arose in *Jurisdictional Immunities* and in *Pulp Mills*. In *Jurisdictional Immunities*, invoking the proportionality requirement, the Court held that ‘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’.⁶⁴ In *Pulp Mills*, the Court interpreted the proportionality exception as including an appropriateness standard, connecting restitution not only to the burden on the wrongdoing State but also to the nature of the wrong committed. The ICJ held that ‘restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it’.⁶⁵ Since the obligations breached by Uruguay were not substantive, ‘ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations’.⁶⁶
- 26** In the investment context, the disproportionality exception to restitution has been considered in cases concerning breaches of substantive obligations under investment treaties. For example, in *RWE Innogy*, the tribunal considered a request for restitution requiring the respondent State to ‘reinstat[e] the legal and regulatory framework’ existing prior to the breach.⁶⁷ Citing Article 35(b), the tribunal held that such an order would ‘involve a burden to the Respondent out of all proportion to the benefit to the Claimants deriving from

⁵⁹ C Gray, *Judicial Remedies in International Law* (OUP 1987) (hereafter Gray, *Judicial Remedies*).

⁶⁰ See, eg, *LG&E v Argentina* (n 45) paras 84–87; See T Ishikawa, ‘Restitution as a ‘Second Chance’ for Investor-State Relations: Restitution and Monetary Damages as Sequential Options’ (2016–17) 3 MJDR 154.

⁶¹ *CMS v Argentina* (n 55) para 406.

⁶² The phrase ‘provided and to the extent that’ suggests that restitution may be partial, available ‘to the extent that this is neither impossible nor disproportionate’; ARSIWA Commentaries (n 1) Article 35 para 6.

⁶³ The Commentary goes on to note that ‘the balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability’. ARSIWA Commentaries (n 1) Article 35 para 11.

⁶⁴ *Jurisdictional Immunities* (n 40) para 137.

⁶⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 274 (hereafter *Pulp Mills*).

⁶⁶ *ibid* para 275.

⁶⁷ *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No ARB/14/34, Award, 30 December 2019, para 118.

restitution instead of compensation.' This was because the case 'involve[d] State regulation that is generally applicable across a very important sector in Spain', whereas 'the Claimants can very readily be afforded full reparation through compensation.'⁶⁸ Similarly, in *Masdar*, the tribunal held that an order to 'reinstate the pre-breach legislative and regulatory framework would involve a disproportionate burden compared to the benefits potentially yielded to the Claimant', pointing to the benefits it would generate for non-protected investors.⁶⁹

Other investment tribunals have interpreted the disproportionality exception more broadly and refused to award restitution where doing so would disproportionately interfere with State sovereignty or otherwise place an undue burden on the respondent State's legislative and regulatory autonomy.⁷⁰ In *Occidental (Provisional Measures)*, the tribunal stated that '[t]o impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation.'⁷¹ Tribunals adopted a similar approach in awards under the Energy Charter Treaty relating to Spain's abolishment of a regulatory regime for renewable energy installations.⁷² **27**

The reasoning in these decisions diverges from the view, prevalent in general international law, that legal or practical difficulties in implementation do not affect the duty of restitution. As one commentator observes, '[f]rom a strict legal perspective, the imposition by a tribunal of a certain obligation as a form of restitution does not impede the sovereignty of states, not only because such power is inherent in the arbitral and judicial functions, but also because restitution in international law is considered to be the primary mode of reparation.'⁷³ Where the violating measures are generally applicable legislative or regulatory measures, restitution might require the reestablishment of the legislative or regulatory framework prior to the relevant breach, with effects beyond the investment at issue and a corresponding burden for the State to revoke or modify laws and regulations. **28**

4. Conclusion

Restitution in investment law has been strictly limited. To date, it has only been ordered in situations in which the violating measure was specifically targeted at the claimant (e.g. expropriation of certain property) or involved an ongoing relationship between the claimant and the respondent State.⁷⁴ Orders for the return of expropriated property and associated permits were issued by the tribunal in *von Pezold et al v Zimbabwe*.⁷⁵ In *Arif v Moldova*, the tribunal **29**

⁶⁸ *ibid* para 685.

⁶⁹ *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018, para 562 (hereafter *Masdar v Spain*).

⁷⁰ See also *BP Exploration Co (Libya) Ltd v Libya*, Award, 10 October 1973, para 53; *LIAMCO v Libya* (n 58); *AMCO Asia Corp and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Award, 21 November 1984, para 202; *LG&E v Argentina* (n 45) para 87. See also Gray, *Judicial Remedies* (n 59) 188.

⁷¹ *Occidental Provisional Measures* (n 45) para 84.

⁷² *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V. v The Kingdom of Spain*, ICSID Case No ARB/13/31, Award, 15 June 2018, paras 634–38; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v Kingdom of Spain*, ICSID Case No ARB/13/36, Award, 4 May 2017; *LG&E v Argentina* (n 45); *Masdar v Spain* (n 69) paras 553–63.

⁷³ E de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014) 184–85 (hereafter de Brabander); See also C Schreuer, 'Non-pecuniary Remedies in ICSID' (2004) 20 *Arb Intl* 325, 331.

⁷⁴ See examples in G Vidigal, 'Targeting Compliance: Prospective Remedies in International Law' (2015) 6 *JIDS* 462–84 (hereafter Vidigal).

⁷⁵ *von Pezold v Zimbabwe* (n 5) para 1020.

ordered Moldova to abide by its contractual obligations and permit the claimant to open and operate his duty-free store at Chisinau International Airport, considering restitution to be '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'.⁷⁶ Other orders for restitution have included the restoration of the claimant investor's right to arbitrate⁷⁷ and the repayment of an amount unduly paid by the investor.⁷⁸ Some of these orders require the State to 'restore' a situation by paying the investor back, or expressly give the State the choice of paying compensation instead of restoring property. These may still be considered restitution in the sense that the State is being directed to do something it might not otherwise do.

- 30** Investment tribunals have therefore expansively interpreted the exceptions to restitution, the consequence being that restitution is virtually always set aside,⁷⁹ deviating from the position under international law that it should be the primary remedy to which there are only limited exceptions. One could attempt to distinguish the cases in which restitution was ordered by investment tribunals on the basis that the order did not impose an 'undue' or 'disproportionate' burden on the State and only involved a specific action taken with respect to a specific investor. In any event, this expansive approach remains in tension with the position under Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) that the mere challenge of implementing an order of restitution under domestic law cannot form the basis of 'material impossibility'.⁸⁰

II. Compensation [Article 36]

Article 36: Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

1. Concept

- 31** Article 36 of ARSIWA provides that a responsible State is under an obligation to compensate for damage caused by an internationally wrongful act, in cases where restitution may be inadequate for full reparation or unavailable due to one of the limitations in Article 35. Compensation, by way of damages, is generally calculated to determine the amount necessary to return the injured party in the position it would have been if the wrongful act had not occurred.⁸¹

⁷⁶ *Arif v Moldova* (n 15) para 570.

⁷⁷ In *ATA*, the tribunal ordered the Respondent State to terminate local court proceedings and submit the dispute to a new commercial arbitration tribunal, finding that 'the single remedy which can implement the *Chorzów* standard is a restoration of the Claimant's right to arbitration'; see *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award, 18 May 2010, para 131.

⁷⁸ This order of restitution was supplemented by an order of compensation of interest in order to achieve full reparation, see *Glencore v Colombia* (n 21) paras 1573–78.

⁷⁹ For analysis of the exceptions, see Vidigal (n 74).

⁸⁰ ARSIWA Commentaries (n 1) Article 35 para 8.

⁸¹ The distinction between 'damages' and 'compensation' has been eroded in the Articles, where the term 'compensation' refers to the obligation to compensate for all damages not made good by restitution. See S Ripinsky and K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008), 4 (hereafter Ripinsky and Williams).

The standard for compensation is ‘financially assessable damage’, which is defined by the ILC as any damage capable of being evaluated in financial terms, including loss of profits.⁸² International courts and tribunals have the discretion to adopt any of a number of valuation methods to quantify ‘financially assessable damage’ and calculate the appropriate compensation. A natural consequence of that discretion is the lack of a consistent approach to quantum in both general international law and investment law.⁸³ The appropriate heads of compensable damage and the principles of valuation to be used to quantify that damage also naturally vary ‘depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.’⁸⁴ **32**

Given that ‘many sovereign interests do not lend themselves to quantification,’⁸⁵ precedent in general international law relation to compensation has been limited. The PCIJ and ICJ have traditionally only awarded compensation for breaches affecting specific individuals or specific property only.⁸⁶ More recently, the ICJ has tackled more complex questions of reparation in *Certain Activities* and *Armed Activities*, where compensation was awarded for damage suffered by entire communities or the environment.⁸⁷ In these cases, significant issues of evidence emerged with respect to both the extent of the damage to be quantified, which is not as straightforward as damage caused to specific individuals or property, and to the causal nexus between the wrongful conduct and the damage. In *Armed Activities*, the ICJ had to elaborate on its position on quantification of damage, finding that a State ‘that is not in a position to provide direct proof of certain facts’ should be allowed ‘liberal recourse to inferences of fact and circumstantial evidence.’⁸⁸ In *Certain Activities*, the ICJ held that it may ‘decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered’, and could make ‘just and reasonable inference’ from the available evidence.⁸⁹ **33**

In other international fora, particularly those that regularly deal with injury to specific individuals and property, such as international human rights courts and the International Tribunal for the Law of the Sea (ITLOS), compensation is the most commonly sought form of reparation, resulting in considerable decisions and literature.⁹⁰ The present entry considers **34**

⁸² ARSIWA Commentaries (n 1) Article 36 para 5.

⁸³ See, eg, Ripinsky and Williams (n 81) 4; ND Rubins and NS Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Oceana Publications 2005) 258 (hereafter Rubins and Kinsella).

⁸⁴ ARSIWA Commentaries (n 1) Article 36 para 7.

⁸⁵ J Barker, ‘The Different Forms of Reparation: Compensation’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 603.

⁸⁶ O Schachter, ‘Compensation for Expropriation’ (1984) 78 AJIL 121; C Gray, ‘Is There an International Law of Remedies?’ (1985) 56 BYIL 25, 29.

⁸⁷ K Kindji and M Faure, ‘Assessing Reparation of Environmental Damage by the ICJ: A lost opportunity?’ (2019) 57 *Quest Int'l L* 5.

⁸⁸ *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Compensation), 9 February 2022, para 120 (citing Eritrea–Ethiopia Claims Commission) (hereafter *Armed Activities*).

⁸⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) [2018] ILC Rep 15, paras 34–35.

⁹⁰ See, for discussion, Crawford, *State Responsibility* (n 3) ch 16; Ripinsky and Williams (n 81); Sabahi, *Compensation* (n 25); I Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP 2017) (hereafter Marboe, *Calculation*); I Marboe, ‘Compensation and Damages in International Law’ (2006) 7 *JWIT* 723; I Marboe, ‘Assessing Compensation and Damages in Expropriation versus Non-expropriation Cases’ in C Beharry (ed), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill Nijhoff 2018); I Marboe, *Damages in Investor State-Arbitration: Current Issues and Challenges*, Brill Research Perspectives in International Investment Law and Arbitration (Brill/Nijhoff 2018); RE Walck, ‘Methods of Valuing Losses’ in M Bungenberg and others (eds), *International Investment Law* (Hart Publishing 2015), 1045–56; D Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 315 ff

three discrete topics in which there are apparent differences between courts and tribunals established under general international law as compared to investment law: the approach to the valuation of damages, the availability and quantification of moral damages, and the applicability of equitable limitations on compensation where a State may be unable to pay damages.

2. Valuation

- 35** The principles of assessment to be applied when quantifying damage vary, depending on the obligation breached and the particular facts of the case. It is therefore difficult to make a direct comparison between the approaches taken to valuation in general international law and in investment law, other than to note that investment tribunals have usually provided more detailed reasoning for how they have applied principles of valuation when determining the amount of compensation.⁹¹ This is a welcome contribution, given the little guidance provided by general international law. As Judge Greenwood has noted, '[w]hat is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded.'⁹² For example, investment tribunals often explain the reasons for the method of valuation chosen, including whether it is a market-, income-, or asset-based approach⁹³ and specify the valuation date.
- 36** The reasoning of investment tribunals may be influential for international courts and human rights courts when tackling questions of compensation down the road.⁹⁴ For example, investment tribunals have considered various issues that arise when awarding compensation, including the application of the principle in general international law that damages are valued at the date that the injury occurred.⁹⁵ When there has been an indirect expropriation resulting from a series of measures (i.e. a 'creeping' expropriation), it may be challenging to determine exactly when the expropriation occurred and when the injury or harm should be measured for the purposes of valuation of damages.⁹⁶ There is a growing consensus that, in cases of indirect expropriation, the appropriate date for valuation should be the culmination

(hereafter Shelton, *Remedies*); JB Simmons, 'Valuation In Investor-State Arbitration: Toward A More Exact Science' (2012) 30 Berkeley JIL 196.

⁹¹ As observed by one commentator, 'finding common principles in these awards is not always easy either, given the absence of precedent, the variety of factual situations and the sometimes less than detailed reasoning as to how the final figure, often a compromise global figure, is reached' (H Heilbron, 'Assessing Damages in International Arbitration: Practical Considerations' in R Hill and L Newman (eds), *The Leading Arbitrators' Guide to International Arbitration* (JurisNet 2008), 468).

⁹² *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 324, Declaration of Judge Greenwood, para 7 (hereafter *Diallo* Compensation).

⁹³ See Ripinsky and Williams (n 81) 231, 272; Rubins and Kinsella (n 83) 258. See also UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-seventh Session (New York, 1–5 April 2019)' (9 April 2019) <https://uncitral.un.org/en/working_groups/3/Investor-State> accessed 3 March 2022.; TW Walde and B Sabahi, 'Compensation, Damages and Valuation in International Investment Law' in P Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1112–14.

⁹⁴ D Pulkowski, 'Remedies for Wrongful Conduct: Lessons from Investment Arbitration' in CJ Tams, S Schill and R Hofmann (eds), *International Investment Law and General International Law* (Edward Elgar Publishing 2023) 276–78 (hereafter Pulkowski, 'Remedies').

⁹⁵ Investment tribunals are also required to apply the terms of the applicable investment treaty. Such treaties generally provide that the valuation date in cases of expropriation is the date of expropriation (or immediately before the expropriation becomes public knowledge, whichever is earlier). For example, the ECT provides that compensation for lawful expropriation 'shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment'.

⁹⁶ Ripinsky and Williams (n 81) 246.

of all expropriatory events rather than the date of the first event, also referred to as the state of 'irreversible deprivation'.⁹⁷

3. Availability and quantification of moral damages

Article 31 of the ILC Articles clarifies that the 'damage' that must be repaired includes 'any damage, whether material or moral, caused by the internationally wrongful act'.⁹⁸ The Claims Commission in the *Lusitania* cases noted that non-material damages may be 'very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated'.⁹⁹ The Commentary excludes the recovery of moral damages to a State, but includes moral damages to nationals where a State brings a diplomatic protection claim on their behalf. For such a claim, the Commentary observes that '[m]aterial and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation'.¹⁰⁰

The availability of moral damages was confirmed by the ICJ in the *Diallo* case. The ICJ held that there had been a violation of the claimant's rights under two international human rights instruments and defined the term 'moral damage' as 'harm other than material injury which is suffered by an injured entity or individual'.¹⁰¹ The Court recognized that '[n]on-material injury to a person which is cognizable under international law may take various forms'.¹⁰²

While the availability of moral damages is well-established, the method of quantification by courts under general international law remains obscure. In *Diallo*, the ICJ noted the lack of a set of principles 'capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just'.¹⁰³ The ICJ awarded USD 85,000 to Guinea referring to equity and reasonableness, without detailing its calculation.¹⁰⁴ Moral damages were also awarded by ITLOS in *M/V Saiga (No 2)*, for the detention of captain and crew members, again with little detail as to the specific calculations.¹⁰⁵

Equitable considerations have influenced the quantification of moral damages before human rights courts. In *Al-Jedda v United Kingdom*, the Grand Chamber of the European Court of Human Rights (ECtHR) stated that, for determining damage, '[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is fair, just and reasonable'.¹⁰⁶ The IACtHR has stated that compensation for non-pecuniary damages may be determined 'in reasonable exercise of its judicial authority and on the

⁹⁷ *International Technical Products Corporation and ITP Export Corporation v The Government of the Islamic Republic of Iran*, 9 IUSCT 206, Final Award, 28 October 1986, 240. See also *Compagnia del Desarrollo de Santa Elena v Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, paras 76–78; *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 417 (hereafter *Azurix v Argentina*). The same approach has also been applied in cases involving multiple breaches of investment protection standards other than indirect expropriation. See, eg, *Azurix v Argentina*, para 417; *Enron v Argentina* (n 44) para 405.

⁹⁸ ARSIWA Commentaries (n 1) Article 36 para 5.

⁹⁹ *Opinion in the Lusitania cases (US v Germany)*, November 1923, 7 RIAA 32, 32, 42.

¹⁰⁰ ARSIWA Commentaries (n 1) Article 36 para 5.

¹⁰¹ *Diallo* Compensation (n 92) para 18.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid* para 25.

¹⁰⁵ *Saiga* (n 29) paras 175–76.

¹⁰⁶ ECtHR, *Case of Al-Jedda v The United Kingdom* App No 27021/08, 7 July 2011, para 114.

basis of equity'.¹⁰⁷ This approach has been subject to criticism for lack of consistency and reasoning.¹⁰⁸

- 41** Moral damages have only been awarded by a handful of investment tribunals.¹⁰⁹ The tribunal in *Desert Line v Yemen* awarded moral damages for the harassment of the claimant's personnel by government authorities. It noted that 'even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, *in exceptional circumstances*, ask for compensation for moral damages'. The tribunal accepted that the claim relating to 'physical duress exerted on the executives of the Claimant' was justified, but awarded the claimant USD 1,000,000, instead of the requested USD 10,000,000, with no explanation as to how that sum was calculated.¹¹⁰ Some commentators have criticized this award, on the basis that the claimant's executives did not qualify as investors under the relevant treaty and therefore had no protected interests.¹¹¹
- 42** Similarly, the tribunal in *Lemire v Ukraine* considered that moral damages were only available in 'exceptional' or 'extraordinary' circumstances. Although it did not see a reason to award 'separate and additional moral damages' in the case, it found that they were due under three conditions: (i) the 'ill-treatment contravenes the norms according to which civilized nations are expected to act', including physical threats, illegal detention, or other analogous situations; (ii) the State's actions 'cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position'; and (iii) the causes and effects of the ill-treatment are 'grave or substantial'.¹¹²
- 43** Similar reasoning and outcome appears in the award in *OI European Group BV v Venezuela*. There, the tribunal in *OI European Group BV v Venezuela* rejected the claimant's request for moral damages, in light of the fact that the respondent State's behaviour was considered not 'worthy of an additional compensation for moral damages' because it did not 'amount [. . .] to physical threats, illegal detention or ill-treatment'.¹¹³
- 44** More recently, the majority of the tribunal in *Gente Oil v Ecuador* granted the claimant's request for moral damages for what was deemed to be 'highly reprehensible' conduct of the State in criminal proceedings.¹¹⁴ Of particular interest is that the claimant investor had claimed non-pecuniary damages allegedly suffered by its officers and shareholders, which

¹⁰⁷ IACHR, *Cantoral Benavides v Peru*, Judgment of 3 December 2001 (Reparations and Costs), Series C No 88, para 53.

¹⁰⁸ See, eg, R White, 'Remedies in a Multi-Level Legal Order: The Strasbourg Court and the UK' in C Kilpatrick and others (eds), *The Future of Remedies in Europe* (OUP 2000) 196–98.

¹⁰⁹ See, for discussion, P Dumbery, 'Moral Damages' in M Bungenberg and others (eds), *International Investment Law* (Hart Publishing 2015) 1130–45; W Coriell and S Marchili, 'Unexceptional Circumstances: Moral Damages in International Investment Law' in I Laird and T Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris 2010); L Markert and E Freiburg, 'Moral Damages in International Investment Disputes: on the Search for a Legal Basis and Guiding Principles' (2013) 14(1) JWIT 1; J Wong, 'The Misapprehension of Moral Damages in Investor-State Arbitration' in A Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2012* (Martinus Nijhoff Publishers 2013) 67.

¹¹⁰ *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award, 6 February 2008, paras 289–291 (emphasis added).

¹¹¹ I Schwenzer and P Hagem, 'Moral Damages in International Investment Arbitration' in S Kröll and others (eds), *Liber Amicorum Eric Bergsten, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Wolters Kluwer 2011) 422; de Brabander (n 73) 197.

¹¹² *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, paras 333, 344.

¹¹³ *OI European Group BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25, Award, 10 March 2015, paras 910–17.

¹¹⁴ *Gente Oil Ecuador v Republic of Ecuador*, PCA Case No 2018-12, Award, 24 May 2022, paras 1398–401 (authors' translation).

Ecuador had disputed. It is, however, unclear from the tribunal's reasoning whether it took these damages into account in its final award.

Other investment tribunals explicitly depart from the ILC Articles, requiring 'exceptional' 45 circumstances which drastically narrows the circumstances in which moral damages are compensable. This requirement has been criticized for being 'unknown to general international law', with particular reference to the different approach taken by human rights courts.¹¹⁵ Other tribunals have considered, in *obiter dicta*, that satisfaction is the more appropriate remedy for moral damages.¹¹⁶ These decisions sit in conflict with the general principles set out in Part II of the ARISWA, which dictates that moral damages are available, but also raise the question of the extent to which investment commitments, generally considered to be designed to protect economic interests, should provide reparation for the mistreatment of the person of the investor or personnel carrying out activities on behalf of that investor.

As one commentator has rightly noted, 'no common understanding or calculation mechanisms exists in international law that would justify a particular amount of money' for moral 46 damages.¹¹⁷ Just like under general international law, the practice of tribunals under international investment law lacks a set of principles which are 'capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just'.¹¹⁸ The circumstances in which moral damages are available under both general international law and international investment law therefore remain unclear.

4. Equitable limitations on compensation

It is not uncommon for courts and tribunals under general international law to refer to 47 equitable considerations when assessing damages, including pecuniary damages. In recent years, it has been suggested that new limitations should be placed on awards of compensation where a State demonstrates a lack of capacity to pay the appropriate compensation, particularly in cases of what one commentator has referred to as 'crippling compensation'.¹¹⁹ Those who advocate for such a limitation suggest it should be applied in both general international law and investment law.

Unlike Articles 34 and 37, the Commentary to Article 36 does not provide for any qualification 48 on disproportionality or considerations of equity when determining the appropriate amount of compensation.¹²⁰ Instead, the Commentary states that any concern 'that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned' should be addressed by 'exclud[ing] damage which is indirect or remote'.¹²¹ In the proceedings in *Armed Activities on the Territory of the Congo*

¹¹⁵ RC Stendel, 'Moral Damages as an 'Exceptional' Remedy in International Investment Law—Re-Connecting Practice with General International Law' (2021) 81 ZaöRV/HJIL 937.

¹¹⁶ *Pey Casado, v Chile*, ICSID Case No ARB/98/2, Decision on Jurisdiction (8 May 2008), para 689. See also TW Wälde and B Sabahi, 'Compensation, Damages and Valuation in International Investment Law' (2007) 4 TDM.

¹¹⁷ S Weber, 'Demystifying Moral Damages in International Investment Arbitration' (2020) 19(3) LPICT 417–50.

¹¹⁸ *Diallo Compensation* (n 92) para 7.

¹¹⁹ See, eg, M Paparinskis, 'Crippling Compensation in the International Law Commission and Investor-State Arbitration' (2021) 37 ICSID Rev/FILJ 289–312.

¹²⁰ The 1996 version of the ILC Articles did provide, in Article 42(3), that reparation must not 'result in depriving the population of a State of its own means of subsistence'. The Commentary to the 1996 draft Articles suggested that 'equitable considerations [...] might be taken into account in providing full reparation, particularly in cases involving an author State with limited financial resources'.

¹²¹ ARSIWA Commentaries (n 1) Article 34 para 5.

(*DRC v Uganda*) before the ICJ), Uganda proposed in its written and oral pleadings that compensation should be limited so as to avoid imposing crippling burdens upon the paying State.¹²² Without expressly addressing this argument, the Judgment noted that the Court was satisfied that the amount of damages awarded was within Uganda's capacity to pay.¹²³

- 49** In the investment context, there is a notable dearth of argument by counsel or any decision by a tribunal arguing for a limitation on compensation where damages would have a crippling effect. In his separate opinion in *CME v Czech Republic*, Ian Brownlie expressed the view that '[i]t would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of [such] liabilities' that may subject a State to 'economic ruin'.¹²⁴
- 50** An exception to the duty of full reparation has yet to be applied in any international fora. James Crawford observed in his role as Special Rapporteur that a rule against 'crippling compensation' would require the victim(s) to bear the loss.¹²⁵ He was not persuaded that a rule against 'crippling compensation' could apply in the context of the secondary obligation of reparation, given that it would require the victim(s) to bear the loss. Martins Paparinskis has argued that a State's inability to pay compensation could instead be taken into account within the existing rules relating to circumstances precluding wrongfulness and the general criteria of loss and causation.¹²⁶ It is also open to treaty drafters to include such a limitation on compensation in treaties.¹²⁷

III. Satisfaction [Article 37]

Article 37: Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

1. Concept

- 51** Under Article 37, satisfaction is an exceptional remedy, appropriate only insofar as reparation cannot be achieved through restitution or compensation.¹²⁸ As the Commentary notes, it is 'a remedy for those injuries not financially assessable which amount to an affront

¹²² *Armed Activities* (n 88) para 109.

¹²³ *ibid* para 407.

¹²⁴ *CME v Czech Republic* (n 44) Separate Opinion on the Issues at the Quantum Phase by Arbitrator Brownlie, paras 77–78.

¹²⁵ J Crawford, *Third Report on State Responsibility*, 51, paras 162–64. YILC 2000, Vol I, UN Doc A/CN.4/SER.A/1996, 5, paras 17–18, 24, para 49, 174, para 14.

¹²⁶ M Paparinskis, 'Crippling Compensation in the International Law Commission and Investor–State Arbitration' (2021) 37 ICSID Rev/FILJ 289.

¹²⁷ *ibid*.

¹²⁸ J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 574 (hereafter Crawford, *Brownlie's Principles*); J McIntyre, 'Declaratory Judgments of the International Court of Justice' (2013) 25 Hague YIL 107–57.

to the State.¹²⁹ Crawford subsequently defined satisfaction as ‘any measure which the responsible state is bound to take under customary international law or under an agreement of the parties to a dispute, apart from restitution and compensation.’¹³⁰

While Article 37 refers to ‘an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality’, adjudicators typically grant satisfaction through declaratory judgments, often when other forms of reparation are unavailable. In *Corfu Channel*, the ICJ found that satisfaction was the appropriate remedy for the breach of Albania’s sovereignty rights, where Albania failed to establish that any injury had been caused that required compensation by damages or should be restored by restitution.¹³¹ Similarly, in *Bosnian Genocide*, the ICJ awarded satisfaction on grounds that the necessary causal link for compensation could not be proven.¹³²

2. Practice

Despite the subsidiary character ascribed to satisfaction in the ILC Articles, this form of reparation is commonly awarded in inter-State proceedings. In the *Carthage* and *Manouba* cases, the arbitral tribunals noted:

[F]or the cases in which one Power has failed to comply with its obligations, whether general or specific, vis-à-vis another Power, the establishment of this fact, in particular in an arbitral award, already constitutes a serious sanction ... this sanction is reinforced, where appropriate, by the payment of damages for material losses ...¹³³

It is often the case that no specific form of reparation is requested and all that is sought in this respect is a declaration of breach.¹³⁴ In other cases, courts have found restitution and compensation inadequate and instead decided to award satisfaction. In *Pulp Mills*, the ICJ held that ‘its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina.’¹³⁵

In the investment context, requests for satisfaction are rare, but the few tribunals addressing a request for a declaratory judgment have found them to be ‘transposable to the investor-State context.’¹³⁶ Claims for satisfaction against a claimant investor are also rare, but are sometimes successful. In *Cementownia v Turkey*, the tribunal acceded to the respondent’s request for satisfaction by ‘declar[ing] formally that the Claimant has filed a fraudulent claim against the Republic of Turkey.’¹³⁷

¹²⁹ ARSIWA Commentaries (n 1) Article 37 para 3. Some commentators have suggested that pecuniary satisfaction should be the *de facto* remedy for moral damages, but this sits in conflict with the position under Article 37 that satisfaction is only available as a remedy where compensation is not appropriate (ie damages cannot be *financially assessed*). See V Stoica, *Remedies before the International Court of Justice: A Systemic Analysis* (CUP 2021) 148–49.

¹³⁰ Crawford, *Brownlie’s Principles* (n 128) 574.

¹³¹ The United Kingdom was entitled to compensation for the damage to its ships: *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Judgment) [1948] ICJ Rep 15, 36.

¹³² *Bosnian Genocide* (n 22) 195.

¹³³ *Manouba (France v Italy)* (1913) 11 RIAA 463, 475 (authors’ translation); *Carthage (France v Italy)* (1913) 11 RIAA 449, 460 (authors’ translation).

¹³⁴ See, eg, *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)*, Judgment, 1 December 2022, para 44.

¹³⁵ *Pulp Mills* (n 65) 102.

¹³⁶ *Quiborax S.A., Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, para 560 (hereafter *Quiborax v Bolivia*).

¹³⁷ See, eg, *Cementownia ‘Nowa Huta’ S.A. v Republic of Turkey (I)*, ICSID Case No ARB(AF)/06/2, Award, 17 September 2009, para 162–63.

- 56** Less rare are cases of satisfaction awarded to investors. In *Pawłowski v Czech Republic*, the tribunal found that a declaration that the respondent State had committed a breach was an appropriate remedy, ‘proportionate to the injury caused’ and ‘not humiliating to the responsible State’.¹³⁸ In *Biwater Gauff v Tanzania*, the tribunal established that the loss and damage claimed by the investor was not caused by the respondent State’s violations of the Bilateral Investment Treaty (BIT), so that ‘the only appropriate remedies for the Republic’s conduct can be declaratory in nature’.¹³⁹ And, in *Quiborax v Bolivia*, the respondent requested the tribunal to dismiss the request for satisfaction, arguing that this was ‘punitive relief’, unavailable to investors.¹⁴⁰ The tribunal agreed that it could not award a form of reparation that was ‘punitive in nature’, but found that, ‘as part of the process of settling the dispute, a declaration can be conceived in a manner that is not punitive’.¹⁴¹ The conduct of the respondent in the arbitration did not warrant what the tribunal described as a ‘declaration of breach of the duty to arbitrate in good faith’.¹⁴² In contrast, in *CMS v Argentina*, the tribunal considered that, since the dispute was ‘not a case of reparation due to an injured State, satisfaction can be ruled out at the outset’.¹⁴³
- 57** Satisfaction is an integral part of public international law. The idea that this remedy is simply not apposite for investment cases is belied by the very existence of requests for satisfaction, by both investors and States. Given how extensively investment tribunals resort to the Articles for their other decisions regarding remedies, it appears incoherent to reject satisfaction outright, based solely on the distinction between inter-State relations, to which Part Two of the ILC Articles apply, and the legal relations arising from breach of international obligations owed to investors. Investment tribunals should give requests for satisfaction serious consideration and examine objectively whether circumstances justify it.

C. Specific Issues

I. Interest [Article 38]

Article 38: Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

- 58** As a general principle, the duty or reparation includes any interest necessary to ensure full reparation.¹⁴⁴ Interest is ‘not an autonomous form of reparation, nor is it a necessary part of

¹³⁸ *Pawłowski AG and Project Sever s.r.o. v Czech Republic*, ICSID Case No ARB/17/11, Award, 1 November 2021, paras 738–41.

¹³⁹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para 807.

¹⁴⁰ *Quiborax v Bolivia* (n 136) para 536.

¹⁴¹ *ibid* para 561.

¹⁴² *ibid* para 594.

¹⁴³ *CMS v Argentina* (n 55) para 399.

¹⁴⁴ ARSIWA Commentaries (n 1) Article 38(1); See *McCullough & Company Inc v Ministry of Post, Telegraph and Telephone*, IUSCT Case No 89, Award No 225-89-3, 16 April 1986, para 98 (hereafter *McCullough Case*); *Siemens*

compensation in every case.¹⁴⁵ The PCIJ and ICJ have usually awarded interest to account for post-judgment delays in payment. In *S.S. 'Wimbledon'*, the PCIJ awarded simple interest at 6 per cent from the date of the judgment, on the basis that interest was payable 'from the moment when the amount of the sum due has been fixed and the obligation to pay has been established'.¹⁴⁶ The ICJ applied the same rate and principle in *Armed Activities* and *Certain Activities* for post-judgment interest, making specific rulings on interest running from the date of the injury to that of the Judgment.¹⁴⁷ In the *M/V 'Saiga'* case, ITLOS awarded interest at different rates depending on the category of loss.¹⁴⁸

By contrast, investment tribunals have consistently awarded interest with the aim of placing investors in the position they would have been in had it not been for the breach(es), usually meaning the inclusion of pre-award interest.¹⁴⁹ As the Iran–US Claims Tribunal observed, the purpose of pre-award interest is 'to compensate for the delay with which the payment to the successful party is made'.¹⁵⁰ In *Crystallex v Venezuela*, the tribunal observed that the function of pre-award interest is to 'compensate the injured party for the loss of its ability to benefit from the use of the principal compensation sum from the date it fell due'.¹⁵¹ The *Crystallex* tribunal awarded pre-award interest under the principle of full reparation, on the grounds that 'in addition to losing its property and other rights, an investor loses the opportunity to invest funds or to pay debts using money to which the investor was rightfully entitled'.¹⁵²

There is significant variance between how international courts and tribunals approach the appropriate rate of interest, the interest period, and whether interest should be simple or compound (and, if compounded, the periodicity of compounding).¹⁵³ These differences can result in markedly different outcomes; for example, awarding compound interest, in particular, can significantly impact the amount of an award for damages. Article 38(1)

A.G. v The Argentine Republic, ICSID Case No ARB/02/8, Award, 6 February 2007, para 396; *LG&E v Argentina* (n 45) para 55; *El Paso Energy Limited Company v Argentina*, ICSID Case No ARB/03/15, Award, 27 April 2006, para 747; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, paras 521–22 (hereafter *ADC v Hungary*); *PSEG v Turkey*, Award, ICSID Case No ARB/02/5, Award, 19 January 2007, para 341; *Vivendi II v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 9.2.1; See also Marboe, *Calculation* (n 90) para 6.09; John Gotanda, *Supplemental Damages in Private International Law* (Kluwer 1997) 13; CH Schreuer and others, *The ICSID Convention: A Commentary* (CUP 2009); P Nevill, 'Awards of Interest by International Courts and Tribunals' (2008) 78 BYIL 255 (hereafter Nevill, 'Awards').

¹⁴⁵ ARSIWA Commentaries (n 1) Article 38 para 1; See also *SGS Société Générale de Surveillance S.A. v The Republic of Paraguay*, ICSID Case No ARB/07/29, Award, 10 February 2012, para 172. See Nevill, 'Awards' (n 144) 255–34.

¹⁴⁶ The interest rate of 6 per cent was deemed fair, given the 'present financial situation of the world and [...] the conditions prevailing for public loans', see *SS 'Wimbledon' (United Kingdom and ors v Germany)* (Judgment) [1923] PCIJ Rep Series A No 1, 32.

¹⁴⁷ See above, n 88 and 89.

¹⁴⁸ *Saiga* (n 29) para 63.

¹⁴⁹ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* [I], ICSID Case No ARB/05/20, Award, 18 April 2014, paras 1265, 127; *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000, paras 128–30; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 2 November 2015, paras 846–47; *Burlington Resources Inc v Republic of Ecuador (formerly Burlington Resources Inc and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No ARB/08/5, Decision on Reconsideration, 7 February 2017, para 531

¹⁵⁰ *McCullough Case* (n 144) para 98.

¹⁵¹ *Crystallex International Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, para 929.

¹⁵² *ibid* para 932. See also *Kardassopolous v Georgia*, ICSID Case No ARB/05/18, Award, 3 March 2010, para 664.

¹⁵³ ARSIWA Commentaries (n 1) Article 38 para 8.

leaves the matter open, linking the issue to the objective of securing full reparation; '[t]he interest rate and mode of calculation shall be set so as to achieve that result'. International courts and tribunals often taking significantly different approaches to these different elements.¹⁵⁴

- 61** The Commentary to ARSIWA provides that '[t]he general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest'.¹⁵⁵ This view, expressed by arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case,¹⁵⁶ was confirmed by the Iran–US Claims Tribunal.¹⁵⁷ The ILC Commentary at the time also concluded that 'given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation'.¹⁵⁸ This is the approach that international courts generally continue to take,¹⁵⁹ despite some commentators arguing that 'compound interest reasonably incurred by the injured party should be recoverable as an item of damage'.¹⁶⁰
- 62** Investment tribunals mostly diverge from general international law in this regard, with most of them awarding interest on a compound basis, on grounds that compound interest best captures the time value of money. Beginning with the award in *Santa Elena*,¹⁶¹ a number of investment tribunals have granted compound interest, first in cases relating only to expropriation, then for other breaches.¹⁶² The tribunal in *Continental Casualty v Argentina* reasoned that:

[C]ompound interest reflects economic reality in modern times [...] The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment.¹⁶³

- 63** This is an obvious divergence from the practice under general international law, which tends towards restricting compound interest to special circumstances. However, a minority of

¹⁵⁴ MA Maniatis and others, 'An Unexpected Interest in interest' (GAR 2015) <<http://globalarbitrationreview.com/article/1034451/an-un-expected-interest-in-interest>> accessed 23 October 2023; MA Maniatis, F Dorobantu and F Nunez, 'A Framework for Interest Awards in International Arbitration' (2018) 41(4) *Fordham Intl L J* 821.

¹⁵⁵ ARSIWA Commentaries (n 1) Article 38 para 8.

¹⁵⁶ *Spanish Zone of Morocco Claims (Great Britain v Spain)* (1924) 2 RIAA 615, 650.

¹⁵⁷ *McCullough Case* (n 144); MM Whiteman, *Damages in International Law* (United States Government Printing Office 1937) 1997.

¹⁵⁸ ARSIWA Commentaries (n 1) Article 38 para 9.

¹⁵⁹ See, eg, *Dr Horst Reineccius, Claimant v Bank for International Settlements, Respondent (Claim no 1) First Eagle SoGen Funds, Inc, Claimant v Bank for International Settlements, Respondent (Claim no 2) Pierre Mathieu and la Societe de Concours Hippique de La Chatre v Bank for International Settlements* (2003) PCA Case No 2000-04, para 138(4) (2003) PCA Case No 2000-04, para 138(4); *Saiga* (n 29) para 175; *Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)*, PCA Case No 2014-07, Award, 5 September 2016, 45; the M/V 'Norstar' Case (*Panama v Italy*) (2019) ITLOS Case No 25, paras 460, 462; M/V 'Virginia G' (Panama/Guinea-Bissau) (2014), ITLOS Case No 19, paras 444–66.

¹⁶⁰ Crawford, *State Responsibility* (n 3) 538. See also FA Mann, *Compound Interest as an Item of Damage in International Law*, Further Studies in International Law (Clarendon Press 1990) 377, 383; JY Gotanda, 'Awarding Interest in International Arbitration' (1996) 90 *AJIL* 40, 61.

¹⁶¹ *Compania del Desarrollo de Santa Elena, SA v The Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, paras 96–106.

¹⁶² See, eg, *Azurix v Argentina* (n 97) para 440; *ADC v Hungary* (n 144) para 522; *BG Group Plc v Argentine Republic*, UNCITRAL, 24 December 2007, paras 454–56.

¹⁶³ *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 309.

investment tribunals have rejected requests for compound interest, with several highlighting both the lack of uniform international practice in this regard and the need to be mindful of whether compound interest is called for in the particular circumstances of the case.¹⁶⁴

II. Contribution to the Injury [Article 39]

Article 39: Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Article 39 recognizes that there may be a reduction of reparation in cases where the injured State or a third party contributed to the injury. Since responsibility is tied to causation, it seems logical that damage suffered by a person to which it has itself contributed should not fully engage the responsibility of another.¹⁶⁵ International courts and tribunals have, on occasion, taken into account the contribution of a State or third party to its own injury.¹⁶⁶ **64**

Investment tribunals have taken account of the claimant's contribution to its own injury, often referring expressly to Article 39. As observed by the International Centre for Settlement of Investment Disputes (ICSID) Annulment Committee in *MTD Equity*: **65**

Part II of the ILC Articles, in which Article 39 is located, is concerned with claims between States, though it includes claims brought on behalf of individuals, e.g., within the framework of diplomatic protection. There is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals.¹⁶⁷

The application of Article 39 in the investment context can have a significant impact on the amount of compensation awarded. For example, in *Copper Mesa Mining v Ecuador*, the tribunal reduced damages by 30 per cent, taking into account the claimant's negligence with respect to violations of Ecuadorian criminal law.¹⁶⁸ Similarly, in *Hulley v Russia*, the claimant's damages were reduced due to its material and significant misconduct which had contributed to the losses it had suffered.¹⁶⁹ **66**

Some investment tribunals have required a showing that the investor's misconduct was 'material and significant' before finding that it contributed to the damage suffered by the **67**

¹⁶⁴ *Strabag SE v State of Libya*, ICSID Case No ARB(AF)/15/1, Award, 29 June 2020, paras 962–63; *Burlington Resources Inc v Republic of Ecuador (formerly Burlington Resources Inc and others) v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/5, Decision on Counterclaim, 7 February 2017, paras 1092–95; *Arif v Moldova* (n 15) paras 616–20.

¹⁶⁵ See DM Puzstai, 'Causation in the Law of State Responsibility' (Doctoral thesis, Cambridge 2017) <https://doi.org/10.17863/CAM.13857>.

¹⁶⁶ See, eg, *LaGrand* (n 11) 486–87 and 508; *M/V 'Virginia G', Judgment*, ITLOS Reports 2014, 4, 211 (Sep Op Judge Paik). See also *Diallo Compensation* (n 92) 337 (finding that, among other things, Guinea had failed to prove the extent to which Mr Diallo, or the DRC, contributed to Mr Diallo's injuries).

¹⁶⁷ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/17, Decision on Annulment, 21 March 2007, para 99.

¹⁶⁸ *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012-2, Award, 15 March 2016, paras 6.91–6.100.

¹⁶⁹ *Hulley Enterprises Limited (Cyprus) v Russia*, PCA Case No 2005-03/AA226, Final Award, 18 July 2014; *Yukos v Russia* (n 23) paras 1594–636.

claimant.¹⁷⁰ This requirement is not provided for in Article 39, which specifies only that a contribution to injury is relevant if it is ‘wilful or negligent’. However, the Commentary confirms that the effect that any negligence has on the determination of reparation will be influenced by the degree on which it contributed to the injury.¹⁷¹

D. Conclusion

- 68** When adjudicating on remedies, both international courts operating in the inter-State context and investment tribunals usually take as a starting point either the ARSIWA directly or the jurisprudence and State practice regarding remedies that the ILC sought to codify. Investment tribunals have consistently invoked the ARSIWA, and cited the ILC’s Commentary, when exercising their remedial powers and considering the extent of responsibility for breaches of investment obligations.
- 69** Despite this shared starting point, over time, numerous divergences in the practices under general international law and under investment law have emerged. The most significant divergence identified is in the forms of remedies most commonly ordered. Investment tribunals have traditionally preferred awards of compensation over all other remedies, while courts and tribunals established under general international law are more likely to consider a wider range of the available remedies, including cessation of the unlawful conduct, determinations of material or juridical restitution, and declarations awarding satisfaction.
- 70** This difference between the practice of international courts and tribunals established under general international law and investment law may be attributed to the fact that remedies other than compensation are rarely sought by claimant investors. It may also be that they are considered too difficult to obtain. In some cases, the limitations on these other remedies are often interpreted more broadly by investment tribunals. In others, tribunals have also introduced new requirements not found in general international law, such as the requirement that restitution should not cause undue interference with State sovereignty.
- 71** One may think about these divergences between general international law and investment law in two different ways. If investment treaties are designed only to ensure the protection of the commercial interests of foreign investors and to avoid those investors being dependent on the discretion of their home State to provide diplomatic protection, tribunals are simply enforcing this objective by limiting their remedial powers. If one adopts this view, it is not the role of investment tribunals to order States to continue their performance obligations or make symbolic sanctions for misconduct. Their role is to merely to ensure that investors are made financially no worse off than if the State had complied with its obligations, which they can do by issuing awards of compensation for investments that are lost or nullified in value as a result of unlawful conduct on the part of the State.
- 72** This view, however, seems unnecessarily limited, not only in terms of its depiction of the role of investment tribunals within the broader framework of public international law, but

¹⁷⁰ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/111, Award, 5 October 2012, paras 669–87.

¹⁷¹ ARSIWA Commentaries (n 1) Article 39 para 5.

also in its failure to consider how investment law fits within that framework. Not all investment claims relate to a single undertaking by an investor in a foreign State where that investor has no personal attachment to the host country or interest in a continued relationship with that State. Even investments made solely for financial reasons may not be easily replaceable with an alternative investment in a different market. In circumstances where investors have an interest in their investment in the future and it is possible for the State to restore the investor's rights, tribunals could weigh seriously the different considerations at hand, possibly first awarding restitution and then placing the burden on the State to provide fair compensation if it does not wish to satisfy such an order.¹⁷² Similarly, to the extent that investors or States seek satisfaction from what they believe is non-financial injury caused by misconduct, tribunals should consider this request seriously as it falls within their remedial powers.

More broadly, the lack of attention on the part of investment tribunals to the wider range of remedies available beyond compensation (including the reluctance to award moral damages) indicates a broader disconnect between how some view the role of investment tribunals and the function of law in a well-ordered international society. Investment law is increasingly portrayed by commentators and tribunals alike not as a mere instrument to enforce bilateral commitments by a State towards a foreign investor, but as an instrument to fulfil broader purposes, such as securing compliance with the rule of law and promoting regulatory stability.¹⁷³ If one shares this view, it becomes far less obvious that the sole or primary response to treaty violations should be to give the claimant the most efficient instrument to exit the investor-State relationship, fully compensated; instead, the focus should be on what other remedies the breaching State should be subject to. As one commentator noted in the context of human rights, 'settling a dispute in a manner that lessens the likelihood of future conflicts is a value that some international tribunals may consider as important as upholding the international rule of law, and more important than ensuring fulfilment of all claims of reparations.'¹⁷⁴

While the different objects and purposes of international investment agreements and human rights treaties must be kept in mind, there certainly is scope for investment tribunals to demand, relying on the provisions on remedies of the ARSIWA, that States fulfil their treaty obligations. Clear possibilities in this regard include orders to preserve a particular legislative or regulatory environment, in order to ensure fair and equitable treatment for those within their territory. Enforcing these broader governance commitments—which one might assume is what governments may have in mind when committing to the international investment regime¹⁷⁵—not only would be conducive to healthy relations with investors but also may contribute to a stable host-State environment and drive investment in the long term.¹⁷⁶

¹⁷² See examples in Vidigal (n 74).

¹⁷³ See, eg, *Arif v Moldova* (n 15) para 570. See also Pulkowski, 'Remedies' (n 94) 261.

¹⁷⁴ Shelton, *Remedies* (n 90) 94–95.

¹⁷⁵ T Schultz and C Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25 EJIL 1147.

¹⁷⁶ On this difficult issue, see JW Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 (4) L & Soc'y Rev 805; J Bonnitcha, LN Skovgaard Poulsen and M Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 155ff.

Selected literature

- Aust HP, 'Investment Protection and Sustainable Development: What Role for the Law of State Responsibility', in Hindelang S and Krajewski M (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016).
- Ishikawa T, 'Restitution as a 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options' (2016–17) 3 MJDR 154.
- Marboe I, *Calculation of Compensation and Damages in International Investment Law* (OUP 2017).
- Marboe I, 'Compensation and Damages in International Law' (2006) 7 JWIT 723.
- Nevill P, 'Awards of Interest by International Courts and Tribunals' (2008) 78 BYIL 255.
- Pulkowski D, 'Remedies for Wrongful Conduct: Lessons from Investment Arbitration' in Tams CJ, Schill S and Hofmann R (eds), *International Investment Law and General International Law* (Brill 2023).
- Ripinsky S and Williams K, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008).
- Sabahi B, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP 2011).
- Stoica V, *Remedies before the International Court of Justice: A Systemic Analysis* (CUP 2021).
- Vidigal G, 'Targeting Compliance: Prospective Remedies in International Law' (2015) 6 JIDS 462.

Selected decisions

- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.
- Arif v Moldova*, Award, ICSID Case No ARB/11/23, 8 April 2013.
- Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12.
- Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015.
- Case Concerning the Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Jurisdiction) (Judgment) [1928] PCIJ Rep Series A No 9.
- Case Concerning the Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Merits) (Judgment) [1928] PCIJ Rep Series A No 12.
- Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador* (II), PCA Case No 2009-23, Second Partial Award on Track II, 30 August 2018.
- Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia*, ICSID Case No ARB/16/6, Award, 27 August 2019.
- LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466.
- Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226.
- Yukos v Russia*, PCA Case No AA 227, Final Award, 18 July 2014.