



Approaches of International Courts and Tribunals to the Award of Compensation in International Private Property Cases and Implications for the Reform of Investor–State Arbitration

IISD REPORT



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Approaches of International Courts and Tribunals to the Award of Compensation in International Private Property Cases and Implications for the Reform of Investor–State Arbitration

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1.0 Introduction

The increasing size of compensation awards being rendered under international investment treaties¹ has attracted scrutiny of the approaches used by tribunals to quantify and set compensation in investor–state disputes. Concerns have also been raised about inconsistent approaches to calculating compensation, as well as the costs and complexities associated with the increasing use of experts in the quantum phase.² States are becoming increasingly engaged in this issue, which has been long overlooked in reform discussions.³ One question that has been raised concerns how these matters are approached by international courts and tribunals in other settings. This paper seeks to help answer this question by analyzing approaches to compensation awards in cases concerning alleged state interference with private property before other international courts and tribunals.

This paper follows previous work by the International Institute of Sustainable Development (IISD) focusing on compensation in investor–state arbitration, which suggested that arbitral practice toward awarding compensation in investor–state disputes differs from the practice of other international courts and tribunals.⁴ To explore this issue further, this paper investigates the practice of several of the most active and/or high-profile international courts and tribunals to identify how they approach awards of compensation in claims regarding injury to the property of non-state actors (including individuals and corporations). These claims are referred to in shorthand in this paper as international private property claims. Each of these international courts and tribunals has differing jurisdictional mandates, geographical coverage, and claim structures (see Box 1). Yet, each is empowered to determine claims that are, at least in some respects, analogous to the claims that may arise before investor–state arbitral tribunals, in part because they involve alleged state interferences with the private property rights of natural and legal persons.⁵ This paper focuses, in particular, on the practice of these courts and tribunals when awarding compensation in these types of claims.

The paper presents an exploratory rather than exhaustive analysis of international adjudicative approaches to compensation. In particular, it does not consider approaches to similar issues in all international adjudicative regimes. It omits consideration, for example, of the practice of the Iran–United States Claims Tribunal, though the rulings of that body on reparation may hold additional insights for those considering the lessons that might be derived from comparative international practice vis-à-vis compensation awards for investor–state arbitration

¹ Bonnitca, J., Langford, M., Alvarez-Zarate, J. M., & Behn, D. (2021). *Damages and ISDS reform: Between procedure and substance*. UNCITRAL Working Group III on ISDS Reform Academic Forum. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/damages_and_isds_-_uncitral_af_paper.pdf

² UNCITRAL Secretariat. (2021). *Possible reform of investor–State dispute settlement (ISDS): Assessment of damages and compensation - Note by the Secretariat*. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/assessment_of_damages_and_compensation_0.pdf

³ See, for example, UNCITRAL Secretariat, 2021, supra n. 2; Energy Charter Treaty Secretariat. (2018, November 27). *List of topics for modernization*. <https://www.energychartertreaty.org/modernisation-of-the-treaty/>

⁴ Bonnitca, J. & Brewin, S. (2020, November). *Compensation under investment treaties* (IISD Best Practices Series). <https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf>

⁵ As with investment claims, not all of the claims examined involve claims for breach of private property rights arising from public policy regulations.



reform. The paper also does not consider other international adjudicative regimes in which compensation is not ordinarily available or otherwise not available at all as a remedy.⁶ A wider comparison of remedies (rather than just approaches to compensation as a remedy) under international law would need to consider the functioning of these regimes. Nevertheless, the paper aims to provide a snapshot of comparative approaches in regimes where compensation is available as a remedy in order to provide greater context for ongoing discussions about how the approaches of investment tribunals compare to those of other international courts and tribunals. It also aims to identify possible reform options based on this comparative review.

Box 1. International courts and tribunals included in the comparative study

- The **Permanent Court of International Justice (PCIJ)** was the first permanent universal court empowered to settle disputes between states. It held both advisory and contentious jurisdiction. Only states or members of the League of Nations could bring cases before the Court (provided that each of the parties to the dispute had consented to the Court's jurisdiction). The Court could thus not entertain claims filed directly by individuals. It was nevertheless "called upon to pass judgment upon the responsibilities of States in their relations with private individuals."⁷ The Court did not frequently decide upon reparation in such cases, as many were settled or decided in a way that foreclosed an analysis of the issue of compensation.⁸ The approach of the Court to reparation in one case in particular—*Chorzów Factory*—has nevertheless been particularly influential in the development of customary international law rules on reparation (as highlighted further below).
- The **International Court of Justice (ICJ)** replaced the PCIJ after the Second World War. It has comparable jurisdiction to the PCIJ, including competence in contentious and advisory proceedings. The ICJ is the "principal judicial organ" of the United Nations⁹ and the only operational international court with general subject-matter jurisdiction of unlimited geographical scope. At the time of

⁶ For example, the previous IISD paper noted various differences between the approaches adopted to the award of compensation in investor–state arbitration as compared to in WTO proceedings: Bonnitcha & Brewin, 2020, p. 3, supra n. 4. The practice of the WTO does not form a focus of this paper because monetary compensation is not available as a remedy in WTO claims, with the WTO Agreements instead prioritizing revision of the wrongful measure to ensure conformity with WTO rules. The specific institutional context of the WTO therefore makes it difficult to derive any guidance from its case law as to the standard for, types of, and requirements for, awarding reparation (particularly compensation) akin to the reparation awarded by other international courts and tribunals with respect to private property claims.

⁷ Steiner, A. (1936). Fundamental conceptions of international law in the jurisprudence of the Permanent Court of International Justice. *American Journal of International Law*, 30, p. 420.

⁸ See, for example, *The Mavrommatis Jerusalem Concessions*, Judgment, 26 March 1925 (Series A, No. 5).

⁹ Charter of the United Nations (1945), Article 92.



writing, the Court has awarded compensation in four cases,¹⁰ only one of which (Ahmadou Sadio Diallo) concerned alleged state interference with an individual's private property rights (although the others also raised claims related to damage to property in conflict situations).

- The **International Tribunal for the Law of the Sea (ITLOS)** has jurisdiction over “all disputes and all applications submitted to it in accordance with [the United Nations Convention on the Law of the Sea (UNCLOS)] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”¹¹ It is one of several dispute settlement options available to state parties to the UNCLOS and may also be used by states not party to UNCLOS through special agreements concluded pursuant to Article 24 of the ITLOS Statute. ITLOS differs from courts like the PCIJ and ICJ in that non-state actors are permitted to access aspects of its contentious jurisdiction, although on a highly limited basis (requesting the prompt release of detained vessels and crews when authorized to do so by the vessel's flag state).¹² ITLOS is empowered to award compensation under Articles 110(3),¹³ 111(8),¹⁴ 263(2),¹⁵ and 304¹⁶ of the Convention. The tribunal has developed its approach to awarding compensation under the Convention in three cases.¹⁷ Disputes under UNCLOS can also be determined by **Annex VII tribunals**, two of which have determined compensation claims (as considered further below).¹⁸

¹⁰ Corfu Channel (United Kingdom v. Albania), Judgment on Compensation, 15 December 194 [Corfu Channel]; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment on Compensation, 19 June 2012 [Ahmadou Sadio Diallo]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment on Compensation, 2 February 2018 [Certain Activities Carried Out by Nicaragua in the Border Area]; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment on Reparations, 9 February 2022 [Armed Activities on the Territory of the Congo].

¹¹ Statute of the International Tribunal for the Law of the Sea, 10 December 1982, 1833 UNTS 561 (ITLOS Statute), Article 21.

¹² United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (UNCLOS), Article 292(2).

¹³ UNCLOS, Article 110(3): “If the suspicions prove to be unfounded and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”

¹⁴ UNCLOS, Article 111(8): “Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.”

¹⁵ UNCLOS, Article 263(2): “States and competent international organizations shall be responsible and liable for the measures they take in contravention of this Convention in respect of marine scientific research conducted by other States, their natural or juridical persons or by competent international organizations and shall provide compensation for damage resulting from such measures.”

¹⁶ UNCLOS, Article 304: “The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.”

¹⁷ The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, 1 July 1999 [M/V “SAIGA”]; The M/V “Virginia G” Case (Panama/Guinea-Bissau), Judgment, 14 April 2014 [M/V “Virginia G”]; The M/V “Norstar” Case (Panama v. Italy), Judgment, 10 April 2019 [M/V “Norstar”].

¹⁸ Arctic Sunrise (The Netherlands v. Russia), Award on Compensation, 10 July 2017 [Arctic Sunrise]; Duzgit Integrity (Malta v. São Tomé & Príncipe), Award on Reparation, 18 December 2019 [Duzgit].



- The **European Court of Human Rights** (ECtHR) became operational in 1959. Until 1998, it could only receive cases referred by states and the European Commission on Human Rights. In 1998, individuals were accorded the right to file cases before the ECtHR.¹⁹ The Court has jurisdiction to determine disputes related to alleged state interferences with private property under Article 1 of Protocol 1 to the Convention (P1-1).²⁰ The Court has noted that this provision, in effect, protects “the right of property.”²¹ The provision consists of three elements: a right of peaceful enjoyment of possessions, protection from deprivations of property, and protection from the imposition of controls on the use of property.
- The **African Court on Human and Peoples’ Rights** (ACtHPR) was established in 1998 by the Organisation of African Unity and began its operations in 2006. The Court has jurisdiction in advisory proceedings on any matter within its jurisdiction and over contentious proceedings between states that have ratified the Court Protocol and cases brought by individuals and non-governmental organizations against states that have accepted the competence of the court to hear such complaints. It is empowered to determine claims concerning, *inter alia*, the interpretation and application of the African Charter on Human and Peoples’ Rights. Article 14 of the Charter recognizes a right to property, providing that: “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”²²
- The **Inter-American Court of Human Rights** (IACtHR) was established under the American Convention on Human Rights in 1969 and began operations in 1979. In 2001, the Court’s Rules of Procedure were updated to allow individuals to participate in proceedings before the Court.²³ Article 21 of the Convention recognizes a right to property as follows: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.”

¹⁹ Protocol 11 to the European Convention on Human Rights and Fundamental Freedoms (1994/1998) ETS 155.

²⁰ Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952/1954) ETS 9: “Protection of property Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

²¹ *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para 106.

²² African Charter on Human and Peoples’ Rights, 27 June 1981 (entered into force 21 October 1986), CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), <https://www.achpr.org/legalinstruments/detail?id=49>

²³ Rules of Procedure of the Inter-American Court of Human Rights, https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf



1.1 The Structure of This Paper

This paper explores how the above international courts and tribunals have determined claims for compensation, focusing on their approaches to compensation in claims concerning alleged state interferences with private property. It is divided thematically to consider

- a) The **standard by reference to which international courts and tribunals award reparation**, that is, whether they use the rules on reparation under customary international law (and the standard of “full reparation”) or instead award remedies by reference to other rules or standards.
- b) The **forms (types) of reparation** that have been awarded by these international courts and tribunals, including whether they have indicated any preference for certain types of reparation over others.
- c) The **types of loss or damage** for which compensation has been awarded by these courts and tribunals, including awards of compensation for material and non-material damage, and the valuation techniques applicable to these forms of loss.
- d) The **requirements for awarding compensation** that these international courts and tribunals have established, focusing particularly on requirements of causation, non-contribution to loss, and mitigation of loss.
- e) The approaches adopted by these international courts and tribunals to **awarding interest**, including the methods used to set interest rates.

1.2 Key Messages

It is hoped that the comparative analysis and discussion contained in this paper will assist those thinking about the reform of investor–state arbitration to resituate that regime of dispute settlement within the broader context of public international law—a body of jurisprudence and practice from which ideas and inspiration for reform can be drawn. In particular, states and other proponents of reform may wish to consider the following options, as inspired by the approaches to reparation examined in the paper:

- a) Crafting new treaty language to expressly and explicitly require investor–state arbitral tribunals to apply a **different standard of reparation** to that which is provided under customary international law.
- b) Crafting new treaty language to provide investor–state arbitral tribunals with **greater guidance as to how to give effect to customary international law standards** of reparation.
- c) Requiring investor–state arbitral tribunals to have **greater engagement with, or give greater deference to, the decisions of domestic mechanisms** regarding reparation for investment treaty breaches.



- d) Encouraging parties to seek to agree on matters of reparation, including through the use of **negotiated or mediated settlements** following arbitral decisions on the merits.
- e) Encouraging (or requiring) **greater use of tribunal-appointed experts** to reduce the reliance on party-appointed experts in quantifying compensation for investment treaty breaches.

States and reform proponents may also wish to contrast these approaches with elements of other courts' and tribunals' practices, which may not be practicable, appropriate, or desirable in the context of the current investor–state arbitration regime. This includes increased reliance on equitable approaches to determining compensation and greater use of the customary international law remedy of restitution. These reform options are elaborated further in Section 7.



2.0 The Standard for Assessing Remedies: “Full reparation” or another standard?

This section examines the standard for reparation applied in assessing remedies by each of the international courts and tribunals under discussion in this paper, whether this is the customary international law standard of “full reparation” or a differently worded, treaty-based standard of reparation. This section also explores some treaty practice that distinguishes between standards of compensation depending on the nature of the state’s act.

2.1 The Standard of “Full Reparation”

The requirement that a state must make “reparation” for its internationally wrongful acts was first developed conceptually by the PCIJ in the *Chorzów Factory* case. In that case, the Court held that a state would be under a duty to make “full reparation” should it breach international law. The Court explained that this standard requires that the reparation provided for the internationally wrongful act “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”²⁴ The Court’s articulation of the “full reparation” standard in *Chorzów Factory* has significantly influenced the subsequent development of principles of reparation under customary international law, including the International Law Commission’s 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts* (ASR).²⁵

The standard of “full reparation” has, in turn, informed the practice of numerous international courts and tribunals as the requisite standard for assessing reparation in claims concerning state interference with private property. Specifically, each of the surveyed courts and tribunals has held that, upon a finding of a breach of either customary international law or an applicable treaty provision protecting an individual’s private property rights, the wrongdoing state will be under a duty to make “reparation.”²⁶ Most have used the customary international standard of “full reparation” to specify the standard at which such reparation must be provided.²⁷ In doing

²⁴ *Factory at Chorzów* (Germany v. Republic of Poland), Claim for Indemnity (The Merits), Judgment, P.C.I.J. Series A No. 17, 1928, p. 47 [*Chorzów Factory*].

²⁵ International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. On references to the ASR in investor-state arbitration see, further: Esmé Shirlow and Kabir Duggal, *The ILC Articles on State Responsibility in Investment Treaty Arbitration*, *ICSID Review – Foreign Investment Law Journal* (forthcoming 2022).

²⁶ Whom the “reparation” is provided to will differ depending on whether the court or tribunal is empowered to hear individual–state or state–state claims.

²⁷ See, for example: *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 2018, paras. 29–30 (ICJ); *Armed Activities on the Territory of the Congo*, 9 February 2022, paras. 69–70; 100–101 (ICJ); *M/V “Virginia G”*, 14 April 2014, para 427 (ITLOS). In addition to reparation, an internationally wrongful act will also generate additional obligations on the wrongdoing state, including a requirement that they cease the wrongful conduct.



so, international courts and tribunals have recalled the “well-established rule of international law that a state which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act.”²⁸ In following this standard, they have restated the principle established in *Chorzów Factory*, excerpted above, that reparation must aim to “wipe out” the consequences of the internationally wrongful act and re-establish the situation that would have existed but for the breach.²⁹

2.2 Other Treaty-Based Standards

The standard of “full reparation” has even been applied by international courts and tribunals where a treaty provision might indicate that the assessment of reparation for breach could proceed by reference to a different standard:

- a) The Protocol to the African Charter on Human and Peoples’ Rights, for example, directs the ACtHPR, upon finding a violation of a human or peoples’ right, to “make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”³⁰ The Court has interpreted this provision as a reference to the standard of reparation applicable under customary international law—that standard being the “full reparation” standard.³¹ In doing so, it has explained that “full reparation” must “place the victim, as much as possible, in the situation prior to the violation.”³²
- b) Similarly, the American Convention on Human Rights provides that, following a finding that the Convention has been breached, the Court “shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated” and “shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party.”³³ The IACtHR, similarly to the ACtHPR, has held that these requirements reflect customary international law rules on reparation,³⁴ such that reparation “is governed by international law in all of its aspects,

²⁸ See, for example, *M/V “SAIGA,”* 1 July 1999, para. 170.

²⁹ See, for example: *M/V “Virginia G,”* 14 April 2014, para. 430; *The M/V “Norstar” Case (Panama v. Italy),* Judgment, 10 April 2019, para 316; *M/V “SAIGA,”* 1 July 1999, para. 170.

³⁰ Protocol to the African Charter on Human and Peoples’ Rights, Article 27(1).

³¹ *Lohe Issa Konate v. Burkina Faso, Judgment on Reparations,* 3 June 2016, para. 15. See, also: *Wilfred Onyango Nganyi and 9 Others v. Tanzania, Judgment (Reparations),* 4 July 2019, para. 13; *Sebastien Germain Ajavon v. Benin, Judgment,* 29 March 2021, paras. 16–17; *Sebastien Germain Ajavon v. Benin, Judgment (Reparation),* 28 November 2019, para 138.

³² *Wilfred Onyango Nganyi and 9 Others v. Tanzania, Judgment (Reparations),* 4 July 2019, para. 17; *Sebastien Germain Ajavon v. Benin, Judgment,* 29 March 2021, para 19.

³³ American Convention on Human Rights, Article 63(1).

³⁴ See, for example: *Mémoli v. Argentina, Judgment (Preliminary Objections, Merits, Reparations and Costs),* 22 August 2013, para. 197.



such as, for example, its scope, characteristics, beneficiaries, etc.”³⁵ It has explained that this standard requires “full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages.”³⁶ It has further explained that reparation must neither lead to the “enrichment” nor “detriment” of the victims or their next of kin.³⁷

- c) In the event that the Court finds a breach of the Convention, Article 41 of the European Convention on Human Rights requires an award of “just satisfaction to the injured party.” In *Georgia v. Russia (I)*, the Court noted that

The general logic of the just-satisfaction rule is directly derived from the principles of public international law relating to State liability. ... Those principles include both the obligation on the State responsible for the internationally wrongful act “to cease that act, if it is continuing” and the obligation to “make full reparation for the injury caused by the internationally wrongful act,” as laid down in Articles 30 and 31 respectively of the Articles on Responsibility of States for Internationally Wrongful Acts.³⁸

The Court has also referred to a requirement of “full reparation” in some individual–state cases in order to justify the award of restitution separate from any remedy under Article 41.³⁹ The Court’s Practice Directions further make it clear that “the principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place, in other words, *restitutio in integrum*.”⁴⁰

The practice of the reviewed international courts and tribunals thus indicates that breaches of international law relevant to the protection of private property rights will, in most cases, give rise to an obligation on the part of the wrongdoing state to provide the applicant (whether that

³⁵ *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, para. 44. See, also: *Villagrán-Morales et al. v. Guatemala (“Street Children”)*, Judgment (Reparations and Costs), 26 May 2001, para. 61.

³⁶ *Velasquez Rodriguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, para. 26. The Court has also emphasized this standard in cases concerning alleged breaches of Article 21. See, for example: *Ivcher Bronstein v. Peru*, Judgment (Merits, Reparations and Costs), 5 February 2001, para. 178; *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, para. 224. See, further: *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, para. 47; *Villagrán-Morales et al. v. Guatemala (“Street Children”)*, Judgment (Reparations and Costs), 26 May 2001, para. 60; *Palamara Iribarne v. Chile*, Judgment (Merits, Reparations and Costs), 22 November 2005, para. 234.

³⁷ *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para 198.

³⁸ *Georgia v. Russia (I)*, Judgment (Just Satisfaction), 31 January 2019. As Altwicker-Håmori, Altwicker, and Peters note: “during the drafting process [for Article 41], the terms ‘satisfaction’, ‘reparation’, and ‘compensation’ have all been employed seemingly without distinction” (p. 6). Altwicker-Håmori, S., Altwicker, T. & Peters, A. (2015), Measuring violations of human rights: An empirical analysis of awards in respect of non-pecuniary damage under the European Convention on Human Rights, *Heidelberg Journal of International Law*, 76, pp. 1–51.

³⁹ *Papamichalopoulos and Others v. Greece*, Judgment, 31 October 1995; *Ilgar Mammadov v. Azerbaijan*, Judgment (Grand Chamber), 29 May 2019.

⁴⁰ European Court of Human Rights. (2007). *Practice directions: Just satisfaction claims*. https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf, para. 10.



be a state or an individual) reparation for the breach. The standard of “full” reparation is likely to be used as a reference point even if a treaty provision refers to something other than “full reparation” as the requisite standard (as the practice, for example, of the human rights courts indicates) or is otherwise silent as to the standard that applies (as the practice, for example, of ITLOS indicates).

Given this, it is worth recalling that the rules of state responsibility under customary international law—including on reparation—are general in character. They operate in a residual way. This means that the rules on reparation that apply under customary international law will apply only in the absence of more specific rules.⁴¹ Such rules may be adopted by states in order to reflect the feasibility or appropriateness of reparation in light of the specific features of a particular adjudicative context. The different phrasing of the standard for reparation in human rights treaties (as requiring “fair” or “just” rather than “full” compensation or reparation), for example, arguably provides such courts with particular discretion to identify what amounts to an appropriate remedy in each case. Such treaty provisions have been observed to “promote the theoretical primacy of the principle of *restitutio in integrum*” while acknowledging that “in most cases, damage caused by human rights violations cannot be fully restored.”⁴²

2.3 Different Standards of Compensation Depending on the Formulation of the Primary Obligation

Some treaty practices distinguish between standards of compensation depending on the nature of the state’s act. Some international courts and tribunals have, for example, held that different standards of compensation would apply to “lawful” as opposed to “unlawful” acts.⁴³ The distinction between the standards of compensation that might apply depending on the lawful or unlawful nature of the act at issue is highlighted in the analysis of the PCIJ in *Chorzów Factory* (see Box 2).

Box 2. The *Chorzów Factory* case

The *Chorzów Factory* case concerned a dispute between the German Reich and the Republic of Poland in relation to a nitrate factory that was located in the area of Chorzów and operated by a German company. In 1922, the area of Chorzów—formerly part of the German Reich—became Polish territory. Subsequently, in 1925, a Polish

⁴¹ International Law Commission, Responsibility of States for Internationally Wrongful Acts (2001) (ILC ASR), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, Article 55 (“These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”).

⁴² Ichim, O. (2015). *Just satisfaction under the European Convention on Human Rights*. Cambridge University Press, p. 16.

⁴³ For a discussion of the ECtHR’s evolving approach to this issue see, especially: Ichim, 2015, pp. 101–105, supra n. 42 (noting that the Court initially followed the approach developed in *Chorzów Factory* but subsequently—in at least some cases—has adopted a position whereby both lawful and unlawful expropriations lead to a valuation of compensation “based on the property’s value at the moment when it was taken [as then] convert[ed] to its current value [to take into account inflation]”).



court transferred the ownership of the factory to the Polish authorities, basing its decision on a Polish law of 1924 permitting such transfers. The German Reich thereafter initiated proceedings against Poland under the German–Polish Convention Concerning Upper Silesia.

The Court held that the standard of reparation for expropriation of property will depend upon whether an expropriation is “lawful” or “unlawful.” As the PCIJ explained,

- a) A lawful expropriation is one that occurs in accordance with the provisions of a treaty, which will usually also require that the expropriation be accompanied by a payment of compensation. Such treaties will typically stipulate a standard for such compensation. In *Chorzów Factory*, for example, the applicable treaty stipulated that the standard for lawful compensation was “adequate and fair” compensation. Where an expropriation takes place in accordance with the provisions of such a treaty, albeit without the payment of compensation, it constitutes a “lawful” expropriation for which “adequate and fair” compensation is due. The Court indicated that this would be equivalent to the “value of the undertaking at the moment of dispossession, plus interest to the day of payment.”⁴⁴
- b) An unlawful expropriation is one that does not occur in accordance with the treaty, thus giving rise to an internationally wrongful act. To remedy such an act, the PCIJ held that the applicable standard would be “full reparation.” The PCIJ distinguished “full reparation” from the reparation due under the treaty for lawful acts (for which different, usually lower standards of compensation will be appropriate).

The Court held that the Polish law did not constitute a lawful expropriation under the Convention but was instead an unlawful expropriation. In such circumstances, the Court held that valuing compensation by reference to the value of the property at the time of seizure (with interest to the date of payment) would have placed the owner “in a situation more unfavourable” than that which it would have been in had Poland complied with its obligations under the Convention.⁴⁵ Instead, in cases of unlawful expropriation, the state must “restore the undertaking and, if this be not possible, ... pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.”⁴⁶ This meant that events that occurred after the property had been seized and which had led to an increase in the value of the property could be taken into account when quantifying the amount to be paid.

The ECtHR, in applying P1-1 (“Protection of Property”), has developed a “fair balance” test as a component of analyzing whether there has been a breach of P1-1. This means that the ECtHR assesses whether a state has paid compensation as a component of analyzing whether there has been a breach of the Convention. This entails an analysis separate (and distinct) from its determination of what compensation will be due under Article 41 to an applicant who

⁴⁴ *Factory at Chorzów*, 1928, p. 47.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 48.



succeeds in demonstrating that the Convention has been breached. Using the fair balance test, the ECtHR assesses whether the state has maintained a “fair balance” between the public interest behind a given measure and the private interest in having a possession protected under the Convention.⁴⁷ To the extent that the state has not maintained a “fair balance,” it will be held to have breached P1-1, entailing an obligation to provide “just satisfaction” to the victim of that breach under Article 41 of the Convention. The Court has held that the terms of compensation provided by the state when expropriating private property are material to the assessment of whether the state has maintained a “fair balance,”⁴⁸ and further, that expropriation without compensation will be justifiable under the fair balance test only in exceptional circumstances.⁴⁹

The requirement to pay compensation when applying the “fair balance” test does not entail a requirement of “full” reparation or compensation.⁵⁰ The Court has also held that any taking by a state of the property of its own nationals (as opposed to the property of foreign nationals) will not entail a requirement to pay prompt, adequate, or effective compensation.⁵¹ Instead, where compensation terms are assessed as part of the “fair balance” test under P1-1, the Court will generally assess whether the compensation provided is “reasonably related” to the value of the property.⁵² This has been interpreted by the Court as requiring market value compensation for any taking of private property for public use. The Court has nevertheless also held that, when applying the fair balance test, there may be circumstances that “may call for less than reimbursement of the full market value.”⁵³ This includes, *inter alia*, where a state has adopted “measures of economic reform or measures designed to achieve greater social justice.”⁵⁴ The Court has also affirmed that states enjoy a wide margin of appreciation when determining the compensation terms for such measures, as “national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area.”⁵⁵ This analysis of compensation by the ECtHR functions as part of the analysis of the primary rule (under P1-1) and is therefore distinct from any analysis of compensation as a form of reparation for a breach of that primary rule (under Article 41).

As the following sections show, even where the “full reparation” standard remains applicable as the standard for reparation for breaches of international law, the approaches for achieving

⁴⁷ *Lithgow v. United Kingdom*, para 120. See, similarly: *Scordino v. Italy (No 1)*, Judgment, 29 March 2006, para. 93.

⁴⁸ *James v. United Kingdom*, Judgment, 21 February 1986, p. 24 (“compensation terms are material to the assessment whether the contested litigation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants”; “the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which would not be considered justifiable”); *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para 120; *Scordino v. Italy (No 1)*, Judgment, 29 March 2006, para. 95.

⁴⁹ *Scordino v. Italy (No 1)*, Judgment, 29 March 2006.

⁵⁰ *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para 121.

⁵¹ *Ibid.*, para 112.

⁵² *James v. United Kingdom*, p. 24; *Scordino v. Italy (No 1)*, Judgment, 29 March 2006, para. 95.

⁵³ *James v. United Kingdom*; *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para 121.

⁵⁴ *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para 121; *Scordino v. Italy (No 1)*, Judgment, 29 March 2006, para. 97.

⁵⁵ *Lithgow v. United Kingdom*, Judgment, 8 July 1986, para. 122.



“full reparation” that have been developed by different international courts and tribunals remain diverse. This includes, *inter alia*, approaches to the types of reparation available or preferred for internationally wrongful acts, the types of loss or damage for which such reparation may be provided, and the quantification methods capable of achieving “full reparation” for such loss or damage. Each of these issues is canvassed in the following sections by reference to the practice of the international courts and tribunals that form the focus of this paper.



3.0 The Forms (Types) of Reparation Available

This section considers the various forms of reparation available for internationally wrongful acts and the extent to which these forms of reparation have been applied in the context of individual–state claims by the courts and tribunals under examination.

Under customary international law, “reparation” for an internationally wrongful act may take the form of restitution, compensation, or satisfaction:

- a) “**Restitution**” refers to the responsibility of the wrongdoing state to “re-establish the situation which existed before the wrongful act was committed”⁵⁶ through the specific performance of an action by the state, such as the return of taken property or the “doing” or “undoing” of an act impacting property rights. Under customary international law, restitution is the preferred means of reparation. However, restitution need not be awarded where it would be “materially impossible” (for example, because property that could have been returned is destroyed) or where it involves “a burden out of all proportion to the benefit deriving from restitution instead of compensation.”⁵⁷
- b) Where the damage arising from an internationally wrongful act cannot be remedied by an award of restitution (or where restitution is not possible or proportionate), the wrongdoing state will be under an obligation to provide “**compensation**” for any damage caused by the act. Such compensation encompasses “any financially assessable damage including loss of profits insofar as it is established.”⁵⁸
- c) “**Satisfaction**” may also be awarded for internationally wrongful acts, where the injury caused by the act cannot be made good by restitution or compensation.⁵⁹ Such satisfaction may be achieved through “acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality.”⁶⁰

An internationally wrongful act will also, under customary international law, entail an obligation on the part of the wrongdoing state to cease the act (if it is continuing) and to offer assurances of non-repetition (if required).⁶¹

⁵⁶ ILC ASR, Article 35.

⁵⁷ Ibid,

⁵⁸ Ibid., Article 36.

⁵⁹ Ibid., Article 37.

⁶⁰ Ibid., Article 37.

⁶¹ Ibid., Article 30. Such consequences are distinct from reparation, though may reinforce or support reparation (including, in particular, orders of restitutionary relief).



These consequences of internationally wrongful acts apply in state–state rather than individual–state disputes.⁶² Nevertheless, they have frequently been applied as a guide (or by analogy) by international courts and tribunals determining the consequences of state responsibility in individual–state claims under international law.⁶³

Indeed, the practice of the international courts and tribunals reviewed for this paper indicates their openness to awarding various types of reparation by reference to the types of reparation available under customary international law.⁶⁴ As the PCIJ reasoned in *Chorzów Factory*, “full reparation” requires “restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.”⁶⁵ The options for achieving “full reparation” under customary international law have thus been influential in the approach of each of the surveyed courts and tribunals. Some international courts have been particularly creative in crafting relief to secure “full reparation” through these various forms of reparation (see Box 3).

Box 3. Achieving “full reparation”: The practice of the IACtHR

The IACtHR has been particularly creative in crafting relief to provide “full reparation” to victims of human rights breaches. The Court has noted that, whenever possible, restitution is the preferred form of relief, aiming at the “re-establishment of the previous situation.”⁶⁶ The Court has frequently ordered reparation in the form of restitution, including directing states to facilitate the restoration of property rights⁶⁷ or the recovery of dividends and other rights under domestic law.⁶⁸ The Court has also ordered states to provide free medical treatment for physical or psychological suffering arising from a

⁶² Ibid. Article 33 (“1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach. 2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”)

⁶³ See, especially Paparinskis, M. (2013). Investment treaty arbitration and the (new) Law of State Responsibility. *European Journal of International Law*, 617, 635–640. <https://doi.org/10.1093/ejil/cht025>

⁶⁴ See, for example: *M/V “SAIGA,”* 1 July 1999, para. 171 (ITLOS); *M/V “Virginia G,”* 14 April 2014, para. 433 (ITLOS); *M/V “Norstar,”* 10 April 2019, para. 319 (ITLOS); *Lohe Issa Konate v. Burkina Faso*, Judgment on Reparations, 3 June 2016, para. 15 (ACtHPR); *Wilfred Onyango Nganyi and 9 Others v. Tanzania*, Judgment (Reparations), 4 July 2019, para. 13 (ACtHPR); *Sebastien Germain Ajavon v. Benin*, Judgment, 29 March 2021, paras. 16–17 (ACtHPR); *Sebastien Germain Ajavon v. Benin*, Judgment (Reparation), 28 November 2019, para. 138 (ACtHPR).

⁶⁵ *Factory at Chorzów*, 1928, p. 47.

⁶⁶ *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, para. 292. See, also: *Mémoli v. Argentina*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013, para. 198; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 197; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, para. 280.

⁶⁷ See, for example: *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 210 (return of land); *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 24 August 2010, para. 281 (return of land).

⁶⁸ *Ivcher Bronstein v. Peru*, Judgment (Merits, Reparations and Costs), 5 February 2001, para. 181.



breach⁶⁹ or to provide appropriate housing to the applicant where the breach relates to the loss of the applicant's home.⁷⁰ When awarding restitution:

- The Court has sometimes provided a contingency remedy to apply in the event that such restitution is not forthcoming from the state. In *Tibi v. Ecuador*, for example, the Court ordered the return of the applicant's goods by the state within 6 months of the judgment or, failing this, the payment of EUR 82,850 to the applicant.⁷¹
- The Court has noted that, while restitution of specific land or property is preferred, if this is not possible (for example, because it has been transferred to a third party), then alternative land or property (meeting criteria specified by the Court) may be provided by the state as restitution.⁷²

Where restitution is not possible, the IACtHR has offered alternative forms of reparation to ensure non-repetition and to "repair the consequences of the violations."⁷³ For example,

- The Court has ordered compensation "in an amount sufficient to remedy all the consequences of the violations that took place."⁷⁴ The Court has held that the concept of "fair compensation" means that reparation "is compensatory and not punitive."⁷⁵ It has, moreover, noted that compensation "is the most usual way" of achieving reparation.⁷⁶
- The Court has awarded satisfaction in the form of, *inter alia*, a public apology to

⁶⁹ *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, para. 403; *Barrios Family v. Venezuela*, Judgment (Merits, Reparations and Costs), 24 November 2011; *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012.

⁷⁰ *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, para. 407.

⁷¹ *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, para. 237.

⁷² *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, para. 217; *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 212; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 24 August 2010, para. 286.

⁷³ See, for example: *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, para. 292. See, similarly: *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 197; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, para. 280. In ordering cessation and non-repetition as a form of "reparation," the IACtHR departs from the approach adopted by the ILC ASR to reparation, according to which guarantees of non-repetition and cessation arise as a consequence of an internationally wrongful act and are analyzed separately to reparation. In any case, and as noted above, in practice "[c]essation may be very closely related to restitution": Paparinskis, 2013, pp. 617, 636, *supra* n. 63.

⁷⁴ *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, para. 47.

⁷⁵ *Velasquez Rodriguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, para. 38.

⁷⁶ *Ibid.*, para. 25.



the victims of a violation⁷⁷ or a judgment against the state.⁷⁸

- The Court has also frequently ordered measures to ensure non-repetition of the breach, including by directing states to
 - i. Take legislative, administrative, and other measures to recognize (or create effective mechanisms to recognize) the applicant’s property rights.⁷⁹
 - ii. Investigate and punish the officials whose conduct has breached the Convention.⁸⁰
 - iii. Create training programs for those responsible for the breaches to ensure the future application of the state’s obligations⁸¹ or take other steps to prevent state agents or third parties from continuing to interfere with such rights.⁸²
 - iv. Create a “community development fund and program” to facilitate ongoing improvements to the land and livelihood of persons impacted by the breach (including, for example, education, housing, agriculture, or health programs).⁸³

⁷⁷ *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004; *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, para. 199; *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 218; *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, paras. 405–406; *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, para. 301; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 24 August 2010, para. 297.

⁷⁸ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, para. 166. See, similarly: *Barrios Family v. Venezuela*, Judgment (Merits, Reparations and Costs), 24 November 2011.

⁷⁹ See, for example: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, para. 164; *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 209; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 235; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 24 August 2010.

⁸⁰ *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004; *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 201; *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, paras. 399–401.

⁸¹ *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, para. 408; *Barrios Family v. Venezuela*, Judgment (Merits, Reparations and Costs), 24 November 2011, para. 341; *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012; *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, para. 302.

⁸² *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001.

⁸³ *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, para. 205; *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 214; *Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 28 November 2007, para. 201.



3.1 The Preference for Restitution

The practice of the international courts and tribunals endorses the above hierarchy of remedies (at least in principle). This preference of international courts and tribunals in favour of awarding restitution for breaches of international law follows from the priority given to that form of relief under customary international law. Nevertheless, where restitution is not sought by an applicant⁸⁴ or is otherwise “materially impossible” or perceived to be disproportionate, international courts and tribunals have readily accepted that compensation⁸⁵ or satisfaction⁸⁶ may be necessary to provide “full reparation” for a breach of international law. These considerations have meant that some international courts have exhibited, in general, a preference for awarding compensation over other types of remedies, particularly restitution.⁸⁷

Institutionalized and standing bodies may find awards of restitution particularly efficacious, insofar as they may have a greater potential to oversee and secure compliance with such judgments as compared to ad hoc bodies. Such oversight is more difficult for ad hoc tribunals, which are constituted for the purposes of a single dispute and disbanded at the conclusion of the dispute with no continuing authority to oversee compliance with the resulting award.⁸⁸ Standing institutionalized courts and tribunals will also often be linked to political bodies that may be able to exercise some form of oversight to secure compliance with the court or tribunal’s orders. The IACtHR, for example, has a Supervision Unit and regularly instructs states to provide reports on their compliance with the reparation it has ordered within a certain period of time after having been notified of the judgment.⁸⁹

Not all standing courts, however, have been able to exercise ongoing oversight over awards of restitutionary relief. The ICJ, for example, has declined to keep proceedings open in order to exercise an ongoing supervisory role to secure compliance with its judgments. It has, instead, indicated that compliance with its judgments is best encouraged through other

⁸⁴ Underlying policy motivations and practical concerns might mean that some courts or tribunals will more frequently be requested and inclined to order restitution as a form of reparation. Certain human rights breaches, for example, may not be possible to rectify through re-establishment of the prior situation (particularly, for example, where the rights at issue involve loss of life or liberty or other ill-treatment of an individual) (Ichim, 2015, p. 32, *supra* n. 42). Further, depending on the nature of the breach, compensation might be preferred to restitution. This is particularly the case where the property that has been subject to the wrongful interference has been destroyed or transferred to a third party.

⁸⁵ See, for example: *M/V “Norstar,”* 10 April 2019, paras. 320–321.

⁸⁶ See, for example: *M/V “SAIGA,”* 1 July 1999, para. 176.

⁸⁷ Fikfak, V. (2020). Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it’s all about the state. *Leiden Journal of International Law*, 33, pp. 335, 340 (“In this sense, ‘satisfaction’ under the Convention could refer to other types of remedies than compensation. Yet, through its case law, the Court has only ever made monetary awards and has only exceptionally required other action from member states.”).

⁸⁸ That said, and with thanks to Martins Paparinskis for highlighting this, the PCIJ in *Chorzow* specifically drew the principle of reparation from arbitral practice, stating that: “The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (emphasis added).

⁸⁹ See, for example, *Mémoli v. Argentina*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013, para. 206.



means, including the award of post-judgment interest.⁹⁰ In addition, while the ECtHR has a Department for the Execution of Judgments,⁹¹ it generally does not order restitutionary relief outside of its “pilot judgments” procedure, according to which the Court provides guidance for the wrongdoing state to assist it in correcting a situation found to be in breach of the Convention for a large class of potential applicants.⁹² Outside of these cases, the Court has tended to leave the selection of appropriate measures to achieve reparation to the discretion of the respondent state. In *Koyv-Tar v. Hungary*, for example, the Court noted that

a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. ... If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.⁹³

These considerations mean that many international courts and tribunals have elected to award compensation, rather than restitution, where they have found states to be in breach of international law. To this effect, the ECtHR’s Practice Directions, for example, specifically note that

the Court’s awards, if any, will normally be in the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention).⁹⁴

⁹⁰ See, especially, *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 404. For an in-depth examination of the ICJ’s approach to awarding “restitution in kind” and “specific performance”, see further: Stoica, V. (2021). *Remedies before the International Court of Justice: A systemic analysis*. Cambridge University Press, especially Chapters 4 and 6.

⁹¹ See, further: <https://www.coe.int/en/web/execution>

⁹² See, further Fikfak, V. (2022, forthcoming). Compliance and compensation: Money as a currency of human rights. In R. Murray & D. Long, *Handbook of implementation of human rights*. Edward Elgar.

⁹³ *Konyv-Tar KFT and Others v. Hungary*, Judgment (Just Satisfaction), 5 October 2021, para. 24 (see, also, para. 26, in which the Court notes that the nature of the violation found in that case—being a control on the use of property rather than a deprivation—“does not enable the Court to proceed on the basis of the principle of *restitutio in integrum*” but that an “indemnity is capable of compensating for the alleged loss”). See, similarly: *Papamichalopoulos and Others v. Greece*, Judgment, 31 October 1995, paras. 34 and 36; *Hentrich v. France*, Judgment, 22 September 1994, para. 71.

⁹⁴ ECtHR, 2007, para. 23, *supra* n. 40. A power for the Court to require the annulment of domestic legislation was proposed but rejected during the negotiation of the European Convention. See further: Ichim, 2015, p. 11, *supra* n. 42.



Consistent with this, many of the Court's judgments emphasize compensation rather than restitution as the appropriate remedy. The Court has nevertheless encouraged states through its decisions to return property where a deprivation has been found, indicating that such restoration would be best adapted to achieve *restitutio in integrum*.⁹⁵ While formulated as guidance for the respondent state, such indications have allowed the Committee of Ministers to emphasize measures of restitution when overseeing the enforcement of ECtHR judgments, even if the Court itself has not formally ordered restitutionary relief.⁹⁶

It is worth noting in this respect that international courts and tribunals have also adopted different views as to when restitution will be "impossible." The ECtHR, for example, adopts a "flexible" approach, according to which it accepts that practical or legal, and not just material, impossibility will be reasons in favour of granting compensation rather than restitution.⁹⁷

While restitution is therefore prioritized as a matter of customary international law, in practice, many courts and tribunals remain willing to provide compensation in lieu of restitution. This may in part stem from concerns about the prospects of enforcing restitutionary relief against sovereign states,⁹⁸ but it may also stem from concerns about the practical feasibility of restitution in a given case. Nevertheless, where restitution is granted, compensation should only be provided to the extent that the loss or damage identified cannot be rectified through the award of restitution. As such, any award of restitution will impact the amount of compensation that is likely to be awarded by the court or tribunal for the relevant loss.

⁹⁵ See, for example: *Papamichalopoulos and Others v. Greece, Judgment (Just Satisfaction)*, 31 October 1995, paras. 38–39 ("... the Court considers that the return of the land in issue ... would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of [P1-1]... If the respondent State does not make such restitution within six months from the delivery of this judgment, the Court holds that it is to pay the applicants, for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence of the buildings, and the construction costs of the latter.").

⁹⁶ *Ichim*, 2015, pp. 33, 100–101, 252–253, *supra* n. 42.

⁹⁷ *Ibid.*, p. 37, 39, *supra* n. 42.

⁹⁸ Many studies have indicated low compliance rates with orders of restitution. See, for example: Hawkins, D. & Jacoby, W. (2010). Partial compliance: A comparison of the European and Inter-American Courts for Human Rights. *Journal of International Law and International Relations*, 6(1), 35. Such concerns have been raised, also, in relation to compliance with ECtHR pilot judgments (Fikfak, 2022 forthcoming, *supra* n. 92).



4.0 The Types of Loss or Damage for Which Compensation May Be Awarded and Applicable Valuation Techniques

This section considers the types of loss or damage for which compensation may be awarded by the various courts and tribunals, including material and non-material loss. This section also explores the more innovative techniques used by the courts and tribunals to quantify compensation, including the use of equitable approaches, the engagement of court or tribunal-appointed experts, the use of negotiated or mediated settlement windows, and close collaboration with domestic courts or authorities.

International courts and tribunals regularly award compensation for both “material” and “non-material” losses flowing from breaches of international law.⁹⁹ The concept of non-material loss includes stress and psychological harm and is particularly relevant to human rights disputes.

4.1 Approaches to Valuing Material Loss

International courts and tribunals readily accept that compensation for material loss can comprise both losses incurred by reason of the breach (*damnum emergens*) and losses expected to be occasioned as a result of the breach in the future (*lucrum cessans*). This is consistent with the ASR, which provides that compensation is due for “the damage caused” by an internationally wrongful act, including “any financially assessable damage including loss of profits insofar as it is established.”¹⁰⁰

Typically, to quantify **material loss**, international courts and tribunals use either (i) market-, income-, or asset-based valuation techniques¹⁰¹; (ii) equitable principles; or (iii) some combination of these techniques.

The use of market-, income-, and asset-based techniques is particularly prevalent in the case law of the PCIJ, ICJ, ITLOS, and Annex VII tribunals. For example,

- a) In *Chorzów Factory*, the PCIJ held that compensation for an unlawful seizure of property should reflect the value of the property at the time of the judgment, as well as compensation for any “loss sustained as a result of the seizure.”¹⁰²

⁹⁹ See, for example: Ahmadou Sadio Diallo, 19 June 2012, para. 33 (ICJ); *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 2018, para. 27 (ICJ); *M/V “SAIGA,”* 1 July 1999, para. 172 (ITLOS); *Beneficiaries of the Late Nohbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Movement on Human and Peoples’ Rights v. Burkina Faso, Judgment on Reparations*, 5 June 2015 (ACtHPR).

¹⁰⁰ ILC ASR, Article 36.

¹⁰¹ See, further, Bonnitche & Brewin, 2020, *supra* n. 4.

¹⁰² *Factory at Chorzów*, 1928, p. 47.



- b) In *Corfu Channel*, the ICJ held that the appropriate amount of compensation due for the wrongful destruction of a ship was its replacement cost at the time of loss,¹⁰³ plus the lost stores on board, less the serviceable equipment and scrap recoverable from the ship (GBP 716,780).¹⁰⁴
- i. The ship's replacement value was calculated by reference to the costs associated with constructing an equivalent ship, taking into account wages, output, insurance, price rises, and depreciation over time.¹⁰⁵
 - ii. The ship's stores were calculated by reference to a blueprint of a former British destroyer of the same class to make an approximate calculation of the damage sustained through the loss or damage of the stores contained in the bows of the ship.
 - iii. The value of the ship's serviceable equipment was valued by reference to the applicant's claim (GBP 74,870), which was considered reasonable because it aligned with the information obtained about similar ships. The sum of GBP 20,000 was nevertheless deducted from the total to account for the fact that this was "in the nature of speculation."¹⁰⁶
 - iv. An amount of GBP 3,800 was estimated as necessary to salvage and transport the ship's scrap materials.

The Court also used repair costs to quantify compensation for damage to another ship, calculating such repair costs by reference to the repair costs incurred for a similar ship in the same year as adjusted to account for a longer repair period for the ship at issue in the claim and higher costs for the transport of repair materials.¹⁰⁷ To this amount, the Court also awarded the value of lost stores and anti-submarine equipment on board the ship. The Court has also awarded compensation for costs and expenses incurred by the applicant as a result of the internationally wrongful act.¹⁰⁸

- c) ITLOS has awarded compensation for damage to ships by reference to the cost of repairs,¹⁰⁹ losses owing to lost charter hire,¹¹⁰ costs incurred by a state in relation to the detention of the vessel by another state,¹¹¹ and loss or destruction of cargo

¹⁰³ One commentator has suggested that the Court's use of replacement value at the time of loss to quantify the compensation due indicates that it was "distanc[ing] itself from the 'full reparation' standard, which would have arguably required the payment of its value estimated at the time of the indemnification": Torres, F. E. (2021). Revisiting the Chorzów Factory standard of reparation – Its relevance in contemporary international law and practice. *Nordic Journal of International Law*, 90, pp. 190, 199. For a recent in-depth study of the ICJ's approaches to remedies (including compensation), see further: Stoica, 2021, supra n. 91, especially Chapter 7.

¹⁰⁴ *Corfu Channel*, 15 December 1949, p. 247.

¹⁰⁵ *Ibid.*, p. 258.

¹⁰⁶ *Ibid.*, p. 259.

¹⁰⁷ *Ibid.*, Annex 2.

¹⁰⁸ See, for example: *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 1986, para. 142.

¹⁰⁹ *M/V "SAIGA"*, 1 July 1999.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*



stored on the ship.¹¹² It has used documentary evidence to quantify compensation for material loss, requiring “a careful scrutiny of invoices and other documents submitted.”¹¹³ In *M/V Virginia*, for example, ITLOS “examined the evidence and documentation provided by Panama” to conclude that the ship at issue was carrying a cargo of 532.2 tonnes of gas oil at the time of its confiscation. The Tribunal held that restitution of the gas oil “would not be practical, as implementing this would entail various complexities including additional costs.” It therefore awarded compensation calculated on the basis of “a price of US\$730 per tonne of gas oil noted in the invoice submitted by Panama.”¹¹⁴ It also awarded compensation for “repairs to the vessel” on the basis of a “careful scrutiny of the invoices provided.”¹¹⁵

- d) Both of the Annex VII tribunals that have made decisions on reparation have assessed market value by reference, *inter alia*, to the replacement cost of lost or damaged items.¹¹⁶ In *Arctic Sunrise*, for example, the Annex VII tribunal appointed an expert to assess whether the applicant’s claims for compensation were well-founded and reasonable in circumstances where the responding state refused to take part in the arbitration.¹¹⁷ The Tribunal held that the majority of the applicant’s claims for compensation arising due to material loss were well-founded and reasonable.¹¹⁸ This included costs for replacing equipment and inventory on board the impacted vessel, costs to repair damage occasioned by the vessel during its detention, costs associated with resuming operations following the return of the vessel, and costs associated with the loss of use of the vessel during its period of detention and repair.¹¹⁹ While most of the claims were thus accepted, some claims were adjusted on the basis that they were not well-founded and reasonable. In particular, the applicant had sought, *inter alia*, the replacement costs associated with six rigid-hull inflatable boats (RHIBs) that had been seized by Russian authorities upon boarding the *Arctic Sunrise*. The applicant submitted that the replacement cost represented the “best estimate for the [ir] fair market value.”¹²⁰ The Tribunal-appointed expert agreed with the applicant that “the book value of the RHIBs would not reflect their fair market value” but considered that the claim submitted by the applicant had to be adjusted to ensure that the compensation would reflect replacement costs on a “like for like basis,” taking into account, in particular, the “age, specification and condition of each RHIB.”¹²¹ The Tribunal noted that the Tribunal-appointed expert had “confirmed the appropriateness of resorting to replacement cost as an indicator for the fair market value of the

¹¹² Ibid.

¹¹³ Ibid., para. 175.

¹¹⁴ *M/V “Virginia G,”* 14 April 2014, para 441.

¹¹⁵ Ibid., para 442.

¹¹⁶ See, for example: Duzgit, 18 December 2019, para. 102 (accepting the applicant’s “cost basis valuation” of cargo and bunkers, and further noting that such valuation “was, in any event, below the market value for MGO [marine gas oil] and HFO [heavy fuel oil] on the West African coast throughout the relevant period”).

¹¹⁷ *Arctic Sunrise*, 10 July 2017, paras. 39, 54–55. See, similarly: Duzgit, 18 December 2019, para. 64.

¹¹⁸ *Arctic Sunrise*, 10 July 2017, paras. 52–62.

¹¹⁹ Ibid., para. 36.

¹²⁰ Ibid., para. 39.

¹²¹ Ibid., para. 41.



RHIBs,”¹²² save that the replacement costs should be valued on a like-for-like basis to ensure that the applicant was not “put in a better position than that in which it would have been absent such unlawful conduct.”¹²³ The Tribunal thus decided that “in the absence of precise information regarding the residual value of the replacement RHIBs and given the circumstances of the case ... it is reasonable to award 50 percent of the amount claimed.”¹²⁴

While most of the claims in *Arctic Sunrise* were assessed by the Tribunal-appointed expert and Tribunal using market-based techniques, the Tribunal in that proceeding also had recourse to more equitable methods for quantifying aspects of the claimed loss. The applicant, for example, had requested a lump sum to compensate for “personal objects seized from the *Arctic Sunrise* that have not been returned to the Netherlands.”¹²⁵ The Tribunal held that

while the Netherlands has not submitted any supporting documentation that would allow the Tribunal to specifically assess the value of individual personal objects, the Tribunal does not doubt that the Arctic 30 had personal belongings with them as they embarked on their voyage on the Arctic Sunrise and that the Respondent’s unlawful conduct caused material injury to the Arctic 30 with respect to their belongings. In such a situation, and in line with the approach adopted by other international courts and tribunals, the Tribunal considers it appropriate to award an amount of compensation on an equitable basis.¹²⁶

The ICJ has similarly used equitable approaches to value material loss.¹²⁷ This has most recently been highlighted in its decision on reparation in *Armed Activities on the Territory of the Congo*, where the Court awarded the applicant (the Democratic Republic of the Congo [DRC]) a global sum of USD 325 million as reparation for losses arising from Uganda’s breaches of international law.¹²⁸ In that case, the Court noted that “a large amount of evidence has been destroyed or rendered inaccessible over the years since the armed conflict”¹²⁹ and, further, that “the evidence included in the case file ... is, for the most part, insufficient to reach a precise determination of the amount of compensation due.”¹³⁰ Nevertheless, the Court held that

while ... there is some uncertainty about the exact extent of the damage caused, this does not preclude it from determining the amount of compensation. The Court may, on an

¹²² Ibid., para. 46.

¹²³ Ibid., paras. 47–49.

¹²⁴ Ibid., para. 51.

¹²⁵ Ibid., para. 96.

¹²⁶ Ibid., para. 98.

¹²⁷ See, for example: *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 2018, para. 35; *Ahmadou Sadio Diallo*, para. 33.

¹²⁸ *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 405. This comprised three lump sums of USD 225,000,000 for damage to persons; USD 40,000,000 for damage to property; and USD 60,000,000 for damage related to natural resources. The amount awarded represents approximately 3% of the total compensation originally claimed.

¹²⁹ *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 124.

¹³⁰ Ibid., para. 125.



exceptional basis, award compensation in the form of a global sum within the range of possibilities indicated by the evidence and taking account of equitable considerations. Such an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury.¹³¹

The Court thus exercised some “flexibility” concerning the standard of proof required to establish reparation.¹³² Specifically, this entailed an

assess[ment of] the existence and extent of the damage within the range of possibilities indicated by the evidence. This may be evidence included in the case file by the Parties, in the reports submitted by the Court-appointed experts or in reports of the United Nations and other national or international bodies. ... In such circumstances, an assessment of the existence and extent of the damage must be based on reasonable estimates, taking into account whether a particular finding of fact is supported by more than one source of evidence (“a number of concordant indications”).¹³³

In approaching the establishment of loss with this lower standard of proof, the Court “accordingly reduced the levels of compensation awarded in order to account for the uncertainties that flow from applying a lower standard of proof.”¹³⁴ Ultimately, this prompted the Court to make several awards of compensation for different heads of damage as “global” lump sums. Specifically in relation to reparation for damage to property, the Court considered that “the evidence presented by the DRC ... is particularly limited” but was “nonetheless persuaded that a significant amount of damage to property was caused by Uganda’s unlawful conduct.”¹³⁵ Taking into account “the exceptional circumstances of the present case,” “the range of possibilities indicated by the evidence,” and “equitable considerations,” the Court awarded a global sum for property damage of USD 40 million.¹³⁶ This approach to awarding global lump sums has been criticized, including by ICJ judges issuing dissenting and separate opinions.¹³⁷

The ECtHR has similarly valued material loss by reference to “equitable” principles—though it has also reverted to market-, income-, or asset-based techniques where such techniques

¹³¹ Ibid., para. 106.

¹³² Ibid., para. 124.

¹³³ Ibid., para. 126.

¹³⁴ Ibid., paras. 107–108.

¹³⁵ Ibid., para. 257.

¹³⁶ Ibid., para. 258.

¹³⁷ See, for example: Declaration of Judge Tomka, para. 9 (“I doubt that the reader will be able to understand how the Court arrived at the particular amounts of compensation for various heads of damages. ... the Court itself does not indicate any precise methodology by which it has arrived at the amount of compensation it has awarded...”); Separate Opinion of Judge Yusuf, paras. 24–26 (“Unfortunately, the Judgment seems to rely upon equitable considerations as a substitute for a reasoned analysis that would identify the evidence presented by the Parties as corroborating — albeit in an approximative manner — the extent of the injury caused by Uganda, and a cognizable method for the valuation of that injury. ... It is not, however, possible to understand from the text of the Judgment how the Court has arrived at these figures. There is no indication as to how the different components of these sums were determined, or the way in which these figures may be justified by the facts.”).



are possible to apply given the evidentiary record before the Court. The ECtHR's Practice Directions, for example, note that

normally, the Court's award will reflect the full calculated amount of the damage. However, if the actual damage cannot be precisely calculated, the Court will make an estimate based on the facts at its disposal. ... it is also possible that the Court may find reasons in equity to award less than the full amount of the loss.¹³⁸

Where possible, the ECtHR will thus ascertain the "full calculated amount of the damage" on the basis of evidence submitted by the parties (including, in some cases, expert reports¹³⁹) and has also occasionally invited the parties to jointly appoint an expert to assist in the valuation exercise.¹⁴⁰ In line with its Practice Directions, however, the ECtHR has nonetheless endorsed an "equitable" approach to assessing compensation for damage, including where a "precise calculation" of damage is not possible.¹⁴¹ Such an approach—similar to that adopted by the ICJ—involves considerable judicial discretion. The ECtHR has been reported to rely upon "a set of tables to determine the amounts and maintain consistency," but these have not been made publicly available.¹⁴² As Ichim notes,

Often the Court does not explain how it arrives at a figure, preferring to keep its discretionary margin of appreciation. The judges do not engage in detailed calculations, but merely examine whether the evidence is convincing. When damage proves difficult to estimate or if both parties have submitted pertinent documentation, the judges amalgamate the compensation with that for moral damage and order a lump sum in equity.¹⁴³

Similarly, in some cases, the ACtHPR has rejected an applicant's evidence as to pecuniary loss as insufficient or the loss claimed as excessive. In such circumstances, however, the Court has tended to rule "on the basis of equity."¹⁴⁴ So, too, the IACtHR has rarely declined to award compensation for material harm due to insufficient evidence of precise loss (provided that some loss is at the very least established).¹⁴⁵ It instead has used principles of fairness or equity to determine monetary compensation, where, for example, it has proven difficult to establish

¹³⁸ ECtHR, 2007, para. 12, *supra* n. 40.

¹³⁹ See, for example: *Papamichalopoulos and Others v. Greece*, Judgment (Just Satisfaction), 31 October 1995, para. 39.

¹⁴⁰ See, for example: *Ibid.*, para. 3.

¹⁴¹ See, for example: *Selcuk and Asker v. Turkey*, 24 April 1998, para. 106 (noting that "the Court's assessment of the amounts to be awarded must, by necessity, be speculative and based on principles of equity"). The Court has linked the availability of equitable approaches to the wording of Article 41, which requires "just" satisfaction (Ichim, 2015, p. 45, *supra* n. 42).

¹⁴² Ichim, 2015, p. 17, *supra* n. 42.

¹⁴³ *Ibid.*, p. 99, *supra* n. 42.

¹⁴⁴ See, for example: *Lohe Issa Konate v. Burkina Faso*, Judgment on Reparations, 3 June 2016; *Wilfred Onyango Nganyi and 9 Others v. Tanzania*, Judgment (Reparations), 4 July 2019.

¹⁴⁵ *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 187; *Barrios Family v. Venezuela*, Judgment (Merits, Reparations and Costs), 24 November 2011, para. 364.



an applicant's income prior to the breach.¹⁴⁶ It has also used equitable principles in cases where the Court found it difficult to determine the amount of loss because of the breach.¹⁴⁷ For instance, in a case where state censorship had prevented the distribution of a copyrighted book, the Court established that a loss of profits and expenses was incurred in the amount of USD 11,000 in equity. In this case, while information as to the price of publication was available, the price of the book as sold in stores was uncertain.¹⁴⁸

The precise methodologies underlying such “equitable” techniques have not been clearly explained but entail approaches to valuation that rely upon the court's sense of fairness (see Box 4).¹⁴⁹ As the ICJ explained in *Diallo*, for example, an equitable approach to valuation “above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.”¹⁵⁰ Similarly, the ECtHR takes into account various factors in assessing compensation claims on the basis of equitable principles, including the nature and extent of the violation(s), the role of the applicant in causing damage, and the circumstances of the state concerned.¹⁵¹ The IACtHR has clarified that quantification on the basis of equity does not imply unlimited discretion on the part of the Court to determine the amount of compensation but must be based on the evidence provided and the “facts of the case and the alleged violations.”¹⁵² The Court has therefore declined to award compensation in circumstances where the evidence is insufficient to prove *any* pecuniary loss, noting that it is necessary to “show and prove, in pecuniary terms, the opportunity lost, as well as its causal relationship to the violation declared, because it is not enough to affirm it in the abstract.”¹⁵³ Such equitable approaches to valuation nevertheless rely upon the exercise of considerable judicial discretion, particularly compared to market-, income-, or asset-based approaches.

¹⁴⁶ *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, para. 236; *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, para. 371.

¹⁴⁷ *Palamara Iribarne v. Chile*, Judgment (Merits, Reparations and Costs), 22 November 2005, paras. 240–242; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, para. 315.

¹⁴⁸ *Palamara Iribarne v. Chile*, Judgment (Merits, Reparations and Costs), 22 November 2005.

¹⁴⁹ The resulting lack of “consistency, reasoning or foreseeability” associated with such awards has been criticized by numerous commentators. See, for example: *Ichim*, 2015, p. 49, *supra* n. 42.

¹⁵⁰ Importantly, equitable approaches to valuation should not lessen the requirements to evidence damage and causation. As explained by Judge Greenwood in *Diallo* (Judgment of 19 June 2012, Declaration of Judge Greenwood, para. 5): “Equitable principles should not be used to make good the shortcomings in a claimant's case by being substituted for evidence which could have been produced if it actually existed: equity is not alchemy.”

¹⁵¹ See, for example, *Varnava and Others v. Turkey*, 18 September 2009, para. 224. See, further: *Fikfak*, 2020, *supra* n. 87.

¹⁵² *Mémoli v. Argentina*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013, para. 214. See, similarly: *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, para. 314.

¹⁵³ *Mémoli v. Argentina*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013, para. 216



Box 4. Examples of equitable approaches to valuing loss

1. *Ahmadou Sadio Diallo (ICJ)*

These proceedings concerned a dispute between Guinea and the DRC, in which Guinea alleged that the DRC had committed “serious violations of international law” against a Guinean national, Ahmadou Sadio Diallo. Guinea claimed that Diallo was unjustly imprisoned by DRC authorities after residing in the DRC for 32 years; had been despoiled of his investments, businesses, movable and immovable property, and bank accounts; and had been wrongfully deported. While the Court accepted that Guinea’s right to afford Diallo diplomatic protection (as his state of nationality) could extend to claims related to his direct rights as a shareholder in two DRC companies (e.g., the right to receive dividends), the Court held that the DRC had not infringed such rights. The Court further dismissed as inadmissible several of Guinea’s claims related to the treatment of Diallo’s businesses, which were being treated for the purposes of the diplomatic protection claim as DRC nationals.

The Court therefore ultimately only decided claims related to the treatment of Diallo himself. The Court ultimately awarded Guinea (on behalf of Diallo) USD 85,000 for Diallo’s non-material injuries and USD 10,000 for Diallo’s material injuries. These amounts were quantified by reference to principles of fairness and equity.

With respect to the claim for material damage, for example, the Court noted that Guinea had not provided sufficient documentary evidence to demonstrate the existence of some items of claimed property or the value of the property lost overall. Nonetheless, the Court assumed that the DRC’s wrongful acts were likely to have caused Diallo some material loss, given the likelihood of him having accumulated private property during his long period of residence in the DRC. Using equitable principles, it awarded compensation in the amount of USD 10,000 (in contrast to the USD 550,000 claimed by Guinea). While the Court accepted that a claim could, in principle, be made for lost remuneration during Diallo’s unlawful detentions and subsequent expulsion, it rejected the claim made by Guinea (USD 6,510,148) as unsubstantiated on the evidence Guinea provided. The Court noted that the absence of evidence of the lost income contrasted with the evidence Guinea had been able to present to substantiate its claims in relation to the losses occasioned by the DRC companies. It noted that the evidentiary record instead indicated that these companies had not been in an economic position to remunerate Diallo at the levels claimed and that Diallo was “already impoverished” at the time of the internationally wrongful acts. The Court moreover held that Guinea had not established how Diallo’s detention and expulsion would have prevented him from receiving the claimed remuneration.

2. *Sporrong & Lönnroth v. Sweden (ECtHR)*¹⁵⁴

These proceedings concerned Sweden’s decision to grant the Stockholm City Council permits to expropriate certain areas of land (the “Decision”). The permits, which were issued for periods of between 10 and 25 years, prohibited the landowners from constructing buildings on or otherwise altering or developing the land before the City

¹⁵⁴ *Sporrong & Lönnroth v. Sweden*, Judgment, 18 December 1984.



Council had made a decision as to whether to proceed to expropriation. This prohibition adversely affected the landowners' potential to sell during this period, notwithstanding the City Council's decision to withdraw the permits at a later stage. The applicants, who owned two properties affected by the Decision, filed an application with the ECtHR alleging, *inter alia*, that the Swedish government's Decision to grant the permits amounted to a violation of P1-1. The Court held that the respondent had breached P1-1.

While accepting the state's argument that the real value of the properties had not fallen between the beginning and the end of the respective period of damage, the Court considered that this did not rule out the possibility of loss during that period. The Court noted, in particular, that the Decision had limited the respondent's use of the property, undermined the respondent's capacity to secure loans with respect to the property, and—by enabling dispossession at any time—adversely affected the value of the property. It further accepted that the subsequent withdrawal of the expropriation permits had not provided adequate reparation.

The Court noted that the precise quantification of the damage suffered by the applicants was a “technical” question, that the submissions of the parties were based on conflicting expert evidence, and “the virtual impossibility of quantifying, even approximately, the loss of opportunities.”¹⁵⁵ In light of this complexity, the Court decided not to use the valuation methods put forward by the applicants (based on a hypothetical redevelopment of the properties) or the respondent (based on the actual use of the properties). Instead, the Court considered that the amount required to afford “just satisfaction” should be determined on an equitable basis and awarded SEK 1 million with respect to the two properties affected by the Decision. It noted, in this respect, that “the damage suffered is made up of a number of elements which cannot be severed and none of which lends itself to a process of precise calculation.”

As indicated above, the surveyed international courts and tribunals have noted the possibility (including for some only in principle¹⁵⁶) for applicants to recover compensation for lost profits arising from a breach of international law (see Box 5) where this would be necessary to achieve “full reparation.” The ECtHR Practice Directions, for example, note that compensation for pecuniary loss “can involve compensation for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*).”¹⁵⁷

While accepting the possibility of awarding compensation for future losses, the surveyed international courts and tribunals have nevertheless rarely used the types of forward-looking, income-based techniques common in investor–state arbitration to award large amounts of compensation for lost profits as a distinct or standalone component of reparation for material breach. Reasons for this may be because they have not frequently been requested by applicants to award such remedies or because the cases at issue before them have not called for the award

¹⁵⁵ Ibid., para 27.

¹⁵⁶ Gray, C. (1990). *Judicial remedies in international law*. Clarendon Press, p. 25. See, for example: *M/V “Norstar,”* 10 April 2019, paras. 431–432 (ITLOS); *Factory at Chorzów*, 1928 (PCIJ); *Ahmadou Sadio Diallo*, 19 June 2012, para. 49 (ICJ).

¹⁵⁷ ECtHR, 2007, para. 10, *supra* n. 40.



of such remedies.¹⁵⁸ Further, where compensation is awarded in conjunction with other forms of relief, including restitution requiring the return of property, any need for compensation for lost profits to be awarded for achieving “full reparation” is likely to be reduced or rendered moot: a claimant would not normally be able to recover compensation for future losses arising after the property is returned.

Awards of compensation for lost profits may also be unavailable or reduced where they are not sufficiently substantiated by the evidence, are perceived to be too speculative, or have not been shown to follow (as a matter of causation) from the breach.¹⁵⁹ In considering claims for lost profits, for example, the ECtHR has emphasized that “where a loss of earnings (*lucrum cessans*) is alleged, it must be conclusively established and must not be based on mere conjecture or probability.”¹⁶⁰ Where the ECtHR has determined a claim for lost profits (or opportunities) to be difficult to quantify (due, for example, to the assessment involving “many uncertain factors”), it has at times awarded compensation as a global lump sum on the basis of equity.¹⁶¹

Box 5. Examples of compensation being awarded for lost profits

1. The ACtHPR: *Sebastien Germain Ajavon v. Benin (I)*¹⁶²

This dispute arose out of legal proceedings against the applicant in Benin for alleged international drug trafficking. The applicant had previously been acquitted of the offence by the Cotonou Court of First Instance but was later sentenced to 20 years imprisonment by the newly established Anti-Economic Crimes and Terrorism Court for the same offence. The ACtHPR held that this violated the applicant’s rights under the Charter.

When awarding reparation for the breach, the Court first considered claims for material prejudice suffered due to the reduced turnover in the applicant’s companies. The applicant contended that this was a direct consequence of the loss of confidence on the part of his business partners following his trial. To assess the quantum of loss, the Court referred to the net profit loss of the companies between 2015 and 2017, as evidenced by the financial statements the applicant had produced. It then calculated the loss incurred by the applicant on a pro rata basis by reference to his shares in the

¹⁵⁸ The IACtHR, for example, focusses on claims concerning the rights of peoples rather than corporations, reducing the likelihood of claims for lost profits.

¹⁵⁹ The ECtHR has often rejected claims for lost profits as unsubstantiated by evidence (see, for example, *Vladimir Vasilyev v. Russia*, Judgment (Merits and Just Satisfaction), 10 January 2012, paras. 92–94) or too speculative (see, for example, *Skibinscy v. Poland*, Judgment (Just Satisfaction), 21 October 2008, para. 24), or on the basis that they have not been demonstrated to follow (as a matter of causation) from the act found to be in breach of the Convention (see for example *Magyar v. Hungary (No 2)*, Judgment (Merits and Just Satisfaction), 4 April 2006, para. 35).

¹⁶⁰ *Centro Europa 7 SRL and Di Stefano v. Italy*, Judgment (Merits and Just Satisfaction), 7 June 2012, para. 219.

¹⁶¹ *Centro Europa 7 SRL and Di Stefano v. Italy*, Judgment (Merits and Just Satisfaction), 7 June 2012, paras. 220–222. See, also, for example, *Konyv-Tar KFT and Others v. Hungary*, Judgment (Just Satisfaction), 5 October 2021, para. 33; *East/West Alliance Limited v. Ukraine*, Judgment (Merits and Just Satisfaction), 23 January 2014, paras. 251–253, 261–265; *Kommersant Moldovoy v. Moldova*, Judgment (Merits and Just Satisfaction), 9 January 2007, paras. 44–49; *Zlinsat SPOL SRO v. Bulgaria*, Judgment (Just Satisfaction), 10 January 2008, paras. 42–45.

¹⁶² *Sebastien Germain Ajavon v. Benin*, Judgment, 29 March 2021.



companies. The Court also awarded compensation for the devaluation of the applicant's shares based on the reduction in share value, as evidenced by the balance sheets of the companies.

The Court also accepted that the applicant had suffered prejudice from the loss of business opportunities relating to an oil exploration and production project. The Court took into account "the amounts claimed by the Applicant at the moment when the Applicant's expectation arose and the basis of the calculation that led to the amount claimed."¹⁶³ These amounts were evidenced by the business plans drawn up in preparation for the project. However, the Court considered that "compensation for damages resulting from a loss of opportunity is a lump sum that cannot be equal to the benefit that would have been earned had the intervening event not occurred and, hence, could not be equal to the entire expected gain."¹⁶⁴ Furthermore, it observed that "expected benefits in the business plan are forecasts which may, during the implementation of the project, undergo significant changes on account of the hazards inherent in any commercial activity, as well as the unpredictability and changes in the cost of petroleum products on the world market."¹⁶⁵ Consequently, using equitable principles, the Court awarded a lump sum of CFA 30 billion.

The Court also awarded compensation for expenses incurred by the applicant in relation to the national proceedings and his departure from Benin, as well as compensation for non-material loss.

2. The ECtHR: *Dacia v. Moldova*¹⁶⁶

In *Dacia v. Moldova*, the Court held that the state had wrongfully deprived the applicant of its property (a hotel). It considered that "the most appropriate form of *restitutio in integrum*" would be the return of the hotel along with compensation "for any additional losses sustained."¹⁶⁷

Ultimately, however, restitution proved impossible, such that the Court awarded the applicant compensation encompassing the value of the hotel (based on its current market value)¹⁶⁸ as well as EUR 763,540 in lost profits. This responded to the applicant's request for lost profits "for the entire period during which the applicant company could not operate its hotel."¹⁶⁹ In awarding compensation for lost profits, the Court noted that it was

aware of the difficulties in calculating lost profits in circumstances where such profits could fluctuate owing to a variety of unpredictable factors. However, it agrees with the applicant company that in the present case, it was rather simple to determine the hotel's profits in a precise manner during the reference period since

¹⁶³ Ibid., para. 61.

¹⁶⁴ Ibid., para. 63.

¹⁶⁵ Ibid., para. 65.

¹⁶⁶ *Dacia SRL v. Moldova*, Judgment (Just Satisfaction), 24 February 2009.

¹⁶⁷ Ibid., para. 40.

¹⁶⁸ Ibid., paras. 41–45.

¹⁶⁹ Ibid., para. 26(d).



it continued to operate without much change, except for the replacement of the owner and the administration in 2003. The failure to submit information regarding the actual profits made or losses incurred since 2003 is fully attributable to the respondent Government, which alone had access to it, and prevents the Court from verifying the applicant company's estimations. ... The Court also considers that the applicant company's calculations are not excessive, considering what it could have claimed based on the latest financial results of the hotel before its transfer to the state. In such circumstances, and considering the absence of any assistance from the Government in its task of calculating the lost profits owed to the applicant company, the latter's claims in this respect are accepted in full.¹⁷⁰

4.2 Approaches to Valuing Non-Material Loss

International courts and tribunals have generally also indicated a willingness to provide compensation for **non-material loss**.¹⁷¹ As the Annex VII tribunal recognized in *Duzgit*, “in principle ... non-material damages may be necessary to achieve full reparation, in particular where harm has been suffered that cannot readily be quantified in economic terms.”¹⁷²

Non-material harm may include, *inter alia*, “mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to ... credit or to ... reputation,” as well as “distress, suffering, tampering with the victim's core values, and changes of a non-pecuniary nature in the person's everyday life.”¹⁷³ ITLOS, for example, has awarded compensation for non-material injuries suffered by crew members subjected to wrongful acts of detention, including for pain and suffering¹⁷⁴ and associated medical costs.¹⁷⁵ Such awards are also very common for human rights courts, given the nature of the obligations applied in those systems. The ECtHR, for example, has in some cases applied a presumption that the breach of a Convention right will give rise to non-pecuniary damage.¹⁷⁶ Empirical analysis of ECtHR practice suggests that awards of compensation for non-material damage are no lower for

¹⁷⁰ Ibid., para. 47.

¹⁷¹ Such compensation has been provided to both natural and legal persons, though it is more commonly associated with harm to natural persons (Altwickler-Hàmori et al., 2015, pp. 16, 40, supra n. 38) (finding that “legal persons are awarded a higher amount of money relative to natural persons ... [given] that legal persons typically comprise a number of natural persons as the ultimately affected rights-holders”).

¹⁷² *Duzgit*, 18 December 2019, para. 180.

¹⁷³ Ahmadou Sadio Diallo, 19 June 2012, para. 18.

¹⁷⁴ See, for example: *M/V “SAIGA,”* 1 July 1999.

¹⁷⁵ See, for example: Ibid.

¹⁷⁶ See, for example (albeit not a P1-1 claim): *Apicella v. Italy*, Judgment (Merits and Just Satisfaction), 29 March 2006, para. 93.



breaches of property, as opposed to other rights.¹⁷⁷ Awards of compensation for non-material losses have been made in favour of both individuals and corporations.¹⁷⁸

Whereas some claims of non-material loss can be substantiated by documentary evidence (for example, through medical costs),¹⁷⁹ the monetary value of other types of non-material harm can be less straightforward to establish. As the ECtHR has noted, “It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation.”¹⁸⁰ Equitable principles are thus often used by international courts and tribunals to value compensation for non-material loss.¹⁸¹ The ACtHPR has held, for example, that non-pecuniary damages must be evaluated “in fairness and taking into account the circumstances of the case.”¹⁸² The IACtHR has similarly held that “indemnification must be based upon the principles of equity.”¹⁸³ The IACtHR has indicated that such principles will mean that the valuation of non-material loss will proceed by reference to a “prudent estimate of the immaterial damage”¹⁸⁴ or “judicial discretion and in terms of fairness.”¹⁸⁵ As noted in Box 3, the IACtHR has been particularly creative when resorting to equitable principles to craft appropriate reparation for non-material damage. The ECtHR similarly values non-material loss “on an equitable basis, having regard to the standards which emerge from its case-law.”¹⁸⁶ This “guiding principle of equity”

¹⁷⁷ Altwickler-Hàmori et al., 2015, p. 37, supra n. 38.

¹⁷⁸ Ichim, 2015, p. 118, supra n. 42. See, for example: *Comingersoll SA v. Portugal*, Judgment (Merits and Just Satisfaction), 6 April 2000, para. 35 (noting—for an Article 6 claim—that companies may seek compensation to account for non-pecuniary damage to “the company’s reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team”).

¹⁷⁹ See, for example: *Corfu Channel*, 15 December 1949 (ICJ); *Velasquez Rodriguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, para. 51 (IACtHR).

¹⁸⁰ ECtHR, 2007, para. 14, supra n. 40.

¹⁸¹ Torres, 2021, p. 90, supra n. 103: (“when compensation is expected to address non-material damages ... the standard of ‘full reparation’ offers little guidance; rather it ends up replaced by ‘adequate compensation’ whose specific amount is determined according to equity considerations”). See, similarly: Ichim, 2015, p. 121, supra n. 42 (“it is incontestable that the very nature of such harm does not allow for accurate calculations”).

¹⁸² *Wilfred Onyango Nganyi and 9 Others v. Tanzania*, Judgment (Reparations), 4 July 2019, paras. 17, 65. See, further: *Lohe Issa Konate v. Burkina Faso*, Judgment on Reparations, 3 June 2016, para. 59; *Sebastien Germain Ajavon v. Benin*, Judgment (Reparation), 28 November 2019.

¹⁸³ *Velasquez Rodriguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, para. 27. See, similarly: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, para. 167; *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, para. 243; *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, para. 192; *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, para. 389.

¹⁸⁴ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, para. 167.

¹⁸⁵ *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, para. 199; *Palamara Iribarne v. Chile*, Judgment (Merits, Reparations and Costs), 22 November 2005, para. 248.

¹⁸⁶ ECtHR, 2007, para. 14, supra n. 40. On how this produces consistency in different cases see, further: Fikfak, 2020, pp. 335, 350, supra n. 87 (“If the Court’s previous awards are taken as a guide for an equitable/just claim, the requests made are not independent of previous awards and will of course correlate with the amounts awarded.”).



entails “flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case.”¹⁸⁷

Some international courts and tribunals have endeavoured to provide greater guidance as to the principles that will inform awards of compensation for non-material loss, despite the adjudicative discretion necessarily associated with such awards. The Annex VII tribunal in *Arctic Sunrise*, for example, noted the remarks of Judge Greenwood in *Diallo* to observe that

a tribunal seized of the task of assessing non-material damages ought not merely select an arbitrary figure but apply principles that are “capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of [the] case, but by comparison with other cases.”¹⁸⁸

The Tribunal sought to achieve such consistency by “compar[ing] the facts of the present case with ... other relevant cases where non-material damages have been awarded for injuries of a similar nature.”¹⁸⁹ Having reviewed cases from the ICJ, ITLOS, and ECtHR, the Tribunal observed that there was “no identifiable consistent practice among international courts and tribunals in respect of the calculation of the award of non-material damages for wrongful detention, certainly not one that could be mechanically applied to any given case.”¹⁹⁰ The Tribunal, nonetheless, derived from comparative practice a tendency for international courts and tribunals to assess such loss as a lump sum amount, a practice which it also adopted to fix a lump sum of EUR 600,000 for non-material loss in the dispute before it.¹⁹¹ (It ought to be noted vis-à-vis this comparative practice that the Annex VII tribunal in *Duzgit*, by contrast, favoured a daily rate per person as opposed to a lump sum amount in order to compensate the master and crew of a vessel for non-material damage arising from their treatment during the wrongful detention of a vessel.¹⁹²)

The ECtHR has similarly sought to achieve greater predictability for awards of just satisfaction on equitable grounds. In 2006, a Just Satisfaction Unit was created and tasked with “adopt[ing] a series of detailed tables setting out a method of calculation of non-pecuniary damage in respect of each article of the Convention” in order to “ensure consistency of awards.”¹⁹³ However, these tables have not been made public (although they nevertheless presumably ensure some degree of consistency between awards of compensation on equitable grounds). Associated with awards of compensation based on equitable principles are awards of compensation as a lump sum with no distinction made between the various heads of loss. Such an approach to valuing compensation accords considerable adjudicative discretion and is also likely to compound concerns associated with the transparency and predictability of a tribunal’s approach to awarding reparation for breaches of international law.

¹⁸⁷ Varnava and Others v. Turkey, Judgment (Merits and Just Satisfaction), 18 September 2009, para. 224.

¹⁸⁸ *Arctic Sunrise*, 10 July 2017, para. 74.

¹⁸⁹ *Ibid.*, para. 74.

¹⁹⁰ *Ibid.*, para. 82.

¹⁹¹ *Ibid.*, paras. 84–85.

¹⁹² *Duzgit*, 18 December 2019, paras. 183–185.

¹⁹³ Fikfak, 2020, pp. 335, 355, *supra* n. 87.



Reflecting the discretionary nature of any award of relief for non-material harm, international courts and tribunals have sometimes awarded a “symbolic” amount for non-material loss or otherwise have declined to award compensation for non-material loss on the basis that the judgment itself is sufficient reparation.¹⁹⁴ The ECtHR, for example, has indicated that it would reserve awards of compensation for non-material damage for situations in which “the impact of the violation may be regarded as being of a nature and degree to have impinged so significantly on the moral well-being of the applicant as to require something further” than a finding of breach.¹⁹⁵ Commentators have also noted that references to principles of equity are often used by the ECtHR to “substantially reduce the amounts sought by complainants, especially in respect of non-pecuniary damage.”¹⁹⁶ The Court has been observed to award “low and predictable damage amounts (eg the most frequent awards [of] non-pecuniary damages are 5000 or 10000 Euros, with individual amounts reaching to 60000 Euros).”¹⁹⁷

4.3 Innovative Approaches to Valuing Loss

In addition to indicating which types of loss will be compensable and the valuation techniques attached to such forms of loss, the practice of international courts and tribunals also indicates several innovative features vis-à-vis analysis of claims for compensation.

In quantifying compensation, for example, several international courts and tribunals have indicated their willingness **to appoint experts to assist in conducting the valuation exercise**.¹⁹⁸ In *Corfu Channel*,¹⁹⁹ for example, the ICJ awarded compensation for damage suffered by British ships due to mines placed in Albanian waters. In that case, the respondent (Albania) did not make submissions before the Court as to reparation.²⁰⁰ To assess the claim for reparation, the Court appointed its own experts to assess whether the United Kingdom’s claim for compensation was “reasonable” and “well-founded.”²⁰¹ Similarly, both of the Annex VII tribunals that have made decisions on reparation have appointed experts to assist them in considering the technical aspects (and reasonableness) of the amounts claimed.²⁰² Such

¹⁹⁴ See, for example: *Fabris v. France*, Judgment, 7 February 2013, para. 84.

¹⁹⁵ *Varnava and Others v. Turkey*, Judgment (Merits and Just Satisfaction), 18 September 2009, para. 224.

¹⁹⁶ *Ichim*, 2015, p. 48, supra n. 42.

¹⁹⁷ *Fikfak*, 2022 forthcoming, supra n. 92.

¹⁹⁸ This occurred, for instance, in *Chorzów Factory*. Note, though, that the parties ultimately reached an amicable settlement such that the Court neither quantified nor awarded monetary compensation. See, also: *Sebastien Germain Ajavon v. Benin*, Application No. 013/2017, Judgment (Reparation), 28 November 2019, paras. itiestiv 130–136 (ACtHPR).

¹⁹⁹ *Corfu Channel*, 15 December 1949.

²⁰⁰ This led to a specific approach being adopted toward compensation, by which the Court indicated that any award of compensation would be limited to the amount requested. With respect to the destruction of one ship, for example, the Court noted that the compensation claimed (GBP 700,087) was reasonable, albeit that the Court-appointed experts had estimated the compensation due to be slightly higher (GBP 716,780): *Corfu Channel*, 15 December 1949, p. 249.

²⁰¹ *Corfu Channel*, 15 December 1949, p. 247.

²⁰² See, for example: *Duzgit*, 18 December 2019, para. 167 (noting that the claim “is technical in nature and depends upon knowledge of marine surveying to assess whether particular repairs were factually related to the detention of the *Duzgit Integrity*. In light of this, the Tribunal considered it essential to have recourse to an expert marine surveyor.”)



innovations allow courts or tribunals to reach their own view on valuation, with assistance from an expert likely to offer a more independent appraisal of the situation at issue as compared to the appraisal in party submissions or by party-appointed experts.

While experts may provide useful assistance for an international court or tribunal assessing a claim for compensation, their evidence must be carefully appraised as part of the valuation exercise.

Depending upon their findings, the appointment of experts may also produce additional costs or delays without necessarily yielding considerable advantages to the court or tribunal that has appointed them. The ICJ in *Armed Activities on the Territory of the Congo*, for example, appointed four independent experts to assist in the valuation of damage for the various losses claimed by the applicant.²⁰³ When valuing certain heads of damage, the Court relied heavily on the expert evidence, noting that “the approach taken in [one] expert’s report, which is based on estimates derived from reliable economic data, scientific publications, and the case file, produces a more persuasive assessment and valuation of damage [than the valuation put forward by the applicant].”²⁰⁴ The evidence of the other experts was not, however, used by the Court as a basis for its valuation of the other heads of loss, as the Court found the experts’ analysis to be not “suitable for the present proceedings.”²⁰⁵

A practice of allowing court or tribunal-appointed experts may also compound risks associated with conflicts of interest, particularly where experts continue to also be appointed by parties (raising a form of expert “double-hatting”). The relationship between arbitrators who also act as counsel and experts favoured by certain law firms has already prompted challenges to arbitrators in investor–state disputes. Such concerns illustrate the interconnected nature of ongoing reform efforts. Care must therefore be exercised when identifying appropriate experts and setting their terms of reference in order to ensure that the appointment of court- or tribunal-appointed experts does not lead to additional costs or delays, or conflict-of-interest risks, without accordant benefits to the court or tribunal and parties. Codes of conduct, clearly drafted terms of reference, and strict eligibility requirements might assist in assuaging some of these concerns.

In quantifying compensation, some international courts and tribunals may also **work by reference to compensation awarded by domestic authorities**.²⁰⁶ For example,

- a) Some treaties require applicants to exhaust local remedies prior to bringing a claim for breach of international law before an international court or tribunal. In such cases, the court or tribunal may take into account whether the applicant has received compensation through such internal processes when awarding compensation for a successful claim. The ECtHR, for instance, has indicated in such circumstances that it may calculate “the difference between the value of the [property, or loss] and the

²⁰³ *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 26. The appointment of such experts was (unsuccessfully) opposed by Uganda: paras. 22, 24.

²⁰⁴ *Ibid.*, para. 277.

²⁰⁵ See, for example *Armed Activities on the Territory of the Congo*, 9 February 2022, paras. 162–163.

²⁰⁶ See, on such techniques more broadly, Shirlow, E. (2021). *Judging at the interface: Deference to domestic decision-making authority in international adjudication*. Cambridge University Press, pp. 138–139.



compensation obtained by the applicants at national level” when assessing what will constitute “just satisfaction” for the breach.²⁰⁷ The IACtHR has similarly held that no compensation is due where the victims have already secured compensation claimed under domestic law, “in keeping with the principle of complementarity.”²⁰⁸

- b) Some international courts or tribunals might also require applicants to use domestic procedures to secure compensation before the international court or tribunal will make a ruling as to whether any or additional reparation is required for the breach of international law. The formulation of Article 41 of the European Convention on Human Rights indicates that reparation can be determined through a domestic process (under “internal law”) prior to the Court ruling on the issue of just satisfaction.²⁰⁹ The Court has not made extensive use of this proviso, but in some cases—particularly under the pilot judgments procedure—the Court has directed successful applicants to apply to a domestic procedure to reopen or start a process to secure reparation for the property interference found to be in breach of the Convention.²¹⁰ The Court may also make a note of any partial reparation that has been received by the applicant from domestic mechanisms in its own appraisal of just satisfaction. In *O’Keefe v. Ireland*, for example, the Grand Chamber noted that while “there is a distinction to be made between the awards made domestically not concerning State liability and the present complaint focusing on State liability ... any award under Article 41 should take account of the [domestic] award [already made in favour of the applicant].”²¹¹
- c) Some international courts and tribunals may award lower amounts of compensation while encouraging the applicant to supplement such awards through recourse to domestic procedures. The IACtHR, for example, has expressly reserved the applicant’s right to seek additional compensation through domestic law mechanisms should proof of loss be forthcoming that indicates that the loss suffered is higher than the amounts awarded by the Court in equity.²¹²
- d) Some international courts and tribunals might elaborate principles or a framework to guide domestic analyses of reparations following the court or tribunal’s finding of a breach of international law. The IACtHR has, for example, directed the competent national bodies of the respondent state to fix the amount of compensation in accordance either with domestic law²¹³ or “objective, reasonable, and effective criteria.”²¹⁴

²⁰⁷ *Scordino v. Italy (No 1)*, Judgment, 29 March 2006, para. 257.

²⁰⁸ *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, para. 336.

²⁰⁹ On the reference to internal law in Article 41 see, further: Fikfak, 2020, pp. 335, 339, supra n. 87.

²¹⁰ See, for example: *Kostov v. Bulgaria*, Judgment, 14 May 2020.

²¹¹ *O’Keefe v. Ireland*, Judgment, 28 January 2014, para. 202.

²¹² *Ituango Massacres v. Colombia*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2006, paras. 372, 374.

²¹³ *‘Five Pensioners’ v. Peru*, Judgment (Merits, Reparations and Costs), 28 February 2003, para 178.

²¹⁴ *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, para. 337.



- e) Some international courts and tribunals also refer to domestic law and practice vis-à-vis the award of compensation to individuals for breaches of international (or domestic) law. The ECtHR's Practice Directions, for example, specify that: "when it makes an award under Article 41, the Court may decide to take guidance from domestic standards" but is "never bound by them."²¹⁵ The ICJ has similarly raised—but did not resolve—the possibility that "judgments of domestic courts may generally serve as an appropriate guide" for the Court's own valuation of reparation for loss of life.²¹⁶

Further, some international courts and tribunals have **encouraged parties to negotiate or mediate a settlement on matters of compensation**. In *Chorzów Factory*, for instance, the PCIJ indicated upon finding a breach of international law that Poland would be required to pay "compensation corresponding to the damage sustained by the German companies."²¹⁷ As noted above, the Court appointed experts to assist as part of this valuation exercise but ultimately did not rule on the matter of compensation because the parties reached a settlement and withdrew the claim. A court or tribunal might be more or less proactive in encouraging the parties to attempt to reach negotiated or mediated settlements.²¹⁸ The ECtHR, in particular, takes a reasonably active role in encouraging parties to settle disputes prior to the Court ruling on matters of just satisfaction.²¹⁹ Such negotiations may lead to a jointly agreed settlement or, where such a settlement is declined by the applicant, a unilateral offer of reparation from the respondent state. The Court is then procedurally empowered to review and endorse (or reject) the parties' settlement as a disposition of the claim.²²⁰

Opportunities for settlement can be created by sequencing proceedings, such as by bifurcating the analysis of the merits of a claim from the analysis of the reparation due for any breach found. Such procedures may nevertheless generate certain disadvantages, including the possibility that the parties are unable to agree to a settlement. The ICJ in *Armed Activities on the Territory of the Congo*, for example, sought to accommodate the parties' settlement efforts, including by postponing its hearing to afford the parties the opportunity to settle the dispute.²²¹ Ultimately, however, the parties failed to reach a settlement of the dispute. Noting that "questions of reparation are often resolved through negotiations between the parties concerned," the Court observed that it could "only regret the failure, in this case, of the negotiations through which the parties were to 'seek in good faith an agreed solution' based

²¹⁵ ECtHR, 2007, para. 3, supra n. 40.

²¹⁶ *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 163.

²¹⁷ *Factory at Chorzów*, 1928, p. 63.

²¹⁸ On the possible role for mediation to generate settlements in investor–state arbitration proceedings see further: Shirlow, E. (2021). The promises and pitfalls of investor-state mediation. In *Yearbook on International Investment Law & Policy 2019*, p. 461.

²¹⁹ See, further, ECtHR, Article 39(1) ("At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto."). See, similarly, American Convention on Human Rights, Article 48(1)(f).

²²⁰ The Court has rarely rejected a settlement (Ichim, 2015, p. 192, supra n. 42).

²²¹ *Armed Activities on the Territory of the Congo*, 9 February 2022, paras. 9–10, 19.



on the findings of the 2005 Judgment.”²²² Procedural adjustments might assist in countering such disadvantages (though they may themselves introduce their own problems). For example, it has been suggested that the ECtHR could be empowered to award costs against applicants who decline offers of settlement deemed to be reasonable by the Court.²²³

Each of the above innovations has been secured through treaties or procedural rules that provide international courts and tribunals with specific procedural powers and/or directions relevant to the analysis of compensation for treaty breaches. The power of international courts and tribunals to appoint valuation experts, for example, is heavily dependent on the relevant court or tribunal’s procedural powers and willingness to invoke those procedures.

²²² Ibid., para. 67.

²²³ See, for example: Council of Europe Committee of Ministers. (2001, September 27). *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, para. 62.



5.0 The Requirements for Awarding Compensation

International courts and tribunals have adopted various requirements (reflective of requirements established under customary international law) that limit the reparation—including amount of compensation—that will be awarded in the event of internationally wrongful acts. Specifically, most international courts and tribunals accept that reparation can only be awarded if the applicant can prove that

- a) The breach of international law **caused** its loss.
- b) It has not itself **contributed** to the breach.
- c) It has taken measures to **mitigate** any loss arising from the breach, as applicable.

The first requirement is that of “causation.”²²⁴ The ASR adopted this requirement by providing that a state must provide full reparation for the injury “caused by” an internationally wrongful act,²²⁵ including an obligation for the wrongdoing state to “compensate for the damage caused.”²²⁶ The commentary to the ASR further indicates that “the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”²²⁷ Causation thus “plays a crucial role in determining the availability, form, and extent of reparation, by linking the internationally wrongful act of the state with the injury for which reparation is sought.”²²⁸ The delineation of the requisite causal link between an internationally wrongful act and alleged loss impacts, in particular, the scope of reparation that may be due for breaches of international law.²²⁹

The requirement of causation has been widely endorsed by international courts and tribunals, including in international private property claims.²³⁰ International courts and tribunals have nevertheless differed in how they have articulated the causal link that will be required between a state’s act and the injury or damage flowing from it. As the commentary to the ASR notes,

²²⁴ See, for example: *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 2018, para. 32 (ICJ); *Lohe Issa Konate v. Burkina Faso*, Judgment on Reparations, 3 June 2016, para. 45 (ACtHPR); *Sebastien Germain Ajavon v. Benin*, Judgment (Reparation), 28 November 2019, paras. 138, 151, 161, 164 (ACtHPR); *Wilfred Onyango Nganyi and 9 Others v. Tanzania*, Judgment (Reparations), 4 July 2019, para. 13 (ACtHPR); *Sebastien Germain Ajavon v. Benin*, Judgment, 29 March 2021, paras. 16–17 (ACtHPR).

²²⁵ ILC ASR, Article 34.

²²⁶ *Ibid.*, Article 36(1).

²²⁷ *Ibid.*, Commentary, p. 92.

²²⁸ Lanovoy, V. (2022). Causation in the Law of State Responsibility. In *British Yearbook of International Law* (advance access), p. 3.

²²⁹ *Ibid.*, p. 46 (“In sum, the more restrictive the standard of legal causation, the harder or even impossible it becomes for the injured party to seek reparation for injuries which were nonetheless a natural consequence of the wrongful act. Conversely, too lenient a standard of legal causation ... would transform the very object and purpose of reparation from a compensatory, into a quasi-punitive one.”); Pearsall, P. W. (2022). Causation and the draft articles on state responsibility. *ICSID Review – Foreign Investment Law Journal* (advance access), p. 2.

²³⁰ See, also, ILC ASR, Article 31. See, further: Lanovoy, 2022, *supra* n. 228; Pearsall, 2022, *supra* n. 229.



“In some cases, the criterion of ‘directness’ may be used, in other cases ‘foreseeability’ or ‘proximity.’ But other factors may also be relevant.”²³¹

The ICJ, for instance, has held that damage will only be compensable if it has a “sufficiently direct and certain causal nexus” to the internationally wrongful act.²³² It has nonetheless noted that “the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury.”²³³ Nevertheless, “this standard of directness has been consistently applied by the ICJ since 2007.”²³⁴ The Court’s recent judgment in *Armed Activities on the Territory of the Congo* provided a further opportunity for the Court to opine on the appropriate test for causation. As the Court noted in that case, “the Parties differ on whether reparation should be limited to the injury directly linked to an internationally wrongful act or should also cover the indirect consequences of that act”;²³⁵ the applicant endorsed a threshold of “foreseeability,”²³⁶ whereas the respondent argued that the requisite question should be whether the wrongful acts were a “direct and certain cause of a specific injury.”²³⁷ The Court adopted the latter test, holding that “ultimately, it is for the Court to decide if there is a sufficiently direct and certain causal nexus between Uganda’s internationally wrongful acts and the various forms of damage allegedly suffered by the DRC.”²³⁸

ITLOS has similarly held that “only damage directly caused by the wrongful act ... is the subject of compensation.”²³⁹ The IACtHR has also held that damage must have “a direct causal link with the facts involving violations.”²⁴⁰ It has further emphasized that the measures of reparation ordered must have a causal link with the factual circumstances of the case, as

²³¹ ILC ASR Commentary, p. 93. See, similarly: Wittich, S. (2000). Direct injury and the incidence of the local remedies rule. *Australian Review of International and European Law*, 5, p. 121, 123 (“[t]here is a plethora of terms describing the necessary causal link,” such as “directness, remoteness, foreseeability, predictability, proximity; reasonable, normal or necessary consequences; equivalent or adequate causation”).

²³² *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 2018, para. 92; *Ahmadou Sadio Diallo*, 19 June 2012, para. 14.

²³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Judgment, 26 February 2007, para. 93; *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 93.

²³⁴ Lanovoy, 2022, p. 47, supra n. 228.

²³⁵ *Armed Activities on the Territory of the Congo*, 9 February 2022, para. 85.

²³⁶ *Ibid.*, para. 87.

²³⁷ *Ibid.*, paras. 89–91 (noting, also, that the requisite nexus “must be assessed differently depending on the internationally wrongful act at issue”: para. 88).

²³⁸ *Ibid.*, para. 94. See, also, paras. 381–384 (finding that there was not a “sufficiently direct and causal nexus between the internationally wrongful act of Uganda and any alleged macroeconomic damage”).

²³⁹ *M/V “Norstar,”* 10 April 2019, para 335. See, similarly: *M/V “SAIGA,”* 1 July 1999, para. 172; *M/V “Virginia G,”* 14 April 2014, para. 436.

²⁴⁰ *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, para. 194. See, similarly: *Barrios Family v. Venezuela*, Judgment (Merits, Reparations and Costs), 24 November 2011, para. 316; *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, para. 291; *Sahoyamaya Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 218.



well as “the violations declared, the harm proved, and the measures requested to repair the respective harm.”²⁴¹

Other international courts and tribunals have adopted differently formulated tests for causation. The ECtHR’s Practice Directions provide, for example, that: “a clear causal link must be established between the damage claimed and the violation alleged. The Court will not be satisfied by a merely tenuous connection between the alleged violation and the damage, nor by mere speculation as to what might have been.”²⁴²

The ECtHR rarely specifies the requisite causal link in its decisions²⁴³ but has referred in some cases to a requirement of a “proximate causal link between the ... violation found and financial loss sustained by the applicant.”²⁴⁴ To similar effect, in *Duzgit*, the Annex VII tribunal assessed whether harms could be said to “constitute a harm proximately following from the detention.”²⁴⁵ The Tribunal ultimately determined that certain repair work claimed by the applicant was not compensable because it “would have been required in any event, regardless of the detention” and that claims to the contrary were “essentially speculative,” such that the damage was “due to factors unrelated to the detention.”²⁴⁶

The difference between a test of proximity and one of directness is likely to have a particularly “significant impact” in cases where the acts at issue constitute “continuing, complex, or composite breaches of international law.”²⁴⁷ Box 6 provides several illustrations from international claims that highlight the potential impact of a court or tribunal’s approach to causation on the analysis of reparation in practice.

Box 6. The principle of causation in practice

Several cases illustrate the potential for the principle of causation to impact the analysis of reparation in international claims. For example,

- The PCIJ in *SS Wimbledon* rejected part of a claim related to reimbursement of general expenses, stamp duty, and other costs of recovery allegedly incurred by a charterer on the basis that these expenses were not “connected

²⁴¹ *Mémoli v. Argentina*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013, para 199. Note, though, that the IACtHR has in other cases “gone as far as presuming the existence of a causal link”: Lanovoy, 2022, p. 56, supra n. 228.

²⁴² ECtHR, 2007, para. 7, supra n. 40.

²⁴³ *Ichim*, 2015, p. 27, supra n. 42 (noting that the Court’s approach “elud[es] formulation of guiding principles” and “evades any scholastic scrutiny of the reasoning”).

²⁴⁴ *Paulet v. United Kingdom*, Judgment (Merits and Just Satisfaction), 13 May 2014, para 73.

²⁴⁵ *Duzgit*, 18 December 2019, para. 93.

²⁴⁶ *Ibid.*, paras. 170–171.

²⁴⁷ Lanovoy, 2022, p. 57, supra n. 228. A further issue that may arise is what reparation will be due where damage can be attributed to concurrent causes. On this see, further: ILC ASR Commentary, p. 93; Papparinskis, M. (2020). COVID-19 claims and the law of international responsibility. *Journal of International Humanitarian Legal Studies*, 11, pp. 324–325.



with the refusal of passage,” which was the internationally wrongful act established by the Court.²⁴⁸

- In *M/V “Virginia G”*, ITLOS held that the applicant had failed to establish a “direct nexus between the confiscation of the *M/V Virginia G* and the damage claimed ... as loss of profit.”²⁴⁹ The Tribunal noted in particular that a contract between the owner of the *Virginia G* and the charterer of the vessel was terminated in September 2009 (after the ship’s arrest but before its release), with a declaration stating that there was no loss of profit. As such, ITLOS held that “only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation.”²⁵⁰ It further rejected Panama’s contention that a 10% increment should be applied to the compensation payable “to reflect the future business lost as a result of the negatively affected reputation of the vessel and her owner as a result of the published falsehoods, and the arrest and detention.”²⁵¹ It held that the claims as to loss of reputation did not have a sufficient “causal link with the action taken by Guinea-Bissau.”²⁵²
- In *M/V “Norstar”*, ITLOS rejected Italy’s contention that the chain of causation had been interrupted when it had informed the *Norstar*’s owner of the possibility of releasing the ship upon payment of bail. The terms of such release did not “provide for the unconditional return of the arrested vessel and thus [did] not constitute the cessation of the internationally wrongful act.”²⁵³ The Tribunal held that the “causal link between the wrongful act of Italy and damage suffered by Panama was interrupted” when the owner of the ship could have collected the vessel following a domestic court judgment but did not do so.²⁵⁴ It rejected Panama’s contention that the owner could not collect the vessel due to the lack of maintenance during its detention. It observed that “taking possession of a vessel means the restoration of the actual control over the vessel to the owner, regardless of its condition.”²⁵⁵ ITLOS further rejected a claim for compensation related to continued payment of wages and payment due for fees and taxes. It held that such payments were linked to labour contracts and administrative expenses and were “not contingent on whether or not a ship is arrested,” such that they were not caused by the internationally wrongful act.²⁵⁶ It also declined to award any compensation with respect to material and non-material damage to natural persons, given that “the criminal proceedings before the Italian courts would have been carried out even if the *M/V “Norstar”* had not been arrested and are not part of the case before the Tribunal.”²⁵⁷

²⁴⁸ S.S. *Wimbledon*, Judgment, P.C.I.J. Series A No. 01, 17 August 1923, p. 32

²⁴⁹ *M/V “Virginia G”*, 14 April 2014, para. 436.

²⁵⁰ *Ibid.*, para 435.

²⁵¹ *Ibid.*, para 418.

²⁵² *Ibid.*, para 440.

²⁵³ *M/V “Norstar”*, 10 April 2019, para 363.

²⁵⁴ *Ibid.*, paras. 362–370.

²⁵⁵ *Ibid.*, para 369.

²⁵⁶ *Ibid.*, paras. 437, 443.

²⁵⁷ See, for example: *M/V “Norstar”*, 10 April 2019, paras. 382, 452.



The second and third requirements are that an applicant for reparation must make reasonable efforts to mitigate any loss or damage arising from the breach of international law and must not have contributed to that damage.²⁵⁸ These two principles have been less frequently applied by international courts and tribunals as compared to the requirement of causation but nonetheless have been readily accepted as a key component of any assessment of reparation. To take the requirement of mitigation as an example, in *M/V “Virginia G”*, ITLOS declined to award compensation for alleged loss of profit during the period after the termination of a contract but before a ship’s release, on the basis that the owner could have had recourse to domestic procedures to secure a release, which they did not do. It rejected that these procedures would have been unreasonable or unaffordable for the applicant and thus that the applicant had not taken steps to mitigate the loss arising from the breach.

²⁵⁸ ILC ASR, Article 39. See, also ILC ASR Commentaries, p. 93. See, further: *S.S. Wimbledon*, Judgment, P.C.I.J. Series A No. 01, 17 August 1923, p. 31; *Duzgit*, 18 December 2019, paras. 197–199. The ECtHR’s *Practice Directions for Just Satisfaction Claims* (2007) note, for example, that “[The Court] may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant’s own fault.” (para. 2, supra n. 40).



6.0 Approaches for Awarding Interest

International courts and tribunals regularly award interest as a component of achieving “full reparation.” This possibility is reflected in the ASR, which provide that “interest on any principal sum due ... shall be payable when necessary in order to ensure full reparation.”²⁵⁹ Suggestions that the ASR should be drafted to specify the periods for which interest would be required, as well as the rate of interest to be applied, were not adopted.²⁶⁰ Instead, the ASR provide that “the interest rate and mode of calculation shall be set so as to achieve [the result of full reparation].”²⁶¹ Typically, moreover, the currency of payment and the applicable interest rate is not governed by express treaty provisions. Instead, international courts and tribunals utilize the “full reparation” standard to exercise considerable discretion in determining issues associated with interest on compensation payments and the currency of such payments.²⁶²

The connection to the “full reparation” standard often guides the selection of a point in time from which a wrongdoing state will be required to provide interest.²⁶³ The ICJ, for instance, has declined to grant pre-judgment interest where such interest was not necessary to achieve “full reparation.”²⁶⁴ The PCIJ similarly indicated that the standard of “full reparation” means that interest may not be due from the date of the internationally wrongful act but rather the date of the judgment, this being “the moment when the amount of the sum due has been fixed and the obligation to pay has been established.”²⁶⁵ Similarly, ITLOS has indicated that it will award interest in addition to compensation where such an award is “fair and reasonable.”²⁶⁶ These considerations may also explain why international human rights courts have opted to award pre-judgment interest on compensation for pecuniary damage but only post-judgment interest on compensation for non-pecuniary damage.²⁶⁷ As Beharry and Hugues explain, pre-judgment interest frequently serves a compensatory purpose (to achieve “full reparation”),

²⁵⁹ ILC ASR, Article 38(1).

²⁶⁰ See, further: Nevill, P. (2008). Awards of Interest by International Courts and Tribunals. *British Yearbook of International Law*, pp. 255, 257–260, and 262.

²⁶¹ ILC ASR, Article 38(1).

²⁶² Subject always to specific approaches being specified in applicable treaties.

²⁶³ See, further: Nevill, 2008, pp. 255, 257–260, 262, supra n. 260 (“As for the particulars of awards of interest on principal sums, Article 38 says that interest starts to run from the date when the principal sum should have been paid. However, as the commentary notes, this is not as straightforward as it appears because different legal traditions, in the absence of agreement between the parties, give different answers to the question as to when a principal sum should have been paid. ... Article 38’s formulation specifying the date the principal ‘should have been paid’ is wide enough to embrace date of breach or loss or date of demand.”). See, also: Beharry, C. L. & Hugues, J. P. (2022). Article 38: The treatment of interest in international investment arbitration. *ICSID Review – Foreign Investment Law Journal*. For a detailed analysis of different approaches to setting the date from which interest will run, including the distinction between pre- and post-award interest, see further: Nevill, 2008, p. 255, supra n. 260.

²⁶⁴ *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 1988, para. 157.

²⁶⁵ *S.S. Wimbledon*, Judgment, P.C.I.J. Series A No. 01, 17 August 1923, p. 33.

²⁶⁶ See, for e.g.: *M/V “SAIGA,”* 1 July 1999; *M/V “Norstar,”* 10 April 2019, para 455.

²⁶⁷ See, further: Nevill, 2008, pp. 255, 276, 284–285, supra n. 260.



whereas post-judgment interest may serve different purposes (e.g., “to incentivize prompt payment of the award”).²⁶⁸

As noted above, international courts and tribunals exercise considerable discretion in setting applicable interest rates, usually either using rates applicable on the international market or those applicable under domestic legislation in the country in which payment is to be made or in whose currency any compensation will be paid (see Box 7). Often, the basis for selecting a particular interest rate is not clearly explained. This may be because the rate claimed by the applicant is not contested by the respondent²⁶⁹ or because the international court or tribunal has developed a particular approach to awards of interest over time that it adopts as a matter of course when confronted with issues related to awards of interest.²⁷⁰ The ECtHR’s Practice Directions, for example, provide that “the Court will also order default interest to be paid in the event that that time-limit is exceeded, normally at a simple rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.”²⁷¹

Most international courts and tribunals have opted to award simple rather than compound interest on awards of compensation. This maybe due, in part, to the fact that applicants have not requested compound interest. However, for its part, in drafting the ASR, the ILC noted that “the 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.”²⁷² This point notwithstanding, on some occasions, compound interest has been requested by applicants and awarded by international courts or tribunals, including in particular by ITLOS (see, further, Box 7). Such awards may reflect a view that “full reparation” requires interest to be compounded to reflect market realities insofar as it serves the “purpose of compensating the injured party for the deprivation of the use of money.”²⁷³

Box 7. Examples of adjudicative approaches to setting applicable interest rates

Each of the surveyed international courts and tribunals has exercised considerable discretion in selecting appropriate interest rates to accompany any award of interest. For example,

²⁶⁸ Beharry & Hugues, 2022, supra n. 263. See, similarly Nevill, 2008, supra n. 260 (“Where the principal damages sum is valued as at the date of breach or loss and the start date for interest accrual is a later date, some of the burden for delay shifts from the respondent to the claimant” [p. 282]) and (“However, there may be good policy reasons to select the date of the notice of the claim, such as fairness to the respondent and an encouragement for claimants to pursue claims promptly...” [p. 285]).

²⁶⁹ Nevill, 2008, pp. 255, 287, supra n. 260.

²⁷⁰ Nevill, 2008, pp. 255, 330, supra n. 260 (“Established courts and tribunals are more likely to adopt standardised approaches to the award of interest than tribunals established for a particular case ... The ECHR and Inter-American Court of Human Rights do not appear to have an entirely consistent approach to pre-judgment interest, although the prevalent practice of lump sum awards makes this difficult to ascertain. Both have settled post-judgment interest approaches.”).

²⁷¹ ECtHR, 2007, para. 25, supra n. 40.

²⁷² ILC ASR Commentary, p. 108.

²⁷³ Beharry & Hugues, 2022, p. 18, supra n. 263.



- The PCIJ awarded interest in one proceeding by indicating that the appropriate interest rate could be set by reference to the “present financial situation of the world,” as well as the “conditions prevailing for public loans.” This yielded a simple interest rate of 6% per annum to run from the date of the judgment.²⁷⁴ Moreover, in that case, the PCIJ indicated that compliance with a judgment should be presumed, such that it would not be appropriate to award interim interest at a higher rate should a state not comply with a judgment within a certain time period.²⁷⁵
- Where the ICJ has awarded interest on compensation, it has done so by reference to the interest rates prevailing on the international market at the time (6% per annum).²⁷⁶
- In *M/V “SAIGA”*, ITLOS indicated a willingness to set different interest rates for different forms of loss. The Tribunal there used a general interest rate of 6% per annum but awarded a higher rate of 8% with respect to “the value of the gas oil to include loss of profit” and a lower rate of 3% “for compensation for detention and for injury, pain and suffering, disability and psychological damage.”²⁷⁷ It has, moreover, set the interest rate by reference to
 - “Commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located” (6% per annum).²⁷⁸
 - The “average US Dollar LIBOR (London Interbank Offered Rate) interest rate of 0.862 per cent ... plus 2 per cent,” compounded annually from the date of confiscation until the date of judgment.²⁷⁹
 - The “average Euro LIBOR (London Interbank Offered Rate) interest rate of 1.165 per cent ... plus 2 per cent,” compounded annually from the date of confiscation until the date of judgment.²⁸⁰
- In *Arctic Sunrise*, the Annex VII tribunal held that different interest rates should be applied to the awards for compensation for material and non-material loss,²⁸¹ with a higher rate of interest to be applied to the former (Euro LIBOR annual rate plus 6%) as compared to the latter (Euro LIBOR annual rate plus 3%).²⁸² The Tribunal awarded simple interest, noting that compound interest had not been requested by the applicant.²⁸³

²⁷⁴ S.S. *Wimbledon*, Judgment, P.C.I.J. Series A No. 01, 17 August 1923, p. 33.

²⁷⁵ *Ibid.*, p. 33.

²⁷⁶ *Certain Activities Carried Out by Nicaragua in the Border Area*, 2 February 1988, para. 56; *Armed Activities on the Territory of the Congo*, 9 February 2002, para. 402.

²⁷⁷ *M/V “SAIGA”*, 1 July 1999, para. 173.

²⁷⁸ *Ibid.*, para. 173.

²⁷⁹ *M/V “Virginia G.”*, 14 April 2014, para 444. See, similarly: *M/V “Norstar”*, 10 April 2019, para 460.

²⁸⁰ *M/V “Virginia G.”*, 14 April 2014, para 445.

²⁸¹ *Arctic Sunrise*, 10 July 2017, para. 121.

²⁸² *Ibid.*, paras. 122–123.

²⁸³ *Ibid.*, 10 July 2017, para. 125.



- In *Duzgit*, the Annex VII tribunal similarly applied different rates of interest to the awards of compensation for material and non-material loss.²⁸⁴ The applicant in *Duzgit* claimed compound interest, which was awarded by the tribunal, which acknowledged that “nearly all financial transactions take place on the basis of compound interest,” such that “insofar as interest is intended to achieve full reparation ... this must recognize the fact that DS Tankers (like the governments of both Malta and São Tomé) borrows funds on the basis of compound interest.”²⁸⁵
- The ECtHR has typically awarded interest by reference to the “simple statutory interest” rate applicable in the country of payment or by reference to the European Central Bank rate applicable during the period of breach plus 3%.²⁸⁶ It typically awards compensation in euros.²⁸⁷ The ECtHR has occasionally been requested to award compound interest but has only rarely done so.²⁸⁸
- The IACtHR has used “rates in effect on the international market”²⁸⁹ or, otherwise, “bank interest” at the rate applicable in the country of payment.²⁹⁰

When awarding compensation, international courts and tribunals have also referred to the concept of “full reparation” to determine the form in which compensation will be paid, including the currency of payment.²⁹¹ In *SS Wimbledon*, for example, the PCIJ ordered compensation to be paid in the currency in which the French charterer conducted its operations, on the basis that this reflected the most “exact measure of the loss to be made

²⁸⁴ *Duzgit*, 18 December 2019, paras. 206–210.

²⁸⁵ *Ibid.*, para. 212.

²⁸⁶ ECtHR, 2007, para. 25, *supra* n. 40.

²⁸⁷ *Ibid.*, para. 24, *supra* n. 40 (“Any monetary award under Article 41 will normally be in euros (EUR, €) irrespective of the currency in which the applicant expresses his or her claims. If the applicant is to receive payment in a currency other than the euro, the Court will order the sums awarded to be converted into that other currency at the exchange rate applicable on the date of payment. ...”). This practice was established by the Grand Chamber in *Christine Goodwin v. United Kingdom*, Judgment, 11 July 2002, para. 123.

²⁸⁸ *Nevill*, 2008, pp. 255, 310, 313, *supra* n. 260.

²⁸⁹ *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, para. 89.

²⁹⁰ *Barrios Family v. Venezuela*, Judgment (Merits, Reparations and Costs), 24 November 2011, para. 392; *Mémoli v. Argentina*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013, para. 232; *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 21 November 2007, para. 287; *Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 28 November 2007, para. 212; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, para. 246.

²⁹¹ *S.S. Wimbledon*, Judgment, P.C.I.J. Series A No. 01, 17 August 1923, p. 33. Related to this issue, the standard of “full reparation” may also cause a court or tribunal to take into account the context within which a breach has occurred. The ECtHR, for example, has indicated that an award of compensation may be adjusted by reference to the “standard of living in the country concerned”: *Apicella v. Italy*, Merits and Just Satisfaction, Judgment of 29 March 2006. As Fikfak explains, this ensures that the compensation awarded “is commensurate with the standard of living and ensures equivalent purchasing power in all countries” (Fikfak, 2020, pp. 335, 357, *supra* n. 87). This rationale differs from one which would reduce compensation by reference to the State’s capacity to pay the valued sum. On this latter approach see, further: *Altwickler-Hāmori et al.*, 2015, p. 21, *supra* n. 38.



good.”²⁹² Similarly, the ACtHPR has indicated that, as a general principle and where possible, compensation should be awarded “in the currency in which loss was incurred.”²⁹³

²⁹² S.S. Wimbledon, Judgment, P.C.I.J. Series A No. 01, 17 August 1923, p. 33.

²⁹³ Wilfred Onyango Nganyi and 9 Others v. Tanzania, Judgment (Reparations), 4 July 2019, para. 19.



7.0 Implications for the Reform of Approaches to Compensation in Investor–State Arbitration

As noted in the Introduction, the purpose of this paper has been to offer a snapshot of the approaches of international courts and tribunals to matters of reparation (and compensation in particular) in international private property claims. This review of comparative international practice highlights several features that may be particularly relevant to consider as part of the ongoing efforts of states to reform approaches to compensation in investor–state arbitration. This includes the negotiation of new bilateral and multilateral treaties providing for investment protection and arbitration, including in multilateral reform settings.²⁹⁴

7.1 Overarching Implications

A key implication of this paper is the importance for states engaged in investor–state reform processes to recontextualize that regime of dispute settlement within the broader context of public international law. Applying such a lens would better allow those considering reforms to identify what lessons might arise from the practice of other international courts and tribunals in relation to specific reform options. Many international courts and tribunals are already referring to one another’s practices when deciding how to analyze the issue of reparation under international law. This takes place jurisprudentially through citations in decisions on reparation but also institutionally through meetings between judges.²⁹⁵ A key message of this paper is that investment tribunals and stakeholders in investor–state arbitration reform may similarly benefit from consideration of comparative practice.²⁹⁶

This paper also highlights that there are a number of functioning international courts and tribunals that provide a neutral forum for the resolution of disputes analogous to those filed before investment tribunals. Such forums (or the creation of like forums) might provide alternative dispute resolution options for those states interested in exiting the investor–state arbitration regime altogether.

The above discussion highlights various practices in relation to awards of reparation (and particularly compensation) that might be useful to consider in more detail as reform options in the investor–state context. Conversely, it also identifies some approaches adopted by other international courts and tribunals that may not be appropriate in the context of investor–state investment arbitration. As will be seen in the discussion below, it may also be that the

²⁹⁴ The Secretariat to UNCITRAL’s Working Group III, for instance, released for comment a paper canvassing matters for consideration and possible future work vis-à-vis reforms to how investment tribunals approach the assessment of damages and compensation: UNCITRAL Secretariat, 2021, supra n. 2. The Energy Charter Treaty modernization process has similarly included “valuation of damages” in the list of topics approved for negotiations.

²⁹⁵ With thanks to Veronika Fikfak for this point.

²⁹⁶ Equally, the reverse might be true insofar as the extensive consideration of issues associated with compensation by investment tribunals might offer important lessons (either positive or negative) for other international courts and tribunals that less frequently grapple with these types of issues.



approaches of other international courts and tribunals are only feasible (or desirable) given their institutional context. This would imply that any meaningful and effective reform of compensation in investor–state arbitration would need to be accompanied by institutional and/or procedural reform.

7.2 Specific Policy Considerations Relevant to Investor–State Arbitration Reform

7.2.1 Treaty Language Providing a Different Standard of Reparation to the Standard Under Customary International Law

As noted in the above discussion, states can direct international courts and tribunals to adopt different approaches to assessing compensation to those that apply under customary international law, including, in particular, through treaty provisions. While states have rarely done so, the general character of the “full reparation” standard under customary international law leaves them free to modify the rules on reparation that apply under a given treaty, including the standard according to which such reparation is assessed. This could follow, for example, from consideration of how the standard of “full reparation” might be adapted for application in investor–state disputes, given the suggestion in the ILC’s ASR that such principles are “without prejudice” to individual–state, rather than state–state, relations.²⁹⁷

States might therefore use treaty negotiation or reform processes to provide greater guidance as to whether the standard (be that “full,” “fair,” “reasonable,” “partial,” or some other standard of reparation) should apply in the event of a treaty breach. In doing so, states could distinguish between standards of compensation depending on the nature of the state’s act (for example, by distinguishing between compensation for unlawful versus lawful expropriation²⁹⁸) or between different types of breaches (for example, expropriations versus breaches of fair and equitable treatment obligations²⁹⁹). States could, for example, consider adjusting the standards applicable to reparation for different types of loss, including, for example, to distinguish between the loss of an investment in its entirety (e.g., through direct expropriation) as opposed to a reduction in the value of an investment that the investor continues to own and

²⁹⁷ On which, see further: Paparinskis, 2013, pp. 617, 635, *supra* n. 63.

²⁹⁸ See, though, Netherlands Model Investment Agreement (22 March 2019), Article 12(5) (“The compensation referred to in paragraph 1 of this Article shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. For greater certainty, this method to evaluate the compensation also applies in case of unlawful expropriation. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.”).

²⁹⁹ See, for example: Bekker, P. & Bello, F. (2021). Reimagining the damages valuation framework underlying fair and equitable treatment standard violations through a three-stage contextualized approach. *ICSID Review – Foreign Investment Law Journal*, 36(2), p. 339 (“Considering that full reparation establishes a principle—not a procedure—for determining damages, and taking into account that what amounts to full reparation may vary from case to case, full reparation guides tribunals on how to determine damages. The standard and process of compensation for lawful expropriation and the hypothetical test for determining damages for unlawful expropriation can be viewed as examples of how the principles and objectives of reparation have been used and have helped develop these strands of the existing frameworks.”).



operate.³⁰⁰ A standard of less than full reparation could also be stipulated in the case of a state measure that breaches an investment treaty obligation but that is in pursuit of defined public interest objectives. Where compensation is coupled with other forms of reparation (particularly restitution), such adjustment of compensation by reference to the nature and type of investment treaty breach could significantly reduce the amounts of compensation claimed and ordered. It may also reduce the risks of a windfall for investors who retain control of profitably operating investments following an arbitral award of reparation.

The practice of the human rights courts canvassed above indicates that any departure from the standard of “full reparation” under customary international law will need to be made particularly explicit in the applicable treaty provision. This would ideally include, for greater certainty, an indication of how the stipulated threshold differs from the standard applicable under customary international law.

7.2.2 Treaty Language Providing Greater Guidance as to How to Give Effect to Customary International Law Standards of Reparation

Reform of investor–state arbitral approaches to reparation need not necessarily entail a departure from the principles of customary international law. States could, through negotiation and reform processes, retain the connection between reparation and customary international law to stipulate that any remedy must achieve “full reparation” while at the same time providing specific directions as to what such “full reparation” will entail. This might assist in clarifying what “full reparation” entails and respond to the diversity of approaches developed by international courts and tribunals under the rubric of this concept.

This could include, *inter alia*, directions concerning the types of reparation available or preferred for internationally wrongful acts, the relative priority to be given to different forms of reparation, the types of loss or damage for which such reparation may be provided (and to what extent or how lost profits will be covered), and the quantification methods capable of identifying what will constitute “full reparation” for such loss or damage.³⁰¹ Some states, for instance, have recently concluded treaties specifying that compensation should not be awarded on a punitive basis³⁰² or should reflect only the loss incurred by the investor, less any

³⁰⁰ See, for an example of a proposal for a new compensation rule: Aisbett, E. & Bonnitcha, J. (2021). A Pareto-improving compensation rule for investment treaties. *Journal of International Economic Law*, 24(1), p. 181.

³⁰¹ See, for example, 2012 U.S. Model Bilateral Investment Treaty, Article 34(1) (“Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney’s fees in accordance with this Treaty and the applicable arbitration rules.”). <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

³⁰² See, for example, EU-Canada Comprehensive Economic and Trade Agreement, Article 8.39(4) (“The Tribunal shall not award punitive damages.”). <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>



loss that has been rectified by the award of another form of reparation like restitution.³⁰³ Such directions need not, of course, be developed as treaty law. States could consider, *inter alia*, adopting interpretive declarations or soft law instruments in order to offer tribunals additional guidance as to what “full reparation” might entail in an investor–state context.

Emphasis on particular approaches to causation may also assist in delimiting the scope of reparation due for particular types of breaches. States might therefore wish to consider the appropriateness of the range of approaches adopted by investment tribunals to setting the requisite causal nexus between a wrongful act and injury.³⁰⁴ They might also seek to direct tribunals to adopt particular approaches to causation through specific treaty language.³⁰⁵

States could also provide greater guidance on applicable interest rates, the periods of time from which interest will apply, and whether interest ought to be applied on a simple or compound basis. States could negotiate or modify treaties, for example, to specify that a given rate of interest (be it an international standard or a domestically linked standard) should apply in the event of an award of compensation and/or that simple or compound interest is to be preferred.

Even if a state prefers to establish a standard of reparation that departs from the customary international law standard of full reparation, it may wish to consider these approaches in order to provide greater guidance and nuance as to how to operationalize that standard. This may assist in specifying how a given treaty standard differs from that of “full reparation.”

7.2.3 Greater Engagement With Domestic Mechanisms and Settlement Opportunities

As highlighted in the above discussion, international courts or tribunals can work in a more or less complementary fashion to domestic processes, including by referring questions of compensation back to domestic mechanisms for determination or by determining matters of compensation by reference to domestic law and practice. Closer engagement with domestic authorities may follow from overall greater deference to domestic authorities’ margin of

³⁰³ See, for example, EU-Canada Comprehensive Economic and Trade Agreement, Article 8.39(3) (“Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure. 4. The Tribunal shall not award punitive damages.”). A similar provision has been proposed for inclusion in the modernized Energy Charter Treaty. (2020). *EU text proposal for the modernisation of the Energy Charter Treaty*. https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf

³⁰⁴ See, further: Pearsall, 2022, p. 10–11, *supra* n. 229 (“[w]ithout empirical data, it is not clear whether these different formulations have had meaningfully different results in practice, and [t]here is limited commentary on what . . . these notions mean”).

³⁰⁵ See, for example: India’s Model Investment Treaty (2015), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>, Article 23.2 (“The disputing investor at all times bears the burden of establishing . . . (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach”).



discretion and position of greater legitimacy (or expertise) to determine what forms of reparation are appropriate in a given context.³⁰⁶

Specific treaty language to encourage such approaches could, for instance, require applicants to use domestic procedures to secure compensation before an investor–state tribunal will have jurisdiction to make a ruling as to whether additional reparation is required for the breach of the investment treaty.

Another option might be for the parties to request that tribunals (or for tribunals to be encouraged through amendments to procedural rules to) divide an arbitration such that any quantum phase is preceded by a decision by the tribunal on the merits, along with a statement as to the principles or framework that would guide its later assessment of compensation. Such a procedural arrangement might provide states with an opportunity to provide reparation ahead of a tribunal decision on the same, including following settlement negotiations or mediations between the disputing parties. Recourse to mediation or other modes of settlement involving a third party neutral might allow the parties to adapt outcomes on compensation to reflect economic and public policy—and not just legal considerations.³⁰⁷ An alternative procedural innovation could be to allow the state to unilaterally provide or offer such means of redress, with the tribunal then called upon to determine whether such redress complies with the requirement for the state to remedy the breach in accordance with the relevant standard of reparation.

7.2.4 Greater Use of Tribunal-Appointed Experts Instead of Party-Appointed Experts

A further potential reform option could include giving investor–state tribunals procedural powers or guidance to allow them to better manage the submission of expert evidence on quantification issues.

Tribunals could, for instance, be encouraged to make greater use of procedural powers to appoint tribunal experts. As noted above, such an approach could allow an investor–state arbitral tribunal to reach its own view vis-à-vis valuation, rather than relying on party submissions or party-appointed experts to underpin that analysis. Arbitral institutions might seek to address potential risks of conflicts of interest by, *inter alia*, providing lists or “panels” of experts who work on the basis of tribunal rather than party appointments. Tribunals might otherwise be encouraged to adapt existing procedures vis-à-vis party-appointed experts to ensure greater objectivity or effectiveness of expert evidence, including, for instance, through the use of joint reports or “hot-tubbing” procedures or through the provision of more detailed

³⁰⁶ See, generally: Shirlow, 2021, *supra* n. 206.

³⁰⁷ As suggested elsewhere, “[t]he nature of some issues under investment treaties may even be particularly well adapted to consideration in an interests based procedure [like mediation]. This might include, for instance, what ‘appropriate’ or ‘adequate’ compensation for expropriation entails...” (Shirlow, 2021, p. 476, *supra* n. 218). There are nevertheless various risks associated with such recourse to mediation proceedings (including the issues of time and cost noted above). Such issues may be compounded where issues of authority arise during the course of efforts to reach a mediated or negotiated settlement (pp. 488–491).



and directive guidance to parties and their appointed experts concerning the scope and role of quantum experts.³⁰⁸

7.3 Practices That It Might Be Desirable to Avoid With Respect to Investor–State Disputes

Equally, the above discussion highlights practices that it might be desirable to avoid adopting in investor–state disputes because of inherent and fundamental differences between the current investor–state arbitration regime and the courts and tribunals discussed above. This includes, in particular, the use of equitable approaches, awards of compensation for non-material harm, and the remedy of restitution.

It is open to question whether ad hoc investor–state arbitral tribunals are properly equipped to assess and award compensation on an “equitable” basis. As noted, some international courts and tribunals have sought to implement processes or institutional responses to this issue. However, even then, any equitable approach to compensation is likely to lead to greater inconsistency and unpredictability in awards of compensation in investor–state arbitration and thus undercut the goals of many reform efforts.³⁰⁹

Several international courts and tribunals also routinely award compensation for non-material loss. By contrast, such awards are typically less common in investor–state claims, perhaps reflecting the economic (rather than human rights-based) nature of such disputes. Investor–state tribunals have entertained requests for awards of compensation for non-material harm (as moral damages), including to note that investment treaties and procedural rules do not foreclose the possibility of such awards.³¹⁰ However, tribunals have also indicated that such awards should only be made in “exceptional circumstances” where a “high threshold” is met to show their appropriateness.³¹¹ To the extent that states agree with such views, they may wish to expressly specify in investment treaties or guidance instruments whether such forms of relief are available and in what circumstances.

Without a standing institutionalized dispute settlement body, moreover, it might be considered ill-advised to encourage investor–state tribunals to privilege restitutionary relief given the concerns noted above with respect to their capacity as ad hoc adjudicative mechanisms to oversee and ensure compliance with such awards. Because they become *functus officio* upon the closure of proceedings with the issuance of a final award, investment tribunals would not have the powers of oversight to ensure the effectiveness of such awards of restitution.

³⁰⁸ Similar approaches are put forward in the UNICITRAL Working Group III Secretariat *Initial Draft on the Assessment of Damages and Compensation* (UNCITRAL Secretariat, 2021, supra n. 2).

³⁰⁹ A similar concern was raised in previous IISD work (Bonnitcha & Brewin, 2020, supra n. 4) with respect to the “balancing approaches” to compensation for expropriation seen in some African regional investment instruments and the Indian Model BIT. Compare, though: Marzal, T. (2021). Quantum (in)justice: Rethinking the calculation of compensation and damages. *Journal of World Investment & Trade*, 22, pp. 249, 267–268 (arguing that compensation analyses should not be “reducible to a fact-finding operation, free from any discretionary appreciation of what justice may require in the circumstances”).

³¹⁰ See, for example, *Cementownia v. Turkey*, Award, 17 September 2009, para 169.

³¹¹ See, for example, *Anatolie Stati v. Kazakhstan*, Award, 19 December 2013, paras 1781–1782.



Existing recognition and enforcement mechanisms may also render the enforcement of such relief particularly difficult.³¹² A further concern about the use of restitution in the context of investor–state arbitration relates to the substantive nature of the claims typically brought in such proceedings, which commonly involve the exercise of regulatory or legislative functions by the state. As such, and as noted in previous IISD work, states have been highly reluctant to encourage the use of restitution in investment treaty arbitration.³¹³ This is because any order of restitution that requires a state to reverse a regulatory measure or repeal legislation would be a deep intrusion into domestic regulatory authority.³¹⁴ Some states, for this reason, have adopted a treaty practice by which they reserve the right to elect to pay compensation in lieu of restitution.³¹⁵

³¹² See, for example, ICSID Convention Article 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. ...” [emphasis added]). <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>

³¹³ Bonnitca & Brewin, 2020, paragraph 2.4.3, supra n. 4.

³¹⁴ The UNICITRAL Working Group III Secretariat Initial Draft on the Assessment of Damages and Compensation refers to possible work on “treaty provisions, guidelines, or standards for tribunals to address... The primacy of restitution over compensation, as stated in the ILC Articles” (https://uncitral.un.org/sites/uncitral.un.org/files/note_by_the_secretariat_-_assessment_of_damages_and_compensation_.pdf para.70(x)).

³¹⁵ See, for example: United States–Mexico–Canada Agreement, Article 14.D.13 (“When a tribunal makes a final award, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”). Such an option may also be provided with respect to specific measures. See, for example, Energy Charter Treaty Article 25(8) (“An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted”). <https://www.energychartertreaty.org/treaty/energy-charter-treaty/>



8.0 Conclusion

This paper has aimed to highlight the ways in which the practice of international courts and tribunals towards analyzing reparation for the breach of private property rights by states differs from, or shares similarities with, approaches of investor–state arbitral tribunals to similar issues. The paper has also provided some reflections on these courts’ and tribunals’ approaches to the principles governing reparations and distinct practices in valuing compensation. It is hoped that these reflections may contribute to reform discussions, as well as to the development of concrete reform options, for investor–state arbitral approaches to awarding compensation under international investment treaties.

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