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ASSESSMENT AND QUANTIFICATION OF DAMAGES IN PRIVATE AND PUBLIC INTERNATIONAL LAW: AN OVERVIEW

Abstract: This piece is a modest tribute to Professor Gilas who has long been the author's tutor during the author's academic career. Its purpose is to concisely describe how international law on damages has evolved, taking into particular account the jurisprudence of international courts and tribunals as well as domestic courts. The topic of damages is important in practice, but seems to be neglected in the doctrine. The author thus wishes to make an overview on the assessment and quantification of damages. To this end, the article starts with a presentation of basic principles to discuss further the burden and standard of proof, entitlement to damages, assessment of amount of damages, quantification of damages, reduction of damages, including causation, prohibition of speculative damages, contributory fault, foreseeability, mitigation and the prohibition of double recovery. Article concludes with final observations.

Keywords: damages, responsibility, compensation, reduction of damages.

1. Introduction

The immense contribution of Professor Janusz Gilas to the development, among others, of international law cannot be emphasized enough. Professor Janusz Gilas belongs to a generation of international lawyers for

1 This article has been prepared by the author in his private capacity. The opinions expressed therein are the author's own and do not reflect the view of any other person or entity.

whom the combination of public and private international law was a natural course of international legal studies. He is known and respected among his colleagues, both locally and abroad. This is not surprising. He collaborated and participated in a variety of projects and conducted research around the globe.

Professor Janusz Gilas' broad theoretical knowledge also formed also an outstanding basis for his contributions to the practice of international law. In his difficult, but excellent and still very readable book, "International Law" (1999), Professor Gilas discussed in a concise but analytical manner the issue of responsibility in international law. The analysis included, amongst others, the legal consequences of responsibility, including damages. Thus, it is with genuine pleasure and deep satisfaction that the author hereof has the honour to join in the tribute to Professor Janusz Gilas.

The purpose of this article is to briefly describe how international law on damages has evolved, taking into particular account the jurisprudence of international courts and tribunals. Therefore, this piece is a modest tribute to Professor Gilas who has long been the author's tutor during the author's academic career.

When the subject of international law (in particular, a State) commits an internationally wrongful act, it has an obligation to make reparation for the injury caused by its conduct.[2] All legal systems oblige the wrongdoer to make reparation. As the Permanent Court of International Justice (PCIJ) stated in the 1927 judgment, "[r]eparation, therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[3] Damages compensate a claimant for losses suffered as a result of the other party's (wrongful) conduct. They aim to erase all consequences of an illegal act or acts. This general rule has been reflected in domestic legal systems as provided, for example, by English law, where:

> any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has

2 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, paras. 50, 69, 131.

3 *Factory at Chorzów*, Judgment of 26 July 1927, P.C.I.J, Series A, No. 9, 21.

> suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[4]

In the same vein, French law recognizes the principle of full compensation (*réparation intégrale*) with the same aim being attached to it, that is, to put the aggrieved party in a position it would have been had the wrongful act had not taken place.[5] Article 7(4)(2) (Full compensation) of the UNIDROIT Principles of International Commercial Contracts states that the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such includes both any loss which it suffered and any gain of which it was deprived taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.[6]

As is usually not contested between parties to a dispute, and, importantly, set out in the ILC Articles which codify to a large extent the rules of customary international law on the responsibility of States for internationally wrongful acts, every internationally wrongful act of a State entails the international responsibility of that State (Article 1 of the ILC Articles).[7] An internationally wrongful act is an act or omission which is attributable to the State under international law and a breach of an international obligation of the State (Article 2 ILC Articles). Under Article 31 of the ILC Articles, the international responsibility of a State entails an obligation on that State to make full reparation for the injury caused thereby. Injury is defined as including 'any damage, whether material or moral, caused by the internationally wrongful act' (Article 36 of the ILC Articles). This reflects the famous *Factory at Chorzów* principle that "reparation must, as far as possible, wipe out all the consequences

4 *Livingstone* v. *Rawyards Coal Co* (1880) UKHL 3 (13 February 1880). See also *Robinson* v. *Harman* (1848) 13 P.D. 191 (C.A.), 200: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

5 For example, the French *Cour de Cassation* decided that "*le propre de la responsabilité civile est de rétablir aussi exactement que possible l'équilibre détruit par le dommage, et de replacer la victime dans la situation où elle se serait trouvée si l'acte dommageable ne s'était pas produit*." Cass. 2ème Civ, 28 October 1954, J.C.P. 1955, II, 8765.

6 UNIDROIT webpage: https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf, last access: October 2022.

7 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR 56th Session, Supp. No. 10.

of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[8] H. Lauterpacht noted that:

> States were originally reluctant to provide full compensation; however, at the beginning of the twentieth century, both the award of lost profits and the full compensation principle were already duly recognized, as shown by the well-known *Factory at Chorzów* case, which reflected contemporary state practice in 1928.[9]

2. Burden and Standard of Proof

The general conceptual legal framework that governs the assessment and calculation of damages is quite clear, but eventually the outcome of a given case remains dependent on the facts and available evidence. In this setting, the question of burden of proof and its standard is important. In international law, as in domestic law, the burden of proof usually lies with the party making an assertion (*actor incumbit probatio*).[10] The International Court of Justice (ICJ) has recently observed that, "[as] a general rule, its fall to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered."[11] It means that a claimant is burdened with proving its claim (relevant facts and law underlying its assertions, e.g. jurisdiction, interests in property, damages), whereas a respondent with proving any counterclaim (e.g. lack of jurisdiction or causation). These facts are sometimes easy to prove, but the burden can be onerous as well, especially if parties lack specific data, including relevant documents and witnesses.

In cases of breaches consisting of failure to act (omissions, failure to comply with one's obligations), the ICJ sometimes relies on a "reverse

8 *Case concerning Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)*, Judgment of 13 September 1928, P.C.I.J. Publ. Series A, No. 17, 47.

9 Lauterpacht, *The Development of International Law by the International Courts and Tribunals*, 315-316.

10 For example, Article 1353 of the French Civil Code; Article 8 of the Swiss Civil Code; Article 27(1) of the UNCITRAL Arbitration Rules.

11 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, para. 93; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) (Compensation)*, Judgment of 2 February 2018, ICJ Reports 2018, 15 para. 33.

burden of proof" which imposes upon a wrongdoer an obligation to establish that certain results of an illegal act were not caused by a State's failure to comply with its obligations. For example, the Court held Uganda responsible for failing to comply with its obligation as an occupying Power in Ituri in respect of violations of human rights and international humanitarian law. Given that, Uganda owed reparation for the loss of life in Ituri unless it established that particular deaths had not been caused by Uganda's failure.[12]

There is no unanimously recognized standard of proof in international law. Domestic laws vary from a "balance of probabilities" or "preponderance of the evidence" to "more likely than not" or "beyond all reasonable doubt" standard. Additionally, as a matter of principle, judges enjoys a wide margin of discretion, in particular, with respect to the allocation of damages. The ICJ has observed that the standard of proof may vary from case to case and may depend on the gravity of the acts alleged.[13] Sometimes international courts and tribunals adopt a lower standard of proof in the determination of damages, but this is done in exceptional circumstances. For example, before the Eritrea-Ethiopia Claims Commission, Ethiopia argued that decisions relating to damages should be based on the preponderance of the evidence, whereas Eritrea asked the Commission to continue to utilize a standard of "clear and convincing" evidence. The Commission decided that the correct position lied in an amalgam of above positions. It required clear and convincing evidence to establish that damage occurred, but for purposes of quantification, it required less rigorous proof. The Commission was of the view that the considerations dictating the "clear and convincing standard" were much less compelling for the less politically and emotively charged matters involved in assessing the monetary extent of injury. It additionally noted the enormous practical problems faced by both parties in quantifying the extent of damage following the 1998-2000 war which – in case of applying clear and convincing evidence – would probably preclude

12 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, para. 149.

13 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, para. 210. In addition, the Court declared that a State that is not in a position to provide direct proof of certain facts "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence." *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)*, Merits, Judgment of 9 April 1949, p. 18; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, paras. 123-126.

any recovery. This would frustrate its agreed mandate to address "the socio-economic impact of the crisis on the civilian population."[14]

In cases involving complex economic issues (e.g., the value of a going concern, often based on the discounted cash flow [DCF] method), it is argued that the existence of damages must be proved with reasonable certainty, while the amount of damages requires a less convincing proof, where the proof regarding the amount may be uncertain and inexact because requiring a high degree of certainty unfairly burdens the injured party and benefits the wrongdoer.[15] This, however, remains controversial, especially in cases where a claimant demands a high amount of compensation. Thus, a general rule in investment arbitration would appear to be that a party claiming damages for lost future profits should prove with reasonable certainty the amount of damages claimed.[16] In any event, the approach should thus be flexible and tribunals should reject the use of DCF (see below) models on grounds that they are too speculative, especially if a project was not a going concern. A possible and useful alternative is to award a claimant the monies it invested instead of using an income approach. Otherwise, a claimant would be compensated for a lost opportunity that seems to be overly speculative. Still, any decision reached by a tribunal should be made against a specific factual background of the case.

3. Entitlement to Damages

Before assessing and quantifying damages, the claimant has first to establish that it is entitled to damages by way of a wrongful act.

In domestic law and in case of contractual damages, universal principles being the emanation of the rule of reason come into play. In similar vein, international law applies those principles. One must first prove a breach of contract. Second, the claimant must have suffered a loss. Third, the damage must not be too remote and losses were reasonably foreseeable at the time the parties entered into contract. Fourth, there must be a causal

14 Eritrea-Ethiopia Claims Commission, Ethiopia's Damages Claims, Final Award, 17 August 2009, UNRIAA, vol. XXVI, para. 36.

15 Gotanda, "Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes", 5-6.

16 Kantor, "Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence", 72-78.

link (nexus) between the breach and the loss. Fifth, deductions may be made on the account of the duty to mitigate or contributory fault. Sixth, any break in the chain of causality or *novus actus interveniens* is reviewed to determine the effective or dominant cause of the loss.[17]

4. Assessment of Amount of Damages

Domestic continental jurisdictions favour specific performance over damages. In other words, the performance of the contract as envisaged in its text has preference over damages seen as a secondary remedy (Article 1221 of the French Civil Code).[18] In common law, the opposite order of remedies is prescribed with damages being the primary remedy for non-performance of contract. For example, the Restatement (Second) of the Law of Contracts provides that: "[s]pecific performance will not be ordered if damages would be adequate to protect the expectation interest of the injured party."[19]

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides that the obligee may choose specific performance, price reduction, avoidance or damages as the primary remedy for a breach, but in the majority of cases claimants seek damages.[20]

It is generally accepted in international law that the State responsible for an internationally wrongful act is primarily under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, to the extent that it is possible or proportionate to do so. When restitution cannot be made, the State is under an obligation to compensate for the damage caused. Such compensation is to cover "any financially assessable damage including loss of profits insofar as it is established" (Article 36 of ILC Articles).

Continental civil laws usually recognize two categories of loss: actual loss or damage already suffered (*damnum emergens*) and loss of profits or wasted costs (*lucrum cessans*).[21] Both these heads of damages have their

17 Connellan, Oger-Gross, André, "Compensatory Damages Principles in Civil and Common Law jurisdictions: Requirements, Underlying Principles and Limits", 12-13.

18 Wöss, San Román Rivera, Spiller, Dellepiane, *Damages in International Arbitration under Complex Long-Term Contracts*, paras. 4.256-4.258.

19 Restatement (2nd) of the Law of Contracts, Section 359(1).

20 1489 UNTS 3; Butler, "Damages Principles under the Convention on Contracts for International Sale of Goods", 45-46.

21 See, for example, Article 1231(2) of the French Civil Code.

origins in Roman law. Common law distinguishes mainly expectation damages (with two subcategories: normal or general damages and consequential damages), performance damages, and reliance (wasted expenditures) damages. The aim of expectation loss damages is to put the injured party in the same position as if the contract had been performed, whereas performance damages comprises the costs of rectifying defective performance. Lastly, reliance damages refer to the expenses incurred by the claimant in reliance on the contract being performed. Expectation damages and reliance damages are in principle mutually exclusive to prevent double recovery.[22] Apart from these heads of damages, domestic law recognizes also other categories of damages such as moral damages, punitive damages, damages for non-pecuniary loss (bodily harm, emotional distress etc.). In contrast, international law knows no punitive damages.[23]

Under the CISG, the obligee is entitled to a sum equal to the loss caused by the breach of contract, thus, it should be put in a position as if the contract had been performed as agreed.[24] This in practice entails full compensation that encompasses *damnum emergens* and *lucrum cessans*. The CISG thus comprises expectation interest (gaining benefits from the performance), indemnity interest (not to suffer damage to other interests as a result of non-performance) and reliance interest (the expenditure made in reliance on the existence of the contract. Damages can include direct loss, incidental loss and consequential loss as well as loss of profits.[25]

In international law, the common starting point is the broad principle articulated in the landmark *Factory at Chorzow* case, according to which any award should: "as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed

22 Gotanda, *Damages in Lieu of Performance because of Breach of Contract*; Connellan, Oger-Gross, André, "Compensatory Damages Principles in Civil and Common Law jurisdictions: Requirements, Underlying Principles and Limits", 19-20.

23 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, para. 102.

24 Butler, ibidem, 48. See Article 76 CISG: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

25 Ibidem, 49-55.

if that act had not been committed."[26] However, in exceptional cases, the ICJ may award compensation "in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account of equitable considerations."[27] This relates especially to cases involving a large group of victims who have suffered serious injury in armed conflicts due to intrinsic difficulties faced by judges or arbitrators.

5. Quantification of Damages

In continental civil law, the principle of full compensation governs the assessment of the amount of damages to be paid to the aggravated party. The main purpose is to put that party in a position it would have been had the wrongful conduct not occurred.[28] The same standard is applicable in common law with the damages being quantified as the difference in value between the actual (non-)performance and the performance that should have occurred.[29] International law does not differ as the ICJ follows a path of domestic jurisprudence.[30]

Private forensic accountants, valuers and economists have developed the but-for principle as the basis for the calculation of damages. Also in international practice, a but-for scenario (premise) is employed as a means to achieve full compensation. The but-for scenario responds to the question of what would have happened in the absence of the breach.[31] Thus, a hypothetical, but-for scenario, is developed and compared to the actual situation with the breach.[32] The loss occurs if there is a difference between

26 *Case concerning Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)*, 1928, PCIJ, Series A No. 17, at 47; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, para. 106.

27 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, paras. 106-107, 181, 193, 206, 225, 258, 332, 344, 363, 366; An example Eritrea-Ethiopia Claims Commission, Ethiopia's Damages Claims, Final Award, 17 August 2009, UNRIAA, vol. XXVI, paras. 19-22.

28 Bénabent, *Droit des obligations*, 683-692.

29 McGregor, J. Edelman, *McGregor on Damages*, Section 2-002.

30 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, paras. 50, 69, 131.

31 MacGregor, Blower, Mitchell, "Overview of Damages and Accounting Basics", 154; Wöss, San Román Rivera, Spiller, Dellepiane, ibidem, 215.

32 In the *Cairn v. India* case, the tribunal declared that the standard of compensation for violations of international law is the customary international law principle of full reparation

the scenario and the actual situation. If the claimant would be in the same economic situation had the breach not happened, there would be no causation.[33]

In investment case law, the general principle of performing a but-for valuation is undisputed and can be derived from both the *Chorzów* standard and Article 36 of the ILC Articles.[34] In *Micula*, the *Chorzów* standard was generally understood to mean that the claimant must be placed back in the position it would have been "in all probability" but for the international wrong.[35]

Establishing the value of an asset in the but-for scenario necessarily involves certain hypothetical assumptions concerning what might have happened but for the State's wrongful conduct. This is usually a difficult if not an almost impossible task. Courts and tribunals thus have remarked that their

> objective is not necessarily to answer each of questions relating to calculation definitively, as a professional evaluator might, but is to identify the strengths and weaknesses of expert opinions and, where appropriate, to draw conclusions on the extent to which it may adopt any of those opinions.[36]

A general rule would appear to be that a claimant is entitled to compensation to the value that its investment would have had but for the respondent's breaches. But if and to the extent the tribunal is not convinced that a specific risk or downside affecting the claimant's investment would not have existed in the but-for scenario, it should make the appropriate deduction in order to determine those, and only those, losses that are caused

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articulated in *Factory at Chorzów*. Accordingly, it must award relief that will wipe out the consequences of the breach and place the claimants in the position they would have been had that breach not been committed in reality (i.e., by comparing what happened in reality (the actual scenario) with "the situation which would, in all probability, have existed if that act had not been committed" (the but for scenario)). *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL)* v. *Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, paras. 1959-1961.

33 Wöss, San Román, "Full Compensation, Full Reparation and the But-For Premise", 109.

34 *Tethyan Copper Company Pty Limited* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award of 12 July 2019, para. 275.

35 *Ioan Micula and others* v. *Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 917.

36 *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited* v. *Republic of India*, PCA Case No. 2013-09, Award on Quantum, 13 October 2020, para. 545.

by the breach.[37] In *Pezold* and *Border Timbers*, the tribunal considered it appropriate to award compensation if the respondent refused to comply with an award of restitution and, even if there was restitution, to award compensation for any shortfall between the current "as is" value of the assets and the "but-for" value of the assets had there been no breach.[38]

Compensation for damages is compensation that should wipe all the consequences of the illegal act. To achieve this purpose, the *Chorzów* standard uses the fair market value (FMV)[39] at either the date of violation or at the award (here the lost profits needs to be added since the date of the wrongful act). In *Factory at Chorzów*, the PCIJ assumed that:

> the factory had remained essentially in the state in which it was on July 3rd, 1922, and secondly, the factory is to be considered in the state in which it would (hypothetically but probably) have been in the hands of the Oberschlesische and Bayerische, if, instead of being taken in 1922 by Poland, it had been able to continue its supposedly normal development from that time onwards.[40] '

FMV is frequently employed by tribunals as a relevant measure in their consideration of damages. When a violation has been committed, the normal way of calculating damages is the valuation basis. The loss is calculated in accordance with the normal ways of estimating fair market value, which are as follows:

- Income Approach (or discounted cash flow (DCF) approach) – this tends to be used by claimants while computing damages before

37 *Tethyan Copper Company Pty Limited* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award of 12 July 2019, para. 286.

38 *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 755; *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co. (Private) Limited* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015, para. 755.

39 *Factory at Chorzów* speaks of the "value of the undertaking," but this has been recognized to refer to FMV. Abdala, Spiller, "Chorzów's Standard Rejuvenated: Assessing Damages in Investment Treaty Arbitrations", 108. A commonly used definition of FMV is provided in the International Glossary of Business Valuation Terms: "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when nether is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."

40 *Case concerning Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)*, 13 September 1928, PCIJ, Series A, No. 17, p. 52.

courts and tribunals. It involves estimating future cash flows and discounting these back to a net present value by applying a suitable discount rate. The approach relies on the underlying financial theory that the fundamental source of an asset's value is its ability to generate cash flows for its owners. The income approach values an asset based on the income it is expected to generate. The most common form of the income approach is to focus on cash and use the DCF method, which values an asset based on the present value of its expected future cash flows. It accounts for basic fundamentals: (1) the expected future cash flows to be generated by the asset being valued, and (2) the appropriate discount rate that allows for risk and uncertainty (e.g. country risk) and the time value of money. In practice, this is a primary method used to implement the income approach.

- Market Approach (or the "comparables" approach) – it values an asset based on observed market prices for similar assets. This approach is based on the underlying financial theory that the wider and open market has already done the work of valuing a company. Thus, the underlying principle is that similar assets will sell at similar prices. It is used by multiplying company's annual earnings by a multiple based on multiples applicable to other similar quoted companies. This method is useful for valuing companies being sold and bought in the real word. As it is difficult to find two identical companies or assets, it is employed as a check on a valuation produced by the other approaches. There are two main and common sources of comparables: observed values of publicly- traded companies and values of corporate transactions.
- Cost Approach – this rests on the principle that a buyer will not pay more for an asset than the cost to obtain a similar asset (replicate that asset, either by buying an alternative or by recreating it. The cost approach often values an asset based on the historical cost of developing the asset (usually the sunk costs), which may serve as a proxy for the cost to reproduce or replace that asset (their second hand value or their replacement cost).[41] This is not the same as historical

41 MacGregor, Blower, Mitchell, ibidem, 158; Haberman, Perks, "Overview of Methodologies for Assessing Fair Market Value", 171-181; Dellepiane, Cardani, Honowitz, "The Applicable Valuation Approach, in: The Guide to Damages in International Arbitration", 182-190; Demuth, "Income Approach and the Discounted Cash Flow Methodology", 191-215; Horn, Janceckova,

costs of a company or asset as they provide the amount actually spent buying or building that company or asset.

6. Reduction of Damages

Both domestic and international courts and tribunals (established under either domestic or international law) apply well-recognized principles of law limiting responsibility and damages awarded to injured parties in response to breaches committed by wrongdoers. This includes especially, but not exclusively, (1) causation, (2) speculation, (3) contributory fault, (4) foreseeability, (5) mitigation, and (6) the prohibition of double recovery.[42] Depending on the system of law, all these principles may coincide or form a part of larger principle encompassing two or more causes reducing damages.

6.1. Causation

Causation is generally and universally recognized as a general principle of law.[43] For example, under the CISG, the obligee must establish that the loss was caused by a breach of the contract. The causation conforms to the *conditio sine qua non*.[44]

When the *Factory at Chorzów* test is analysed, it becomes clear that one key requirement of any claim for compensation is an element of causation.

The jurisprudence of the Hague Court demonstrates that compensation can be awarded only if there is "a sufficiently direct and certain causal nexus between the wrongful act... and the injury suffered by the Applicant, consisting of all damage of any type, material and moral."[45] A similar approach is followed by investment tribunals. As the *Biwater* Tribunal

Yin, Bivolaris, "Market or Comparables Approach, in: The Guide to Damages in International Arbitration", 248-260

42 Miles, Weiss, "Overview of Principles Reducing Damages, in: The Guide to Damages in International Arbitration", 94.

43 Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 241-253.

44 Butler, ibidem, 57.

45 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, 43, para. 462; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Reparations)*, Judgment of 9 February 2022, paras. 92, 381.

declared, "[c]ompensation for any violation of the [treaty] will only be due if there is a sufficient causal link between the actual breach... and the loss sustained..."[46] If a claimant has not succeeded in its attempt to establish a causal link between the wrongful conduct on the one hand and the losses allegedly incurred on the other hand, no damages are due.[47] The *S.D. Myers* tribunal held that:

> [c]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached; the economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes.[48]

International law, like domestic systems, distinguishes factual causation and proximate causation which in principle reflects factual and legal factors. Here, a claimant sustains its burden of proving that its damages were directly and proximately caused by an unlawful act. The factual causation boils down to proving that a specific unlawful act caused the damage in question.[49] Proximate causation reflects legal considerations and policies lying behind international law that limit and exclude or do not influence responsibility and the amount of compensation (e.g. mitigation). In its Commentary, the ILC, for example, indicated that:

> Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case, the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case, the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases,

46 *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 779.

47 *B3 Croatian Courier Coöperatief U.A.* v. *Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019, para. 1121.

48 S.*D. Myers, Inc.* v. *Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, para. 316.

49 Sabahi, *Compensation and Restitution in Investor-State Arbitration : Principles and Practice*, 170-171.

> the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.[50]

On the other hand, other causes may effectively exclude any form of reparation. Again, the *Biwater* tribunal was apt to conclude that:

> in order to succeed in its claims for compensation, [claimant] has to prove that the value of its investment was diminished or eliminated, and that the actions [State] complains of were the actual and proximate cause of such diminution in, or elimination of, value.[51]

Since the expropriated investment was of zero value due to the actions of the claimant, "none of the [State]'s violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question, or broke the chain of causation that was already in place."[52] Therefore, only the primary cause can lead to damages. In the same vein, the ICJ observed that if the claimant's difficulties resulting in its own mismanagement over a period of years, no compensation is due. In reaching this conclusion, the Court applied an "underlying" or "dominant" cause analysis.[53]

6.2. Prohibition of Speculative Damages

Both under domestic systems and international law, it is a settled principle that hypothetical or speculative damages are not recoverable, as only those damages that are reasonably certain to exist can be recovered.[54] It therefore seems that a certain reasonable (degree of) certainty seems to be necessary as the bar against damages does not require a claimant to prove

50 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Article 13, para. 12.

51 *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 787.

52 Ibidem, para. 798.

53 *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)*, Judgment of 20 July 1989, paras. 100-101.

54 Kantor, ibidem, 70.

its damage to an absolute degree of certainty.[55] Also, UNIDROIT Principles of International Commercial Contracts speak of a "reasonable degree of certainty."[56]

There are several rules which are in favour or against the speculative nature of the damages. For instance, doubts should be resolved against the wrongdoer.[57]

6.3. Contributory Fault

It has been established in the domestic legal system as well as in international law that contributory fault should limit or exclude responsibility of a wrongdoer. In his Hague lecture, G. Savioli pointed out that the conduct of a victim could lead to attenuation or exclusion of responsibility.[58] According to J.J.A. Salmon, the culpable behaviour of a victim could be an element affecting the amount of compensation.[59] In the Harvard Draft on State responsibility, the contributory fault of an injured alien, or his voluntary participation in activities involving an unreasonable risk of injury, barred the claim for compensation.[60]

Also in the context of the principle of clean hands, Article 39 of the ILC Articles is considered which provides that in the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought (also known as: contributory negligence, comparative fault, *faute de la victime*, *faute concourante*). Contributory fault is well known in domestic legal systems.[61] For example, Article 80 of the CISG states that a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

55 Ibidem, 71.
56 UNIDROIT Principles 2010, Article 7.4.3.
57 Restatement (2nd) of the Law of Contract, Section 352.
58 Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", 265-266.
59 Salmon, "Des «mains propres» comme condition de recevabilité des reclamations internationals", 239.
60 Draft Convention on the International Responsibility of States for Injuries to Aliens, *Harvard Law School*, 548–549.
61 Von Bar, *The Common European Law of Torts*; Smith, *Atiyah's Introduction to the Law of Contract*, 398.

International courts and tribunals confirm that contributory fault may lead to the reduction or attenuation of responsibility. The ILC referred to the *LaGrand* case, where the ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. In the *LaGrand* case, Germany had delayed asserting that there had been a breach and instituted proceedings. The ICJ noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification."[62]

The conduct of claimants was taken into account in the *Malléna* and *Garcia and Garza* cases.[63] In *Delagoa Bay Railway*, the arbitrator came to the conclusion that circumstances that could be invoked against the claimants as well as circumstances in favour of the respondent reduced its responsibility and dictated the attenuation of reparation.[64] In investment jurisprudence, Article 39 of the ILC Articles is regarded as declaratory of international law and reflects a general approach applied to issues of causation, contributory fault and unclean hands.[65] The doctrine usually cites the *Yukos*, *Occidental* and *MTD* cases. In the latter, the tribunal decided that Chile breached the treaty, but the claimant contributed to its own loss by imprudent conduct and therefore was partially responsible for the injury.[66]

62 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Article 39, para. 3; *LaGrand (Germany* v. *United States of America)*, Judgment, ICJ Reports 2001, para. 57.

63 *Francisco Mallén (United Mexican States)* v. *U.S.A.*, Award of 27 April 1927, UNRIAA, vol. IV, at 173–190; *Teodoro García and M.A. Garza (United Mexican States)* v. *U.S.A.*, Decision of 3 December 1926 r., UNRIAA, vol. IV, para. 9.

64 *Delagoa Bay Railway, (Great Britain, USA/Portugal)*, Final Decision of 29 March 1900 ; Stoerk, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, 407.

65 *Copper Mesa Mining Corporation* v. *Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 6.91, 6.97.

66 *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, UNCITRAL, PCA Case No. AA 226, *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, UNCITRAL, PCA Case No. AA 227, *Veteran Petroleum Limited (Cyprus)* v. *The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Awards of 18 July 2014, *passim*; *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 659-687; *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, paras. 242–243; Sadowski, "Yukos and Contributory Fault", 1-36.

6.4. Foreseeability

The foreseeability requirement acts as a criterion limiting the amount of liability. In common law, a loss must be able to be anticipated when a breach occurred. Under English law, damages are recoverable only to the extent that the loss was reasonably foreseeable at the time the contract was executed (not at the date of breach).[67] Additionally, the defendant cannot shield itself from liability if it has been grossly negligent (*faute lourde*) or has committed an intentional breach (*dol*, *faute dolosive*).

Legal systems usually recognize that only those damages may be claimed that could have been foreseen. The are some variations among domestic laws, with an emphasis being placed on the intentional conduct or gross negligence of a wrongdoer.[68]

In an average international economic law case, the factual and legal backgrounds are usually quite complex. The parties to the dispute are either (prudent) investors and sovereigns. It is thus difficult to argue that a certain head of loss could not have been foreseen. The same issue arises in some inter-State cases. In the *Nauliaa* case, the tribunal was forced to consider the foreseeability (indirectness) of a loss. Portugal declared that it waived compensation for consequential damages that it had suffered. However, it claimed compensation for the damage caused by the local revolt, and maintained, on the one hand, that this revolt was instigated by Germany and, on the other hand, that it was the natural and necessary consequence of the aggression committed (the German aggression indirectly entailed locals with an opportunity to commit the acts that directly caused damage to Portugal).[69] The tribunal decided to rest its decision on equitable considerations:

67 "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Hadley v Baxendale (1854) 9 Ex 341 (23 February 1854). 1231(3) of the French Civil Code or Section 252 of the German Civil Code.

68 Butler, ibidem, 99; Kantor, ibidem, 103.

69 *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité). Portugal contre Allemagne*, Lausanne, 31 July 1928, UNRIAA, vol. II, 1031.

> il faut distinguer deux catégories de dommages: les dommages immédiats causés par les agressions allemandes que l'État défendeur est tenu de réparer entièrement, mais que le Portugal devra tout d'abofd établir et chiffrer — et les autres dommages dont les pièces déjà produites permettent, sans nouvelle instruction, d'évaluer l'importance et dont les arbitres tiendront compte, dans une mesure très limitée, par la fixation d'une indemnité supplémentaire équitable, en prenant en considération la prépondérance des causes concomitantes étrangères à l'Allemagne.

Likewise, in the second decision the tribunal determined that the above damage should be fixed *ex aequo et bono*. It decided that a fraction of damage claimed by Portugal had to be paid by Germany.[70]

6.5. Mitigation

Damages should be reduced if the aggrieved party mitigated or could have mitigated the loss. In common law, the victim is under a duty to take steps to mitigate the loss. A separate doctrine relates to contribution to the loss by the aggrieved party through a series of actions or inactions. Mitigation and contributory negligence are variously embodied in domestic legal systems. Still, irrespective of the specific solutions developed by those systems, they include mechanisms that more or less reflect those two doctrines. In addition, domestic courts usually enjoy a wide margin of discretion and their case law shows that they apply either mitigation and contributory negligence.

Domestic and international adjudicators proceed on the assumption that the claimant cannot recover for losses that he could have avoided, or did avoid, by taking reasonable steps. Thus, the claimant is expected to mitigate the loss.[71] In international law, mitigation and contributory negligence is also an element affecting the scope of reparation. The ILC noted that: "even the wholly innocent victim of wrongful conduct is expected to act reasonably

70 *Responsibilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité). Portugal contre Allemagne*, Lausanne, 30 June 1930, UNRIAA, vol. II, 1074-1076. "Ex aequo et bono, les arbitres évaluent cette fraction à la somme de 25.000.000 de marks or; cette somme globale comprenant également la part des frais des enquêtes et de l'arbitrage qu'ils estiment devoir mettre à la charge de l'Allemagne et qu'il est superflu de chiffrer séparément."

71 Smith, ibidem, 420; Wöss, San Román Rivera, Spiller, Dellepiane, ibidem, 215.

when confronted by the injury."[72] In the *Gabčíkovo-Nagymaros Project* case, the ICJ declared that:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[73]

The duty to mitigate has widely been applied in investment arbitration. The EDF tribunal, while citing the ILC's Commentary to Article 31 of the ILC Articles and *Middle East Cement*, found that the duty to mitigate damages was a well-established principle in investment arbitration.[74] In *SPP v. Egypt*, the tribunal recognized the duty to mitigate as a general principle of law.[75] Also, the *Cairn* tribunal, citing *Clayton* v. *Canada*, considered a duty to mitigate applied, following a treaty breach, when: (i) a claimant was unreasonably inactive; or (ii) a claimant engaged in unreasonable conduct.[76] The tribunal additionally observed that a mitigation defence was difficult to prove, requiring, as a rule, sufficient evidence to show conduct (action or inaction) following the breach was unreasonable, abusive or against its own economic interests.[77]

72 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Article 31, para. 11.

73 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, para. 80.

74 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012, para. 1302.

75 *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 167.

76 *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL)* v. *Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, paras. 1887-1888.

77 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt* v. *Hungary* , ICSID Case No. ARB/17/27, Award, 13 November 2019, para. 427.

6.6. Double Recovery

As in the case of mitigation, the prohibition of double recovery for the same loss is a well-established principle, also referred to as *enrichessement sans cause*.[78] Double recovery is a threat that arises in the context of independent parallel or multiple proceedings, for example international and domestic proceedings or two international proceedings bought independently under two separate BITs. Although double recovery is not a bar to the admissibility of claims, it does not allow a party to obtain more than full compensation, *i.e.* compensation in excess of what is required to make that party whole.[79]

Courts and tribunals should aim at limiting and preventing double recovery as a claimant cannot be allowed to recover twice for the same injury. Also, they should rely on the abuse of process doctrine should a claimant decide to litigate twice. Courts and tribunals indirectly indicate that claimants are under a duty of good faith not to seek double recovery, when seeking enforcement.[80] On the other hand, a wrongdoer should not rely on the mere possibility to compensate twice in order to avoid recovery. The *Chveron* tribunal accordingly noted that the claimants' recovery of damages under their BIT claim should not be reduced based on the uncertain possibility of a favourable outcome in the national court proceedings, highlighting the fact that international law and decisions as well as domestic court procedures offer numerous mechanisms for preventing the possibility of double recovery.[81]

The defence of double recovery might be successful. In *Total*, the tribunal decided that in order to avoid double recovery, the amount

78 *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others)* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, para. 378.

79 *HOCHTIEF Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, para. 180; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa* v. *Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 253; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, para. 38.

80 *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, paras. 961-965.

81 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.)* v. *Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, para. 557.

of operator fees awarded needed to be reduced by the claimant's proportionate ownership in the project.[82]

7. Conclusion

This brief overview of basic principles governing the assessment and quantification of damages shows that domestic laws and international law share virtually the same set of rules. It is especially visible in the context of limiting responsibility and damages awarded to injured parties in response to breaches committed by wrongdoers: causation, speculation, contributory fault, foreseeability, mitigation, and the prohibition of double recovery. It may also be observed that international law benefited from principles developed in domestic laws and eventually assimilated them, bearing in mind the specific nature of international law. In addition, adjudicators have usually been trained in their respective domestic fields, so they know the rules applicable to the assessment and quantification of damages in their domestic systems. International case law suggests and, in particular, in the classic old case, that judges and arbitrators simply extrapolated those principles and adjusted them on the international plane. Thus, it appears that analogies have been made to private law to draw help and inspiration from that law. This also confirms that "[i]nternational law has recruited and continues to recruit many of its rules and institutions from private systems of law,"[83] and international lawyers are first domestic lawyers. Of course, this does not mean that those principles were imported without any modifications, as they need to be reconciled with the specific nature of international law.

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82 *Total S.A.* v. *Argentine Republic*, ICSID Case No. ARB/04/1, Award, 27 November 2013, para. 95. See: *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, para. 104.

83 *Separate Opinion by Sir Arnold McNair, International Status of South West Africa*, Advisory Opinion of 11 July 1950, ICJ Report 1950, 148.

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