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Assessing Damages in Customary International Law

The Chorzów's Tale

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1 Introduction

International Investment Agreements (IIAs)[1] regulate the basic treatment and protection of foreign investors and their investments in cases of expropriation where an adequate compensation based on the investment's value has been provided.[2] They do not, however, regulate compensation for other substantive protections granted to investors. This includes, for instance, the fair and equitable treatment (FET), the minimum standard of treatment (MST) or the prohibition of discrimination. In the absence of a conventional standard of compensation in assessing the value of damages to be paid to an alien for international wrongful acts of States, today, there is a common understanding among arbitral tribunals that customary international law (CIL) is a valuable source to apply. Nevertheless, determining the amount to be paid for damages, through an application of the relevant CIL rules, is far from a simple task since tribunals are faced with assessing the evidence provided by the parties, if any, and taking a

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[1] In this chapter the term IIA and BITs are used with interchangeably.

[2] For example: USTR, '2012 U.S. Model Bilateral Investment Treaty' (*USTR*, 2012) Art 6 <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 25 July 2022 '2. The compensation referred to in paragraph 1(c) shall: (…) (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation")'; and, Germany, 'Germany Model Treaty -2008' (*German Government*, 2008) Art 4 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download>: 'Such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measure became publicly known'; see, UNCTAD, 'Expropriation: UNCTAD series on Issues in International Investment Agreements II' (*UNCTAD*, 2012) UN Doc UNCTAD/DIAE/IA/2011/7.

position on the existence and content of the CIL rule.[3] Thus, a myriad of important questions arise, both for the parties to argue and for the tribunals to determine the connection to such CIL rules in a concrete case. For instance, where should tribunals look for the existence of an invoked CIL rule and should it be identified? When did the rule emerge as a result of the practice of States and how can it be interpreted?

Despite recognising the Herculean task of establishing the generality of State practice and *opinio juris* of a CIL rule for damages in international investment law, some commentators maintain that for practical reasons international tribunals: (i) often find it in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) simply because there is no better legal source for guidance; (ii) oftentimes, they also turn to decisions of courts and other tribunals that, in their view, have established the content of these customary rules;[4] and, (iii) draw inspiration from UN General Assembly (UNGA) resolutions.[5] In the latter case, for example, some authors frame the discussion of the CIL rule for the standard of compensation as 'appropriate compensation' by utilising its articulation in the 1962 UNGA Resolution No 1803, relating to the 'Permanent Sovereignty over Natural Resources', to assert the existence of *opinio juris*,[6] which bears a resemblance to one of the elements of CIL. However, as 'evidenced by the process of elaboration of this instrument … the classical doctrine [on compensation] does not represent the general consensus of States and consequently cannot be considered as a rule of customary law'.[7]

[3] S Ripinsky & K Williams, *Damages in International Investment Law* (BIICL 2008) 26, 31.

[4] ibid; in the view of these authors, in particular, the judgment in the *Case Concerning the Factory at Chorzów (Germany v Poland)*, (Merits), PCIJ, Judgment 13 of September 1928, PCIJ Series A No 17 (*Chorzów Factory, Chorzów or Chorzów Factory* (Indemnity)).

[5] Ripinsky & Williams (n 3) 27. As for the use of ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 31 (ARSIWA). These commentators said that neither of the parties challenged the customary status of a particular rule. As a matter of practice, arbitral tribunals tend to treat the Articles without scrutiny as evidence and as general reflection of international custom. This assertion might be applicable to cases decided after 2001, but not to cases decided before the ARSIWA were approved by the UN.

[6] I Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed, OUP 2017) 46–7, where it was said that 'The UN General Assembly Resolution No 1803 relating to the Permanent Sovereignty over Natural Resources of December 1962 can be regarded as the last expression of a common *opinio juris* of the international community on this question'.

[7] E Jiménez De Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 RdC 1, 301.

The *Chorzów Factory* case has been widely commented on and is still referenced by international courts[8] to follow the full reparation principle for reparations as in *Chorzów* and to expand on cases when there is 'uncertainty about the extent of the damage caused' to say that it should be taken into 'account of equitable considerations'[9] and 'to make reparation in and adequate form' where 'compensation should not, however, have a punitive or exemplary character.'[10] However, there is a persistent narrative perpetuated by some investment tribunals, after 2001, that some of the rules on the assessment of compensation interpreted in *Chorzów* are CIL, or that this case itself is CIL.[11] This is not necessarily an accurate reflection of the existing normative *status quo*, because the rules described in the case did not automatically achieve CIL status. Nevertheless, *Chorzów* is still being used as a jurisprudential golden standard for applying 'recognised' CIL rules when assessing damages, and is often invoked to assert that when expropriations do not follow the rules provided in the treaty,[12]

[8] *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, the Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act; see also, *Chorzów Factory* (Indemnity); *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7; *Avena and Other Mexican Nationals (Mexico v USA)* (Judgment) [2004] ICJ Rep 12 [259]; and *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Reparations) 2022 <www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> accessed 1 August 2022 (the Court recalls that 'reparation must, as far as possible, wipe out all the consequences of the illegal act' (*Chorzów Factory* (Indemnity) [21]) [259]); also, *Ahmadou Sadio Diallo (Republic of Guinea v Congo)* (Merits) [2010] ICJ Rep 639 [161]; *Ahmadou Sadio Diallo (Republic of Guinea v Congo)* (Compensation) [2012] ICJ Rep 324 [13]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Compensation) [2018] ICJ Rep 15 [29] ('Before turning to the consideration of the issue of compensation due in the present case, the Court will recall some of the principles relevant to its determination. It is a well-established principle of international law that "the breach of an engagement involves an obligation to make reparation in an adequate form"').

[9] *Congo v Uganda.* (Judgment of Reparations) [2022] ICJ 106.

[10] Costa Rica v Nicaragua (Compensation) [2018] ICJ 29-30.

[11] For example: *SD Myers Inc v Canada* (Partial Award of 13 November 2000) UNCITRAL [331]; *Metalclad v Mexico* (Award of 30 August 2000) ICSID Case No ARB(AF)/97/1 [122]; *ADC Affiliate Limited v Hungary* (Award of 2 October 2006) ICSID Case No ARB/03/16 [480, 483–4]; *Stati & ors v Kazakhstan* (Award of 19 December 2013) SCC Case No V116/2010 [1462–3]; *Houben v Burundi* (Award 12 January 2016) ICSID Case No ARB/13/7 [218, 220–1]; *Tethyan Copper v Pakistan* (Award of 12 July 2019) ICSID Case No ARB/12/1 [278, 280]; *Watkins Holdings v Spain* (Award 21 January 2020) ICSID Case No ARB/15/44 [673, 677].

[12] For a summary of the discussion on lawful and unlawful expropriation, see SR Ratner, 'Compensation for Expropriations in a Word of Investment Treaties: Beyond the Lawful/Unlawful Distinction' (2017) 111(1) AJIL 7.

ie when compensation to the investor is not promptly paid, it subsequently becomes an illegal expropriation.[13]

However, a closer reading of *Chorzów* reveals that this judgment did not state that neither the rules of full compensation, nor the one applied for the illegal taking of German interests in Upper Silesia, provided in its decision to assess the quantum of damages were CIL. The famous passage in page 47 of the decision, which has been invariably quoted by tribunals and scholars, could not be considered an assertion of CIL.

2 The *Chorzów* Narrative

The lack of guidance from primary investment protection norms in assessing damages has led to discussions in the academia[14] and international investment arbitral tribunals,[15] where it has been claimed that in the absence of a conventional norm to assess the amount of the reparation for the investor, CIL must be applied. Although this claim might be correct, there has been a lack of explanation in the realms of investment literature and arbitral decisions about the moment when the customary rule for the assessment of damages, and the standard of full reparation, were formed. Subsequently, the *Chorzów* case has emerged as an initial point of reference for many scholars and arbitral tribunals, who have created a storyline claiming that this case represents CIL in the assessment of damages.[16] The language of the often-cited passage states that

[13] For example: *Unión Fenosa v Egypt* (Award of 31 August 2018) ICSID Case No ARB/14/4 [10.96]; *Tethyan Copper* [278, 280]; *ConocoPhillips v Venezuela* (Award of 8 March 2019) ICSID Case No ARB/07/30 [207–17]; and, *Watkins Holdings v Spain* [673, 677].

[14] ZC Reghizzi, 'General Rules and Principles on State Responsibility and Damages in Investment Arbitration: Some Critical Issues' in A Gattini, A Tanzi & F Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 69; MH Mendelson, 'Compensation for Expropriation: The Case Law' (1985) 79(2) AJIL 414, 418; M Shaw, *International Law* (6th ed, CUP 2006) 801; DA Desierto, 'The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in Chorzòw' (2017) 55(2) ColumJ Transnat'l L 395, 407–8.

[15] For example: *Foresight v Spain* (Award of 14 November 2018) SCC Case No V2015/150 [434–6]; *Masdar Solar v Spain* (Award of 16 May 2018) ICSID Case No ARB/14/1 [549]; *Novenergia II v Spain* (Final Award of 15 February 2018) SCC Case No 2015/063 [807–9]; *OperaFund v Spain* (Award of 6 September 2019) ICSID Case No ARB/15/36 [609].

[16] S Marks, 'Expropriation: Compensation and Asset Valuation' (1989) 48(2) CLJ 170, 171; J Neill, '*Chorzów Factory* and Beyond: Case Law Update' (*Landmark Chambers*, August 2018) <www.landmarkchambers.co.uk/wp-content/uploads/2018/08/Presentation-JN-Chorzow-Factory.pdf> accessed 1 June 2022; T Yamashita, 'Investors in the Formation of Customary International Law' in S Droubi & J d'Aspremont (eds), *International Organisations, Non-State Actors, and the Formation of Customary International Law*

> [T]he essential principle contained in the actual notion of an illegal act – a principle which seems to be established *by international practice* and in particular by the decisions of *arbitral tribunals* – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[17]

Firstly, the language used in this passage did not explicitly say that it was interpreting or applying CIL rules. Secondly, if that passage is intended to be interpreted as a statement of the Permanent Court of International Justice (PCIJ) about the CIL in 1928, a closer look shows that contrary to what the judgment said, as will be seen further on, prior to the *Chorzów* case neither *international practice* nor *arbitral tribunals* have consistently applied the full reparation principle and its means to assess the damages suffered by an injured alien.

So, from where has this narrative – which considers *Chorzów* as the distillation of the CIL on the assessment of damages – been conceived? Looking at the doctrine and cases, from 1928 to present, one can find that the *Chorzów* case especially rose to prominence after the adoption of the 2001 ARSIWA.[18] Special Rapporteur James Crawford quoted it when commenting on Article 36 ARSIWA regarding compensation.[19] At that time, there was also the boom of Investor-State dispute settlement (ISDS) cases against Latin American countries, where many arbitrators that had no prior experience or knowledge in public international law were thrust onto the ISDS scene.[20] Such reasons may have facilitated the post-2001 diversion of arbitral decisions from the previously established doctrine and cases, where *Chorzów* has increasingly been featured prominently as a reference of a principle of law in assessing

(Manchester University Press 2020) 396; R Cox Alomar, 'Investment Treaty Arbitration in Cuba' (2017) 48(3) U Miami Inter-Am L Rev 1, 30, 45; CM López Cárdenas, *La desaparición forzada de personas en perspectiva histórico jurídica: su origen y evolución en el ámbito internacional* (Editorial Universidad del Rosario 2017) 280.

[17] *Chorzów Factory* (Indemnity), [47] (emphasis added).

[18] F Torres, 'Revisiting the *Chorzów Factory* Standard of Reparation – Its Relevance in Contemporary International Law and Practice' (2021) 90(2) Nord J Intl L 190, 191.

[19] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 218–30.

[20] JM Álvarez-Zárate & DM Beltrán, 'Desafíos del arbitraje de inversión en los sectores minero-energético en América Latina' in LFM Castillo & C Villanueva (eds), *Anuario iberoamericano en Derecho de la Energía, Vol. II, Regulación de la transición Energética* (Universidad Externado de Colombia 2019) 261; JM Álvarez-Zárate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?' (2018) 59(8) BCLRev 2765.

damages.[21] These same post-2001 international arbitral decisions also relied on *Chorzów* as a legal source, because of the prestige of the PCIJ. In essence, the invocation of the *Chorzów* 'precedent' functioned on two levels. One, by invoking it, investment tribunals hoped that this would by 'association' bestow, somehow, an authority, or *gravitas,* behind their reasoning on assessment of damages. Two, the *Chorzów* case was a focal point in their argument that, under international investment law, CIL perhaps provided the rules for assessment of damages for responding to the so-called "illegal" expropriations where a payment was not made promptly. As a result, this narrative needs to be questioned to demystify the *Chorzów* judgment as a custom-making moment, where supposedly custom was interpreted in the decision and the rules for illegal takings[22] were created. Yet, in reality, CIL cannot be found nor identified in this decision.

This narrative implies that the decision was a custom-making moment,[23] where, back in 1928, the Court identified the already crystalised international custom to measure damages for international wrongs and that it interpreted the contended CIL with authority in the way it did so. However, no crystallised custom was revealed in the

[21] For example: C Eagleton, 'Measure of Damages in International Law' (1929) 39(1) YLJ 52; AJIL, 'Article 27. Violation of Treaty Obligations' (1935) 29 AJIL Supp 1077, 1080; A Herrero Rubio, 'Curso De 1955 De La Universidad De Valladolid en Vitoria' (1956) 9(1/2) REDI 281, 285; E Vitta, 'Responsabilidad De Los Estados' (1959) 12(1/2) REDI 11, 27–8; International Organization, 'International Court of Justice' (1959) 13(3) Int'l Org 446; OECD, 'Draft Convention on the Protection of Foreign Property' (1967) 7 ILM 117; SD Metzger, 'Property in International Law' (1964) 50(4) VaLRev 594, 600; GW Haight, 'International Organizations OECD Resolution on the Protection of Foreign Property' (1968) 2(2) Int'l L 326, 327; CQ Christol, 'International Liability for Damage Caused by Space' (1980) 74(2) AJIL 346, 352; N Kaufman Hevener & SA Mosher, 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978) 27(3) ICLQ 596, 598; G Handl, 'The Environment: International Rights and Responsibilities' (1980) 74 ASIL Proc 222, 233; JR Crook, 'Applicable Law in International Commercial Arbitration: The Iran-U.S. Claims Tribunal Experience' (1989) 83(2) AJIL 278, 303; JM Selby, 'State Responsibility and the Iran-United States Claims Tribunal' (1989) 83 ASIL Proc 240, 245; YN Kly, 'Human Rights, Aboriginal Canadians and Affirmative Action' (1992) 24(4) Peace Research 33, 37; and *Aloeboetoe et al v Suriname*, IACtHR (Reparations and Costs, Judgment of 10 September 1993) IACHR Series C no 15, 11.

[22] For the different meanings of illegal takings see, M Żenkiewicz, 'Compensable vs. Non-Compensable States' Measures: Blurred Picture Under Investment Law' (2020) 17(3) MJIEL 362.

[23] J d'Aspremont. 'The Custom-Making Moment in Customary International Law' in P Merkouris, J Kammerhofer & N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022).

decision, but still, the *Chorzów* case has been utilised for different purposes by arbitral tribunals under the contour of that authoritative narrative. In order to cast a critical eye on whether this narrative stands up to scrutiny, three different periods with regards to damages in international law will be examined. The following sub-sections will seek to determine whether the CIL rules on assessing damages existed in these periods and whether a custom-making moment had emerged. These three periods are: (i) prior to the *Chorzów* judgment, ie prior to 1928; (ii) from 1928 to 2001, ie between *Chorzów* and the adoption of the ARSIWA; and (iii) from 2001 to present. A point that needs to be mentioned here, and to which we shall return, is that in these last two periods the *Chorzów* case was interpreted by arbitral tribunals and academia in a variety of different ways.

2.1 Damages before the Chorzów *Decision in 1928*

In 1929, Clyde Eagleton wrote that little attention was devoted by writers 'to the measure of damages in international law; and the paucity of doctrine and precedent has embarrassed recent attempts to codify the law relating to the responsibility of states'.[24] Also, he saw that no consistent practice existed in these words.

> [B]ecause of the divergencies of theory which underlie the measuring of damages, which, indeed, lie at the foundation of international responsibility, it is contended, however, that, because of contrariety of opinion, and the difficulties of statement, no effort should be made to state rules as to the measure of damages.[25]

A closer look at the arbitral and mixed claims commissions' practice before 1928 confirms Eagleton's assertions, ie, that the *Chorzów* decision was not the alleged custom-making moment and that the PCIJ could not have relied on earlier cases in identifying CIL rules for the assessment of damages, for the simple reason that prior practice was vastly inconsistent in the means and methods employed in determining the amount of reparation. This simple verification contradicts the narrative that a full reparation standard was customarily applied before 1928 to determine the amount of compensation in international claims; least of all, in expropriations to 'wipe-out all the consequences of the wrongful act and re-establish

[24] Eagleton (n 20) 52.
[25] ibid 75.

the situation which would, in all probability, have existed if that act had not been committed'.[26]

The pleadings of States before mixed commissions and arbitral tribunals is a veritable treasure trove of variety for the proposed means of reparations for different kinds of breaches of international obligations. Sometimes, discussions were on the different ways to provide reparations, such as in the *Delagoa* case (1900),[27] where Portugal proposed two different means that could be acceptable. The *compromis*, which granted the tribunal its jurisdiction and determined its scope, was concerned exclusively with the form and measure of the compensation for a cancelled railway concession. At no time was there any question raised on the validity of the act of expropriation itself, as to verify whether this was legal or not.[28]

In the Spanish Treaty Claims Commission of 1901, Rule 9 required proof to sustain an award.[29] Consequently, injuries were assessed by the value of the property, ie, the market price of the houses, machinery, furniture, and buildings with affidavits, which would include further explanation.[30] In this commission, the method for calculation of damages was not a debated issue, but only the property subject to reparation.

[26] Some cases before 1928 decided to award *lucrum cessans*. For a thoughtful description of the cases and the evolution in private law and influence in international law see, HE Yntema, 'The Treaties with Germany and Compensation for War Damage. IV: The Measure of Damages in International Law' (1924) 24(2) ColumLRev 134, 153, where Yntema states that 'there is a duty to make complete compensation … The only limitations upon this duty spring from evidential or equitable considerations … The compensation must be reasonably adjusted to the particular circumstances of the individual case'.

[27] 'In this relation it is proper to advert to the note of Senhor Barros Gomes, in which he stated that there were two ways in which an arrangement could then be made with the Portuguese company that would protect the interests of the share and bondholders. One of these ways was the acceptance by the company of the tariff of rates proposed by the government of the Transvaal; the other, a radical alteration of the concession, which would produce the same result (…)' *Delagoa Bay Railway* (1900) published in JB Moore (ed), *History and Digest of the International Arbitrations to Which the United States Has Been a Party,* Vol 2 (US GPO 1898) 1865.

[28] ILC, 'Report on International Responsibility by Mr FV Garcia-Amador, Special Rapporteur' (20 January 1956) UN Doc A/CN.4/96, 173–231.

[29] Spanish Treaty Claims Commission, *Rules and Regulations of Practice and Procedure: Adopted and Amended from Time to Time by the Comission, Together with a Copy of the Organic Act and Other Papers* (US GPO 1902) 4, Rule 9 ('All facts necessary to sustain an award and all special facts, proof of which is required by the Commission, must be established by evidence and not otherwise').

[30] ibid 62 (on the market price) & 454 (on the question of damages that must be actual and direct, and not remote or prospective).

In the *Janes* Claim (1926), the Claims Commission awarded damages, not because the amount 'corresponded to the injury' caused by the original harm, but because the respondent Government had been guilty of an 'international delinquency' in failing to measure up to 'its duty of diligently prosecuting and properly punishing the offender'.[31]

In the *Lorenzo A Oliva* case, large damages were claimed for future profits that could have been achieved during the concession granted to the claimant for the construction of a pantheon in Caracas cemetery because the claimant's wrongful expulsion from Venezuela. In awarding damages for the claimant's expulsion, and for the loss sustained on account of the interference with his concession, 'Umpire Ralston disallowed the claim for estimated profits'.[32] Other cases, such as the *Alabama, Montijo* or *Cotesworth*, also merit mention, as they demonstrate the multifarious approaches used in assessing damages.[33]

Thus, upon reviewing the case-law preceding the 1928 *Chorzów* judgment, it is clear that in some of the most well-known cases, arbitral tribunals did not consistently follow the full reparation principle, unlike what the *Chorzów* judgment may lead one to believe, nor did they state that any breach of an engagement would transform an expropriation into an illegal one.[34] This makes both the claims that there was a constant line of international precedents applying the principle of full reparation, and that a CIL rule was applied by the PCIJ to decide *Chorzów,* baseless or shaky at best.

A similar lack of evidence exists with respect to the assertion of arbitral tribunals that the principle of full reparation forms part of the applicable international law in cases where no prompt payment by the State has occurred. This principle was infrequently applied, and a contextual reading

[31] ILC (n 28) 213, referring to General Claims Commission (US & Mexico), *Opinions of Commissioners Under the Convention Concluded on 8 September 1923 Between the United States and Mexico*, Vol 1 (US GPO 1927) 108.

[32] See, *Oliva case (Italy) v Venezuela* (1903), published in MM Whiteman, *Damages in International Law*, Vol III (US GPO 1943)1865–6.

[33] See, for example: *Alabama Claims of USA v UK* (Ad hoc Award of 14 September 1872) published in JB Moore (ed), *History and Digest of the International Arbitrations to Which the United States Has Been a Party,* Vol 1 (US GPO 1898) 543, 658–9; *Montijo (USA) v Colombia* (Award of 10 April 1875) published in JB Moore (ed), *History and Digest of the International Arbitrations to Which the United States Has Been a Party,* Vol 2 (US GPO 1898) 1421, 1444–5; *Cotesworth & Powell (UK) v Colombia* (Award of November 1875) published in JB Moore (ed), *History and Digest of the International Arbitrations to Which the United States Has Been a Party,* Vol 2 (US GPO 1898) 2050–85; and the *Delagoa case* 1865.

[34] See *Chorzów Factory* (Indemnity) [29,47].

of *Chorzów* lends no real support to this assertion. More specifically, in *Chorzów*, the PCIJ interpreted Article 6 of the Geneva Convention[35] as providing a clear prohibition of the liquidation of German interests in Upper Silesia.[36] Commenting on the case, Manley O Hudson observed that the Court stated that Poland's action was not an expropriation to render which lawful only the payment of fair compensation would have been wanting, 'but a seizure of property which could not be lawfully expropriated even against compensation'.[37] So, the result of the seizure in this case was to create an 'obligation to restore the undertaking and, if this be not possible, to pay its value at the time of indemnification'.[38] Thus, because Poland seized German interests it behaved contrary to international law, since the legal course of action was to expropriate, not seize, property, according to *Chorzów's* interpretation of the Geneva Convention. From this, many arbitral tribunals have extrapolated that expropriating with no prompt compensations is illegal,[39] ie, in direct violation of an obligation enshrined in an international treaty. However, this may be an oversimplification. As Herz correctly noted as early as 1941, even if the compensation was provided with a delay, this does not render an expropriation automatically illegal because 'in practice deferred payments have frequently

[35] German–Polish Convention regarding Upper Silesia (Germany & Poland) (adopted 15 May 1922) Art 6 (Geneva Convention). Poland may expropriate in Polish Upper Silesia enterprises belonging to large-scale industry, including deposits, and frank rural property, in accordance with the provisions of Articles 7 to 23. Subject to these provisions, the property, rights and interests of German nationals or companies controlled by German nationals cannot be liquidated in Polish Upper Silesia.

[36] 'It should first of all be observed that whereas Head II is general in scope and confirms the obligation of Germany and Poland in their respective portions of the Upper Silesian territory to recognize and respect rights of every kind acquired before the transfer of sovereignty, by private individuals, companies or juristic persons, Head III only refers to Polish Upper Silesia and establishes in favour of Poland a right of expropriation which constitutes an exception to the general principle of respect for vested rights' *German Interests in Polish Upper Silesia* (Germany v Poland) (Merits) [1926] PCIJ Series A No 7 [21]; '(…) As these rights related to the Chorzow factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in respect of them. Poland should have respected the rights held by the Bayerische under its contracts with the Obserschlesische, been contrary to Article 6 and the following articles of the Geneva Convention' *German Interests in Polish Upper Silesia* (Germany v Poland) (Merits) [1926] PCIJ Series A No 7 [44].

[37] MO Hudson, 'The Seventh Year of the Permanent Court of International Justice' (1929) 3(1) AJIL 1, 23.

[38] ibid 23.

[39] *ADC Affiliate Limited v Hungary* [481–4, 493]; *Siemens AG v Argentina* (Award of 7 February 2007) ICSID Case No ARB/02/8 [352]; *Vivendi (I) v Argentina* (Final Award of 20 August 2007) ICSID Case No ARB/97/3 [8.2.3].

been accepted or agreed upon, the fact that interest has usually been paid for the delay seems to corroborate this rule'.[40]

2.2 *Damages after* Chorzów *and until 2001*

After the *Chorzów* decision, there remained a lack of consensus among scholars and tribunals about the assessment of damages. For example, on the problem of compensation of expropriations and requisitions, Bin Cheng asserted that, according to the *Upton* case, compensation was indispensable and that the duty to compensate has been 'either based upon respect for private property'[41] or, as the *Norwegian Ships* case provided, 'upon enrichment of the community at the expense of isolated individuals'.[42]

In 1938, LH Woolsey recognised that 'international commissions have not followed definite rules' in assessing indemnity, because they have 'treated each case according to its peculiar circumstances and considered several standards of value in reaching the final result'.[43] He also made a distinction between just compensation related to lawful expropriations and damages for tortious actions, where '[i]t is clear that damages might be more comprehensive than just compensation for property taken'.[44] For Woolsey, 'the distinction between lawful and unlawful dispossession is commented upon by the Permanent Court of International Justice in the *Chorzów Factory* case'.[45] Other authors have claimed that the PCIJ held the principle of full compensation, but such decisions were regarding the interpretation of a specific treaty, thus it was not a *dictum* where a general rule was identified.[46] Given the different views between various authors and tribunals, it cannot reasonably be argued that there was a consensus on the assessment of damages.[47]

[40] JH Herz, 'Expropriation of Foreign Property' (1941) 35(2) AJIL 243, 243–62; Herz gave as examples: the *Savage* case (1865) published in JB Moore (ed), *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol 2 (US GPO 1898) 1855–7, *Norwegian Shipowners' Claims (Norway v USA)* (Award of 13 October 1922) I RIAA 307, and the *Chorzów Factory*.

[41] B Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (Stevens 1953) 47.

[42] ibid.

[43] LH Woolsey, 'The Expropriation of Oil Properties by Mexico' (1938) 32(3) AJIL 519, 524.

[44] ibid ('where property has been taken by expropriation proceedings or by tortious action, international law imposes the duty of making adequate reparation').

[45] ibid.

[46] PS Wilde Jr, 'El Derecho Internacional y el Petróleo Mexicano' (1940) 7(26(2)) Trimestre Económico 271, 271–90.

[47] R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75(3) AJIL 553, 553–89.

This is buttressed by the jurisprudence of the period. During this, there were different kinds of cases, such as those before the Iran-U.S. Claims Tribunal (IUSCT), contractual cases, and some (although not too many) ISDS cases, which dealt with assessing damages. A common theme in all of these was that the tribunals involved did not consider *Chorzów* as either reflecting CIL or providing guidance on how to identify the relevant CIL rules. In furtherance to this, out of 28 public cases reviewed for this piece, not even one held that there were illegal expropriations in play.[48] Eight cases did not make an analysis on damages,[49] 13 cases did not even mention CIL or *Chorzów*,[50] three mentioned *Chorzów* on the assessment,[51]

[48] For this chapter we reviewed 28 out of 31 cases between 1928 and 2001, two of which are not public: *Guadalupe Gas Products Corporation v Nigeria* (Award of 22 July 1980) ICSID Case No ARB/78/1; *Biedermann v Kazakhstan* (Award of 1 January 1999) SCC Case No 97/1996.

[49] *Holiday Inns SA & ors v Morocco* (Order Taking Note of the Discontinuance 17 October 1978) ICSID Case No ARB/72/1; *Reynolds Jamaica Mines Limited and Reynolds Metals Company v Jamaica* (Order Taking Note of the Discontinuance of 12 October 1977) ICSID Case No ARB/74/4; *Kaiser Bauxite Company v Jamaica* (Decision on Jurisdiction and Competence of 6 July 1975) ICSID Case No ARB/74/3; *Gabon v Société Serete SA* (Order Taking Note of the Discontinuance Issued by the Tribunal of 27 Feb 1978) ICSID Case No ARB/76/1; *SEDITEX Engineering v Madagascar* (Settlement by the Parties of 20 June 1983) ICSID Case No CONC/82/1; *Swiss Aluminium Limited & Icelandic Aluminium Company Limited v Iceland* (Order of the Secretary-General Taking Note of the Discontinuance of 6 March 1985) ICSID Case No ARB/83/1; *Tesoro Petroleum Corporation v Trinidad and Tobago* (Report of the Conciliation Commission of 27 November 1985) ICSID Case No CONC/83/1; and, *Colt Industries Operating Corporation v Republic of Korea* (Order Taking Note of the Discontinuance of 3 August 1990) ICSID Case No ARB/84/2.

[50] *Adriano Gardella SpA v Côte d'Ivoire* (Award of 29 August 1997) ICSID Case No ARB/74/1; *AGIP SpA v Congo* (Award of 30 November 1979) ICSID Case No ARB/77/1; *Klöckner Industrie-Anlagen GmbH & ors v Cameroon & Société Camerounaise des Engrais* (Award of 21 October 1983) ICSID Case No ARB/81/2; *Amco Asia Corporation & ors v Indonesia* (Award of 20 November 1984) ICSID Case No ARB/81/1; *Société Ouest Africaine des Bétons Industriels v Senegal* (Award of 25 February 1988) ICSID Case No ARB/82/1; *SARL Benvenuti & Bonfant v Congo* (Award of 8 August 1980) ICSID Case No ARB/77/2; *LETCO v Liberia* (Award of 31 March 1986) ICSID Case No ARB/83/2; *Atlantic Triton Company Limited v People's Revolutionary Republic of Guinea* (Award of 21 April 1986) ICSID Case No ARB/84/1; *American Manufacturing & Trading, Inc v Republic of Zaire* (Award of 21 February 1997) ICSID Case No ARB/93/1; *Saar Papier Vertriebs GmbH v Poland* (Final Award of 16 October 1995) UNCITRAL; *Fedax NV v Venezuela* (Award of 9 March 1998) ICSID Case No ARB/96/3; *Sedelmayer v Russia* (Arbitration Award of 7 July 1998) SCC; *Maffezini v Spain* (Award of 13 November 2000) ICSID Case No ARB/97/7; *Vivendi (I) v Argentina* (Award of 21 November 2000) ICSID Case No ARB/97/3; and *Wena Hotels v Egypt* (Award of 8 December 2000) ICSID Case No ARB/98/4.

[51] *Southern Pacific Properties (Middle East) Limited v Egypt* (Award of 20 May 1992) ICSID Case No ARB/84/3; *SD Myers Inc v Canada* (Partial Award I); *SD Myers Inc v Canada* (Second Partial Award of 21 October 2002) UNCITRAL; *Metalclad v Mexico*.

and three (with *Metalclad* falling under both these last categories) mentioned CIL within the context of damages' assessment.[52]

In 1992, in the *Southern Pacific Properties v Egypt* case, no reference was made to CIL, and *Chorzów* was referred to in regard to the application of the Discounted Cash Flow (DCF) method to assess the damages. Following the *Amoco* case, the Tribunal considered that DCF method was not appropriate for determining fair compensation in this case, because of the lack of operational time that would result from awarding 'possible but contingent and undeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account',[53] and then held that 'no reparation for speculative or uncertain damage can be awarded'.[54]

From the above, one can see that none of these cases said that *Chorzów* was CIL, but there was some rudimentary consistency among certain arbitral tribunals, which held in broad strokes that the *Chorzów* case contained some principles. The tribunals understood such principles in varying ways: as a principle without qualification to award the costs of the investment, such as in *Metalclad v Mexico*;[55] or stated as a principle of international law as *Myers v Canada* held;[56] or, as *Amoco v Indonesia* stated, full compensation is a general principle of law 'which may be considered as a source of international law', with *Chorzów* functioning as 'the basic precedent in this respect'.[57] However, in other cases, a different line was followed, as for instance in *Mobil Oil Corporation*, where the Tribunal was of the view that the investor was 'entitled under the principles of customary international to *appropriate compensation*'.[58]

[52] *Mobil Oil Corporation & ors v New Zealand* (Decision on Liability of 6 January 1988) ICSID Case No ARB/87/2; *AAPL v Sri Lanka* (Final Award of 27 June 1990) ICSID Case No ARB/87/3; *Metalclad v Mexico*.

[53] *Southern Pacific Properties (Middle East) Limited v Egypt* [189]; *Chorzów Factory* (Indemnity) [51].

[54] ibid [189].

[55] *Metalclad v Mexico* [122].

[56] *SD Myers v Canada* (Partial Award I) [331].

[57] *Amco Asia Corporation & ors v Indonesia* [267].

[58] *Mobil Oil Corporation & ors v New Zealand* [3.4] (emphasis added); see also, *Amoco International Finance Corp v Iran* (Partial Award (Award No 310-56-3) of 14 July 1987) IUSCT Case No 56 [191] (emphasis added), in [113] this case also states that *Chorzów* contained principles of international law generally accepted for the treatment of foreigners.

2.3 *Damages from 2001 until Present*

Examining the cases relating to assessment of damages post-adoption of the ARSIWA, it seems that the *Chorzów* case has served as a means for tribunals and scholars to make different kinds of claims regarding the standard of compensation, and its assessment and application under CIL. So much so, in fact, that the *Chorzów* standard has been seen by some not only as a reflection of CIL, but 'as a static set of uncontested rules that can be applied automatically and deductively in granting redress whenever an international wrongful act takes place'.[59] Despite this, what is striking is that such statements are not supported by delving deeper into the matter or providing any further evidence other than merely quoting the *Chorzów* judgment. Several scholars have fallen in line with this view, assenting to this conception of the narrative.[60] Some also claim, in relation to the so-called illegal expropriations, that 'the standard of compensation is found, not in the applicable … BIT, but rather in customary international law under the rubric of the widely reputed *Chorzów Factory* rule'.[61]

However, more established authors currently recognise in *Chorzów* a general principle of law as opposed to a CIL rule, expressing that 'the guiding principle is that reparation must, as far as possible, restore the situation that would have existed had the illegal act not been committed, expressed in the *Chorzów Factory case*'[62] and that '[u]nder this principle, damages for a violation of international law have to reflect the damage actually suffered by the victim'.[63] As a source of international law, general principles of law have been recognised as a legal basis for international legal principles relating to foreign investment. As Sornarajah notes, '[t]he principle that compensation must be paid is itself said to be a general principle of law'.[64]

As already mentioned, cases after 2001 show that many arbitral tribunals have resorted to, and argued that the *Chorzów* judgment reflects CIL[65] without giving reasons why this is so while others do not even

[59] Torres (n 17) 227.
[60] Marks (n 15) 171; Neill (n 15); Yamashita (n 15) 396; López Cárdenas (n 15) 280.
[61] Cox Alomar (n 15) 45; see also, JW Salacuse, *The Law of Investment Treaties* (OUP 2010) 254–5, who says that, in *Chorzów*, the PCIJ 'stated that, according to customary international law, if a state has committed a wrong it is liable to pay reparations'.
[62] R Dolzer & C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 294.
[63] ibid 295.
[64] M Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 85.
[65] For example: *ADC Affiliate Limited v Hungary* [480, 483–4]; *Siemens AG v Argentina* [349, 353]; *Stati & ors v Kazakhstan* [1462–3]; *OAO Tatneft v Ukraine* (Award on the Merits

mention it at all.[66] For example, in some tribunals when the IIAs do not provide a rule for illegal takings, the tribunal is required to apply the default standard contained in '[t]he customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory* case …'.[67] Similarly, 'for purposes of determining the compensation' the tribunal must assess this, 'which is governed by customary international law as reflected in *Factory at Chorzów*'.[68] For others, 'it is appropriate for the Tribunal to apply the standard of reparation found in customary international law. The claimants correctly cite, and the respondent does not dispute, the full reparation standard articulated in *Chorzów*'.[69] Or, when tribunals conflate two sources of international law, principles and CIL, by interpreting them as being the same, they quote *Chorzów*, where '[i]t is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply'.[70]

Most of the cases that state *Chorzów* is CIL have ignored the basic requisites for custom, State practice and *opinio juris*, distilled from Article 38(1)(b) 1920 Statute of the PCIJ.[71] Additionally, and perhaps most importantly, these cases have ignored that according to Article 59 of the PCIJ Statute, decisions 'of the Court [have had] no binding force except between the

of 29 July 2014) PCA Case No 2008–8 [540]; *Gold Reserve Inc v Venezuela* (Award of 22 September 2014) ICSID Case No ARB(AF)/09/1 [678–9]; *British Caribbean Bank v Belize* (Award of 19 December 2014) PCA Case No 2010–18 [288, 293]; *Vivendi (II) v Argentina* (Award of 9 April 2015) ICSID Case No ARB/03/19 [27]; *AWG Group v Argentina* (Award of 9 April 2015) UNCITRAL [27]; *Houben v Burundi* [218, 220–1]; *Crystallex International Corporation v Venezuela* (Award of 4 April 2016) ICSID Case No ARB(AF)/11/2 [846]; *Burlington Resources Inc v Ecuador* (Decision on Reconsideration and Award of 7 February 2017) ICSID Case No ARB/08/05 [160, 177]; *Unión Fenosa v Egypt* [10.96]; *Tethyan Copper* [278, 280]; *Watkins Holdings v Spain* [673, 677].

[66] *Adriano Gardella SpA v Côte d'Ivoire*; *AGIP SpA v Congo*; *Klöckner Industrie-Anlagen GmbH & ors v Cameroon & Société Camerounaise des Engrais*; *Amco Asia Corporation & ors v Indonesia*; *Société Ouest Africaine des Bétons Industriels v Senegal*; *SARL Benvenuti & Bonfant v Congo*; *LETCO v Liberia*; *Atlantic Triton Company Limited v People's Revolutionary Republic of Guinea*; *American Manufacturing & Trading, Inc v Republic of Zaire*; *Saar Papier Vertriebs GmbH v Poland*; *Fedax NV v Venezuela*; *Sedelmayer v Russia*; *Maffezini v Spain*; *Vivendi (I) v Argentina*; and *Wena Hotels v Egypt*.

[67] *ADC Affiliate Limited v Hungary* [483–4].

[68] *Siemens AG v Argentina* [353].

[69] *Watkins Holdings v Spain* [673].

[70] *Gold Reserve Inc v Venezuela* [678].

[71] Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 8 October 1921) 6 LNTS 389, Art 38(1)(b) (PCIJ Statute).

parties and in respect of that particular case'.[72] So, its jurisprudence did not create international law nor was it a source of law in 1928; contemporarily, it is likewise not the case as the 1945 ICJ Statute basically replicates the same rules of 1920 PCIJ Statute.[73]

3 Concluding Remarks

The different and flexible interpretations given to *Chorzów* might be explained because it was written by way of general statements, which referred to the principles of law and international law that had supposedly been constantly applied in the international cases preceding it. So, despite the fact that the Court did not explicitly mention *any* of these previous cases that established such rules, subsequent cases have blindly trusted those general statements, thus ignoring that the principles of reparation in *Chorzów* were already enshrined in the Geneva Convention.[74] Further, as has been demonstrated, the principle of full reparation was not previously provided for nor consistently applied in prior arbitral practice as *Chorzów* had claimed. However, being a sound judgment, after *Chorzów*, the principle of full reparation was used more frequently by arbitral tribunals.

Thus, tribunals and commentators assembled the story of *Chorzów* by conflating rules that were intended to serve different purposes. For example, those rules for the determination of the amount of compensation as provided in *Chorzów,* being simultaneously placed together with the principle of international responsibility[75] and the obligation of reparation for

[72] The Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, Arts. 38 & 59 have equal language as the PCIJ Statute, Art 38(4), which provide that the Court '[S]hall apply: (4) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[73] ICJ Statute, Art 38(1) reads as follows: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of laws as recognised by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists'.

[74] German–Polish Convention regarding Upper Silesia, Art 22, 'Completion of the expropriation within the meaning of Article 10, paragraph 2, and Article 15, paragraph 1, paragraph 2, includes, among other things, the payment of the fixed indemnity; it does not imply the termination of a lawsuit brought before the German-Polish Mixed Arbitral Tribunal relating to a more extensive claim for damages, or of a procedure relating to the admissibility of expropriation'.

[75] *ADC Affiliate Limited v Hungary* [480–4]; *Siemens AG v Argentina* [349–50, 355]; *Stati & ors v Kazakhstan* [1462–3]; *OAO Tatneft v Ukraine* [540]; *Gold Reserve Inc v Venezuela*

wrongful acts, which were considered in the judgment to be principles of international law.[76] A close look at the judgment shows that these are rules that need to be applied in different times; first, when finding whether the State is responsible for breaching an international obligation and, second, at the time of assessing the amount for reparation.[77]

At present, many arbitral tribunals do not explain why *Chorzów* is CIL, nor if it is being applied as a general principle of law. Mostly, the technique used by these tribunals has consisted of merely quoting the passages of *Chorzów* that contain such assertions.[78] In other cases, tribunals will occasionally interpret the rules regarding international responsibility contained in *Chorzów* to assert that they are CIL in order to apply them when determining the amount of compensation in a case.[79] By 1928, it is arguable that there was constant international practice in the application of the principle of full reparation or that the method to determine the amount of compensation, as stated by *Chorzów,* had been well developed.

Reasons for the lack of contemporary explanation could be attributed to the recognition of the authority of the World Court, or perhaps because the ARSIWA cites the *dicta* of the case. Also, such confidence in the narrative, that the *Chorzów* case established the rules for assessing the damage in a case, may have surged because this judgment had explicitly asserted that these rules were internationally recognised.[80]

[678–9]; *British Caribbean Bank v Belize* [288, 293]; *AWG Group v Argentina* [27]; *Crystallex International Corporation v Venezuela* [847–8]; *Unión Fenosa v Egypt* [10.96]; *Watkins Holdings v Spain* [673, 677].

[76] *Amco Asia Corporation & ors v Indonesia* [266–8, 281]; *SD Myers Inc v Canada* (Partial Award I) [311, 315]; and *Gold Reserve Inc v Venezuela* [678, 681].

[77] ('[I]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law') & ('it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation') *Chorzów Factory* (Indemnity) [27, 29].

[78] See *Chorzów Factory* (Indemnity) [47].

[79] *Amco Asia Corporation & ors v Indonesia* [281]; *SD Myers Inc v Canada* (Partial Award I) [311, 315]; *SD Myers Inc v Canada* (Dissenting Opinion of Professor Bryan P Schwartz of 30 December 2002) UNCITRAL [12–14]; and *Gold Reserve Inc v Venezuela* [678, 681].

[80] '(…) [T]he Court observes that it is a principle of international law, an even a general conception of law, that any breach of an engagement involves an obligation to make reparation (…)' & '[t]he 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*…' *Chorzów Factory* (Indemnity) [29, 47] (emphasis added).

Following this line of argument, the principle of full reparation and the distinction between legal and illegal expropriation emerges where some tribunals and case laws claim that these would form part of CIL.[81] This claim has had important effects on matters pertaining to the applicable law, especially when discussing the date for the assessment of damages and the standard of reparation.

To summarise, the narrative built around *Chorzów* has some inconsistencies, mostly (i) because the decision has been taken out of context by some in academia, and by investment arbitration tribunals alike, when assessing damages;[82] (ii) because the *Chorzów* ruling does not cite the legal sources that, without doubt, would allow them to affirm that the full reparation principle was applied consistently by claims commissions and arbitral tribunals before 1928, and that the counterfactual method to assess damages were CIL;[83] (iii) the ruling did not categorically say, neither show, that CIL had been applied to the case as a legal source,[84] but this has not prevented many investment arbitral awards after 2001 from claiming that *Chorzów* is CIL;[85] and (iv) the context in which the judgment ruled upon the international illegal act, ie by breach of the

[81] *Yukos Universal Ltd v Russia* (Final Award of 18 July 2014) UNCITRAL, PCA Case No 2005–04/AA227 [1581–4, 1758–69, 1826–7]; *Tidewater v Venezuela* (Award of 13 March 2015) ICSID Case No ARB/10/5 [140–6, 159–63]; and, *Quiborax v Bolivia* (Award of 16 September 2015) ICSID Case No ARB/06/2 [240–55, 325–30, 343–7, 370–85].

[82] M. Sornarajah (n 68) 425.

[83] In the *Chrozów Factory* Indemnity decision, no reference was made either to a legal source (aside from the Upper Silesian Treaty of 1922) or any previous jurisprudence nor arbitral cases. Regarding the latter, it is generally mentioned by the Court as 'decisions of arbitration tribunals' without specifying which ones. *Chorzów Factory* (Indemnity) [68, 79, 125, 155].

[84] Instead, the judgment said 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 re-establish the situation which would, in all probability, have existed if that act had not been committed' *Chorzów Factory* (Indemnity) [47].

[85] For example: *ADC Affiliate Limited v Hungary* [480, 483–4]; *Siemens AG v Argentina* [349, 353]; *Stati & ors v Kazakhstan* [1462–3]; *OAO Tatneft v Ukraine* [540]; *Gold Reserve Inc v Venezuela* [678–9]; *British Caribbean Bank v Belize* [288, 293]; *Vivendi (II) v Argentina* [27]; *AWG Group v Argentina* [27]; *Houben v Burundi* [218, 220–1]; *Crystallex International Corporation v Venezuela* [846]; *Burlington Resources Inc v Ecuador* [160, 177]; *Unión Fenosa v Egypt* [10.96]; *Tethyan Copper* [278, 280]; *Watkins Holdings v Spain* [673, 677].

Geneva Convention, is overlooked by those who argue that in the context of Bilateral Investment Treaty (BIT) claims, there are illegal expropriations[86] to justify awarding damages with a different date that that provided by the BIT.[87]

[86] A discussion on illegal expropriation can be find in *Quiborax v Bolivia* (Partially Dissenting Opinion of Brigitte Stern of 7 September 2015) ICSID Case No ARB/06/2 [28–9] 'The majority attempts to justify its approach based on what is referred to as a careful analysis of the *Chorzów* case as well as on the position adopted by 'several investment arbitration tribunals' (…) In my view, a careful analysis of *Chorzów* does not support the approach of the majority and it cannot be contested that there are extremely few awards having adopted an ex post analysis as has been used here. (…)'.

[87] At the date of the expropriation. See, for example: Agreement Between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (Japan & Georgia) (adopted 29 January 2021, not yet in force) Art 11, (Expropriation and Compensation) '2. The compensation shall be equivalent to the fair market value of the expropriated investment *at the time* when the expropriation was publicly announced or when the expropriation occurred, whichever is earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become known earlier' (emphasis added); Agreement Between The Government of the State of Israel and The Government of the United Arab Emirates on Promotion and Protection of Investments (Israel & UAE) (adopted 20 October 2020, not yet in force) Art 6 (Expropriation and Compensation) '2. The compensation shall: (…) (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (…)'; Agreement Between The Government of Hungary and The Government of The Kyrgyz Republic for the Promotion and Reciprocal Protection Of Investments (Hungary & Kyrgyzstan) (adopted 29 September 2020, entered into force 10 April 2022) Art 6, (Expropriation) '1. (…) Such compensation shall amount to the market value of the investment expropriated immediately before expropriation or impeding expropriation became public knowledge (whichever is earlier) (…)'.