Reconceptualizing Property by Pricing: A Critique of the Compensation Rule in International Law

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ABSTRACT

As international disputes increasingly arise from global challenges – from armed conflicts and ecological harm, to energy transition – questions of compensation for internationally wrongful acts have become more urgent. Across different areas, compensation is governed by the general rules of state responsibility unless special rules apply. Yet these general rules remain strikingly thin and abstract, due to the vast range of contexts in which they apply. In May 2025, the UN International Law Commission (ILC) added the topic 'Compensation for the damage caused by internationally wrongful acts' to its program of work, creating a critical opportunity to revisit this body of rules.

This article argues that, in the absence of clear guidance from customary international law, prevailing approaches to compensation developed in judicial or arbitral practice embed problematic normative and distributive choices, which can distort the intent behind primary rules and produce unintended consequences. While damages awards in investment arbitration can reduce an asset to its 'market price', income-based compensation for personal injury can reinforce global inequality. To illustrate this problem, it critically examines the treatment of compensation in investment arbitration using a comparison between domestic remedial rules and approaches to compensation in investment arbitration. It shows how compensation awards in this context have effectively reshaped the legal relationships associated with private property in domestic legal systems. Guided by the vaguely defined rule of 'full reparation', investment tribunals have applied market-based valuation methods – followed by the logic of private torts – to claims of a public law character. This effectively transforms policy and distributive decisions over an asset or resource into profitability forecasts in a hypothetical 'free market', disregarding the social and public dimensions of property recognized and protected in domestic legal systems and human rights law.

Crucially, this transformation arises not from deliberate law-making choice by states, but from analogical reasoning in judicial practice across different areas, which obscures the varied nature of different legal claims in international law. The second contribution of this article is to identify the structural law-making gaps that have shaped current approaches to compensation and to suggest how they might be addressed. Rather than codifying and reinforcing existing jurisprudence to achieve coherence across different areas, states and the ILC should confront, openly and transparently, the normative and distributive choices embedded in the application of compensation rules and tailor them to the specific characters of various claims in different contexts. Until detailed and context-sensitive compensation rules emerge through interstate negotiations, general

principles of law, the third source listed in Article 38(1) of the ICJ Statute, can serve as an interim solution.

I. INTRODUCTION

Debates following recent geopolitical developments – from those on war reparations and climate reparations to those on compensation claims linked to the fossil fuel phase-out – have propelled the remedial framework in international law into the forefront.[1] Yet the general rule on compensation in international law remains strikingly vague, abstract, and undertheorized, with various methods for its application largely shaped by judicial practice. These ostensibly neutral methods, this article argues, can sometimes generate systemic normative and distributive consequences that are both unintended by states and problematic in practice. On May 30, 2025, the International Law Commission (ILC) decided to add the topic 'Compensation for the damage caused by internationally wrongful acts' to its program of work.[2] While it opens a timely opportunity to clarify and develop the law in this area, there is a risk that certain problematic aspects of existing practice may become entrenched.

To some scholars in domestic law, it may seem problematic that in international law, discussions on primary rules governing states' international obligations are often separated from the secondary responsibility arising from their breach.[3] Even without fully subscribing to the realist view that '[a] right is as big . . . as what the courts will do' in terms of remedies,[4] it is doubtful that the precise nature and substance of primary rights and obligations can ever be adequately understood without describing the responsibility flowing from their breach and attendant remedies. Across diverse legal fields ranging from constitutional and administrative law, to tort and contract law, remedies are tailored to align with the values the primary rules seek to protect.[5] In international law, however, the 2001 ILC Articles on State Responsibility separate primary rights and obligations from secondary responsibility.[6] This distinction not

1 Benoit Mayer, *State Responsibility and Climate Change Governance: A Light Through the Storm*, 13 CHINESE J. INT'L L. 539 (2014); Monika Pacholska, *'Neither Criminal Nor Civil': Russia State Responsibility for Conduct of Hostilities Violations in Ukraine*, 56 TEX. TECH. L. REV. 151 (2023); Olivia Hailes, *Unjust Enrichment in Investor-State Arbitration: A Principled Limit on Compensation for Future Income from Fossil Fuels*, 32 REV. EUR. COMP. & INT'L ENV'T L. 358 (2023).

2 Int'l Law Comm'n, Rep. on the Work of Its Seventy-Sixth Session, 109, ¶ 437, U.N. Doc. A/80/10 (June 9, 2025) [https://perma.cc/ZJ4S-PV7J]; Int'l Law Comm'n, Rep. on the Work of Its Seventy-Fifth Session, 14, ¶ 46, U.N. Doc. A/79/10 (Aug. 12, 2024) [https://perma.cc/E6RF-CXEU].

3 For the connections between rights and remedies, *see* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); Stephen Steel, *Remedies, Analysed*, 41 OXFORD J. LEGAL STUD. 539, 562-563 (2021); Daniel Friedmann, *Rights and Remedies*, *in* COMPARATIVE REMEDIES FOR BREACH OF CONTRACT 3-17 (Nili Cohen & Ewan McKendrick eds., 2005).

4 KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 88 (2008).

5 Levinson, *supra* note 3; Friedmann, *supra* note 3; Steel*, supra note* 3; Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

6 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries* (2001), 31, ¶ 1 [https://perma.cc/AM7F-7S7V] [hereinafter *Draft Articles with Commentaries*]:

only separates the law-making processes in both realms, but also creates an epistemic divide between them, increasing the risk of rights-remedies mismatch.

The primary-secondary rules distinction drawn by the ILC was regarded as a pragmatic move, allowing the Commission to 'maintain a special course without mixing (or without mixing too much) the technical aspects of responsibility with the substantive norms'.[7] The unique structure of international law on rights, responsibility, and remedies might partly be due to states' inability to agree on the legal consequences for every breach of various primary rules. Nonetheless, it remains doubtful whether the secondary rules can truly be treated as mere 'technical' matters and can operate independently without interfering with the substance of primary rights and obligations.

In this article, I do not challenge or critique the divide between primary and secondary rules or the 2001 ILC Articles *per se*. Rather, while working within the existing legal framework and recognizing that primary and secondary rules might involve distinct moral and practical considerations, I critique the distributive and normative choices adopted and entrenched by international adjudicators when *applying* the vaguely defined secondary rules to concrete cases, in the absence of clear and specific guidance from states. To address the unintended distortions caused by the law-making gap regarding compensation, I propose greater reliance on general principles of law – the third source of international law listed in Article 38(1) of the ICJ Statute – as a means of incorporating normative choices found in domestic legal systems into the international law on compensation.

To illustrate the law-making problem regarding the rules on compensation, I use the example of international investment law and contrast it with corresponding remedial frameworks in domestic legal systems. In investment law, the dominant approach to compensation is guided by the general rule of compensation in the law of state responsibility developed in an inter-state setting, following a logic resembling private torts and relying on market-referenced valuation methods. Applied indiscriminately to disputes involving public regulatory measures, these

> These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

7 Ernest David, *Primary and Secondary Rules*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 32 (James Crawford ed., 2010).

methods reduce the proprietary entitlements of foreign investments – entitlements that in domestic legal systems mediate a complex interplay of public and private values – to mere commercial value or 'market price' for foreign investors. Compared with the one-dimensional approach to compensation in investment arbitration, corresponding rules on remedies in domestic legal systems offer more detailed, context-specific guidance, and are shaped by a multiplicity of considerations. This comparison not only highlights how damages awards in investment arbitration have stripped assets of their social and public values safeguarded in domestic legal systems, but also exposes a broader law-making gap in international law: the failure of states – the 'legislature' in international law – to impose meaningful constraint and clear guidance on how the secondary rule of compensation should be tailored to the distinct normative underpinnings of diverse primary rules in international law. The absence of such guidance risks allowing compensation decisions to distort legislative intent and undermine the values embedded in various primary rules in international law.

As explained in Section II, the general rules of 'full reparation' and compensation in the law of state responsibility are, by design, remarkably broad, thin, and abstract. Their expansive scope of application – ranging from international humanitarian law to international investment law – necessitates considerable flexibility to accommodate divergent applications across different fields, and for that reason, these general rules leave crucial normative and practical questions undertheorized. At the same time, the methods used to operationalize these abstract secondary rules can produce consequences unintended by lawmakers of particular primary rules. For instance, while market-based calculation methods implicitly endorse certain regulatory choices that underpin a particular notion of state-market relation, income-based valuation methods applied in cases of personal injury might discriminatorily distribute harm and risk across communities. The persistent judicial reliance on certain valuation methods – ostensibly neutral but embedding specific normative and distributive choices – and their 'cross-fertilization' across various fields[8] absent state intervention, can gradually generate certain norms or entrench certain practices with systemic normative consequences.

Governed by the general compensation rule, in investment arbitration, valuation methods applied in *inter-state* disputes have been extended to

8 Some international law scholars have seen this phenomenon in a positive light, regarding it as supportive of the perception that international law is a 'system'. For instance, Chester Brown has observed that '[t]he emergence of common standards in international procedure', including remedies, 'permits the suggestion that . . . international courts do not operate as self-contained regimes', instead, it indicates the 'development of the international legal system'. Chester Brown, *The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals*, 30 LOY. L.A. INT'L & COMP. L. REV. 219, 243–244 (2008).

investor-state claims that resemble judicial review actions in domestic law. This extension occurred as investment arbitral tribunals introduced certain modern public law notions in their interpretations of primary rules in international investment agreements (IIAs). As a result, public law claims under IIAs were paired with private law remedies that focus almost exclusively on recovering an asset's commercial value to its owner. This effectively sidelines the social and public values associated with property owned by foreign investors – values widely recognized both in domestic legal systems and in international human rights law and carefully safeguarded by various doctrines and institutional mechanisms in domestic jurisdictions.

Using comparative law analysis, Section III compares investment arbitration jurisprudence on damages with corresponding remedial rules in domestic legal systems for property disputes arising from public acts. It shows how particular applications of the abstract 'full reparation' rule have reduced *policy and distributive decisions* regarding the use or exploitation of assets – authorized and regulated under domestic law – into *profitability forecasts* within a hypothetical 'free market'.

While these damages awards effectively reconceptualized the concept of 'property' and redefined the relationship between the state and property owners as understood in domestic law, this transformation is not a direct result of a deliberate choice by states under either IIAs or specific secondary rules. Instead, as discussed in Section IV, it stems primarily from analogical reasoning by international adjudicators applying the same rules to different types of disputes. While UNCITRAL Working Group III's investor-state dispute settlement (ISDS) reform program attempts to address some of these policy concerns by offering guidelines for states to formulate IIA provisions on compensation, the current draft guidelines do not fundamentally question the prevailing market-referenced, private law-based calculation methods under the general compensation rule.[9]

As the ILC embarks on the topic 'Compensation for the damage caused by internationally wrongful act', it opens an opportunity to address these problems. In light of the distortions arising from the mismatch between primary rules and secondary remedies, this article argues that what is needed is not greater consistency and coherence within the *general* compensation rule applicable across various areas, but rather detailed guidance tailored to the normative foundations of *specific* primary norms. While it may be extremely difficult – if not impossible – for states to agree on detailed secondary rules for every distinct type of primary norms as a matter of

9 *See* U.N. Comm'n on Int'l Trade L., *Note by the Secretariat: Possible Reform of Investor-State Dispute Settlement: Draft Guidelines on the Calculation of Damages and Compensation in ISDS* (June 2025), A/CN.9/WG.III/WP.255 (June 24, 2025) [https://perma.cc/3MP8-HBY2] [hereinafter *Note by the Secretariat*].

customary international law, general principles of law offer a mechanism for states to legislate by 'implied consent', drawing on domestic rules on remedies governing various subject matter. As discussed in Section V, until states are able to develop detailed rules through treaties or customary international law, general principles can serve as a bridge, translating normative positions embedded in different areas of domestic law into the international law on compensation. To this end, I refute two key theoretical objections to a greater role of general principles of law in this context, emphasizing that the identification and application of this source require a process that moves from the 'specific' to the 'specific'.

II. UNPACKING THE NORMATIVE CHOICES IN THE APPLICATIONS OF THE 'FULL REPARATION' RULE: BEYOND THE MYTH OF 'FAIR MARKET VALUE'

In international law, the full reparation principle was most prominently pronounced by the PCIJ in 1928 in *Chorzów Factory*:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[10]

This general proposition, central to structuring the content of state responsibility as codified and further developed in the 2001 ILC Articles, allows for considerable flexibility. Initially, the PCIJ made it clear that this rule was meant to apply to an inter-state relationship, rather than to the relations between the state and the affected individual in that case.[11] But it has since been endorsed and applied in contexts involving rights of non-

10 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A), No. 17 at 47 (Sep. 13) [https://perma.cc/6E8P-Y8NY].

11 *Id*. at 28.

state actors, including those in international human rights law and international investment law.[12]

The requirement that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would . . . have existed if that act had not been committed" is reminiscent of torts.[13] But the rules on state responsibility do not seem to be narrowly tailored to a specific type of legal relationship.[14] The rules contained in the ILC Articles incorporate elements of both contract[15] and tort law[16] in various respects. This seems to reflect the fact that in inter-state settings – which was the ILC's main focus when drafting these articles[17] – legal relationships are more closely analogous to a private-law paradigm, although particular rules have also been developed to accommodate multilateral interests of the broader community.[18] In the meanwhile, given the generality and vagueness of these secondary rules and the flexibility they allow, a one-size-fits-all approach applicable across a wide variety of legal relationships under different primary rules seems unproblematic.

This flexibility is reflected in the ICJ's approach under the general framework of the secondary rules, where the Court has shown considerable deference to political settlements between disputing parties and to the responsible state's choice of specific modalities for implementing reparation. For example, in cases of procedural breaches, the ICJ has limited itself to declaratory findings[19] or instructed the responsible state to review

12 *See, e.g.*, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 2010 I.C.J. Rep. 639 (Nov. 30, 2010) [https://perma.cc/54TG-NQLJ]; Cyprus v. Turkey, App. No. 25781/94, Judgment, ¶¶ 41–46 (May 12, 2014) [https://perma.cc/LF7G-P54N]; For other examples both in human rights and in international investment law, *see Materials on the Responsibility of States for Internationally Wrongful Acts*, U.N. LEGIS. SERIES, ST/LEG/SER.B/25/Rev.1, 397–414 (2023) [https://perma.cc/8N5J-MJL3].

13 Emmanuel Giakoumakis, *A Riddle Wrapped in a Mystery Inside an Enigma: Equitable Considerations in the Assessment of Damages by Investment Tribunals*, *in* 181 CUSTOM AND ITS INTERPRETATION IN INT'L INVESTMENT L. (Panos Merkouris, Andreas Kulick, José Manuel Álvarez-Zarate & Maciej Żenkiewicz eds., 2024) ('Within this conceptual framework, strongly influenced by private-law analogies from municipal tort law, compensation has acquired a strong, 'damage-centric' focus, in the sense that it depends primarily – if not exclusively – on the demonstration of a financially assessable damage and a 'sufficiently direct and certain causal nexus' between the damage and the wrongful act').

14 For instance, it was stated in *Rainbow Warrior Affair* that "in the field of international law there is no distinction between contractual and tortious responsibility." Rainbow Warrior Affair (New Zealand v. France), 10 R.I.A.A. 215, 251, ¶ 75 (Apr. 30, 1990) [https://perma.cc/Q6D4-9SBE]; *Draft Articles with Commentaries*, *supra* note 6, art. 12, ¶ 1 ("existence of a breach of an international obligation").

15 For citations to notions or ideas derived from contract law, *see, e.g.*, *Draft Articles with Commentaries, supra* note 6, at n. 317 (on circumstances precluding wrongfulness); n. 357 (on *force majeure*); n. 466 (on compensation).

16 *Id.* at n. 315 (on circumstances precluding wrongfulness); nn. 464-471 (on causation of damages).

17 *Id*. at art. 33(2).

18 *Id.* at arts. 41, 48.

19 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, 106, ¶ 282 (Apr. 20) [https://perma.cc/KL2F-BGFM].

or reconsider decisions using methods of its own choosing.[20] In situations where compensation was deemed appropriate, the Court has often first let the disputing parties to negotiate to reach an overall settlement.[21] Even regarding consequences for violations of the right to self-determination in decolonization processes, where participants in the Advisory proceedings sought compensation for individual victims,[22] the ICJ deferred to the defaulting state on the specific modalities for ending its unlawful administration and left decisions regarding the resettlement of affected individuals to the political processes within the UN General Assembly.[23]

However, when the matter of compensation becomes more judicialized and jurisprudence accumulates in specific areas, adjudicators have to theorize further and engage more deeply in normative decision-making over remedies.[24] Under the law of state responsibility, compensation aims to reestablish the situation which would have existed if the wrongful act has not been committed, covering 'financially assessable damage' suffered by states, individuals, or legal persons, including personal injury and property damage.[25] In domestic tort law, it has been recognized that when actual restitution is impossible, there is no completely objective account of *status quo ante*: pricing personal injury or proprietary damage inevitably entails distributive consequences and involves normative judgments about competing, and sometimes incommensurable, values.[26] In international law, the 2001 ILC Articles do not seem to have fully theorized such matters. According to the ILC:

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20 Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, 2004 I.C.J. 12, 70–73, ¶ 153 (Mar. 31) [https://perma.cc/7LW4-54K5]; LaGrand (Germany v. United States of America), Judgment, 2001 I.C.J. 466, 514–17, ¶ 128 (June 27) [https://perma.cc/2EC5-Q6QG]; Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening), Judgment, 2012 I.C.J. 99, 153–56, ¶ ¶ 137–39 (Feb. 3) [https://perma.cc/A5U4-UL2T]; *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, 2002 I.C.J. 3, 31–34, ¶¶ 76–78 (Feb. 14) [https://perma.cc/P3KB-CHVX].

21 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. 7, 82–84, ¶ 155 (Sep. 25) [https://perma.cc/2CEA-PQUL]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, 717–718, ¶ 142 (Dec. 16) [https://perma.cc/4FFF-5Q77]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, 279–82, ¶ 345 (Dec. 19) [https://perma.cc/5NV6-F9ET].

22 *See, e.g.*, Written Statement of the African Union, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Mar. 1, 2018, at 62, ¶ 244 [https://perma.cc/3KU9-BAAV].

23 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Request for Advisory Opinion, 2017 I.C.J. 95, 139–41, ¶¶ 181–83 (June 22) [https://perma.cc/79ZY-LBJP].

24 Although operating in a treaty-based context, the ECHR has had to grapple with multiple normative objectives in its jurisprudence on 'just compensation', and the opacity of its reasoning risks charges of arbitrariness. *See* Veronika Fikfak, *Non-pecuniary Damages Before the European Court of Human Rights: Forget the Victim; It's All About the State*, 33 LEIDEN J. INT'L L. 335 (2020).

25 *Draft Articles with Commentaries*, *supra* note 6, art. 36(2), ¶¶ 4–34.

26 *See e.g.*, Katherine A. Yuracko & Ron Avraham, *Valuing Black Lives*, 106 CAL. L. REV. 325 (2018); Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138 (1999).

> As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[27]

Accordingly, at least in theory, complex normative judgments are meant to be made at the level of primary, substantive rules, which also shape findings on fault and causation, and the calculation methods under the secondary rules are, in this view, only technical instruments designed to translate those normative decisions into remedies based on factual assessments. But in practice, neither the primary rules nor the general secondary rules offer clear guidance on many of these issues. As a result, normative judgments are often left to those tasked with applying the secondary rules and awarding remedies. In the meanwhile, there is a tendency to extrapolate certain general propositions – whether as legal norms, by analogy, or as best practices – from a limited set of judicial decisions on damages, and to extend them to a broader range of cases. Although these calculation methods are often treated as value-neutral, technical matters transferrable across contexts, important normative judgments are concealed both in these methods themselves and in the processes of generalization and extrapolation that give them broader normative force.

For instance, compensation for damages arising from personal injury in international law generally covers material losses, such as loss of earnings and earning capacity, medical expenses, and non-material losses, such as loss of loved ones, sufferings, and affront to sensibilities.[28] Income-based discrimination embedded in widely endorsed calculation methods has largely gone unnoticed and remains unaddressed by law-makers. In *Corfu Channel*, compensation for damages – in respect of the deaths and injuries of UK naval personnel caused by Albania's failure to notify the existence of mines – covered the cost of pensions and other grants made by the UK government to victims or their dependents, and the costs of administration, medical treatment, and so on.[29] This is in line with the stream of decisions by mixed claims commissions on damages caused by wrongful treatment of aliens in the late 19th and early 20th centuries. For instance, in the 1931 *William McNeil* case – cited in the 2001 ILC Articles – the Great Britain-Mexico Mixed Claims Commission, when awarding compensation to a

27 *Draft Articles with Commentaries*, *supra* note 6, art. 36, ¶ 7.

28 *Id.* ¶ 16.

29 Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, 1949 I.C.J. 4, 249 (Apr. 4) [https://perma.cc/XML2-A5LU].

British mining company's general manager detained by Mexican revolutionary forces, based the amount on the victim's 'station in life' and the recovery time and expenses for his resulting nervous system breakdown.[30]

In these cases, the victims' occupation, earning potential, social status, and nationality, were crucial determinants for the amount of compensation. The ILC's use of such examples to illustrate valuation methods, along with the practice of international courts and tribunals in consistently referencing each other's decisions, appears to endorse a general rule foregrounding these factors. As long as a causal link – and, when necessary, fault – can be established, the nature of the wrongful act does not appear to make a major difference in terms of the calculation. Such a rule, if adopted as customary international law and/or applied consistently in judicial settings as 'preferred methods'[31] or 'best practices',[32] might have significant normative and distributive implications.

In several domestic legal systems income-related discrimination can lead to constitutional challenges, despite the importance of lost income in calculating damages for personal injuries. For instance, in U.S. law, race-based classifications have, in some cases, been rejected on the ground of the Equal Protection Clause of the Fourteenth Amendment when estimating work-life expectancy and economic losses of the victim.[33] In Chinese law, the distinction drawn by the Supreme People's Court between urban and rural residents, based on their different average wages, in compensation for personal injury[34] has prompted requests for constitutional review.[35] The

30 William McNeil (Great Britain) v. United Mexican States, 5 R.I.A.A. 164, 165–68 (May 19, 1931) [https://perma.cc/4CLP-HLVB].

31 *Draft Articles with Commentaries*, *supra* note 6, art. 36, ¶ 23.

32 Martins Paparinskis, *Compensation for the Damages Caused by Internationally Wrongful Acts*, Int'l Law Comm'n, Rep. on Its Seventy-Fifth Session, U.N. Doc. A/79/10, at 133, ¶ 15 [https://perma.cc/DS2K-2FV6]

33 *See* McMillan v. City of New York, 253 F.R.D. 247, 248 (E.D.N.Y. 2008); G.M.M. ex rel. Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 131–35 (E.D.N.Y. 2015); *see also* Yuracko & Avraham, *supra* note 26; Marlene Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); J.B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 264 (2010).

34 最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释 [Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law for the Trial of Personal Injury Compensation Cases], Fa Shi [2003] No. 20 (Dec. 26), http://gongbao.court.gov.cn/Details/42c996d38500495f50ad95c1c23d21.html [https://perma.cc/G6GY-K4TF].

35 Jingjing Cao & Furong Wang, 律师上书呼吁"同命不同价"称与宪法抵触 [A Lawyer Petitioned for "Equal Compensation for Equal Lives", Arguing That Unequal Compensatin Contradicts the Constitution], SHANGHAI BAR ASS'N (Mar. 4, 2008), https://www.lawyers.org.cn/info/708ca25595f949409b200afa327f74a2 [https://perma.cc/XX2G-QU94]; Jiang Xiaotian, 城市人命更值钱？农民一封信撬动全国人大改变同命不同价 [Is Life More Valuable in the City? A Letter From Farmers Leveraged the National People's Congress to Change "the Same Life But Different Price"], SOUTHERN METROPOLIS DAILY (Jan. 21, 2021), https://m.mp.oeeee.com/a/BAAFRD000020210121421919.html [https://perma.cc/FT86-9HD4].

Supreme People's Court subsequently amended its Interpretation to equalize compensation standards for deaths or disability among urban and rural victims.[36]

Admittedly, certain prejudice in compensation decisions might be inevitable in the world that we live in. Income-based discrimination manifests differently across societies, and states may have different priorities when dealing with this matter. However, the fact that states may differ on how to tackle the unequal distribution of harm does not mean that international law should ignore this issue entirely. In international law, the distributive effect of compensation under secondary rules may well impact or compromise the realization of normative goals under primary rules.

In a leaked 1991 World Bank memo, then–Chief Economist Lawrence Summers observed that because pollution-related health damages are calculated as lost earnings, economic logic favored relocating "dirty industries" to less developed countries:

> [The measurements of the costs of health impairing pollution depend on the foregone earnings from increased morbidity and mortality. From this point of view, a] given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.[37]

If certain institutional arrangements allow individual victims across different jurisdictions to claim compensation for health impairments caused by violations of international environmental obligations—either directly or through espousal by their home states—thorny questions of compensation may arise. Would the existing secondary rules on reparation, along with the valuation methods endorsed by the ILC and applied in case law, become barriers to a more equitable distribution of harm and risk? The distributive dimension of compensation under the 'full reparation' rule has not been addressed in depth either by states, by the ILC, or by the PCIJ and the ICJ.

As with personal injury, the calculation of financially assessable damage to property interests also involves controversial normative judgments, which are often hidden underneath seemingly neutral and technical

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36 最高人民法院关于修改〈最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释〉的决定 [Supreme People's Court Regarding the amendment of of the Supreme People's Court on the Trial of Personal Injury Compensation: Interpretation on Several Issues Concerning the Application of Law in Cases], Fa Shi [2022] No. 14 (Apr. 24), http://gongbao.court.gov.cn/Details/3b032047d8cb44a89a514777ce6dad.html [https://perma.cc/ZP39-UH38].

37 *See* D. N. PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE 9 (2007).

valuation methods. When calculating property damages, both the ILC and judicial/arbitral bodies tend to frame the question as valuing the 'fair market value' of the asset,[38] and the choice of particular valuation methods is often seen as contingent on the particular factual situation and the type of asset involved.

The ILC observed that "[w]here the property in question or comparable property is freely traded on an open market, value is more readily determined,"[39] which can be calculated based on "market data and the physical properties of the assets."[40] In the meanwhile, the ILC was mindful of the fact that such market data is not always readily available.[41] For "art works or other cultural property" or those that "are not the subject of frequent or recent market transactions," whose valuation might be difficult, the ILC determined that "[t]he preferred approach" was "to examine the assets of the business, making allowance for goodwill and profitability, as appropriate."[42] For businesses of going concern, the ILC noted that "discounted cash flow (DCF) method has gained some favour . . . [and] can . . . be useful in the context of calculating value for compensation purposes."[43] This is especially the case in international investment arbitration since the adoption of the 2001 ILC Articles.[44]

In relation to investment disputes arising from public interests regulation such as fossil fuel phase-out, the exceedingly large damages awards using the DCF method have prompted considerable criticisms and backlash.[45] In response, various proposals have sought to incorporate prospective regulatory action as a form of "country risk" or "political risk" when determining the appropriate discount rate.[46] In the meantime, legal practice largely treated the objective of calculating the "market value" compromised by the wrongful act as a given.

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38 While the "fair market value" formula was initially used mainly in the context of compensation for expropriation, neither the ILC nor international adjudicators clearly distinguished compensation for expropriation and compensation for non-expropriatory damages. *See, e.g.*, YANNICK RADI, RULES AND PRACTICES OF INTERNATIONAL INVESTMENT LAW AND ARBITRATION 459-60 (2020).

39 *Draft Articles with Commentaries*, *supra* note 6, at 103, ¶ 22.

40 *Id.*

41 *See id.*

42 *Id*. at 103, ¶¶ 23-24.

43 *Id.* at 103, ¶ 26.

44 *See* Toni Marzal, *Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS*, 22 J. INT'L INV. & TRADE 249 (2021) (reviewing and critiquing the DCF method in investment arbitration).

45 *See*, *e.g*., Hailes, *supra* note 1; Anatole Boute, *Investor Compensation for Oil and Gas Phase-Out Decisions: Aligning Valuation Methods to Decarbonization*, 23 CLIMATE POL'Y 1087 (2023).

46 *See, e.g.*, Boute, *supra* note 45; Yawen Zheng, *Rethinking the 'Full Reparation' Standard in Energy Investment Arbitration: How to Take Climate Change Into Account*, 27 J. INT'L ECON. L. 509-10 (2024); Markus Burgstaller & Jonathan Ketcheson, *Should Expropriation Risk Be Taken into Account in the Assessment of Damages?*, 32 ICSID REV. 193 (2017).

However, neither "market conditions" nor "fair market value" are value-neutral, objective facts.[47] In many cases, the 'market' itself is nothing more than a fiction. According to the WTO Appellate Body, a "market" refers to "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices."'[48] Such a "market" is conditioned on a sound constitutional order with effective legislative, regulatory, and judicial branches allowing private actors to vindicate their property rights and enter consensual transactions with one another. The objects of property (land, animals, slaves, companies) are historically contingent and subject to continual reconstruction. Likewise, the scope of their legal protection and the terms on which they generate value evolve over time.[49] There is no such thing as the "true" market value of assets free from regulation; the "market" for an asset can be highly contingent on the physical, legal, and social conditions provided by the state, and the bargaining power of property owners is shaped by the state's regulatory authority.[50]

If that is accepted, requiring governments to compensate for every "financially assessable damage" in terms of the "fair market value" of the assets damaged by *any* wrongful act in all circumstances might be not only normatively questionable but empirically inconsistent with the reality of the state-market relationship. In domestic law, as elaborated in Section III.C, the government may owe compensation to private actors, but the way that compensation is assessed is closely intertwined with its broader regulatory authority over the market. The rationale for determining compensation is context-dependent, which differs for contract claims, torts, takings, legislative schemes, and discretionary compensation granted by regulatory bodies. Accordingly, the valuation approach differs considerably across various contexts, not only in terms of the guiding principles and valuation methods, but also regarding the procedures and the allocation of decision-making power.

In international law, on the other hand, the judicial and arbitral practice and examples cited in the 2001 ILC Articles seem to endorse a one-size-fits-all approach focusing on the market value of damaged assets. Despite the persistent debate over calculation methods, there is a remarkable

47 Toni Marzal, *Conjuring Markets: Valuation in Comparative International Economic Law*, 27 J. INT'L ECON. L. 362-63 (2024); Marzal, *Quantum (In)Justice*, *supra* note 44.

48 Appellate Body Report, *United States-Subsidies on Upland Cotton*, ¶ 404, WTO Doc. WT/DS267/AB/R (adopted Mar. 3, 2005) [https://perma.cc/AR22-54NU]; Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.150, WTO Doc. WT/DS436/AB/R (adopted Dec. 8, 2014) [https://perma.cc/9N45-6554].

49 *See* PADDY IRELAND, PROPERTY IN CONTEMPORARY CAPITALISM (2025); KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

50 Sabine Frerichs & Rick James, *Correlated Ownership: Polanyi, Commons, and the Property Continuum*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (Moshe Hrisch & Andrew Lang eds., 2018).

consensus that restoring "market value" is the guiding principle and the main question is how to reach the most reasonable amount. In the meanwhile, as with personal injuries, this is far from a "purely technical" or "value neutral" matter.[51] The next section will illustrate the distortive effect of applications of the "full reparation" rule in investment arbitration.

III. RECONCEPTUALIZING 'PROPERTY' IN INTERNATIONAL INVESTMENT LAW

In international investment law, the concept of protected investments—which typically covers a broad range of assets such as tangible and intangible property, claims to money, intellectual property, enterprise, and shares[52]—is usually undefined. While investors' rights are initially established and defined under the applicable domestic law,[53] international investment law adds another layer of protection. Due to the lack of clear definition of investors' rights[54] and the ambiguous standards of protection in IIAs, such as 'fair and equitable treatment', the entitlements granted to foreign investors were largely developed through investment arbitration jurisprudence. This jurisprudence, often follows a logic of "if value, then

51 *See* Marzel, *supra* note 47.

52 *See, e.g.*, Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. I(1)(a), Aug. 27, 1993, S. Treaty Doc. No. 103-15, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1337/ecuador—-united-states-of-america-bit-1993- [https://perma.cc/MNH9-6RJ6]; Agreement Between the United Arab Emirates and the Republic of India for the Promotion and Protection of Investments, U.A.E.-India, art. 1(1), Dec. 12, 2013 [https://perma.cc/6YQJ-LCMB]; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art 1(1), Sep. 9, 2012, C.T.S. 2014 No. 26 [https://perma.cc/DC6Y-8FJR]; Agreement Between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, Japan-Peru, art. 1(1), Nov. 21, 2008, 2808 U.N.T.S. 23 [https://perma.cc/C6RZ-9CLW]; Cooperation and Investment Promotion Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, art. 1, Dec. 3, 2016 [https://perma.cc/VYU6-BQWN]; United States-Mexico-Canada Agreement, art 14.1, Dec. 10, 2019, Pub. L. No. 116-113, 134 Stat. 11 (2020).

53 *See* Zachary Douglas, *Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 162-64, 197-98 (2003).

54 Despite different conceptions of the legal relationship under IIAs, this article takes the position that a typical IIA grants direct and substantive rights to investors. Under most IIAs, investors can claim against host states for their own benefit, at their own costs, and have full entitlement to the potential damages awarded in their favor. As such, it is artificial to construe IIAs as granting rights exclusively to state parties. For more details on this debate, *see id.*, at 167-68; Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT'L L. 617 (2013). For a different view, *see* Loewen Group, Inc. v. United States of America, ICSID Case No ARB(AF)/98/3, Award, ¶ 233 (June 26, 2003) [https://perma.cc/B4HP-VEGE]; Archer Daniels Midland Company v. Mexico, ICSID AF Case No. ARB/(AF)/04/5, Award, ¶¶ 176-79 (Nov. 21, 2007) [https://perma.cc/CHS2-RVJH]; Anastasios Gourgourinis, *The Nature of Investor's Rights under IIAs: A Comment on Paparinskis' 'Investment Treaty Arbitration and the (New) Law of State Responsibility'*, EJIL: TALK! (Oct. 22, 2013), https://www.ejiltalk.org/the-nature-of-investors-rights-under-investment-treaties-a-comment-on-paparinskis-investment-treaty-arbitration-and-the-new-law-of-state-responsibility/ [https://perma.cc/57WB-CXU9].

rights,"[55] has sometimes diverged from the corresponding legal institutions in domestic legal systems.[56] This has led to an expansion of legal protection of foreign investments at the cost of host states' regulatory discretion and public interests.[57]

International investment law's divergence from basic notions in domestic laws is increasingly seen as a problem. Concerns about its potential distortive impact on domestic legal systems have driven states to reform the substantive rules in IIAs, trying to (re)align international investment law with domestic legal institutions.[58] Against this background, and given the absence of clear definitions of foreign investors' substantive rights in IIAs, there seems to be little justification for adopting an interpretation of investors' rights that is fundamentally distinct from those existing in domestic legal systems. As will be explained below, the right to property not only empower property owners to exclude others: as widely recognized in domestic constitutions and in international human rights law, the right to property also carries public and social functions. In fact, investment arbitral tribunals are increasingly willing to openly acknowledge the need to respect host states' right to regulate for public interests,[59] sometimes making connections between IIA standards and human rights law.[60]

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55 For this description, *see* Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICH. J. INT'L. L. 586 (2015). According to the "Salini test" (which was originally applied to interpret Article 25(1) of the ICSID Convention, but has since been used to define the coverage of "investments" under IIAs), to qualify as a protected "investment," there must be a commitment of resources, assumption of risk, certain duration, and contribution to development. Salini Construttori S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 50-58 (July 23, 2001) [https://perma.cc/7ZDP-QZJ5]. Beyond the ICSID Convention, definitions of similar nature have been adopted in relation to 'investment' in IIAs. *See* Mavluda Sattorova, *Defining Investment under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond*, 2 ASIAN J. INT'. L. 267 (2012).

56 *See, e.g.*, Dreyfuss & Frankel, *supra* note 55; Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L 1 (2019).

57 *See* SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009); Gus Van Harten, *Private Authority and Transnational Governance: The Contours of the International System of Investor Protection*, 12 Rev. INT'L POL. ECON. 600 (2005).

58 *See* Wenhua Shan, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631 (2007); Jan Kleinheisterkamp, *Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions*, 78 MOD. L. REV. 793 (2015).

59 *See, e.g.*, Philip Morris Brands SÀRL v. Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 422 (July 8, 2016) [https://perma.cc/8P39-Z4EY]; Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 272-73, 285 (Jan. 14, 2010) [https://perma.cc/43ZB-9HY9].

60 *See, e.g.*, Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 1193-1210 (Dec. 8, 2016) [https://perma.cc/E4DC-37BF]; Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶¶ 116, 122 (May 29, 2003) [https://perma.cc/HCV7-GXWD]. *See also* Pierre-Marie Dupuy, *Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds., 2009).

In the meantime, remedies in investment arbitration, governed under the general rules of state responsibility, also participate in the shaping of foreign investors' proprietary entitlements under investment treaties. Despite references to the state's "right to regulate" and to human rights obligations at the level of primary rules, arbitral damages—calculated through market-based methods and following "full reparation" standard in the 2001 ILC Articles—ultimately focus almost exclusively on restoring the "market value" of assets to property owners. This approach overshadows the public and social values associated with the assets in question, effectively reconceptualizing the notion of property rights widely recognized in domestic law and human rights law. This impact is evident not only in the amount of damages states are ordered to compensate, but also in the *de facto* constraint or outright denial of host states' decision-making power in vindicating these non-commercial values.

Section III.A introduces the right to property in international human rights law and domestic constitutions, explaining that the commercial value of property to its owners needs to be considered together with its broader social and public functions. As argued in Section III.B, there is no clear legal or policy justification for departing from the basic understandings of 'property' in human rights and domestic laws when interpreting IIAs. Sections III.C and III.D compare the compensation rules and remedies against public authorities in domestic property disputes with the approaches to compensation in investment arbitration, illustrating how the notion of 'property' is reconceptualized through damages awards in investment arbitration, guided by the vaguely defined compensation rule enshrined in the 2001 ILC Articles.

A. Property and its Non-Commercial Values

Institutions of property, which define the relationship between owners and non-owners regarding a resource,[61] reflect the plurality of values cherished by a society. Although negotiations and balances struck over these institutions vary across jurisdictions depending on their legal, political, and social contexts, the public and social dimensions of property are widely recognized.[62] Beyond the financial value of an asset to its owner, other values, such as aggregate welfare, social justice, and solidarity, also shape various legal institutions of property in different contexts. As Dagan points out,

61 *See* Jeremy Waldron, *Property Law*, *in* A COMPANION TO PHILOSOPHY OF LAW & LEGAL THEORY 9 (Dennis Patterson ed., 1996).

62 *See* Shiela R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Law Perspective Introduction*, 80 FORDHAM L. REV. 101 (2011); Gregory S. Alexander, *Reply: The Complex Core of Property*, 94 CORNELL L. REV 1066 (2009).

> Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth . . . imposing the impersonal norms of the market governing the fee simple absolute on these divergent spheres might have effectively erased or marginalized [diverse] spheres of human interaction and human flourishing.[63]

Under international human rights law, property rights are not solely about granting owners the power to exclude others; they also bear significance in realizing the right to adequate housing,[64] public health,[65] and education.[66] This is despite the fact that the social and public dimensions of property rights have not been protected with the same vigor as the financial value of private property for owners.[67]

There is no international consensus on the definition of right to property.[68] Neither the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor the International Covenant on Civil and Political Rights refers to property as a right as such. But the role of property in realizing economic, social, and cultural rights has been recognized. For instance, in the CESCR General Comment No. 26 on access to land, land has been associated with cultural and religious values, right to food, right to adequate housing, right to water, right to health, right to self-determination, and non-discrimination.[69] In General Comment No. 24 on state obligations under the ICESCR in the context of business activities, intellectual property rights were linked to the right to health, right to food, farmers' rights, and indigenous peoples' rights.[70] In 2020, in an 'urgent appeal for a human rights response to the economic recession' emerging from the COVID-19 pandemic issued by the UN Independent Expert on Foreign Debt and Human Rights,[71] it was urged that 'property rights are not absolute and, if

63 *See* Hanoch Dagan, *The Public Dimension of Private Property*, 24 KING'S L. J. 260, 275 (2013).

64 *See* Koldo Casla, *Unpredictable and Damaging? A Human Rights Case for the Proportionality Assessment of Evictions in the Private Rental Sector*, 3 EUR. HUM. RTS. L. REV 253 (2022).

65 *See A Double Dose of Inequality: Pharma Companies and the Covid-19 Vaccine Crisis*, AMNESTY INT'L (Sep. 22, 2021), https://www.amnesty.org/en/documents/pol40/4621/2021/en/ [https://perma.cc/X5GD-VYCA].

66 *See* REALIZING THE ABIDJAN PRINCIPLES ON THE RIGHT TO EDUCATION (F. Adamson, S. Aubry, M. De Koning, & D. Dorsi eds., 2021).

67 *See* Koldo Casla, *The Right to Property Taking Economic, Social, and Cultural Rights Seriously*, 45 HUM. RTS. Q. 171 (2023).

68 *See id.*; JOHANNES MORSINK, ARTICLE BY ARTICLE: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS FOR A NEW CREATION 110 (2022).

69 Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 26: Land and Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GC/26 (Dec. 22, 2022) [https://perma.cc/E44P-W7KT].

70 Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 24: State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, ¶ 24, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [https://perma.cc/BTJ5-7C3W].

71 J.P. Bohoslavsky, *COVID-19: Urgent Appeal for a Human Rights Response to the Economic Recession,* U.N. H.R. SPECIAL PROCEDURES (Apr. 15, 2020),

duly justified, States should be able to take the necessary economic and legal measures to more effectively face the current health crisis.'[72]

Regional human rights regimes – while taking different approaches to the right to property – all recognize its public and social dimensions, apart from the financial value of assets to property owners. For instance, under Article 23 of the 1948 American Declaration of Rights and Duties of Man, the 'right to own … private property' was associated with 'the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'[73] In the jurisprudence of the Inter-American Court of Human Rights, the value of the right to property has been linked to indigenous peoples' cultures, spiritual life, integrity, economic survival, and right to a healthy environment.[74]

Article 14 of African Charter on Human and Peoples' Rights provides 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.'[75] In the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* set out by the African Commission on Human and Peoples' Rights, the right to property imposes obligations on member States to, *inter alia*, 'ensure that members of vulnerable and disadvantaged groups, including indigenous populations/communities who are victims of historical land injustices, have independent access to and use of land and the right to reclaim their ancestral rights, and are adequately compensated for both historical and current destruction or alienation of wealth and resources' and 'prevent unfair exploitation of natural resources by both state and non state national and international actors.'[76] And while states are obligated to compensate for public acquisition of property, they are required to balance private rights against public interests, and 'in certain circumstances public interest may require less than market value compensation or, exceptionally, none at all.'[77]

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https://www.yourhomeworksolutions.com/wp-content/uploads/edd/2020/09/66pgpaper5.pdf [https://perma.cc/M4YE-4UWY].

72 *Id*.

73 American Declaration of the Rights and Duties of Man, art. 23, Oct. 8, 1948, E/CN.4/122/ Rev.1 [https://perma.cc/C2MZ-5HZ2].

74 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001) [https://perma.cc/Y8QE-YY37]; *Indigenous Communities of Lhaka Honhat (Our Land) Ass'n v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶¶ 92-98, 202-54 (Feb. 6, 2020) [https://perma.cc/4BER-5NMZ].

75 African Charter on Human and Peoples' Rights, art. 14, Oct. 21, 1986, 1520 U.N.T.S. 217 [https://perma.cc/SW7L-9ATZ].

76 African Commission on Human and Peoples' Rights, *Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, ¶ 55 (Oct. 24, 2011), https://achpr.au.int/index.php/en/node/871 [https://perma.cc/AD7N-KEQD].

77 *Id*.

For Article 1 of Protocol No. 1 of the European Convention on Human Rights, drafters have debated and consciously decided not to include compensation in the Protocol given the lack of agreement about whether full or even partial compensation should be part of the essential content of the right to property.[78] As declared by the ECtHR, any interference with the right to the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of 'the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[79]

The idea of social and public functions of private property has also been explicitly recognized in national constitutions, which have sometimes been instrumental in justifying social and economic reforms.[80] For instance, article 14 of German Basic Law provides that: 'Property entails obligations. Its use shall also serve the public good.'[81] Article XXIII of the Brazilian Constitution provides that "property shall observe its social function."[82] Article 27 of the Mexican Constitution provides that: "The Nation shall at all time have the right to impose on private property such restrictions as the public interest may demand, as well as to regulate, for social benefit, the use of those natural resources which are susceptible of appropriation, in order to make an equitable distribution of public wealth, to conserve them, to achieve a balanced development of the country and to improve the living conditions of rural and urban population."[83] Even under constitutions without such an express recognition, these values are reflected in legislation or court decisions.[84]

In light of these domestic and international legal authorities, the public and social dimensions of property rights not only *allow* but actually *require* states to take certain measures at the cost of the commercial value of assets to property owners. Such measures often require policy-driven decision-making and balancing exercises that are inherently contextual and granular. As will be discussed in Section III.C, in domestic legal systems, the rules

78 T. Allen, *Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights*, 59 INT'L & COMPAR. L.Q. 1055, 1063-1065 (2010).

79 *Sporrong and Lönnroth v. Sweden*, App. No. 7151/755 Eur. H.R. Rep. 35, ¶ ¶ 69 (1982) [https://perma.cc/MUP5-5ZET].

80 Constitution of Ireland 1937, art 43, https://www.irishstatutebook.ie/eli/cons/en/html [https://perma.cc/CJ39-FSZ9]; GRUNDGESETZ DER BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW), art. 14 (translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html) [https://perma.cc/VJ62-4P8Z]; C.E., B.O.E. n. 311, Dec. 29, 1978, art. 33 (Spain) [https://perma.cc/54EU-BGBP]; Constitución Política de los Estados Unidos Mexicanos, CP, art. 27 [https://perma.cc/UR2Z-R7F8]; Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 [https://perma.cc/73Z9-CLH5].

81 Grundgesetz [GG] [Basic Law], art. 14(2) (translation at http://www.gesetze -im-internet.de/englisch_gg/index.html) [https://perma.cc/QM9B-SVVP].

82 CONSTITUIÇÃO FEDERAL [C.F.] (CONSTITUTION), art. 23 [https://perma.cc/8YML-BV5H]

83 Constitución Política de los Estados Unidos Mexicanos, *supra* note 80, at art. 27.

84 *See, e.g.*, N.M. Davidson, *Sketches for A Hamiltonian Vernacular as a Social Function of* Property, 80 FORDHAM L. REV. 1053, 1066-1069 (2011); Foster & Bonilla, *supra* note 62, at 106-107.

governing remedies for various property-related claims against public authorities have developed various doctrines to accommodate such functions. Even when monetary damages are actually ordered by the judiciary, considerations *beyond* repairing property owner's financial loss come into play. However, as will be explained in Section III.D, the damages jurisprudence in investment arbitration – often available even without exhaustion of local remedies and enforceable under the ICSID Convention or New York Convention – implementing the "full reparation' principle by repairing assets" "market value" undermined by the wrongful act, would leave limited space for accommodating these non-commercial values. This is despite the frequent references to "respect for the right to regulate" when interpreting the primary rules contained in IIAs.[85]

But before comparing the rules on compensation and remedies in domestic and international law, an issue that has been raised and needs to be addressed first is whether the assets owned by foreign investors should be treated differently, due to the investors' "foreignness" to the political and social community of the host state.

B. A Special Case for Foreign Investment?

For some, a relationship of *quid pro quo* exists between foreign investors and host states: in exchange for the benefits brought by foreign investors, host states promise under IIAs not to compromise these investors' financial interests through arbitrary actions even for public interests.[86] In *James and Others v. United Kingdom*, the ECtHR held that the taking of property for legitimate objectives such as economic reform or measures for achieving greater social justice may call for less than reimbursement of the full market value.[87] In the meanwhile, it distinguished that rule from the rule applicable to the taking of assets owned by foreigners because, *inter alia*:

> Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have they been consulted on its adoption. Secondly,

85 *See* AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW 275-298 (2014); YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT (2019).

86 *See* T. Waelde & A. Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMPAR. L.Q. 811, 819-820 (2001).

87 James and Others v. The United Kingdom, App No. 8793/79, 8 Eur. H.R. Rep. 123, ¶ 54 (1986) [https://perma.cc/8DV7-U9EM].

> although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[88]

Legally speaking, it is true that the expropriation rule contained in most IIAs, typically requiring compensating the "fair/genuine market value" of the property taken,[89] differs from what exists in many domestic legal systems and in human rights regimes.[90] That is an outcome of inter-state negotiations driven by political, economic, and pragmatic considerations. Nonetheless, it cannot automatically be employed as a policy reason or extended by analogy for dismissing the social and public dimensions of foreign investors' assets in a host state when deciding non-expropriatory claims under IIAs, unless that is explicitly stipulated in the treaty.

The formalistic argument that compared with nationals, "non-nationals are more vulnerable to domestic legislation" and "generally have played no part in the election or designation of its authors nor have been consulted on its adoption"[91] is of doubtful force in many cases of foreign investment. For instance, in capital- and technology-intensive sectors and in those involving ongoing managerial improvements, foreign investors are likely to hold strong bargaining power vis-à-vis the host state government.[92] While circumstances may vary considerably by industry and by country, empirical works across different regions have shown that foreign investors can have political influence comparable to domestic firms and have been able to derive substantial fiscal and regulatory advantages from such influence.[93] Foreign firms might be treated better than domestic competitors in certain sectors.[94] In some cases, it is the local community who were excluded, receiving neither adequate notice nor meaningful opportunities to participate in decision-making processes concerning investment projects

88 *Id*. at 27, ¶ 63.

89 *See* J.M. COX, EXPROPRIATION IN INVESTMENT TREATY ARBITRATION 295-97 (2019).

90 Matthew C. Porterfield, *State Practice and the (Purported) Obligation Under Customary International Law to Provide Compensation for Regulatory Expropriations,* 37 N.C.J. INT'L L. 159, 171 (2011).

91 *James and Others*, *supra* note 87, ¶ 63.

92 S.J. Kobrin, *Testing the Bargaining Hypothesis in the Manufacturing Sector in Developing Countries*, 41 INT'L ORG. 609, 619-620 (1987).

93 R. Desbordes & J. Vauday, *The Political Influence of Foreign Firms in Developing Countries*, 19 ECON. & POL. 421 (2007); E. Aisbett & C. McAusland, *Firm Characteristics and Influence on Government Rule-Making: Theory and Evidence*, 29 EUR. J. POL. ECON. 214 (2013); JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF INVESTMENT TREATY REGIME 150 (2017).

94 Emma Aisbett, Carol McAusland & Lauge Poulsen, *Relative Treatment of Aliens: How Level Is the Playing Field for Foreign Firms in Developing Countries?*, 23 SOCIO-ECONOMIC REV. 1975 (2025).

that impact their livelihoods, health, and environment.[95] At the same time, some international trade and investment agreements impose obligations on member states to ensure transparency, participation, reason-giving, and review processes.[96] These provisions offer foreign firms direct access to domestic decision-making procedures that may not be available to other interested parties.[97]

More substantively, even if "different considerations may apply to nationals and non-nationals" when it comes to proprietary damages caused by legislative/regulatory measures,[98] this by no means removes the need to consider the public and social dimensions of foreign investors' assets. Reading from the preambles of typical IIAs, contemporary investment treaty regime is premised on the idea that free flow of capital can contribute to the development of capital-importing state. But while multinational corporations' commercial interests and a host state's public interests are usually deeply intertwined, they are often not aligned and their tension has been characterized as "structurally inherent."[99] For multinationals, decisions on their subsidiaries' operation are usually driven by their overall business strategies, taking into account factors such as the supply and demands within its supply chain, fluctuations in international market, and strategies of tax avoidance.[100] Depending on the industry in question, its characteristics of production, and the multinational's role in the host state's economy, these commercial interests may—and often do—clash with the capital-importing state's policies in employment, income growth, and industrialization.[101] In the meanwhile, the profits of multinationals, either through its global supply chain or by trading with local or foreign firms or consumers, can be heavily dependent on their access to land, natural resources, labor, and other factors of production in the host state. In this context, the fact that the business decisions by foreign investors serve interests external to the host state does not mean that, as implied by the ECtHR, morally speaking and/or as a matter of policy they are necessarily less justified to "bear a burden in the public interest" of the host state.

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95 Patrick Wieland, *Why the Amicus Curia Institution Is Ill-Suited to Address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention,* 3 TRADE, L. & DEV. 334 (2011).

96 P. Mertenskötter & R.B. Stewart, *Remote Control: TPP's Administrative Law Requirements as Megaregulation*, *in* MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP 387-388, 404-407 (B. Kingsbury ed., 2019).

97 *See e.g.*, *TPP Text Analysis: The Environment Chapter Fails to Protect the Environment*, SIERRA CLUB (Oct. 29, 2015), https://www.sierraclub.org/sites/default/files/uploads-wysiwig/TPPanalysis.pdf [https://perma.cc/NP9M-PR6C].

98 *James and Others*, *supra* note 87, ¶ 63.

99 N. Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, *in* VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 164 (R.B. Lillich ed., 1987).

100 *Id.*

101 *Id.* at 157-165.

Furthermore, as recognized in the constitution or legislation of some jurisdictions on compensation for taking, consideration must be given to the extent to which the value of a property is the product of public investment or natural conditions instead of contribution by the property owner.[102] For instance, a property owner may not be entitled to the increased value of land arising from infrastructure development or state subsidies.[103] Similarly, a public utility enterprise may not claim the profits derived from its monopoly pricing position in the state. As a matter of principle, there is no obvious reason why such considerations do not apply to foreign capital. Whether a special legal requirement—such as full compensation for expropriation - has been explicitly agreed upon by IIA parties is a separate question.

The argument that foreign investors are less justified to bear sacrifices for local public interests carries a striking irony, especially when viewed against the backdrop of the history of colonization and its lasting distributive impacts across continents. As noted by Girvan, the narrow framing of the question of compensation—focused solely on the expropriation of foreign property by newly independent states, while those states remain unable to claim reparations for the harms of colonization and extraction—results from the prevailing balance of power and is driven by political and economic expedience.[104] In this context, while a special case was made for cases of expropriation for pragmatic reasons, there is no legal or moral basis for extending that approach, as a matter of principle, to other IIA provisions. Unless IIAs explicitly define "investments" in terms that depart fundamentally from domestic understandings, there is no reason to presume that the public and social dimensions of property, widely recognized in domestic constitutions and international human rights law, are removed for the purposes of foreign investment protection just because of the "foreignness" of an investor.

This raises the question of whether the non-commercial values of assets owned by foreign investors can be adequately accommodated by compensation decisions narrowly aimed at repairing the lost "market value" of foreign investors' assets. In investment arbitration literature, it has been suggested that "regulatory risks" can be factored into the discount rate when assessing the market value of investors' assets affected by a host state's internationally wrongful act.[105] However, as the next two sections will explain, domestic legal systems regulate compensation in disputes between property owners and state authorities based on considerations that extend

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102 *See, e.g.,* S. AFR. CONST., 1996, § 25(3)(d) [https://perma.cc/BA2Y-HF6J]; Allen, *supra* note 78, at 1061-63, 1066; D. Kleyn, *The Constitutional Protection of Property: A Comparison Between the German and South African Approach*, 11 S. AFR. PUB. L. 402, 443-44 (1996).

103 *See* United States v. Fuller, 409 U.S. 488 (1973).

104 Girvan, *supra* note 99, at 156-57.

105 *See supra* note 45, *and all accompanying text*.

beyond repairing property owner's financial loss. These broader considerations often cannot be adequately captured by the market-referenced valuation methods used by investment arbitral tribunals in awarding damages.

C. Decision-Making Over Property And Remedies Against Public Authorities: A Comparative Study

Institutions of property are shaped by a range of commercial and non-commercial values that often interact or conflict with one another, and cannot be reduced to a single, uniform standard.[106] The weight and relevance of these values depend on the character of the asset, the social relationships it supports, and the context they are embedded in. Decisions about how property is used and how benefits are distributed therefore require pragmatic, context-specific political and policy choices, defying the one-size-fits-all valuation. Thus, in domestic legal systems, decisions pertaining to the content of property rights and the extent to which they are limited for public purposes are primarily made through legislative or administrative decision-making, while courts tend to refrain from interfering with these decision-making processes by assigning a standardized "market price" through monetary remedies. This is reflected not only in the determination of the compensation amounts for expropriation but also in the various doctrines limiting tort liability of public authorities. Where state intervention serves public or social goals, remedies usually take into account factors more than just the market value lost by the property owner.

1. Compensation for Expropriation in Domestic Legal Systems

In domestic legal systems, although compensation is normally required in the expropriation of private property, judicial deference to the amount of compensation decided by the legislature or the executive often stems from the latter's mandate in regulating the use or exploitation of an asset. In certain cases, judicializing compensation and legalizing the required amount might be seen as impairing democratic channels for seeking changes or foreclosing a political outcome.[107] A brief comparative survey of domestic legal approaches to compensation in both direct and indirect takings, presented below, reveals the normative decisions displaced by the 'fair market value' requirement in international law. While compensation for expropriation is now governed by primary rules of international

106 *See* Gregory S. Alexander, *Pluralism and Property,* 80 FORDHAM L. REV. 1017, 1043-45 (2011); Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, *in* INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (R. Chang ed., 1998).

107 CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 145, 152 (1993).

investment law as opposed to secondary rules of state responsibility, the methods for assessing "fair market value" applied in (both lawful and unlawful) expropriation cases were used by the ILC to illustrate the valuation methods in the application of the compensation rule in the law of state responsibility.[108] As will be discussed later, some of the issues in the context of expropriation extend to compensation under secondary rules.

In some constitutional systems, it is the legislature, rather than the judiciary, which holds the authority to determine compensation. For instance, article 14 of the German Basic Law authorizes the legislature to not only define "the content and limits" of property rights, but to determine "the nature and extent of compensation" by "establishing an equitable balance between the public interest and the interests of those affected."[109] Although judicial oversight is available, proportionality-based judicial review defers to the legislature's discretion in defining property rights and fixing the form and the amount of compensation.[110] In Australia, the Constitution also leaves decisions on the amount of compensation and the way in which it is measured to the discretion of the legislature. In the meantime, the judiciary retains the power to strike down decisions as unconstitutional if the compensation falls short of "just terms".[111]The approach in both jurisdictions gives the legislature considerable leeway in balancing different values and considerations in the use or exploitation of an asset or resource.

Conversely, the South African Constitution gives the ultimate authority overcompensation for expropriation to the judiciary: "the amount of [compensation] and the time and manner of payment [shall be either] agreed to by those affected or decided or approved by a court."[112] But when determining the amount of compensation, market value of the asset taken is not the only relevant factor. Other factors stipulated in the constitution include "the history of the acquisition and use of the property," "the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property" and 'the purpose of the expropriation."[113]

The Takings Clause in the U.S. Constitution requires "just compensation," without prescribing the manner and procedure for its

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108 *Draft Articles with Commentaries*, *supra* note 6, art. 36, ¶¶ 22-34.

109 Grundgesetz, *supra* note 81, at art. 14(1)-(3).

110 Gregory S. Alexander, *Property as A Fundamental Constitutional Right? The German Example,* 88 CORNELL L. REV. 733 (2003).

111 *Australian Constitution* § 51 (xxxi) [https://perma.cc/79AY-FN94]; *Attorney-General v. De Keyser's Royal Hotel*, [1920] AC 508 (HL) 542 [https://perma.cc/YDV5-KCYF]; *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocat*e, [1965] AC 75 (HL) 75-76 [https://perma.cc/YG6G-RLQZ]; *Jenkins v. Commonwealth*, [1947] H.C.A. 41, 74 C.L.R. 400, 404 (1947) [https://perma.cc/4RCN-F8S4].

112 S. AFR. CONST., 1996, *supra* note 102, § 25(2)(b).

113 *Id.* § 25(3).

implementation.[114] Legal development in this area has evolved through the interactions between the legislature and the judiciary.[115] In cases of acquisition by condemnation, the amount of "just compensation" is normally determined by courts at the federal level.[116] For "just compensation" in regulatory taking, on the other hand, deference is often preserved for the legislature and the executive, as the asset in question might not be freely tradeable or the "market" in which the value of an asset can be assessed is contingent on the exercise of discretion by the relevant authority.[117]

In areas where the value of an investor's asset is heavily dependent on public regulation, the determination of compensation is inherently connected to the relevant authority's regulatory mandate. One example is rate regulation for utilities, which might constitute a taking if the rate is set so low as to be confiscatory.[118] At the same time, there is no "regulation-free" profit for utilities enterprises, whose "fair market value" inevitably depends on the regulation enacted by the authorities responsible for regulating market competition and allocating costs between investors and the general public. In the jurisprudence of the U.S. Supreme Court, the existence of a taking depends on the effect of the regulation on the investor's rate of return relative to the risks involved in the kind of business in question.[119] As held in *Duquesne*, what mattered was whether the rate regulation "jeopardiz[ed] the financial integrity of the companies" or whether the permitted rates were "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme."[120] In such cases, even when a taking does occur, the "market value" of the asset immediately before the taking cannot serve as a compensation benchmark, as it is in itself an outcome of regulatory powers.

In the context of social reform or economic restructuring, the blanket solution of "market value" often proves politically and economically infeasible. In the post-communist reforms conducted by East European states after independence from the former USSR, below-market-value

114 U.S. CONST., amend. V ("[N]or shall private property be taken for public use, without just compensation.").

115 *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law,* 52 VAND L. REV. 57 (1999); Christopher A. Bauer, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 B.Y.U. L. REV. 265 (2003).

116 40 U.S.C. §§ 3113-14.

117 Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause,* 96 NOTRE DAME L. REV. 1421 (2021).

118 Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 597 (1896).

119 Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 315 (1989).

120 *Duquesne Light Co.*, 488 U.S. at 312.

compensation was often mandated by statutes or executive decisions to facilitate economic restructuring and/or to redistribute morally questionable titles under previous regime.[121] In the South African land reform aiming to address historical injustice and advance equality and social cohesion, the market-based approach prevailing in practice was seen as an important obstacle.[122] In the Green Paper on Land Reform by Department of Rural Development and Land Reform published in 2011,[123] the lack of clear legislative guidance for land valuation and the willing-buyer willing-seller model that is often used in practice were identified as a major problem.[124]

From rate regulation to economic restructuring and land reform, disputes over the value of relevant assets can be complex and polycentric, involving many affected parties.[125] In many such cases, there is no single, universally fixed formula for determining the "true value" of an asset in a regulation-free market that its owner can assert as legally protected against all external forces.

On the international plane, compensation for the nationalization of enterprises or concessions held by multinational corporations in developing countries was a highly contentious issue between developed and developing states during the 20th century. Before this matter became legalized or "depoliticalized" through the adoption of the "full compensation for expropriation" provision in bilateral investment treaties (BITs) from the late 20th century onwards,[126] context-specific policy arguments – e.g. unjust profit of multinationals during the colonial era or under previous regime, whether the profit comes from rent or investors' productive input, unfair treatment of labor forces, and the practice of transfer pricing for tax avoidance – were frequently raised in debates and inter-state negotiations over the amount of compensation.[127]

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121 Tom Allen, *Restitution and Transitional Justice in the European Court of Human Rights,* 13 COLUM. J. EUR. L. 1 (2006).

122 *See* Edward Lahiff, *'Willing Buyer, Willing Seller': South Africa's Failed Experiment in Market-Led Agrarian Reform*, *in* MARKET-LED AGRARIAN REFORM (S. Borras Jr., C. Kay, E. Lahiff eds., 2008).

123 *Green Paper on Land Reform*, DEP'T OF RURAL DEV'T & LAND REFORM (Sep. 19, 2011) https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf [https://perma.cc/EP4A-LMP3].

124 *Id.* ¶¶ 5(a), 6.6.1.

125 According to Fuller, such type of disputes are ill-suited for resolution through adjudication in an adversarial context, as such resolution could implicate other policy areas, interests, and parties unrepresented in the judicial proceedings. Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978).

126 *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 525-572 (5th ed. 2021).

127 Maarten H. Muller, *Compensation for Nationalization: A North-South Dialogue,* 19 COLUM. J. TRANSNAT'L L. 35 (1981); Girvan, *supra* note 99; KENNECOTT COOPER CORP., EXPROPRIATION OF EL TENIENTE, THE WORLD'S LARGEST UNDERGROUND COPPER MINE (1972); JOHN E. HUETA, *Peruvian Nationalization and the Peruvian- American Compensation Agreements,* 10 N.Y.U. J. INT'L L. & POL. 1 (1977).

With the advent of BITs, expropriation clauses significantly narrowed the scope for considering social and public values in legal analysis, marking a departure from the approaches adopted in domestic laws. This reflects an explicit choice by state parties to these treaties. The requirement of "full compensation for the fair market value of the expropriated property" might, in some cases, erase the social and public values tied to IIA-protected foreign investments, anchoring them in a fictional "free market" where considerations such as social justice, community welfare, and national development policies are largely disregarded.

2. Primacy of Non-Pecuniary Remedies And Constraints On Tort Damages Against Public Authorities

Besides expropriation, vague and abstract standards in IIAs, such as 'fair and equitable treatment' and "full protection and security," have enabled actions that resemble contract, tort, or public law claims. These claims can stem from a wide range of disputes, including arbitrariness in judicial or administrative procedures, radical change to regulatory framework, destruction of physical assets in armed conflicts, and failures to protect private enterprises from violence by non-state actors.[128] Unlike expropriation, where remedies are typically specified in IIAs, breaches of non-expropriatory provisions usually lack treaty-defined remedies. A comparison with domestic legal approaches will show that compensation decisions for these claims in international law—determined by arbitral tribunals applying the general rules under the 2001 ILC Articles—leave limited room for accommodating the non-commercial values associated with investors' assets.

In domestic legal systems, various types of remedies are available against public authorities when they infringe upon the proprietary interests of private parties, depending on, *inter alia*, the nature of public act, the identity of its author, and the rights or interest infringed.[129] Judicial remedies may include quashing orders, injunctions, mandatory orders, declarations, and damages.[130] Other non-judicial remedies may also be available, such as *ex gratia* payments made by the executive, statutory compensation schemes, and recommendations by ombudsmen.[131] While compensating the affected party is certainly a factor influencing the form and content of the remedy,

128 RUDOLPH DOLZER, URSULA KRIEBAUM & CHRISTOPH S.C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 186-295 (3d ed. 2022); CHIN L. LIM, JEAN HO, & MARTINS PAPARINSKIS, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS 330-366 (2d ed. 2021).

129 *See* Peter Cane, *Damages in Public Law,* 9 OTAGO L. REV. 489 (1999).

130 See PAUL CRAIG, ADMINISTRATIVE LAW, ch. 26, 30 (9th ed. 2021).

131 *Administrative Redress: Public Bodies and the Citizen*, THE LAW COMM'N NO. 322 at 39-63 (May 25, 2010), https://assets.publishing.service.gov.uk/media/5a7c04f4e5274a7318b90896/0006.pdf [https://perma.cc/C2QD-TDZH].

other factors, such as the separation of powers, accountability of public body, and potential financial and social costs are also important considerations.[132] The latter considerations account for the limitations and various control mechanisms governing damages liability of public authorities in certain jurisdictions.[133] In many domestic legal systems, a finding of illegality in public law does not automatically result in damages liability in tort, with non-monetary remedies serving as the primary means of redressing wrongful acts.

Indeed, it is required in many jurisdictions that a right holder needs to seek primary remedies (such as injunctive relief and declaratory order) before claiming damages. For instance, in German law, to make a successful tort claim against the state, the claimant must have exhausted all reasonable possible procedural remedies, including appeal to the administration itself and administrative court proceedings, within the prescribed time limits.[134] Similarly, in Austrian law, claims for damages can only be made where the injured person has exhausted other remedies such as filling a complaint before administrative courts, and failure to make use of available procedures can be regarded as evidence of contributory negligence.[135] The same is true of several East and Southeast Asian states.[136]

In many cases, public law remedies can leave considerable flexibility and discretion for public authorities to decide how to comply with the order, which sometimes involves negotiation, informal dialogue, and *ex parte* communication.[137] While courts may specify decisions that authorities cannot make, they often refrain from prescribing the exact course of action that must be taken.[138] A quashing order or an injunction might nullify an existing decision but still leave the authority with the discretion to reconsider and remake it.

In cases of frustration of procedural legitimate expectations, for instance, the decision might be annulled, and its author can be ordered to remake the decision following the required procedures, taking into account

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132 Cane, *supra* note 129.

133 DUNCAN FAIRGIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY 2 (Oxford Univ. Pres 2003); KEN OLIPHANT, THE LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 2 (2017).

134 BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] § 839(3) (Ger.) [https://perma.cc/4CRK-A4XE]; Ulrich Magnus, *'Germany'*, *in* THE LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 183, 186, (K. Oliphant ed., 2017).

135 Helmut Koziol & Klaus Vogel, *Liability for Damages Caused by Others Under Austrian Law*, *in* UNIFICATION OF TORT LAW: LIABILITY FOR DAMAGES CAUSED BY OTHERS 30 (J. Spier ed., 2003); *see also* Irmgard Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 398 (S.W. Schill ed., 2010).

136 YONG ZHANG, COMPARATIVE STUDIES ON GOVERNMENTAL LIABILITY IN EAST AND SOUTHEAST ASIA (1999).

137 Cane, *supra* note 129, at 493-94.

138 *Id. at* 494.

legitimate expectations of affected parties.[139] Where the object of legitimate expectations is *ultra vires*, such as granting planning permission beyond the statutory power, those expectations might not be enforceable[140] and monetary remedy might be precluded as it is unauthorized by statute.[141] In the jurisprudence of English law, which took into account the requirements under Article 1, Protocol No. 1 of the ECHR, although legitimate expectations cannot entitle a party to something *ultra vires*, they might be able to obtain an alternative relief which is within the powers of the public body, e.g., benevolent exercise of discretion available.[142] In these examples, the non-monetary remedies leave considerable leeway to public bodies in bringing their decisions into line with the legal requirements. Another reason for the aversion to damages liability is that it might create an excessive burden, not only through the financial obligation of paying damages but also by exposing public bodies to a potentially large volume of lawsuits, which could have a chilling effect on their performance of public duties.[143]

For similar reasons, in civil suits, public authorities are often not held to the same standard as private parties. Domestic jurisdictions have introduced additional requirements – such as the degree of fault, the severity of the illegality, the foreseeability of harm, and the scope of statutory duties – to limit the exposure of governments and their officials to tort liability.

In English law, liability for damages against public bodies arises only if the requirements of a specific head of tort are fulfilled. The tort of breach of statutory duty requires that the statute must be intended to confer a right to claim for damages on a limited class of individuals.[144] For instance, a statutory scheme of social welfare is usually treated as enacted for the benefit of the general public rather than a specific group of individuals, and as such is unlikely to be interpreted as creating a right to claim for damages for a specific group.[145] In negligence, liability depends on establishing the

139 *See* Att'y Gen. of Hong Kong v. Ng Yuen Shiu, [1983] 2 A.C. 629 (PC) [https://perma.cc/KL6Y-YXN4]; SOREN SCHØBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 42-45 (2000).

140 Christopher Forsyth, *Legitimate Expectations Revisited*, 16 JUD. REV. 429, 435 (2011). For Hong Kong law, *see* Yook Tong Elec. Co. Ltd. v. Comm'r for Transp., [2003] H.K.C.U. 135, H.C.A.L. 94/2002 ¶ 45 [https://perma.cc/4FCD-BEAR]; Julien Chaisse & Sum-yu R. Ng, *The Doctrine of Legitimate Expectations: International Law, Common Law and Lessons for Hong Kong,* 48 H.K.L.J. 79, 95-96 (2018).

141 Office of Personnel Management v. Richmond, 496 U.S. 414, 423 (1990); Dorit R. Reiss, *Relying on Government in Comparison: What Can the United States Learn from Abroad in Relation to Administrative Estoppel*, 38 HASTINGS INT'L L. & COMP. L. REV. 75 (2015).

142 Rowland v. Environmental Agency, [2003] ECWA (Civ.) 1885 [¶ 85], [2004] 3 W.L.R. 249 (citing Pine Valley Devs. Ltd v. Ireland, ECHR Application No. 12742/87 (1992)) [https://perma.cc/M9H8-AQVB].

143 FAIRGIEVE, *supra* note 133, at 130-135; Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982).

144 WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 781 (2004); FAIRGIEVE, *supra* note 133, at 185-86.

145 FAIRGIEVE, *supra* note 133, at 39; SCHØBERG, *supra* note 139, at 185.

existence and breach of a duty of care. Although public authorities are subject to ordinary principles of negligence and do not benefit from special exclusions from liability, courts may take public policy considerations into account where existing precedent does not clearly resolve whether a duty of care arises in a novel situation.[146] Meanwhile, public law duties do not generally give rise to private law duties of care in the absence of special circumstances, such as an assumption of responsibility.[147] Statutory immunities may also limit or exclude tort liability for certain actions of public bodies.[148]

Similarly, in German law, while a breach of public duty may lead to state liability,[149] the public duty must have the aim of protecting specific persons from certain damages or disadvantages for a liability to arise.[150] Thus, for instance, while the public body supervising the safety of cars may be liable if an overlooked defect causes personal injury in a car accident, it is not liable for the economic loss when the injured party resells the car and does not get the full price, as the latter is not covered by the specific duty.[151] Such legal tests require something *more than* a factual analysis of the causal link between the wrongful act and the injury suffered.

In EU law, for liability in damages to arise, the law must confer rights on individuals, and the content of these rights must be apparent.[152] Also, illegality does not necessarily cause liability, and a "sufficiently flagrant violation of a superior rule of law for the protection of the individual" is required for damages claim to succeed.[153] When determining whether a breach is serious enough, relevant factors include the clarity and precision of the rule which had been breached, whether the breach was intentional, and whether it was excusable or not.[154] In French law, although there is a parity between public law illegality and administrative fault and fault generally leads to liability, *faute lourde* (gross fault) is required in certain circumstances.[155]

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146 *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4, 25-29, 34-42 (Eng.) [https://perma.cc/6GRJ-FBTD].

147 *Brooks v. Com*m'r *of Police of the Metropolis* [2005] UKHL 24 (Eng.) [https://perma.cc/2E43-GXF9].

148 *See, e.g.,* Financial Services & Markets Act 2000, sch. 1ZA ¶ 25 (Eng.) [https://perma.cc/AZ6X-33SM] & sch. 1ZB ¶ 33 (Eng.) [https://perma.cc/BU7D-8Z9L]; Postal Services Act 2000, § 90 (Eng.) [https://perma.cc/3VDB-TCB9].

149 BGB § 839 (Ger.); Grundgesetz, *supra* note 81, art. 34.

150 Magnus, *supra* note 134, at 185; Marboe, *supra* note 135, at 389.

151 *See* Magnus, *supra* note 134, at 185.

152 Case C-6/90 & C-9/90, Andrea Francovich and Danila Bonifaci and Others v. Rep. of Italy, 1991 E.C.R. I-5357, 2 C.M.L.R. 66, 84 ¶ 40 (1993) [https://perma.cc/7YC6-UTJB].

153 Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities, 1971 E.C.R 975, ¶ 11 (E.U.) [https://perma.cc/AMS6-4Q7E].

154 FAIRGIEVE, *supra* note 133, at 32; PAUL CRAIG & GRAINNE DE BÚRCA, E.U. LAW: TEXT, CASES AND MATERIALS, ch. 12 (1998).

155 FAIRGIEVE, *supra* note 133, at 113-20.

In the U.S. law, the federal government enjoys the "discretionary function immunity" from civil liability where a federal employee's allegedly wrongful conduct was discretionary and influenced by policy considerations.[156] As explained by the Supreme Court, this is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[157]

Regarding civil claims for breach of the Constitution, injunctive relief, as opposed to liability in tort, has been "long recognized as the proper means for preventing entities from acting unconstitutionally,"[158] especially as the burden of tort litigation may prevent officials from properly discharging their duties[159], and it may require courts to interfere with the policy choices by the public body.[160] Decisions on the availability of constitutional tort liability against the government and its officials requires balancing between the need to compensate the affected party and deter constitutional violations on the one hand, and the consequent burdens and costs on the government, as well as their impact on governmental operations systemwide, on the other.[161]According to the Supreme Court, such decisions are ones for Congress to make.[162]

Despite the diverse approaches across these jurisdictions, what they have in common is that when proprietary damage is caused by actions of public bodies performing public duties, the form, procedure, and substance of remedies are shaped by a multiplicity of considerations. Context-specific analysis is often necessary, and repairing the "lost market value" of the affected party's asset is rarely the sole relevant factor. This is reflected both in the judicial deference to decisions on compensation for expropriation and in the various doctrines and mechanisms to limit or prevent tort damages against public authorities. In both cases, special rules were devised to preserve the autonomy and discretion of public authorities in making policy and/or political decisions with distributive impact on the community at large. This aligns with the understanding that, as discussed in Section III.A, the legal institutions of property not only protect the commercial value of assets for their owners but also serve broader public and social functions. Realizing the public and social functions of property requires a special position for public authorities when their wrongful acts cause property

156 Federal Tort Claims Act, 28 U.S.C. § 2680; Berkovitz v. United States, 486 U.S. 531 (1988).

157 United States v. Varig Airlines, 467 U.S. 797, 814 (1984).

158 Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 74 (2001); *see also* Ziglar v. Abbasi, 582 U.S. 120 (2017).

159 Cheney v. United States Dist. Ct. for D.C., 542 U.S. 367, 382 (2004).

160 Clinton v. Jones, 520 U.S. 681, 701 (1997).

161 Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts,* 107 CALIF. L. REV. 933, 953 (2019).

162 *Ziglar,* 582 U.S. at 135.

damages. In many cases, treating a public body as equivalent to a private respondent in civil suits—and requiring it to pay compensation sufficient to recover the diminished pre-regulation market value of the asset—would practically deny both the special functions of the public body and the public and social values associated with the asset. As explained in the next section, damages awards in investment arbitration often fail to capture the nuances, deference, and complex normative considerations recognized in domestic legal systems.

D. Reconceptualizing Property By Remedies in Investment Arbitration

As outlined in Section II, in the absence of clear guidance from states, crucial normative decisions were left to those charged with applying the abstract "full reparation" rule, and the systemic consequences of this remain largely unaddressed by states or the ILC. As explained below, arbitral tribunals in international investment law are often tasked with determining compensation. In doing so, they inevitably enter the terrain of decision-making on value-laden and politically charged issues pertaining to the distribution of benefits from the use or exploitation of a resource or asset – issues that domestic courts often refrain from deciding. By applying market-based calculation methods aimed at "full reparation" for a state's breach of investment treaty obligations, investment arbitral tribunals often effectively strip an asset or resource of its social and public values. *Policy* decisions over social and distributive issues have been displaced by *profitability forecasts* in hypothetical no-breach scenarios, often developed by arbitrators with the help of accounting experts and investment consultancy firms.[163]

In response to the concern that arbitral awards may circumscribe regulatory space in host states, commentators have proposed incorporating broader policy considerations into the hypothetical profitability assessments. This would involve factoring in elements such as "political risks," "country risks," or price forecasts.[164] However, the logic, objective, and the evidence relied on in these forecasts are fundamentally distinct from those of the decision-making aiming to achieve various policy goals such as equal distribution or environmental protection. For instance, in a land reform designed to rectify historical injustice, existing market-related data can provide little guidance on how redistribution *should be*. As shown in the following examples arising from states' refusal to grant licenses or permits, as well as adjudgments to the feed-in tariff regimes supporting

163 The approach of matching public law claims with private law remedies has been criticized in the literature. *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 166-67 (2008).

164 *See supra* note 46, *and all accompanying text*.

renewable energy, the damages awards often focus narrowly on recovering the diminished market value of investors' assets. In doing so, they tend to prioritize investors' financial interests over broader societal and public policy considerations. In these cases, finding treaty breaches in host states' legislative or regulatory actions is one thing; allowing investment arbitral tribunals to remake states' policy decisions through methods with the sole purpose of recovering an asset's market value is quite another. While the procedures and institutional settings of investment arbitration are certainly crucial in shaping these decisions—which fall beyond the scope of this article—the vague and open-ended compensation rule as well as the prevailing approaches for its application are also crucial to this transformation.

In investment arbitration, where procedural flaws in the denial of permits or licenses give rise to violations of investment treaty obligations, tribunals have undertaken factual inquiries aimed at constructing "but-for" counterfactuals without the wrongful act. This took place in *Lemire v Ukraine*, where the claimant's company, Gala Radio, was denied multiple radio frequency licenses, which the tribunal found to be discriminatory and arbitrary, constituting a breach of the fair and equitable treatment (FET) standard under the U.S.-Ukraine BIT.[165] To determine the amount of compensation necessary to achieve "full reparation," the majority of the tribunal estimated the likelihood that Gala Radio would have been awarded the frequencies in hypothetical tender processes absent the state's treaty violations.[166] It then applied the DCF method to determine the claimant's foregone profits.[167] In making these decisions, the majority relied primarily on the business plans and business records of Gala Radio supplied by the claimant during the proceedings. After reviewing these materials, the majority were convinced that Gala was more qualified than other known bidders, should have won in the hypothetical tender processes, and would have been able to successfully operate the relevant radio channels.[168]

Dissenting arbitrator Jürgen Voss strongly opposed this fact-focused approach, emphasizing that procedural safeguards in tender processes are designed to ensure fair competition, not to secure individual profitability. He stressed that the economics of tendering involve balancing the chance of success against the risk of loss, and that legal protections enhance this risk-return ratio without entitling applicants to compensation for lost profits.[169] Allowing recovery of lost profits based on procedural flaws could open the

165 Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (28 Mar. 2011) [https://perma.cc/49SR-UXWD].

166 *Id.* ¶ 169.

167 *Id.* ¶¶ 243-98.

168 *Id.* ¶¶ 173-208.

169 *Id.* at 80, nn. 313-17 (Jürgen Voss, Arb., dissenting).

floodgates for claims by unsuccessful applicants, creating the risk of "incalculable liability avalanches."[170]

Arbitrator Voss highlighted that the EU law prohibits recovery of lost profits in public tenders, permitting compensation for *actual losses* only if it is reasonably certain the applicant would have won but for the violation.[171] In German law, lost profits are recoverable only if the claimant proves the authority had no lawful alternative but to award them the contract. Otherwise, profits remain unrecoverable where rejection is legally discretionary.[172]

He also criticized the majority's damages calculation as a "perfunctory summary assessment" based on the claimant's business expansion plans.[173] In particular, the majority's estimation of lost profits benchmarking Gala's hypothetical performance against Ukraine's top four radio companies—which inflated Gala's enterprise value by seventy times—was deemed by arbitrator Voss as an "audacious speculation."[174] In fact, awarding radio frequencies often involves policy judgments on factors like cultural values, market competition, technological efficiency, and even national security.[175] It is doubtful that the tribunal's composition, expertise, and available evidence would enable it to competently make such decisions.[176]

In *Rockhopper v. Italy*, Italy's ban on oil and gas exploration and production within 12 miles of the coastline was found to constitute an unlawful expropriation under the Energy Charter Treaty.[177] While reaching this decision, the tribunal repeatedly emphasized that it was not passing judgment on the legitimacy of the contested measures, nor was it contesting Italy's sovereign right to adopt the drilling ban.[178] Notably, it declared that it "has sought to assiduously refrain from any form of 'legislating' by its reasoning and final decision."[179]

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170 *Id.*

171 *Id*. at xii-xiii, ¶¶ 274-78.

172 *Id*. ¶¶ 279-84.

173 *Id*. at xii.

174 *Id*. at xii-xiii.

175 This is reflected in the debate surrounding India's invocation of 'security exceptions' in relation to the allocation of electromagnetic spectrum in *CC/Devas (Mauritius) Ltd. et al v. India* and *Deutsche Telekom AG v. India*. *See* CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Rep. of India (I), PCA Case No. 2013-09, Award on Jurisdiction and Merits (July 25, 2016) ¶¶ 296-374 [https://perma.cc/Q96K-3M5X]; Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017) ¶¶ 240-291 [https://perma.cc/8CY2-J68C].

176 *Id.* ¶¶ 302-09 (Given that the tender has not actually taken place, there is no information about the conditions of competitors.).

177 Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, Award, ¶¶ 137-45 (Aug. 23, 2022) [https://perma.cc/Y85K-LWUY].

178 *Id.* ¶¶ 6, 10.

179 *Id.* ¶ 11.

However, when calculating damages following the "full reparation" formula under general international law, the tribunal essentially remade these policy decisions by restoring the claimant's lost income as if the drilling ban had not occurred. Rejecting the sunk-costs model, it adopted the DCF model, as the project was at a "more advanced stage."[180] In particular, the tribunal relied on the valuation derived from an earlier DCF model used by the claimant during its acquisition of MOG, the enterprise in question.[181] The tribunal found this method preferable to other alternatives proposed by the parties, noting that "the competing interests surrounding its creation serve as a balance that the rival valuations in this arbitration largely lack" – while Rockhopper had to convince its shareholders that the MOG acquisition was a sound decision, it also had to avoid inflating the acquisition price.[182]

As in *Lemire*, the *Rockhopper* tribunal based its compensation assessment primarily on the investor's business plan and business records, with minimal, if any, consideration of the non-commercial interests and values associated with the project. As arbitrator Pierre-Marie Dupuy pointed out, the project was located "in an area not devoid of seismic dangers [and granting the permit] could very legitimately give rise, as it actually did, to the concern and even the manifest disapproval of a large part of the local population."[183]

In *Tethyan Copper v. Pakistan*, Pakistan was found to have violated the FET standard and the expropriation clause by its local government's denial of the mining license.[184] The tribunal awarded $4.1 billion plus interest, using the DCF method based on a series of hypothetical scenarios, such as Pakistan agreeing to a mining agreement, granting special tax and royalty terms, issuing land permits, as well as favorable environmental and security conditions.[185] The tribunal placed significant weight on the claimant's feasibility study and its backing by two world-leading mining companies, viewing this as evidence of the project's profitability.[186] Despite Pakistan's legal discretion to reject such terms, the tribunal assumed it would have acted in the project's interest, concluding that the 30-year license would likely have been renewed with favorable tax and royalty terms.[187] A 25%

180 *Id.* ¶ 280.

181 *Id.* ¶¶ 284-286.

182 *Id.* ¶ 287.

183 Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, Individual Opinion by Professor Pierre-Marie Dupuy, 2, ¶ 2 (Aug. 23, 2022) [https://perma.cc/Y85K-LWUY].

184 Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Award, ¶ 155 (July 12, 2019) [https://perma.cc/NW4G-AZ9U].

185 *Id.* ¶¶ 113-468.

186 *Id.* ¶¶ 331-32.

187 *Id.* ¶¶ 452-60.

discount was applied to reflect the risk that renewal might not occur or might include less favorable conditions,[188] though the overall assessment relied heavily on the claimant's own projections.[189]

In *Bear Creek v. Peru*, the dispute arose from the revocation of mining concessions following some exploration work, driven by local community protests and constitutional legality issues.[190] The tribunal found that Peru's actions constituted unlawful expropriation in view of due process violations and the frustration of the investor's legitimate, investment-backed expectations.[191] Applying the general rule of state responsibility to calculate damages, the tribunal considered and ultimately rejected using the DCF method. It agreed with the claimant's expert that the valuation should reflect the price at which the property would trade between hypothetical willing parties "in an open and unrestricted market."[192] In assessing whether a willing buyer would have paid a price based on the DCF method, the tribunal examined the project's material conditions, including the surrounding social unrest, and expressed doubts about its viability and profitability, even without Peru's wrongful acts.[193] It also highlighted the lack of evidence of comparable profitable projects in the region and the absence of proof of the project's future success.[194]

Notably, dissenting arbitrator Philippe Sands argued that the compensation should be reduced by half, citing the claimant's failure to obtain a "social license" to operate the project.[195] However, the tribunal's majority rejected a finding of contributory fault, holding that Peru had failed to establish a causal link between the claimant's actions with local communities and the resulting losses.[196]

Although the tribunal ultimately awarded sunk costs instead of applying the DCF method, its general reasoning closely mirrored those in the cases discussed above. The compensation assessment focused on the risks and profitability of the project, as reflected in the investor's business record and the feasibility of its operation plans. Non-commercial values associated with the project, such as social and environmental concerns, were not considered as such but as business risks. This is fundamentally different from the decision-making processes by domestic policymakers.

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188 *Id.* ¶¶ 454-60.

189 *Id.* ¶¶ 336-65.

190 Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶¶ 119-216 (Nov. 30, 2017) [https://perma.cc/C56L-KCL4].

191 *Id.* ¶ 415.

192 *Id.* ¶ 597.

193 *Id.* ¶¶ 595-604.

194 *Id.* ¶ 600.

195 Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands QC, ¶ 39 (Nov. 30, 2017) [https://perma.cc/CG2H-7FMW].

196 Bear Creek Mining Corp., *supra* note 190, ¶¶ 400-14, 560-64.

In some cases, tribunals have acknowledged the difficulty of constructing reliable counterfactuals to assess damages. In *Eco Oro v. Colombia*, while the mining ban itself was deemed a lawful exercise of the state's police powers consistent with the expropriation clause, related measures were found to be inconsistent, arbitrary, and unfair, breaching the FET standard.[197] The tribunal held that this breach deprived the claimant only of the opportunity to apply for an environmental license—not the full value of its investment.[198] Given the discretionary nature of licensing under Colombian law and the lack of evidence on whether a license would have been granted, the tribunal found it could not quantify the loss associated with the lost license application opportunity.[199] This is especially so as the grant of the particular environmental license would have depended on the delimitation of the "regulatory Santurbán Páramo," a process requiring both scientific assessments and policy considerations.[200] Indeed, these factors echo one of the key reasons why domestic courts often refrain from awarding damages against public authorities discussed in Section III.C.2.

Compensation decisions also interfere with climate policy. In a series of investment cases against Italy and Spain in the renewable energy sector, tribunals have replaced host states' policy decisions on feed-in tariff adjustments with financial projections of investors' foregone profits. In the renewable sector, the cost, risk, and profitability of investments are particularly hard to predict and fluctuate over time, influenced by a wide range of economic and non-economic variables.[201] At early stages, renewable projects often depend heavily on state subsidies to remain viable. When setting premium rates, states must weigh scientific evidence, technological progress, cost-effectiveness, market dynamics, price volatility, and equitable distribution.[202] Insufficient remuneration may fail to incentivize renewable investment, while overly generous subsidies can place undue burdens on consumers and taxpayers and distort energy market competition.[203]

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197 Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 821 (Sep. 9, 2021) [https://perma.cc/597P-54LK].

198 Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Award on Damages, ¶ 303 (July 15, 2024) [https://perma.cc/TD74-2BQP].

199 *Id.* ¶¶ 305, 316-17.

200 *Id.* ¶¶ 305-06.

201 *See* Bjarne Steffen, *Estimating the Cost of Capital for Renewable Energy Projects,* 88 ENERGY ECON. 1 (2020); Matteo Fermeglia, *Cashing-In on the Energy Transition? Assessing Damage Evaluation Practices in Renewable Energy Investment Disputes,* 23 J. WORLD INVS. & TRADE 982 (2022).

202 Dominique Finon & Phillipe Menanteau, *The Static and Dynamic Efficiency of Instruments of Promotion of Renewables,* 12 ENERGY STUD. REV. 53 (2004).

203 Harry Granqvist & David Grover, *Distributive Fairness in Paying for Clean Energy Infrastructure*, 126 ECOLOGICAL ECONS. 87 (2016); Arjun Mahalingam & David M. Reiner, *Energy Subsidies at Times of Economic Crisis: A Comparative Study and Scenario Analysis of Italy and Spain*, 1608 (Univ. Cambridge Energy Pol'y Rsch. Grp., Working Paper No. 1608, 2016).

Both Italy and Spain adopted ambitious climate targets and introduced generous feed-in tariffs to support renewable industries.[204] Neither of them explicitly tied these tariffs to the underlying costs of renewable energy production. When the costs of solar PV panels dropped dramatically between 2007 and 2010, the high premiums offered under these regimes made them particularly attractive to investors.[205] This led to significant financial liabilities for both states, which were exacerbated during the global financial crisis.[206] In Spain, the Spanish Electricity Authority held down electricity prices to protect consumers, which ended up causing large tariff deficits.[207] In Italy, the tariffs also resulted in significant extra costs to the system, with approximately 9 billion euros per year being borne by consumers, accounting for around 20% of the average Italian electricity bill in 2012.[208] In response to these challenging circumstances, both states rolled back their generous subsidies, which triggered a wave of investment arbitration claims, many of which resulted in findings against the states.

When calculating damages under the "full reparation" formula, tribunals have often ventured into policy terrain, including decisions about what constitutes reasonable remuneration for energy producers. The public dimension of these decisions is ironically illustrated by an investor's argument that, instead of cutting incentives for photovoltaic facilities, Spain should have increased consumer electricity tariffs to better reflect "the actual costs of generating that electricity."[209] To put this in perspective, the unemployment rate in Spain was 27.1% in 2013, with the unemployment rate for young people (16-24) reaching 57.2%, worse than it was in the US during the Great Depression of the 1930s.[210]

As discussed in Section III.C, legislatures and the executives generally enjoy broad discretion in making such decisions in domestic legal systems, provided they remain within legal boundaries such as "reasonableness" and "proportionality," with considerable deference afforded by the judiciary.[211] In line with this, the Spanish Supreme Court has held that economic incentives in sectors like renewable energy may fluctuate in response to evolving circumstances and policies; companies entering a market do so

204 Fermeglia, *supra* note 201, at 983–84, 988–92.

205 Mahalingam & Reiner, *supra* note 203, at 16.

206 *Id.*

207 *Id.* at 20.

208 *Id.* at 16.

209 Mathias Kruck & Others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Partial Dissenting Opinion by Prof. Zachary Douglas KC, ¶ 106 (Sep. 13, 2022) [https://perma.cc/BQN3-8MAE].

210 *World of Work 2013: Snapshot of Spain*, INT'L INST. FOR LAB. STUD. (June 3, 2013), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/documents/briefingnote/wcms_214388.pdf [https://perma.cc/LVR6-XZAX]; *see also* Mathias Kruck & Others, *supra* note 209 ¶ 107.

211 *See* Section III.C.

with the understanding that these incentives are subject to lawful modification by public authorities.[212]

In response to investment arbitration claims, Italy consistently argued that it should not be liable to compensate the investors, stressing that the regulatory changes were general, in good faith, and in public interest; it also repeatedly emphasized that the measures did not destroy the value of the investments, which continued to be profitable under the revised regime.[213]

Nonetheless, some tribunals have dismissed the relevance of a measure's public purpose, insisting that the "full reparation" rule requires nothing less than restoring the *status quo ante*. In *CEF v Italy*, for instance, the tribunal rejected considerations of "fair" compensation or investor profit, finding them reasoning inconsistent with the *Chorzów Factory* principle.[214] In *Greentech and NovEnergia v Italy*, the tribunal also held that the *Chorzów Factory* principle does not allow a tribunal to weigh contextual or equitable factors to reduce compensation.[215] In *ESPF v Italy*, the tribunal similarly declined to consider regulatory intent, stating that its discretion in estimating damages does not extend to awarding less than full compensation.[216] On the other hand, for the dissenting arbitrator Boisson de Chazournes in *ESPF v Italy*, given that the claimants' remuneration is 'principally made of public subsidies', it is 'difficult to see how reducing the cost of electricity to consumers by reducing the incentives tariffs for producers cannot be considered as a rational policy goal.'[217]

A similar pattern can be observed in the cases against Spain. In some decisions, tribunals calculated the damages based on a hypothetical scenario assuming no regulatory change had been introduced.[218] Yet in other cases, damages were determined by factoring in reasonable modifications to the

212 S.T.S., Oct 25, 2006 (T.S., No. 12/2005), ECLI: ES:TS:2006:6317 (Spain).

213 *See, e.g.*, CEF Energia BV v. Italian Republic, SCC Case No. 158/2015, Award, ¶¶ 2, 263, 265 (Jan. 16, 2019) [https://perma.cc/8UJ4-5EDD]; ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and Infra Class Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5, Award, ¶¶ 850, 856 (Sep. 14, 2020) [https://perma.cc/BK27-L7ZU]; Greentech Energy Sys. A/S, NovEnergia II Energy & Env't (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic, SCC Case No. 2015/095, Final Award, ¶¶ 543, 546 (Dec. 23, 2018) [https://perma.cc/X9VH-F6DL].

214 *CEF Energia BV*, *supra* note 213, ¶ 275.

215 *Greentech Energy Sys.*, *supra* note 213, ¶ 548.

216 *ESPF Beteiligungs GmbH*, *supra* note 213, ¶ 858.

217 *Id*. ¶ 709.

218 *See, e.g.*, Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Case No. 063/2015, Final Award (Feb. 15, 2018) [https://perma.cc/96V6-SGD9]; Antin Infrastructure Servs. Lux. S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award (June 15, 2018) [https://perma.cc/2J26-MLFC]; Mathias Kruck v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Damages (Sep. 14, 2022) [https://perma.cc/VMY7-RD9W]; Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017) [https://perma.cc/YK42-6RPA].

regime that ensured a reasonable rate of return for investors.[219] Notably, in certain cases, while the tribunal recognized the legitimacy and discretion of state authorities to enact regulatory changes, the compensation ultimately awarded was based on the assumption that no such changes should have occurred.

In *Antin v Spain*, the tribunal acknowledged that the Energy Charter Treaty does not require 'the immutability of the legal framework' and '[t]he State is certainly entitled to exercise its sovereign power to amend its regulations to respond to changing circumstances in the public interest.'[220] Yet, in its quantum decision, the tribunal adopted the DCF method and calculated damages based on the projected future income as if no regulatory change had occurred.[221] In doing so, it effectively insulated the investor's proprietary interests from the impact of any future regulatory changes.

Some tribunals factored in the state's regulatory discretion in quantum decisions, but that also requires deciding what constitutes a "reasonable rate of return". In *NextEra v Spain*, the tribunal acknowledged that investors were not entitled to a frozen regulatory framework, and found no clear basis for a DCF-based "but-for" calculation.[222] Instead, it calculated the damages based on a reasonable rate based on the investor's Weighted Average Cost of Capital (WACC), adding a 200-basis-point premium in line with the Spanish National Energy Commission's view on reasonable returns – effectively deferring to the state's judgment on reasonable remuneration.[223]

Where no such domestic benchmarks exist, tribunals must define "full reparation" independently. Commentators have suggested that climate policy can be factored in when determining the discount rate following the DCF method to calculate the amount of compensation.[224] Similarly to how profitability forecasts are adjusted when valuing mining enterprises to account for risks such as regulatory risks and environmental conditions, in renewable industries, discount rate can also reflect factors such as regulatory changes, energy market fluctuations, and technological progress.[225] Yet again, the logic and evidence underlying such profitability

219 *See, e.g.*, RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 398 (Nov. 30, 2018) [https://perma.cc/KR88-JCSF]; PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award (Feb. 28, 2020) [https://perma.cc/DEE6-MRHG]; NextEra Energy Global Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, ¶¶ 645, 662–65 (Mar. 12, 2019) [https://perma.cc/GR75-PD95]; Sevilla Beheer B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and Principles of Quantum (Feb. 11, 2022) [https://perma.cc/BC65-3TRJ].

220 Antin Infrastructure Servs. Lux. S.à.r.l., ICSID Case No. ARB/13/31, Award, ¶ 555 [https://perma.cc/NM7L-293C].

221 *Id.* ¶¶ 715–25.

222 *NextEra Energy Global Holdings B.V.*, *supra* note 219, ¶¶ 645–46.

223 *Id.* ¶¶ 665–66.

224 Zheng, *supra* note 46, at 505; Boute, *supra* note 45.

225 Boute, *supra* note 45.

forecasts are fundamentally distinct from the policy calculations aiming to advance climate transition, energy efficiency, and fair distribution.

While the general rule of "full reparation" is broad enough to accommodate a wide variety of contextual factors, as explained in Section II, its applications discussed above revealed a structural bias favoring property owners' commercial interests over broader public and social values. Tribunals have applied the "full reparation" rule as narrowly focused on repairing the lost "market value" of investors' assets that are factually linked to IIA breaches, while excluding broader considerations of fairness and the policy goals behind the state's conduct. The public and social interests implicated in these disputes are typically addressed only *indirectly*, through the lens of "risk/profitability assessments" grounded in factual analysis. Given this structural bias, it is unsurprising that these valuation methods often afford investors significantly more generous protection than is typical in domestic legal systems.

In the current Draft Guidelines on the Calculation of Damages and Compensation in ISDS prepared by the UNCITRAL Working Group III Secretariat, states are advised to clarify in IIAs the preferred valuation method, between the DCF method and cost-based valuation approaches, based on factors such as the investment's performance history, the reliability of future cash flow projections, and the existence of an established market.[226] The Guidelines also suggest that states may require tribunals to incorporate equitable principles and proportionality in assessing damages, taking into account factors such as the state's economic situation and benefits it may have derived from the breach.[227] While these suggestions may help to mitigate concerns about uncertainty and excessive damages awards, the prevailing tort-like, market-referenced approach was not put to question, and the kind of principled, nuanced, and context-specific guidance found in domestic legal systems is still lacking.

Damages awards discussed above are constitutive of the substance of foreign investors' proprietary entitlements under investment treaties. As such, they effectively reconceptualize notions of 'property' at the expense of public and social values. Currently, much of the discussion around preserving host states' 'right to regulate' focuses on interpreting substantive standards in IIAs and reforming treaty provisions to safeguard states' policy space.[228] However, in practice, a significant portion of these substantive and normative decisions materialize during the quantum phase.

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226 *See Note by the Secretariat*, *supra* note 9, at 26.

227 *Id*. at 20.

228 *See, e.g.*, TITI, *supra* note 85; Julie Kim, *Balancing Regulatory Interests Through An Exceptions Framework Under the Right to Regulate Provision in International Investment Agreements*, 50 GEO. WASH. INT'L L. REV. 289 (2018).

In practice, the divide between primary obligations and secondary responsibility poses a significant challenge for states seeking to align international investment law with their common interests and policy goals. As noted, some tribunals ostensibly refrained from second-guessing states' policy decisions when interpreting and applying IIA standards, only to do precisely that when calculating damages under the secondary rule of 'full reparation through compensation'. To the extent that arbitral tribunals focus exclusively on achieving 'full reparation' for the 'lost market value' of the investors' asset, IIA provisions that expressly recognize states' 'right to regulate' might have limited effect in bringing substantial changes. The epistemic division between primary and secondary rules inhibits a coherent and transparent account of the exact nature and content of foreign investors' proprietary rights under an IIA. This disconnect between rights and remedies, which partly stems from the lack of concrete guidance under the secondary rules, can in turn hinder legal reform.

IV. POWER SHIFTS UNDER THE PRIMARY-SECONDARY DIVIDE AND THE TYRANNY OF 'GENERAL RULES'

In light of what has been discussed, both the secondary rule of 'full reparation' and the methods of its application embody substantial normative choices with real-world distributive consequences. As illustrated in the example of international investment law, damages awards rendered under the 'full reparation' rule often displace domestic policy decisions concerning the use and exploitation of assets or resources. Rather than accounting for the context-sensitive considerations and multiplicity of public and social values that inform such decisions, these awards rely on market-referenced calculation methods focused narrowly on repairing the financial loss of property owners.

To avoid unintended distortion, the normative implications and distributive consequences of secondary rules – including their potential to reshape rights and obligations under primary rules – should be explicitly acknowledged and treated as such. This inevitably raises questions about decision-making power and law-making authority. It is one thing that states agree to treat foreign investors 'fairly and equitably' by entering IIAs, committed to offering a 'stable legal framework' and respecting investors' 'legitimate expectations'. It is quite another to suggest that, by agreeing to these standards, including procedural ones, states have thereby committed, in the event of treaty breach, to compensation calculated exclusively by reference to an investor's projected profitability in a hypothetical market. Under the current structure of international law, the latter results not from specific agreement reached by states on the specific legal consequences and remedies flowing from particular breaches of primary rules, but from broad-based general rules of the law of state responsibility.

Despite the formal and explicit recognition of the 'right to regulate' both in IIAs and their interpretation, the effects of investment arbitration in 'depoliticalizing' distributional conflicts, freezing the regulatory *status quo*, and foreclosing possibilities for policy change have been extensively criticized in the literature.[229] For Chimni, such 'depoliticization' of distributive matters took place through a 'double move' by the ILC:

> [F]irst, it distinguished between primary and secondary rules to keep out the controversial issue of compensation for taking of alien property, and then it reintroduced it in the guise of a secondary rule stating the Western position.[230]

According to Chimni, the separation of primary and secondary rules facilitated the adoption of compensation rules that reflect the 'the global triumph of Western market economies',[231] which occurred at a time when the disagreements between developed states and the Global South regarding the treatment of foreign investment remained unsettled under customary international law.[232] The question, then, is whether, and to what extent, states have consciously decided to 'legalize' or 'depoliticalize' these distributive decisions through the general, secondary rules. As argued below, states have not taken a firm position on this matter, and a range of options remain open under the existing customary rules on state responsibility.

As seen in domestic legal approaches discussed in Section III.C, given the normative and distributive implications of remedies, not only do substantive guiding principles require careful consideration, but the institutions and processes for developing and implementing these principles are equally important. In domestic jurisdictions, legislatures often intervene and react to judicial decisions to make sure that remedies are aligned with their normative and practical considerations in particular areas. In international law, although the substantive rules of state responsibility are 'conceptually autonomous' from the institutional and procedural settings for their implementation,[233] in practice, the interplay between general rules

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229 DAVID SCHNEIDERMAN, INVESTMENT LAW'S ALIBIS: COLONIALISM, IMPERIALISM, DEBT AND DEVELOPMENT 57 (2022) (discussing depoliticalizing); Nicolas Perrone & David Schneiderman, *International Economic Law's Wreckage: Depoliticization, Inequality, Precarity*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY INEQUALITY, PRECARITY (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019); David Schneiderman, *Revisiting the Depoliticization of Investment Disputes*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010-11, 693–714 (2012).

230 B.S. Chimni, *The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective*, 31 E.J.I.L. 1211, 1214 (2020).

231 *Id.* at 1213 (citing Dinah L. Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 A.J.I.L. 833, 852 (2002)).

232 Chimni, *supra* note 230, at 1214.

233 Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246, 1251 (2020).

and their judicial/arbitral application is crucial in shaping the substance of the relevant normative decisions.

As the 'full reparation' rule itself is normatively thin, considerable discretion is left to those applying it to concrete cases. In the absence of effective State intervention, crucial normative decisions are made through analogical reasoning in judicial or arbitral decisions. Given the broad scope of application of the 2001 ILC Articles, they were intended to 'operate in a residual way', providing default solutions where no special rule exists,[234] and many of the rules are abstract in nature.[235] For instance, questions of causation and compensability of lost profits are addressed only in a very general and broad manner,[236] and the standards of fault, culpability, and diligence are left to be determined under primary rules.[237] As already discussed in Section II, the general compensation rule aiming to achieve 'full reparation' does not fully theorize questions such as which legal interests should be considered, how to balance these interests, and what principles of assessment should be applied.[238]

Furthermore, the application of this general rule to investor–State disputes – though now widely accepted in practice – is justified primarily by analogy rather than by deliberate State choice. As reflected in the cases discussed in Section III.D, the understanding of the 'full reparation' rule as narrowly reflecting corrective justice between equal parties is often traced to the *Chorzów Factory* judgment. Yet the PCIJ made it clear in that case that the law it applied governed inter-state relationships, 'not the law governing relations between the State which has committed a wrongful act and the individual who has suffered the damage.'[239] In a 2022 article, Crawford, Special Rapporteur on state responsibility, and Baetens observed that the 2001 ILC Articles do not 'directly apply to the investor-state relationship but was drafted with the relations between states in mind.'[240] They further noted that 'some tribunals read more authority and certainty into the Articles than warranted by their formal status'.[241]

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234 *Draft Articles with Commentaries*, *supra* note 6, at 140, art. 55, ¶¶ 2–3).

235 David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109, 181 (Richard B. Lillich, Daniel Barstow Magraw & David J. Bederman eds., 1998); Daniel M. Bodansky & John R. Crook, *Introduction and Overview*, 96 AM. J. INT'L L. 773, 779 (2002). For the trade-offs between the need to develop general rules and the divergent approaches in different sub-areas, *see* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 878–879 (2002).

236 *See Draft Articles with Commentaries*, *supra* note 6, at 91, art. 31(2); at 92–93, art. 31, ¶¶ 9–14; at 104–05, art. 36, ¶¶ 27–34.

237 *Id.* at 34–35, art. 2, ¶ 3).

238 *Id*. at 100, art 36, ¶ 7).

239 Factory at Chorzów, *supra* note 10, at 28.

240 James Crawford & Freya Baetens, *The ILC Articles on State Responsibility: More than a "Plank in a Shipwreck"?*, 37 ICSID REV. 13, 13–14 (2022).

241 *Id.*

Despite this, the general principles enshrined in the 2001 ILC Articles have been widely adopted by adjudicators in disputes involving non-state actors, both in investment arbitration and in human rights cases.[242] It is certainly possible that the habitual reliance on these articles in arbitral decisions, followed by the explicit or implicit acceptance by states, might make them customary rules in international investment law and might even end up developing 'a sort of new branch of customary international law'.[243] Indeed, at the UNCITRAL Working Group III, some member states expressly insisted that the 'full reparation' principle should be the guiding principle for the calculation of damages and compensation in investment arbitration.[244] This position was also endorsed by the UNCTAD in its IIA Issues Note on compensation and damages in ISDS.[245] But even if the 'full reparation' requirement is applicable as a matter of general principle, the different circumstances in *Chorzów Factory* – as well as in the cases supporting the 'fair market value' approach cited in the commentary to article 36 (Compensation) of the ILC Articles – militate against extending the same exact approach to all kinds of claims. Again, these general and broad principles are in themselves broad enough to allow different outcomes.[246]

The case law under the traditional customary rules on foreign investment protection—which played a crucial role in shaping the compensation rule codified by the 2001 ILC Articles, as well as the calculation methods for its application—mainly concerned expropriation, physical destruction of property, or denial of justice amounting to "an outrage, to bad faith, to willful neglect of duty".[247] In modern investment treaty regimes, provisions in IIAs, such as the FET standard, have been interpreted as autonomous

242 *See* Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo Compensation, Judgment, 2012 I.C.J. 324, 331 (June 19) [https://perma.cc/NN49-KMUY] (human rights); Paparinskis, *Compensation for the Damages Caused by Internationally Wrongful Acts*, *supra* note 32, at 131 (investment arbitration).

243 Pierre-Marie Dupuy, *Concluding Remarks: ARSIWA – A Reference Text Partially Victim of Its Own Success?*, 37 ICSID REV. 601, 610 (2022).

244 *See* U.N. Comm'n on Int'l Trade L., *Report on Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Sixth Session*, 17, U.N. Doc. A/CN.9/1160 (Oct. 27, 2023) [https://perma.cc/3H6M-3NXT]; U.N. Comm'n on Int'l Trade L., *Report on Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Ninth Session*, 17, U.N. Doc. A/CN.9/1194 (Oct. 16, 2024) [https://perma.cc/EZE7-5UFM].

245 U.N. Conf. on Trade & Dev., *Compensation and Damages in Investor–State Dispute Settlement Proceedings*, UNCTAD/DIAE/PCB/INF/2024/3) (Sep. 2024) [https://perma.cc/AD6G-BD6H].

246 *See* Section II.

247 *See* Neer v. United Mexican States, 4 R.I.A.A. 60 (Oct. 15, 1926) [https://perma.cc/78X9-DCWW]; *Text of Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law*, League of Nations Doc. No. C.351(c).M.145(c).929.V (1930), *reprinted in* MARTINS PARARINSKIS, BASIC DOCUMENTS ON INTERNATIONAL INVESTMENT PROTECTION (2019); F.V. García-Amador, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens – Reparation of the Injury*, 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/134 & Add.1 (Jan. 26, 1961) [https://perma.cc/4QMP-SL2J].

from the traditional customary rules.[248] These interpretations have introduced new public law notions, such as "proportionality" and "legitimate expectations", both incorporated through treaty interpretation based on general principles of law.[249] Meanwhile, the secondary rules have not been "updated" in line with the evolution of primary rules. While the primary rules were interpreted based on principles derived from domestic *public* law, where relevant claims are typically matched with public law remedies, they are paired with *private* law remedies in investment arbitration. Such a "partial transposition" of public law principles in investment arbitration distorts the relationship between state authorities and property owners but is widely adopted in domestic jurisdictions.

Crucially, such a distortion does not result from clear agreement among states but from investment tribunals extending the general rules of state responsibility by analogy. Arguably, such a one-size-fits-all approach was never intended by the drafters of the 2001 ILC Articles, which left ample space for more specific rules reflecting distinct normative and practical considerations across different areas. However, the generality of these rules—combined with the limited ability of states to create more tailored rules through practice and *opinio juris*—practically shifts the center of decision-making from law-making to law-application. As a result, crucial normative decisions were made by international adjudicators tasked with applying these general rules, with the risk that their decisions might diverge from the intentions and preferences of states behind the primary rules. Meanwhile, as Shelton observed, the lack of legal clarity on reparations can discourage principled and well-reasoned deliberation by both states and adjudicators, further inhibiting the development of the law.[250]

The tendency cautioned by Shelton is clearly evidenced in the legal reasoning of investment arbitral decisions discussed in Section III.D. Under the abstract general rules, the self-referencing in arbitral decisions, along with the adjudication centeredness in international legal discourse,[251] may reinforce path dependence and further undermine states' ability to formulate more tailored and context-sensitive rules. Such a power shift from

248 *See e.g.,* Pope & Talbot Inc. v. The Gov't of Can., UNCITRAL, Interim Award, ¶ 102 (June 26, 2000) [https://perma.cc/D8R5-KNTV]; Compañiá de Aguas del Aconquija S. A. and Vivendi Universal S.A. v Argentine Republic, ICSID Case No ARB/97/3, Award, ¶ 7.4.7 (Aug. 20, 2007) [https://perma.cc/H9LH-M8AM]; F.A. Mann, Notes, *British Treaties for the Promotion and Protection of Investments,* 52 BRITISH YBK. INT'L L. 241, 244 (1981); UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in Int'l Inv. Agreements, UNCTAD/ITE/IIT/11 (Vol. III) (1999) [https://perma.cc/G5NC-WQ9T].

249 Michele Potestà, *Legitimate Expectations in Inv. Treaty Law: Understanding the Roots and the Limits of a Controversial Concept,* 28 ICSID REV. 88 (2013); Alec Stone Sweet & Giacinto della Cananea, *Proportionality, Gen. Principles of Law, and Inv.-State Arb.: A Response to José Alvarez*, 46 N.Y.U. J. INT'L L. & POL'Y 911, 46 (2014).

250 Shelton, *supra* note 231, at 837; *see also* Bodansky & Crook, *supra* note 235, at 781.

251 *See* Fuad Zarbiyev, *On the Judge Centeredness of the Int'l Legal Self,* 32 E.J.I.L. 1139 (2021).

lawmakers to adjudicators would inevitably privilege—or at least amplify the influence of—certain groups of actors with greater resources to influence judicial/arbitral decisions.[252] The secondary rules—along with their application—might end up distorting the normative decisions made by states under primary rules.

Against this background, the ILC's new program on "compensation for the damage caused by internationally wrongful act" presents both opportunities and risks. Regarding the direction of legal development, one view clearly favors coherence and consistency over "fragmentation". For instance, in *Ahmadou Sadio Diallo*, a case decided by the ICJ concerning injuries caused by DRC to an individual, Judge Greenwood emphasized that the principles on compensation must be "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 this case, but by comparison with other cases."[253] He supports the practice that international courts and tribunals draw on each other' jurisprudence on compensation, as "[i]nternational law is not a series of fragmented specialist and self-contained bodies of law" but "a single, unified system of law".[254]

In a 2016 working paper on compensation under international law, the ILC Secretariat noted the "relatively consistent approaches to quantifying compensation" by international courts and tribunals in fields such as human rights or the law of the sea, and the "more varied practice" in investment arbitration where tribunals "contributed considerably to the law on the quantification of compensation . . . by innovatively applying standards of compensation."[255] For the Secretariat, "[s]uch developments illustrate both the need and the potential for *a more general approach* to the determination of quantum in the law of international responsibility."[256] While acknowledging that "[t]he rules on quantification might vary depending on the facts of the case and the primary obligation in question, possibly giving rise to *lex specialis"*, it also highlighted the need and possibility to "elucidate a number of applicable general rules and principles".[257]

In the syllabus presented in 2024 at the ILC by Martins Paparinskis, Special Rapporteur for the topic "Compensation for the damage caused by internationally wrongful acts", it was indicated that the secondary obligation arising from wrongful acts "will be assumed to have a general character and

252 *Id.* at 1158–59

253 *Ahmadou Sadio Diallo*, Merits, *supra* note 12, ¶ 7.

254 *Id.* ¶ 8.

255 Int'l L. Comm'n, *Working Paper by the Secretariat: Long-Term Programme of Work: Possible Topics for Consideration Taking into Account the Review of the List of Topics Established in 1996 in the Light of Subsequent Developments*, Prepared, ¶ 38 (Mar. 31, 2016), A/CN.4/679/add.1 ([https://perma.cc/KG9S-JD8X].

256 *Id.* ¶ 38 (emphasis added).

257 *Id.* ¶ 40.

not vary with the nature of the underlying primary rule in question (in the absence of *lex specialis*)."[258] As the same time, he was open to the possibility that the applicable secondary rules might be affected by the particular type of claim and by the legal relationship under the primary rules:

> The final question relates to the broader perspective of compensation before different courts and tribunals, and has two aspects. One aspect relates to the extent, if any, that the applicable secondary rules may be affected by the character of the entity invoking responsibility, particularly (certain) non-State entities. Another aspect considers the uniformity of approaches in different settings, and whether 'those principles [are] capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just [. . .] by comparison with other cases'.[259]

Furthermore, the approach proposed by Paparinskis follows the distinction between "identification" of the general rules and their "application" drawn by the ICJ, which involves:

> [P]os[ing] the legal question in terms of general principles of, or consistent with, the draft articles on the responsibility of States for internationally wrongful acts, and answer[ing] it by reference to diverse authorities that constitute the best examples in the particular field of international law.[260]

In light of what has been discussed, the broad scope of applicability of the general rule of compensation makes it unlikely that these "general principles" would be detailed enough to offer meaningful constraint or practical guidance regarding specific claims. A crucial problem in practice is that the lack of detailed rules developed by states has practically transferred the decision-making power to those tasked with *applying* these general principles. In this context, the work by the ILC opens an opportunity for states to reclaim the power to make these normative and distributive decisions from international adjudicators. Indeed, commenting on the inclusion of the topic on compensation in the ILC's long-term program of work, both Argentina and the United States have cautioned against uncritical reliance on decisions of international courts and tribunals.[261] If, on the other hand, the ILC codifies the existing jurisprudence into law, the

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258 Paparinskis, *Compensation for the Damages Caused by Internationally Wrongful Acts*, *supra* note 32, at 129, ¶ 7.

259 *Id.* at 133, ¶ 14 (footnote omitted).

260 *Id.* at 129, ¶ 8 (footnotes omitted).

261 *Intervention of the Argentine Delegation,* 79th Sess., 6th Comm. (2024) [https://perma.cc/S9XX-4B2P]; *Agenda Item 79: Report of the International Law Commission on the Work of Its Seventy-Fifth Session*, Statement at the Int'l Law Comm'n on the Work of Its Seventy-Ninth Session (Oct. 23, 2024) [https://perma.cc/89BT-ZNRV].

current one-size-fits-all approach and the mismatch between primary rules and secondary remedies might be further entrenched. This, in turn, could make it even harder for states to achieve legal reforms through primary rules, not only in international investment law but also in other areas, in response to rapidly evolving global challenges.

V. LEGISLATING BY 'IMPLIED STATE CONSENT': A CASE FOR TURNING TO GENERAL PRINCIPLES OF LAW

To (re)align remedies with primary rights and obligations within the current framework of international law, a major challenge is to formulate secondary rules that are specific enough to guide and constrain those who apply them and, at the same time, flexible enough to avoid unintended distortions. But even if this more tailored and adaptable approach is followed, formulating detailed compensation rules that exhaustively address every distinct category of primary rules—both existing ones and those that may emerge in the future—remains an exceedingly daunting task. As evidenced in the example of international investment law, different types of claims, from public law claims to private law claims, can arise even within a single legal regime. Moreover, even if primary rules could be thoroughly and comprehensively categorized, it remains doubtful whether states would be able to reach an agreement on corresponding secondary rules for each category as a matter of customary international law with sufficient specificity to guide practice. Simply put, the "legislature" in international law might be less capable than its domestic counterparts.

But international law has more tools than customary international law and *ad hoc* judicial decisions. The former is often both over- and under-inclusive and the latter are case-specific by nature and unable to offer a principled framework for matching remedies with rights. General principles of law, this article argues, can play a crucial role in bringing the secondary rules, including those on compensation, into line with primary rules across various subject matters. This source of law, especially those derived from domestic tort law, has historically been instrumental in shaping certain areas of secondary rules in the period before the adoption of the 2001 ILC Articles.[262] But with the development of customary international law, alongside the adoption of the 2001 ILC Articles, general principles of law have been marginalized on this subject.[263]

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262 *See* G. Arangio-Ruiz (Special Rapporteur), *Second Report on State Responsibility, Int'l L. Comm'n Forty-First Session*, UN Doc. A/CN.4/425, ¶¶ 27–105 (June 9 & 22 1989), *reprinted in* [1989] 2 Y.B. INT'L L. COMM'N [https://perma.cc/AMF5-QSFX].

263 *See* Paparinskis, *A Case against Crippling Compensation in International Law of State Responsibility*, *supra* note 233, at 1274-75.

It is proposed that general principles of law, particularly those derived from national legal systems,[264] can provide more specific guidance on the determination of compensation and its interplays with other forms of reparation, supplementing the vague and abstract customary rules. A concrete proposal on which particular general principles can help (re)tailoring remedies in different areas, and how this can be done, requires an in-depth comparative law analysis that is "wide and representative, including the different regions of the world".[265] This analysis must also consider how domestic legal solutions can be "transposed" to the particular institutional and procedural framework in international law.[266] Such an undertaking lies beyond the scope of this article. Instead, the discussion that follows aims to refute two key theoretical objections to expanding the role of general principles of law in this space: first, general principles of law, by their nature as "general" and "principles", cannot provide the specificity needed to address the problems discussed in this article; second, customary international law takes precedence over general principles of law, and the customary rules codified in the 2001 ILC Articles leave little space for general principles of law.

In the draft conclusions on general principles of law provisionally adopted by the ILC on second reading in 2025, general principles of law must be "recognized" by "the community of nations."[267] For those derived from national legal systems, this "recognition" can be evidenced by "the existence of a principle common to the various legal systems of the world" and "its transposition to the international legal system."[268] Unlike *opinio juris* for the formation of customary international law, such a "recognition" is not a direct consent to an international rule and indeed, when adopting a legal position in domestic law, a state may not bear in mind its international implications. As such, the required "recognition" should be understood as a form of indirect or implied state consent that reconciles two competing objectives. On the one hand, it enables an international legal solution when treaty and customary international law "do not resolve a particular issue in whole or in part".[269] On the other hand, it ensures that general principles are anchored in objective evidence, using domestic legal positions as both a guide and a constraint.[270] Thus, the requirement of "recognition" is both

264 Int'l L. Comm'n, General Principles of Law: Text and Titles of the Draft Conclusions Adopted by the Drafting Comm. On Second Reading, UN Doc. A/CN.4/L.1018, at draft conclusion 3 (May 20, 2025) [https://perma.cc/2WUL-DB56] [hereinafter Second Reading General Principles of Law].

265 *Id*. at draft conclusion 5(2).

266 *Id.* at draft conclusion 6.

267 *Id.* at draft conclusion 2.

268 *Id.* at draft conclusion 4.

269 *Id*. at draft conclusion 10(2).

270 *Id.* at draft conclusion 4; *See also Text of the Draft Conclusions on General Principles of Law Adopted by the Commission on First Reading*, *in* Rep. of the Int'l L. Comm'n on Its Seventy-Fourth

permissive and restrictive. In judicial contexts, it helps to avoid *non liquet* while preventing judicial law-making by grounding decisions on the concrete legal positions in domestic legal systems.[271]

In his second report, the Special Rapporteur on general principles of law pointed out that the steps of "distilling" common principles and "transposing" them to the international level are "a combined operation" in practice.[272] This essentially involves identifying a legal solution to an international problem based on commonalities between domestic legal systems. The comparative law analysis required for identifying a general principle begins with a specific problem in the international context and is shaped by the structure and conditions of international law—precisely what "transposition" is also about.[273]

In essence, through the source of general principles of law, the commonalities across domestic legal systems are meant to indicate what states *would have intended* when dealing with an international legal problem. For present purposes, it offers a form of guidance derived from the "implied consent" of states on how to approach remedies for different types of claims, even in the absence of express agreements among states on specific solutions in treaty law or customary international law.

Yet, in view of the diversity across domestic jurisdictions, one might question whether a common approach to compensation is even possible.[274] Alternatively, one could argue that "a principle common to the various legal systems" that is ultimately identified through comparative law analysis might be no less abstract and general than the "full reparation" rule and as such, it would be unable to provide concrete guidance in practice. However, it is submitted that the identification of a general principle does not require that various domestic legal systems adopt the same exact rule, nor does it require distilling an abstract principle underlying the legal rules in various jurisdictions.

In international legal practice, both states and adjudicators have taken the position that "unanimity" in the domestic approaches is not essential for identifying general principles,[275] and that it is not necessary for the same

Session, UN Doc. A/78/10, at 17, Conclusion 4, ¶ 2 (Nov. 3, 2023) [https://perma.cc/PP9E-5W94] [hereinafter First Reading General Principles of Law].

271 A. Pellet & D. Müller, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (A. Zimmermann, C.J. Tams, K. Oellers-Frahm, and C. Tomuschat eds., 2019).

272 Marcelo Vázquez-Bermúdez (Special Rapporteur), *Second Rep. on General Principles of Law*, UN Doc. A/CN.4/741, ¶ 20 (Apr. 9, 2020) [https://perma.cc/WH7L-MVTC].

273 Second Reading General Principles of Law, *supra* note 264, draft conclusion 6; First Reading General Principles of Law, *supra note 270*, at 20–22, Conclusion 6.

274 *See* Paparinskis, *A Case against Crippling Compensation in International Law of State Responsibility*, *supra* note 233.

275 *See* Case Concerning Right of Passage over Indian Territory, Reply of Portugal, ¶ 328 (Feb. 27, 2017) [https://perma.cc/HLJ7-LSAK]; Certain Property (*Liechtenstein v Germany*), Memorial of Liechtenstein, 147, ¶ 6.14 (Mar. 28, 2002) [https://perma.cc/5Y2U-CK2W].

"specific legal provision" to be adopted across jurisdictions.[276] The question, then, is what it means to identify a "principle" that is "common to the various legal systems". While the draft conclusions and their commentaries provisionally adopted by the ILC do not provide detailed guidance in terms of the comparative law methodology,[277] commentators have understood the comparative analysis as a process of "distilling" the "core aspect" or the "essence" of domestic norms, discarding the "idiosyncrasies of local law".[278] This implies a movement from the specific to the general, and then from the general to a specific international solution. But in practice, as discussed below, the "combined operation" of comparative analysis and "transposition" can only operate between a concrete international problem and specific domestic solutions, moving directly from the *specific* to the *specific*. To conceptualize it otherwise would not only contradict the basic tenets of comparative law but also undermine the goal of constraining judicial discretion. The phrase "general principles of law" needs to be understood holistically; neither "general" nor "principles" prescribes a specific characteristic that a norm of this source must possess.[279]

Regarding comparative law methodology, Frankenberg has questioned the feasibility of the idea that legal solutions be 'cut loose' from their domestic contexts to extrapolate some universal 'functions', pointing out the 'two contradictory operations' it involves: 'first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what makes the specific.'[280] In a similar vein, Ellis has observed in relation to general principles of law that:

> [D]oubts have arisen regarding the possibility of isolating *the* essence of a legal rule or institution. Consider the various ways in which different legal systems determine when compensation must be paid. How are we to identify *the* essence of these norms? . . . a rule has many different 'essences', which advance or recede as a function of the perspectives and purposes of observers.[281]

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276 Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 439 (Feb. 22, 2001) [https://perma.cc/6FJM-GBHN];Vázquez-Bermúdez, *supra* note 272, at ¶¶ 55–69.

277 *See* First Reading Draft Conclusions on General Principles of Law, 17-18, Conclusion 5, ¶¶ 2–3 [https://perma.cc/Y435-VPA9].

278 *See* CHARLES T. KOTUBY JR. & L.A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INT'L DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 19-20 (2017); *See also* P. DUMBERRY, A GUIDE TO GENERAL PRINCIPLE OF LAW IN INTERNATIONAL INVESTMENT ARBITRATION 122 (2020).

279 Second Reading General Principles of Law, *supra* note 264, at draft conclusion 5; First Reading General Principles of Law, *supra* note 270, at 18, Conclusion 5, ¶ 3.

280 G. Frankenberg, *Critical Comparisons: Re-thinking Comparative Law,* 26 HARV. INT'L L.J. 411, 440 (1985).

281 J. Ellis, *General Principles and Comparative Law,* 22 E.J.I.L. 949, 959–960 (2011).

In public law, for instance, how can we speak of the 'essence' of a rule of administrative law without reference to the institutional context a particular state? To pursue comparative law analysis with the aim of distilling the 'essence' of the norms by discarding their 'national particularities' is misguided.

Further, even if one is able to identify a 'common denominator' among different domestic rules – deemed as the 'essence' common to domestic legal solutions – this common denominator is likely to be so vague and abstract (think of legal certainty or the rule of law) that it offers little concrete guidance for resolving an international issue. In practice, it may merely conceal, rather than restrict, the discretion exercised by those applying the principle. As a result, the international solution derived from it may bear little resemblance to its domestic sources, raising doubts about whether states' 'recognition' offers any meaningful real-world guidance.

Contrary to the aforementioned approach, this article submits that rather than seeking 'the essence' of domestic rules, the combined operation of 'comparative analysis' and 'transposition' should aim to ascertain whether the differences among domestic legal approaches to a particular issue can be reconciled to develop an international solution. Comparative law analysis is not meant to *insulate* the rules from their national contexts, but to *understand* them within their national contexts.[282] The understanding of differences would then help to identify an international solution: in certain cases, diverse doctrines or legal techniques, when understood in their contexts, might yield similar practical results; furthermore, the reasons behind different domestic approaches might be irrelevant or inapplicable in the international context and thus do not preclude the identification of an international legal solution.

In some cases, differences in the rules of various domestic jurisdictions result mainly from the doctrinal and/or institutional environment in which they operate, and the substantive solutions are more similar than they initially appear.[283] For instance, in a case were a public authority cancels a business license on erroneous grounds, causing financial loss to a business owner,[284] English courts might reject a claim for damages because the authority owes no duty of care to the claimant.[285] In Spain, a similar outcome could occur, but non-liability would be justified on the ground that the cancellation, while being erroneous, was a proportionate response to

282 *See* D. Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance,* 2 UTAH L. REV. 545 (1997); M. Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century,* 50 A.J.C.L. 671, 675–676 (2002).

283 Uwe KISCHEL, COMPARATIVE LAW 167 (2019).

284 For the comparative study on this issue, *see Case 2: Wrongfully Cancelled Licence*, *in* THE LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 661–98 (K. Oliphant ed., 2017).

285 Jain v. Trent Strategic Health Authority [2009] UKHL 4 (appeal taken from Eng.). [https://perma.cc/5B5K-AN5Q].

relevant risks.[286] In other jurisdictions, the same result might arise because the law governing the issuance of license does not confer a right to damages regarding private business interests,[287] because the cancellation falls within the authority's discretion,[288] or because loss of chance is non-recoverable absent gross negligence.[289]

Although the functional equivalence of various conceptual approaches across jurisdictions might be imperfect, it can still be sufficient to provide a pragmatic solution to the particular problem in international law. In some instances, even substantively similar legal solutions might be underpinned by different reasons and principles in various domestic legal systems, due to their structural differences or the distinct cultural, political, and societal contexts these rules are embedded in. But that should not preclude the identification of a shared international approach.

Moreover, in some cases, even where the differences cannot be resolved, to the extent that the reasons behind these differences are inapplicable at the international level, these differences would not prevent the identification of an international solution. In other words, differences at the domestic level might be 'resolved' in the process of 'transposing' domestic solutions to the international level. Assume *solution a* offered in state A differs from *solution b* offered in state B, and the key difference lies in *element x* in *solution b*. To the extent that the considerations behind *element x* are inapplicable in the international context, the key question would be if *solution b* is purged of *element x*, whether a common solution (with adjustments where necessary) to the international problem can be found between these two legal systems. As pointed out by Bothe and Ress, the crucial question is 'which elements are really "relevant" and constitute [. . .] a part of the principle [to be applied at the international level]?'[290] In this regard, the approach taken by Judge Stephen in *Erdemović* before the ICTY in resolving the differences between civil law systems and common law systems provides some valuable insights.

In *Erdemović*, the Appeals Chamber examined whether duress could serve as a defense to international crimes. Noting that civil law systems allow duress as a defense to murder while common law – such as English law – does not, Judge Stephen scrutinized the rationale behind the English law's approach. He traced its origin back to the *Pleas of the Crown* written by Lord Hale in 1800,[291] arguing that the justification for the domestic

286 *Case 2: Wrongfully Cancelled Licence*, *supra* note 284, at 684–85.

287 *Id*. at 671 (Greece).

288 *Id.* at 671–72 (Israel), 694 (United States).

289 *Id*. at 661–63 (Austria).

290 Michael Bothe & Georg Ress, *The Comparative Method and Public International Law*, *in* INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 53 (W. Butler ed., 1980).

291 Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶ 31 (Oct. 7, 1997) [https://perma.cc/ATM3-YUEU].

approach (i.e., availability of alternative safeguards offered by the courts) is unsuitable for international law in the context of armed conflict.[292] Moreover, he differentiated between the typical English scenario – where a defendant must choose between one life or another – and the case at hand, where the appellant had to choose between one life or both lives.[293] Consequently, he held that, where stringent conditions are maintained, the availability of duress as a defense in international law would not contradict the basic approach in common law.[294] In this way, Judge Stephen avoided rendering the identification of general principles of law 'a contest' between different legal systems.[295] A similar approach can also be applied on questions of compensation as well as other issues of state responsibility.

In a nutshell, the comparative survey of different jurisdictions should not be aimed at identifying the 'common essence' or the 'common underlying principle' of different domestic rules. Instead, the key question is, despite the differences in the legal structure, techniques, and underlying principles, whether the substantive and practical solutions offered in different legal systems, when taking into account the distinct context in international law, may yield a common approach applicable to the international problem. This 'single combined operation' of comparative analysis and 'transposition' moves between a specific problem at the international level and concrete solutions in domestic legal systems.

Following this approach, general principles of law can establish guidelines on remedies for different types of claims in international law by drawing on domestic legal approaches to similar issues. Given the distinct structures and characteristics of international law compared to national legal systems, general principles derived from domestic law may need to be adapted for the international context.[296] The structural differences between the two legal orders do not prevent international law from drawing on domestic law. For instance, although international law lacks the separation of powers found in national constitutions, the principles of legality and that a criminal tribunal must be 'established by law' were identified as general principles and adjusted for the particular structure of international criminal law.[297] Similarly, the absence of formal separation between primary and

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292 *Id.*

293 *Id.* ¶¶ 33, 47, 64.

294 *Id*. ¶ 64.

295 *See Erdemović*, *supra* note 291; Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 72 (Oct. 7, 1997) [https://perma.cc/9S26-EYKZ].

296 Second Reading General Principles of Law, *supra* note 264, at draft conclusion 6; First Reading General Principles of Law, *supra* 270, at 20-22, Conclusion 6, nn. 6, 33 ("As a result of the transposition, general principles of law applied in international settings may not have exactly the same content as the relevant domestic legal principles.").

297 For instance, the principle of legality was adapted for the particularities in international criminal law. *See* Prosecutor v. Duško Tadić a/k/a "DULE", Case No. IT-94-1-AR72, Decision on the Defence

secondary rules in domestic legal systems would not prevent the identification of general principles in the area of secondary rules.[298]

Substantively, relying on general principles of law allows the multiplicity of normative considerations embodied in domestic rules on remedies to be incorporated into the international law on compensation. For example, the varying approaches to addressing wage discrimination in compensation for personal injuries across domestic legal systems might help to inform how similar problems are addressed in international law. Likewise, the different ways in which domestic legal systems accommodate public and social values associated with an asset or resource when deciding on damages caused by public acts can provide valuable insights for international decisions on compensation. By aligning the international rules with domestic legal approaches, refining, and adding nuance to the existing one-size-fits-all approach to 'full reparation', general principles of law can help to address some of the problems highlighted in Sections II and III.

Lastly, another potential argument against a more extensive role of general principles of law is that the existing customary rule on full reparation and compensation, codified in the 2001 ILC Articles, would take precedence and leave little room for general principles. As provided in the ILC's draft conclusions on general principles of law provisionally adopted on second reading, '[g]eneral principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part' and this source may serve to 'interpret and complement other rules of international law'.[299] In the meanwhile, it is explained that '[a]ny conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law', which include the principle of *lex specialis*.[300] A common understanding is that despite the absence of formal hierarchy among the three sources,[301] the reason for the 'residual' or 'supplementary' role of general principles vis-à-vis the other sources is that general principles tend to be more 'general' relative to the other sources on the same subject matter.[302] A key issue pertaining to the role of general principles in supplementing the customary

Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 43–45 (Oct. 2, 1995) [https://perma.cc/6JA5-LW5A]; Prosecutor v. Zejnil Delalić et al., Case No. IT- 96-21-T, Judgment, ¶¶ 403–05 (Nov. 16, 1998) [https://perma.cc/N4WX-9UNA].

298 *See* Second Reading General Principles of Law, *supra* note 264, at draft conclusion 10(1)(a).

299 *Id*. at Conclusion 10(1)(b), (2).

300 *Id*. at Conclusion 11(3); First Reading General Principles of Law, *supra* note 270, at 35, Conclusion 11, ¶ 7.

301 Second Reading General Principles of Law, *supra* note 264, at draft conclusion 11(1).

302 *See* Marcelo Vázquez-Bermúdez (Special Rapporteur), *Third Rep. on General Principles of Law*, UN Doc. A/CN.4/753, ¶¶ 76–82 (18 Apr. 2022), https://docs.un.org/en/A/CN.4/753 [https://perma.cc/S8NG-S9W6]; Pellet & Müller, *supra* note 271, at 932.

rule of 'full reparation through compensation', then, is what constitutes 'general' and 'special'.

According to the ILC Study Group on fragmentation of international law, the priority given to special law over general law is because 'such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied' and 'may often better reflect the intent of the legal subjects'.[303] Based on what has been discussed, when determining compensation for a state's frustration of an investor's legitimate expectation by radical change of regulatory regime, as claimed in the Italian and Spanish renewable energy cases, the identification of the applicable general principles would require a comparative analysis of the rules on remedies applicable to similar situations in various domestic jurisdictions. A general principle identified in this way – transposed to the international legal context – would be more narrowly tailored to the particular claim in question, compared with the customary rules found in the 2001 ILC Articles. Meanwhile, if states were to subsequently adopt specific rules for such situations, whether through treaty provisions or the development of customary international law, those rules would be more direct and specific indications of how states intend to regulate that matter. In comparison, general principles of law, identified through inductive and deductive reasoning, serve as more indirect indicators of states' intent.

VI. CONCLUSION

In the context of constitutional law, one test for the failure of the law to constrain judicial tyranny is whether 'it licenses judges to require in their sole discretion either that a strict regime of *laissez faire* be followed without deviation or that socialism be adopted.'[304] As illustrated by the example of international investment law, a similar failure has occurred in the international law on compensation. Through damages awards governed under the vaguely defined general compensation rule, controversial policy questions and politically charged distributive matters – subjects that national governments sometimes struggle to deal with – have been decided through ostensibly 'technical' methods with the one-dimensional goal of preserving the financial value and profitability of foreign investors' assets in a hypothetical 'free market'.

As in domestic law, in international law, the precise nature and content of primary rules – and the normative choices they embody – sometimes materialize only through remedies. The lack of clear guidance over the

303 Int'l L. Comm'n, *Rep. on the Work of its Fifty-Eighth Session*, 407-09, U.N. Doc. A/61/10, Conclusion 7 (2006) [https://perma.cc/UD46-ZQ94].

304 Mark. V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory,* 58 S. CAL. L. REV. 683, 685 (1985).

normative choices under the secondary compensation rule risks undermining the objectives of primary rules and producing outcomes unintended by lawmakers. While damages awards in investment arbitration can reduce an asset or resource to its 'market price', erasing its broader public and social values, income-based compensation for personal injury under international environmental law may reinforce global inequalities in the distribution of harm and risk.

Now that compensation is back on the ILC's agenda, states are presented with an opportunity to reclaim control over this matter. This article has argued that a broad range of normative choices remain possible under the existing 'full reparation' rule and has highlighted the distortions that can arise from the 'consistency and coherence' across different areas in the law on compensation. Moving forward, states and the ILC should not simply reinforce the existing rules and practices developed by international courts and tribunals, but should engage openly and transparently with the normative and distributive dimensions of compensation rules as they apply in different contexts. Before specific rules emerge through inter-state negotiations, general principles of law can serve as an interim solution.