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A Riddle Wrapped in a Mystery Inside an Enigma

Equitable Considerations in the Assessment of Damages by Investment Tribunals

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1 Introduction

It is perhaps trite to say that the principle of 'full reparation', enunciated by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case, has been widely recognised as the customary rule governing the reparation of internationally wrongful acts.[1] According to that judgment, where restitution is unavailable or insufficient, customary law requires the payment of compensation in the form of 'a sum corresponding to the value which a restitution in kind would bear [and] 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'.[2] Whilst the rights of private

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Judgment) [2018] ICJ Rep 15 [29–32]; *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 324 [13]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [460]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [152]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 80 [149–50]; *The M/V Saiga (No 2) (Saint Vincent and Grenadines v Guinea)* (Judgment) [1999] 120 ITLOS Rep 10 [170–1]; *Papamichalopoulos and Others v Greece* (1995) Series A No 330-B [34–6]; *Velásquez-Rodríguez & ors v Honduras* (Reparations and Costs, Judgment of 21 July 1989) IACHR Series C No 7 [26]; *Eritrea's Damages Claims* (Final Award of 17 August 2009) (Eritrea-Ethiopia Claims Commission) XXVI RIAA 505, 524 [24 ff].

[2] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17, 27, 47.

entities are 'on a different plane' to those belonging to States, the damage suffered by an individual affords 'a convenient scale for the calculation of the reparation due to the State',[3] so the extent of the individual injury affords the metric for the calculation of damages at the inter-State level.

The International Law Commission (ILC) took *Chorzów Factory* as the basis for the elaboration of the rules governing the consequences of wrongful acts in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[4] In the Commentary to Article 31, the ILC explained that '[t]he responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act"'.[5] If restitution is unavailable or insufficient, '[t]he role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.'[6] Article 36 ARSIWA then states that '[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution', damage being understood as 'any financially assessable damage including loss of profits'.[7] Given that most Bilateral Investment Treaties (BITs) are silent as to the remedies applicable in case of their violation, investment tribunals have referred to Article 36 ARSIWA as reflecting the applicable standard of compensation,[8] and have recognised *Chorzów Factory* as an 'authoritative description' of customary law on the subject.[9]

In line with the *Chorzów Factory* standard, the determination of compensation seems to operate within three governing parameters.[10] First, the identification of the extent of the damage (material or moral) as a question of fact.[11] Second, the establishment of a sufficiently direct and

[3] ibid 28.

[4] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 31, Commentary to Art 31 [2–3] (ARSIWA).

[5] ibid 91, Commentary to Art 31 [5].

[6] ibid 99, Commentary to Art 36 [3].

[7] ibid.

[8] *Vivendi (I) v Argentina* (Final Award of 20 August 2007) ICSID Case No ARB/97/3 [8.2.6–7]; *Ron Fuchs v Georgia* (Award of 3 March 2010) ICSID Case No ARB/07/15 [504, 532–4].

[9] *Crystallex International Corporation v Venezuela* (Award of 4 April 2016) ICSID Case No ARB(AF)/11/2 [847–8]; *ConocoPhillips v Venezuela* (Award of 8 March 2019) ICSID Case No ARB/07/30 [207–10].

[10] *Ahmadou Sadio Diallo* [14].

[11] *Opinion in the Lusitania Cases* (1923) VII RIAA 32, 39 ('[t]he fundamental concept of "damages" is (…) reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole'); see also *Wall Advisory Opinion* [152–3]; *Diplomatic and Consular*

certain causal nexus between the damage and the internationally wrongful act.[12] Third, the quantification, in monetary terms, of any 'financially assessable' damage through the application of an appropriate valuation methodology.[13] The final amount of compensation will vary depending on permutations of these factors. Conversely, factual or legal considerations beyond these parameters are generally deemed irrelevant to quantum.[14]

Within this conceptual framework, strongly influenced by private-law analogies from municipal tort law,[15] 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.[16] Thus, at the final stages of its codification efforts the ILC decided to omit from the text of ARSIWA any provision allowing for extraneous factors to be taken into account in the determination of compensation beyond damage and causality, such as aggravating or mitigating circumstances, the gravity of the act, or limitations relating to proportionality.[17]

Staff in Tehran (USA v Iran) (Judgment) [1980] ICJ Rep 3 [90]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 16 [284]; *Gabčíkovo-Nagymaros Project* [152]; J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 553; H Grotius, *The Rights of War and Peace* (first published 1625, Richard Tuck ed, Liberty Fund 2005) Book II, ch XVII, sects I and II.

[12] ILC (n 4) 92, Commentary to Art 31 [9]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [460–2].

[13] ILC (n 4) 102–5, Commentary to Art 36 [7–32].

[14] An exception here is made by the ILC concerning the failure to mitigate damages: ILC (n 4) 93, Commentary to Art 31 [11]. The ILC does not, however, attempt to proffer a cognisable legal basis for this consideration.

[15] B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP 2011) 13–17 ('[n]owhere, perhaps, is this link (or the debt of international law to Roman law) more clearly demonstrated than in the (…) landmark *Chorzów Factory* case'). On the influence of rules governing tort liability under municipal legal systems and Roman law upon the standard of compensation under international law: ILC (n 4) 10 [27]; ILA Study Group on Use of Domestic Law Principles in the Development of International Law, 'Report' (Sydney Conference, 2018) [126–7, 157, 165]; H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927) 149.

[16] *Ahmadou Sadio Diallo* [14]; *Certain Activities* (n 1) [32]; ILC (n 4) 99, Commentary to Art 36 [4].

[17] ILC, 'Summary Records of the Meetings of the 31st Session' (14 May–3 August 1979) UN Doc A/CN.4/SER.A/1979, 26 [23, 30], 205 [22], 207 [14]; ILC, 'Report of the International Law Commission on the Work of its 31st Session' (14 May–3 August 1979) UN Doc A/34/10, Commentary to Draft Chapter V, 109 [11]; ILC, 'Summary Records of the Meetings of the 32nd Session' (5–25 July 1980) UN Doc A/CN.4/SER.A/1980, 80 [33], 96 [47]; ILC, 'Preliminary Report on the Content, Forms and Degrees of International Responsibility

A perusal of international jurisprudence, however, paints quite a different picture. In fact, early arbitral commissions,[18] the International Court of Justice (ICJ),[19] the Iran-US Claims Tribunal,[20] *ad hoc* inter-State tribunals,[21] as well as regional human rights courts,[22] have referred to equity (or, interchangeably, 'equitable considerations'[23]) as a normative proposition capable of affecting the determination of damages in ways not expressly contemplated in *Chorzów Factory*. Investment tribunals have followed a similar path, invoking equitable considerations for the determination of compensation due for violations of BIT provisions.[24] What this means in practice is unclear: despite the frequent invocation of equity for the purposes of determining compensation, international courts and tribunals have made little effort to explain the legal basis of these considerations or their underlying methodology.

(Part II of the Draft articles on State Responsibility), by Mr William Riphagen, Special Rapporteur' (1 April 1980) UN Doc A/CN.4/330 reproduced in [1980/II] YBILC 107, 112–13 [27, 34] & 128 [95]; ILC, 'Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur' (15 March, 15 June, 10 and 18 July and 4 August 2000) UN Doc A/CN.4/507, 51 [161, 164], 49 [156(b)], 51 [162–3].

[18] VD Degan, *L'Equité et le Droit International* (Martinus Nijhoff 1970) 158–91.

[19] *Certain Activities Carried Out by Nicaragua in the Border Area* [35]; *Ahmadou Sadio Diallo* [24, 33–6]; *Judgments of the Administrative Tribunal of ILO Upon Complaint Made Against UNESCO* (Advisory Opinion) [1956] ICJ Rep 77, 100; *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Reparations) [2022] ICJ Rep 1 [106, 164, 166, 181, 193, 206, 225, 258, 365].

[20] *Islamic Republic of Iran v USA* (Award of 2 July 2014) IUSCT Case Nos A15(IV) and A24 [230–1] ('investment jurisprudence has recognized the authority of international arbitral tribunals to determine equitably (ie, in equity *intra legem*) the amount of damages'); *Starrett Housing Corporation v Iran* (Final Award of 14 August 1987) IUSCT Case No 24 [339]; G Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon 1996) 241.

[21] *Loan Agreement Between Italy and Costa Rica* (1998) XXV RIAA 21 [69–70].

[22] *Varnava & ors v Turkey* (2009) ECHR 1313 [224]; *Velásquez-Rodríguez* [25–7].

[23] According to A Gourgourinis, 'Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)' (2009) 103 ASIL Proc 79, 80, the words 'equity', 'equitable principles' and 'equitable considerations' are different facets of the same concept: equity denotes the 'normative process' whereas equitable principles or considerations denote the normative means. According to P Weil, 'L'Equité Dans La Jurisprudence de la Cour Internationale de Justice: Un Mystère en Voie de Dissipation?' in V Lowe & M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 123, the terminological confusion between equitable 'principles', 'processes', 'solutions' and 'results' evidences a reluctance to define the normative aspects of equity, but what matters is the result.

[24] *American Manufacturing & Trading, Inc v Zaire* (Award of 21 February 1997) ICSID Case No ARB/93/1 [7.02 & 7.16] (*AMT*); *Gold Reserve Inc v Venezuela* (Award of 22 September 2014) ICSID Case No ARB(AF)/09/1 [686]; *Técnicas Medioambientales Tecmed, SA v Mexico* (Award of 29 May 2003) ICSID Case No ARB (AF)/00/2 [190]. Tribunals have also

Arguably, the integration of equitable considerations in quantum analysis presents some significant advantages. From a procedural point of view, it allows for some flexibility in the fact-gathering process and enables the tribunal to award compensation even when objective circumstances preclude the injured party from producing sufficient evidence to substantiate its loss. The ICJ, for example, has invoked equitable considerations for the determination of compensation where the evidence was insufficient to enable a precise quantification, for 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.'[25] From a substantive point of view, the rigid or mechanical application of customary rules governing compensation might also lead to a juridical outcome that places too strong an emphasis on the extent of the injury caused by the wrongful act, in a manner disconnected from the context in which the injury arose, the nature of the unlawful act, or the respective interests and conduct of the parties. Thus, the application of equity to compensation enables the tribunal to 'infuse' elements of reasonableness and 'individualized justice' in its reasoning,[26] and arrive at a balanced outcome that accommodates the interests of both parties.

Be that as it may, equitable considerations may also give rise to complications in practice. In fact, an unprincipled application of equity to compensation may have serious repercussions for the legitimacy of the dispute settlement procedure. It might also affect the procedural rights of the parties and, ultimately, undermine the integrity of the decision itself. This complexity is exemplified in the International Centre for Settlement of Investment Disputes (ICSID) framework where *ad hoc* annulment committees have stated that if a tribunal misapplies the legal rules in favour of a settlement based on 'general equity', the award might be subject to annulment for manifest excess of power or a failure to state adequate reasons, within the meaning of Article 52(1)(b) and (e) of the Washington Convention.[27]

Outside the ICSID framework, the application of equitable considerations may also give rise to challenges to recognition and enforcement of arbitral

referred to equitable considerations in the context of compensation due for lawful nationalisation: *Kuwait v American Independent Oil Company* (Award of 24 March 1982) *Ad Hoc* Arbitration, 66 ILR 518 [77–8] (*Aminoil*).

[25] *Certain Activities Carried Out by Nicaragua in the Border Area* [35].

[26] F Francioni, 'Equity in International Law' [2013] MPEPIL 1399 [7].

[27] *MTD Equity Sdn Bhd v Chile* (Decision on Annulment of 21 March 2007) ICSID Case No ARB/01/7 [48 & 77]; *Amco Asia Corporation & ors v Indonesia* (Decision on Annulment of 16 May 1986) ICSID Case No ARB/81/1 [26–8].

awards. For instance, States have challenged the validity of arbitral awards relying upon equitable considerations before domestic courts, portraying them as attempts at awarding punitive damages in a manner contrary to international law.[28] Conversely, some municipal courts have attempted at re-opening certain arbitral awards, especially with regard to questions of compensation, invoking 'equity', 'fairness' or 'proportionality' as the legal basis for their judicial review.[29] This development may have serious implications for the finality of arbitral awards: a broadly-construed conception of 'equity' for quantum purposes may in fact be used as the trojan horse to re-open arbitral proceedings and substitute a tribunal's decision for the views of domestic courts, especially where large monetary awards are at stake.

In light of these challenges and the risk of protracted proceedings, it is imperative to develop an analytical framework for the operation of equity in the determination of compensation by investment tribunals. Against this background, this chapter argues that while investment arbitral tribunals are entitled to apply equitable considerations when determining compensation as a general principle of international law, this possibility is restrained by certain limitations beyond which the award might result in a legal error or an excess of powers. To that end, Section 2 will distinguish between the different forms that equity may take and examine the interpretative function of equity in the framework of compensation. Section 3 will examine the interpretative function of equity in the framework of customary norms of State responsibility, whereas Section 4 will argue that recourse to equity is subject to intrinsic and extrinsic limitations, emanating either from the nature of equity as an interpretative canon or from the procedural framework in which tribunals are bound to operate, respectively.

A few words are in order on the scope of this chapter. For analytical purposes, the term 'compensation' should be understood as a pecuniary remedy for the reparation of injury caused by an internationally wrongful act within the meaning of Articles 31 and 36 of ARSIWA. The relationship between equity and other forms of remedies, such as restitution or satisfaction, fall outside the scope of the analysis. In the same vein, equity may also have a bearing on the determination of 'compensation' that is due upon liability for injurious, yet *lawful* acts. Indeed, there are numerous treaty provisions that require the payment of 'fair', 'equitable' or 'just' compensation for

[28] *Gold Reserve Inc v Venezuela* (Venezuela's Motion to Dismiss Petition and to Deny Recognition of Arbitral Award, or in the Alternative, to Stay Enforcement of 12 June 2015) ICSID Case No ARB(AF)/09/1, 31, 36–7.

[29] *Al-Kharafi & Sons Co v Libya and Others* (Judgment of the Cairo Court of Appeal of 3 June 2020) *Ad Hoc* Arbitration [3–4 & 8–12].

acts that are not prohibited by international law, such as the expropriation of foreign investments[30] or the civil liability of economic operators for the harm caused to persons or the environment by hazardous or ultrahazardous activities.[31] Nevertheless, the interpretation of these treaty-specific provisions is a question of primary, not secondary, norms, which are subject to distinct rationales and present structural legal differences when compared to State responsibility. Thus, the meaning of equity within these treaty-specific regimes falls to be determined by reference to their distinctive teleologies and contextual specificities. Finally, even though equitable considerations are frequently integrated in computational models proposed by valuation experts[32] and the methodology employed by tribunals,[33] this chapter will only address the legal function of equity, as opposed to the use of equity in the process of valuation methodologies.

2 The Legal Basis for the Application of Equity to Compensation

Doctrinal analysis of the concept of equity typically begins with some preliminary questions regarding the normative character of equity and its functions in general international law. It is not, however, the purpose of this chapter to revisit the doctrinal debate surrounding the normativity of equity.[34] Suffice to say that, throughout the twentieth century, the development of international law has transformed equity from a non-legal

[30] *Compañia del Desarrollo de Santa Elena SA v Costa Rica* (Award of 17 February 2000) ICSID Case No ARB/96/1 [91–2 & 95]; U Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8(5) JWIT 717, 717 ff; *contra* E Lauterpacht, 'Issues of Compensation and Nationality in the Taking of Energy Investments' (1990) 8(1) JERL 241, 247–50 ('Attractive though the concept of equity may be in many situations, and perhaps as much beyond criticism as is mother love, we must recognise that it is not a concept that can be sprinkled like salt on every part of the law (…) it is not permissible to use equitable considerations to qualify the role of the various individual factors in a DCF calculation of value').

[31] For a detailed analysis, A Boyle & C Redgwell (eds), *Birnie, Boyle, and Redgwell's International Law and the Environment* (4th edn, OUP 2021) 226–33; A Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17(1) JEL 3, 5, 12, 19.

[32] WH Knull, ST Jones, TJ Tyler & ors, 'Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments' (2007) 25 JERL 268, 290, 298–300.

[33] *AMT v Zaire* [7.02]; *American International Group, Inc v Iran* (Award of 7 December 1983) IUSCT Case No 2, 4 IUSCTR 96, 109; *Amoco International Finance Corp v Iran* (Partial Award of 14 July 1987) IUSCT Case No 56, 83 ILR 500, 542–3, 570, 574–6, 587 [224–5, 252–5 & 258].

[34] See generally A Gourgourinis, 'Delineating the Normativity of Equity in International Law' (2009) 11(3) ICLR 327, 327 ff; *Maritime Delimitation in the Area Between Greenland*

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concept[35] to a general principle of law within the meaning of Article 38(1)(c) of the PCIJ and later ICJ Statute.[36] As early as 1920, the Advisory Committee of Jurists, tasked with the preparation of the draft Statute for the PCIJ, understood equity as an integral part of international law to be applied by the World Court,[37] a point subsequently endorsed by the overwhelming majority of scholars and jurisprudence.[38]

Nevertheless, investment tribunals have not clearly articulated the legal basis for the application of equitable considerations to the assessment of damages. In *LIAMCO*, for example, the tribunal confusingly referred to equity as a 'general principle of law' under Article 38(2) of the ICJ Statute, instead of Article 38(1)(c).[39] In the same vein, the *Aminoil* Tribunal stated that 'redress will be ensured *ex aequo et bono*' without 'depart[ing] from principles of law', in plain contradiction to the terms of Article 38(2) of the ICJ Statute.[40]

It is, however, clear, that the application of equity as a general principle of law should not be confused with a decision *ex aequo et bono*. In the *North Sea Continental Shelf* cases, the ICJ drew a distinction between the power of the Court to settle disputes *ex aequo et bono* and equity as an integral part of international law (equity *intra legem*).[41] In *Tunisia/Libya*, the Court explained that 'the legal concept of equity is a general principle

and Jan Mayen (Judgment) [1993] ICJ Rep 38, Separate Opinion of Judge Weeramantry, 211 [52–102]; Weil (n 23) 121, 124 ff.

[35] G Ripert, 'Les Règles du Droit Civil Applicables aux Rapports Internationaux (Contribution à l'étude des principes généraux du droit visés au Statut de la Cour permanente de Justice internationale)' (1933) 44 RdC 565, 575–6; Degan (n 18) 15–17; *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, Dissenting Opinion of Vice-President Koretsky, 154, 166.

[36] M Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (HUP 1931) 1052; G Berlia, *Essai sur la Portée de la Clause de Jugement en Équité en Droit des Gens* (Université de Paris 1937) 74; T Gihl, 'Lacunes du droit international' (1932) 3 NordJIntlL 37, 54; H Lauterpacht, 'Règles Générales du Droit de La Paix' (1937) 62 RdC 96, 183–4; MO Hudson, *The Permanent Court of International Justice, 1920–1942, A Treatise* (Macmillan 1943) 617–18.

[37] Francioni (n 26) [6].

[38] W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) 197; C de Visscher, 'Contribution à l'etude des sources du droit international' (1933) 60 RDILC 395, 414 ff; S Rosenne, 'The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law' in A Bloed & P van Dijk (eds), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality* (Europa Instituut 1988) 85, 108.

[39] *Libyan American Oil Company v Libya* (Award of 12 April 1977) *Ad Hoc* Tribunal, 62 ILR 140, 209 (*LIAMCO*).

[40] *Aminoil* [78].

[41] *North Sea Continental Shelf Cases* [88].

directly applicable as law.'[42] The Court, 'whose task is by definition to administer justice is bound to apply it.'[43] By contrast, dispute-settlement *ex aequo et bono* entails that a tribunal may act as an *amiable compositeur* for the 'adjustment of the respective interests' of the parties.[44] While the latter function requires express agreement by the parties (Article 42(3) of ICSID),[45] the former is not simply 'a matter of abstract justice', but a rule of law capable of generating legal obligations between States.[46]

Within the framework of *intra legem* equity, the ICJ has drawn a further distinction between equity *praeter* and *infra legem.*[47] Equity *praeter legem* acquires an autonomous normative function in case of *lacunae*, 'in order to remedy the insufficiencies of international law and fill in its *logical* lacunae.'[48] Conversely, *infra legem* equity consists in 'a method of interpretation of the law in force, and is one of its attributes.'[49] Leaving aside doctrinal objections against the traditional typology of equity,[50] this analysis will not focus on the *praeter legem* of equity: to the extent that the *Chorzów Factory* standard has received wide-spread acceptance in State practice and jurisprudence as reflecting customary law, it seems untenable to speak of a general 'gap' in State responsibility to which *praeter legem* equity could apply,[51] although it may always be possible to identify smaller gaps to which *praeter legem* equity may be of relevance.

Rather, it is the interpretative function of equity that is most pertinent to the customary rules governing the determination of compensation.[52] Thus, in *Amco v Indonesia* the ICSID annulment committee dismissed the idea that any mention of 'equitable considerations' in the award would

[42] *Continental Shelf (Tunisia/Libya)* (Merits) [1982] ICJ Rep 18 [71].
[43] ibid.
[44] *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep 554 [28]; C Schreuer, 'Decisions *Ex Aequo et Bono* under the ICSID Convention' (1996) 11 ICSID Rev – FILJ 37.
[45] Eg, see *SARL Benvenuti & Bonfant v Congo* (Award of 15 August 1980) ICSID Case No ARB/77/2 [4.90–8]; *Atlantic Triton Company Limited v Guinea* (Award of 21 April 1986) ICSID Case No ARB/84/1.
[46] *Continental Shelf* [71]; *North Sea Continental Shelf Cases* [71].
[47] *Frontier Dispute* [28].
[48] *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, 286 [42] (emphasis in the original); O Schachter, 'International Law in Theory and Practice' (1982) 178 RdC 15, 85.
[49] *Frontier Dispute* [28]; see also, M Akehurst, 'Equity and General Principles of Law' (1976) 25(4) ICLQ 801, 801–2.
[50] V Lowe, 'The Role of Equity in International Law' (1988) 4 Aust YBIL 54, 56, 59 ff; Gourgourinis (n 34) 330.
[51] I Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, OUP 2017) [3.347].
[52] *Iran v USA* [230].

necessarily amount to a decision *ex aequo et bono*, and accepted that equitable considerations may 'form part of the law to be applied by the Tribunal' for the purposes of compensation.[53] In *Dogan v Turkmenistan* the annulment committee also stated that equitable considerations were 'inherent (…) in the interpretation of the law applied by the Tribunal.'[54] The committee in *MTD v Chile* developed this point further, stating that a tribunal is entitled to 'tak[e] into account considerations of fairness in applying the law', given that 'individual rules of law will often require fairness or a balancing of interests to be taken to account.'[55]

These propositions align with the general understanding of the hermeneutical function of equity as intimately linked with the requirements of good faith and reasonableness. Following a long tradition of jurists,[56] Schwarzenberger postulates that equity demands 'reasonableness and good faith in the interpretation and application of treaties'.[57] For '[e]ven in a relatively static environment, the need arises sooner or later to soften the harshness of *jus strictum* by the infusion of elements of equity and elasticity.'[58] In the same vein, certain authors have argued that equity may 'soften' or 'temper' the strict application of positive rules, by 'infusing elements of reasonableness and 'individualised' justice in their interpretation, whenever the applicable law leaves a margin of discretion',[59] or as a 'a normative flexifier [*sic*] mitigating the rigidity of application of positive international law'.[60]

[53] *Amco v Indonesia* (n 27) [26]–[28].

[54] *Adem Dogan v Turkmenistan* (Decision on Annulment of 15 January 2016) ICSID Case No ARB/09/9 [100].

[55] *MTD v Chile* [48 & 77].

[56] R Kolb, *La bonne foi en droit international public: Contribution à l' étude des principes généraux de droit* (Graduate Institute Publications 2000) 264, fn 545–7; R Phillimore, *Commentaries Upon International Law*, Vol II (T&JW Johnson 1855) 70 ('[a]ll international treaties are covenants *bonae fidei*, and are, therefore, to be equitably and not technically construed'); Baron É Descamps, 'L'Influence de la Condamnation de la Guerre sur l'Evolution Juridique Internationale' (1930) 31 RdC 394, 554 ('Quand le droit des gens universel affirme que les traités sont des conventions de bonne foi, il érige en règle l'obligation de les interpréter et de les appliquer avec toutes les suites que l'équité, notamment, leur donne suivant leur nature'); E Kaufman, 'Règles Générales du Droit de la Paix' (1935) 54 RdC 511 ('le principe de la bonne foi (…) [est] destiné à faire prévaloir les exigences de l'équité contre les pures formalités').

[57] G Schwarzenberger, 'Equity in International Law' (1972) YBWA 346, 357.

[58] G Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 RdC 192, 379 & 301 ('[o]bservance of good faith, then, becomes equivalent to the infusion of considerations of equity in the moral sense into the treaty superstructure of international law').

[59] Francioni (n 26) [7]; M Fitzmaurice, 'International Protection of the Environment' (2001) 293 RdC 16.

[60] Gourgourinis (n 34) 327.

Insofar as *infra legem* equity has been mostly theorised at the level of treaty interpretation, the question arises whether its interpretative function extends to customary rules. In this regard, academic authors have raised a series of doctrinal objections against the possibility of interpreting customary norms *as such*, pointing towards the absence of a *written* text that could be analysed through the ordinary means of interpretation.[61] Without further delving into this wider doctrinal debate, it is sufficient to note that the applicability of *infra legem* equity to compensation has been relatively uncontested in practice: thus, in the *Armed Activities* case the ICJ made several references to equitable considerations at the reparations stage, and several judges acknowledged that recourse to equitable considerations in determining compensation 'is an application of equity *infra legem*'.[62] In *Total v Argentina*, the tribunal also noted that '[e]quitable considerations in the application of the law, including in performing calculation of damages, pertain to *aequitas infra legem* (…) and not *aequitas praeter legem* to use a Latin expression (equity within what the law admits)'.[63] Indeed, if *infra legem* equity can affect the interpretation of treaty-based rules, it stands to reason that it can also affect the interpretation of customary norms, which are framed at such level of generality that a further deductive process is required to particularise their content and meaning to the circumstances of each case.[64] The question, therefore, is not about whether equitable considerations may apply to the interpretation of customary law *in abstracto*, but rather about how that process comes to bear.

3 Lost and Found: Equitable Considerations in the Law of State Responsibility

Heretofore, academic authors have approached the principle of equity through the lens of primary rules governing inter-State relations, ranging

[61] Eg. T Treves, 'Customary International Law' [2006] MPEPIL 1393 [2]; VD Degan, *L'interprétation des accords en droit international* (Nijhoff 1963) 162. For a response to these arguments, P Merkouris, *Interpretation of Customary International Law: of Methods and Limits* (Brill 2023) (on file with the author).

[62] *Armed Activities on the Territory of the Congo,* Separate Opinion of Judge Iwasawa [5–15], Separate Opinion of Judge Yusuf [24] ('equitable considerations are of an essentially legal character (equity *infra legem*)').

[63] *Total SA v Argentina* (Award of 27 November 2013) ICSID Case No ARB/04/1, fn 39.

[64] P Merkouris, 'Interpreting the Customary Rules of Interpretation' (2017) 19 ICLR 126, 136–42.

from maritime boundary delimitation[65] to the exploitation and management of natural resources,[66] the 'fair and equitable treatment' standard in BITs,[67] or the law of the WTO.[68] By contrast, much less attention has been paid to the question whether – and if so, how – equity may affect the interpretation of secondary norms governing the consequences of wrongful acts,[69] even less so compensation.[70] As noted by Milano, the function of equity in the identification of remedies for wrongful acts

> is an aspect of the general principle of equity which has been under-investigated in the literature and one where the relationship between equity itself and the application of the ordinary rules of State responsibility, presumably of a customary nature, becomes crucial.[71]

However, recourse to equitable considerations for compensation purposes is not new.[72] States have instructed arbitral tribunals and mixed claims commissions to apply 'equity' to the assessment of damages arising from foreign claims as early as the 1794 Jay Treaty, where the US and Great Britain mandated the umpire to settle their claims to compensation on the basis of 'justice, equity and the law of nations'. But even where equity was not expressly mentioned in the arbitral agreement, this did not prevent arbitrators from invoking equity *proprio motu* for the determination of compensation.[73] Even though some of these early decisions were rendered *ex aequo et bono*,[74] some other tribunals invoked equity within

[65] D Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries' (1990) 84(4) AJIL 837, 837 ff.

[66] T Franck, *Fairness in International Law and Institutions* (OUP 2012) 56 ff; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397, Arts 74, 83, 140, 155(2).

[67] Francioni (n 26) [22]–[28].

[68] A Gourgourinis, *Equity and Equitable Principles in the World Trade Organization* (Routledge 2016) 42–134.

[69] Gourgourinis (n 23) 81. On this distinction, see HLA Hart, *The Concept of Law* (Clarendon Press 1984) 77 ff.

[70] E Milano, 'General Principles *Infra, Praeter, Contra Legem*? The Role of Equity in Determining Reparation' in M Andenas & ors (eds), *General Principles and the Coherence of International Law*, vol 37 (Brill Nijhoff 2019) 67.

[71] ibid.

[72] For early writings on this question, see A Heffter, *Le Droit International Public de l'Europe* (first published 1844, Jules Bergson tr, 3rd edn, Cotillon Libraires 1873) [101–200]; C de Visscher, *De l'equité dans le règlement arbitral ou judiciaire des litiges de droit international public* (Pedone 1972) 57–66.

[73] Degan (n 18) 158–91.

[74] *Orinoco Steamship Company Case* (1910) XI RIAA 16, 240; *Attaque de la caravane du maharao de Cutch* (1927) II RIAA 821, 826; *Campbell* (1931) II RIAA 1145, 1157–8; *The Masonic* (1885) published in H La Fontaine, *Pasicrisie internationale* (Stämpfli 1902) 281–2.

the framework of legal reasoning, either as the normative basis for allowing a claim (*praeter legem*),[75] or as a legal principle capable of influencing the interpretation of customary law (*infra legem*).[76]

Eventually, the concept of equity found its way into the codification efforts of the ILC on the law of State responsibility. Originally, the 1930 Preparatory Committee of the Hague Conference stated in its 'Basis for Discussion No. 29' that '[r]esponsibility involves (…) an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation.'[77] This standard echoes the conventional understanding of the *Chorzów Factory* judgment that had been rendered by the PCIJ just the previous year. As early as 1956, however, Special Rapporteur Garcia-Amador recognised that, apart from the remedial function of compensation, there may also be some 'attenuating', 'extenuating' or 'aggravating' circumstances that can affect the extent to which a State is bound to compensate for injury caused to aliens in its territory.[78] This position, which signalled a departure from *Chorzów Factory*, became clearer in his subsequent reports, where he noted that, while

> the basic and at the same time general criterion, is that the reparation should be commensurate with the nature or extent of the actual injury (…) the reparation is not always strictly in keeping with the true nature or extent of the injury. Other factors generally come into play, such as the circumstances in which the injury occurred, the gravity, in special situations, of the act or omission imputable to the respondent State and, on occasion, factors justifying a reduction in the amount of the reparation.[79]

[75] *John Gill* (1931) V RIAA 157, 162; *Spillane* (1931) RIAA 290; *Règlement des prestations effectuées dans la Ruhr* (1927) II RIAA 797, 818; *Biens britanniques au Maroc espagnol: Réclamation No 51* (1925) II RIAA 615, 726; *Heny* (1903) IX RIAA 125, 134; *Compagnie de la Baie d'Hudson* (1869) published in in N Politis & AG de Lapradelle (eds), *Recueil Des Arbitrages Internationaux (1856–1872)* (Pedone 1923) 503, 512; *Harington et autres* (1862) published in N Politis & AG de Lapradelle (eds), *Recueil Des Arbitrages Internationaux (1856–1872)* (Pedone 1923) 155, 157–8.

[76] For an overview of pre-1960 arbitral jurisprudence, see Degan (n 18) 164 ff.

[77] League of Nations, 'Bases of Discussion Drawn up by the Preparatory Committee of the Hague Codification Conference' (1929) LoN Doc C.75.M.69.1929.V, 151.

[78] ILC, 'International Responsibility: Report by FV Garcia Amador, Special Rapporteur' (20 January 1956) UN Doc A/CN.4/96 reproduced in [1956/II] YBILC 173, 208–9 [183–91]; ILC, 'Summary Record of the 370th Meeting' (1956) UN Doc A/CN.4/SR.370, 230 [33].

[79] ILC, 'International Responsibility: Sixth report by FV Garcia Amador, Special Rapporteur' (26 January 1961) UN Doc A/CN.4/134 reproduced in [1961/II] YBILC 1, 30 [117]; see also, ILC, 'Report of the International Law Commission on the Work of its 27th Session' (5 May–25 July 1975) UN Doc A/10010/Rev. l reproduced in [1975/II] YBILC 47, 56 [42] & 59 [51] (referring to 'various circumstances whose existence (…) might preclude, attenuate or aggravate any wrongfulness of the conduct attributed to the State').

Special Rapporteur Ago did not submit a report on the consequences of internationally wrongful acts before his election to the ICJ. However, when discussing his eighth report on the circumstances precluding wrongfulness, several ILC members observed that, while certain circumstances may not preclude the wrongfulness of an act *qua*, they may nonetheless operate as mitigating factors for the purposes of reparation.[80] Special Rapporteur Ago acknowledged this point[81] and the commentary to draft Chapter V stated that circumstances precluding wrongfulness 'must not be confused with other circumstances which might have the effect not of precluding the wrongfulness of the act of the State but of attenuating or aggravating the responsibility entailed by that act', with regard to the content, form and degree of responsibility.[82] Even though neither Rapporteur expressly referred to 'equity' as the legal basis, they both acknowledged that it was possible for compensation to take into account not only the extent of the injury caused by the wrongful act, but additional factors as well.

The following year, Special Rapporteur Riphagen argued in favour of a 'qualitative' and 'quantitative' degree of proportionality between the characteristics of the unlawful conduct and the consequences in response thereto, including the level and amount of compensation.[83] Notably, since the *North Sea Continental Shelf* cases the ICJ has drawn a connection between the application of equitable principles and a 'reasonable degree of proportionality' to be observed by the respective decision-maker.[84] In the course of the debate on Riphagen's report, the principle of proportionality was expressly endorsed by some ILC members[85] (notably in the context of compensation[86]) but met with scepticism from others.[87]

Equitable considerations resurfaced with greater force at the last stages of the codification process. In his first report to the ILC, Special Rapporteur

[80] ILC, 'Summary 31st Session' (n 17) 26 [23, 30] & 205 [22].
[81] ibid 207 [14] ('there might be situations in which wrongfulness would not be precluded but in which account should be taken of the circumstances involved as attenuating circumstances in regard to fixing the amount and form of reparation for damage').
[82] ILC, 'Report 31st Session' (n 17), Commentary to Draft Chapter V, 109 [11].
[83] ILC, 'Preliminary Report International Responsibility' (n 17) 112–13 [27, 34], 128 [95]; ILC, 'Summary 32nd Session' (n 17) 80 [33], 96 [47].
[84] *North Sea Continental Shelf Cases* [93–4, 98 & 101.D.(3)].
[85] ILC, 'Summary 32nd Session' (n 17) 83 [15–17], 87–8 [11, 17, 21], 95 [36].
[86] ibid 88 [17], 91 [7] ('[a]nother aspect was that proportionality could act as a mitigating circumstance in the determination by the forum court or States concerned of the amount of reparation to be paid'); 95 [40] ('proportionality was the linchpin of Part II of the draft, and it applied equally to reparation').
[87] ibid, 82–4 [9, 25].

Arangio-Ruiz described the *Chorzów Factory* principle as too vague or sweeping a proposition, which does not settle all of potential legal issues involved, such as the 'relevance of the injured State's conduct', of the 'gravity of the wrongful act' or the 'degree of fault of the offending State'.[88] The following year, however, he explained that '[h]e had omitted express references to equity from the report because, as experience showed, such references were apt to be unhelpful. Needless to say, however, equity was implied in all legal rules and formed an essential and integral part of law.'[89] In his opinion, equity was intimately linked to the relevance of fault, wilful intent or negligence for the purposes of compensation.[90] In the same vein, other ILC members raised the question of the onerousness of the financial obligation upon the obligor State as an equitable consideration that could justify a proportional reduction of damages in some cases.[91] The Special Rapporteur expressly acknowledged the role of equity in the assessment of damages, but noted that 'it might be dangerous to refer expressly to [equity], since it was part and parcel of law and of any legal decision'.[92] Still, the original Commentary to Article 6*bis* stated that:

> There may be other equitable considerations *that militate against full reparation*, particularly in cases involving an author State with limited financial resources, but only to the extent that such considerations can be reconciled with the principle of the equality of all States before the law and the corresponding equality of the legal obligations of all States.[93]

It was, therefore, understood that the customary standard of full reparation could be balanced against equitable considerations, which could reduce the extent of reparation, including the amount of compensation. In his third report to the ILC, Special Rapporteur Crawford observed that international jurisprudence reflected

[88] ILC, 'Second Report on State Responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur' (9 and 22 June 1989) UN Doc A/CN.4/425 and Add.L reproduced in [1989/II] YBILC 1, 8 [21–2].

[89] ILC, 'Summary Records of the Meeting of the 42nd Session' (1 May–20 July 1990) UN Doc A/CN.4/SER.A/1990, 173 [41].

[90] ibid 173 [41].

[91] ibid 165 [57], 168 [7], 177 [6], 189 [31–2], 190 [39].

[92] ibid 198 [31].

[93] ILC, 'Draft Report of the ILC on the Work of its 45th Session, Addendum' (9 July 1993) UN Doc A/CN.4/L.484/Add.3, 5–6 [6 *bis*] (emphasis added). The text of the commentary was amended in ILC, 'Report of the International Law Commission on the Work of its 45th Session' (3 May–13 July 1993) UN Doc A/48/10, 60 [8] to read: ('There may be other equitable considerations that *might be taken into account* in providing full reparation') (emphasis added).

> the wide variety of factual situations, the influence of particular primary obligations, evaluations of the respective behaviour of the parties (both in terms of the gravity of the breach and their subsequent conduct), and, more generally, a concern to reach an equitable and acceptable outcome.[94]

When international judges are making a complex judgment such as one regarding the amount of compensation, he observed, 'equitable considerations will inevitably be taken into account, whether acknowledged or not.'[95] He warned, however, that, 'while illustrations can be given of the operation of equitable considerations and of proportionality in international law, the attempt to specify them in detail is likely to fail.'[96] Given that the ILC was anxious to conclude its codification work before 2001, the Special Rapporteur made no effort to define 'equitable considerations' in detail. But the general proposition made it to the final commentary to Article 36 of ARSIWA (albeit with diluted wording), stating that:

> As to (…) 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.[97]

It follows that the ILC understood that the customary standard of 'full reparation' would not always provide satisfactory solutions and that international tribunals could have recourse to equity, as a general principle of law, for the adjustment of compensation in such a way as to reflect additional factors, such as the parties' conduct and situation, the content of the primary norm breached, or an evaluation of their respective interests. While most Special Rapporteurs acknowledged the relevance of equity for compensation (including under the rubric of proportionality),

[94] ILC, 'Third report on State Responsibility, by Mr James Crawford, Special Rapporteur' (15 March, 15 June, 10 and 18 July and 4 August 2000) UN Doc A/CN.4/507, 51 [159] (internal references omitted).

[95] ibid.

[96] ibid.

[97] ILC (n 4) 100 [7], referring to Aldrich (n 18) 242; B Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages' (1984) 185 RdC 14, 101 (discussing the non-permissibility of punitive damages); L Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Sirey 1938) 175 (suggesting that the principle of full reparation may at times be unsatisfactory and unhelpful); C Gray, *Judicial Remedies in International Law* (Clarendon 1987) 11 (discussing references to 'equity' in early arbitral awards) & 33–4 (discussing different types of injury); J Personnaz, *La Réparation du Préjudice en Droit International Public* (Sirey 1939) 98–109 (discussing the relevance of the source of the obligation to provide reparation, of the conduct of the parties and of their general situation on the determination of reparation).

it was agreed not to insert an express qualification to the text of the draft articles. However, far from discounting the relevance of equity in favour of a mechanical approach to quantum, the ILC suggested that *infra legem* equity forms part-and-parcel of the secondary rules of State responsibility and may have a bearing on the level of compensation. This proposition, reflected in the final commentary of ARSIWA after more than 50 years of discussions and buttressed by the contemporaneous and subsequent practice of courts and tribunals, is of key import for the interpretation of the rules governing compensation.[98]

4 Equitable Considerations in Investment Arbitration: Is There a Limit?

In line with the preceding analysis, investment tribunals have, expressly or impliedly, applied equitable considerations to the determination of compensation payable in case of unlawful acts. As early as 1982, for example, the *Aminoil* Tribunal observed that 'any estimate in money terms of amounts intended to express the value of an asset, of an undertaking, of a contract, or of services rendered, must take equitable principles into account'.[99] In *Amco v Indonesia*, the committee further stated that 'a tribunal applying international law may take account of equitable considerations in non-maritime boundaries cases', such as compensation.[100]

While this proposition is generally accepted in the literature,[101] there seems to be no consensus as to what these 'equitable considerations' might be. Commentators, practitioners and tribunals alike have proffered

[98] D Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31(1) EJIL 171, 198.

[99] *Aminoil* [78].

[100] *Amco v Indonesia* [27].

[101] B Sabahi, K Duggal & N Birch, 'Principles Limiting the Amount of Compensation' in C Beharry (ed), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill Nijhoff 2018); Marboe (n 51) 155–7 [3.343–59]; SN Elrifai, 'Equity-Based Discretion and the Anatomy of Damages Assessment in Investment Treaty Law' (2017) 34(5) JInt'l Arb 835, 835–88; C Schreuer & ors, *The ICSID Convention – A Commentary* (CUP 2009) 636–7 [269–70]; M Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer 2008) 116 ('[t]he use of equitable considerations in the computation of compensation amounts is not uncommon, even if it is not always admitted (…) It also lies just beneath the surface of many judicial and arbitral decisions'); T Wälde & B Sabahi, 'Compensation, Damages, and Valuation in International Investment Law' in P Muchlinski, F Ortino & C Schreuer (eds), *Oxford Handbook of International Investment law* (OUP 2008) 1049, 1103–5.

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a wide range of factors capable of influencing quantum (well beyond the *Chorzów* formula), albeit not always invoking equity as the relevant legal basis. On the one hand, it has been suggested that equitable considerations may justify an aggravated amount of compensation, in order to reflect the 'seriousness' or 'gravity' of the unlawful act,[102] or the subjective intent (or fault) of the wrongdoer State.[103] Similar considerations, however, evoked serious objections within the ILC during the codification process that led to the ARSIWA: despite the original proposals to enable damages reflecting the gravity of the breach,[104] the ILC eventually rejected the idea that compensation be used as a vehicle for the introduction of punitive damages.[105] The ICJ has also rejected the availability of punitive or exemplary damages, even in those cases involving the most serious violations of international human rights and humanitarian law.[106]

On the other hand, it has been suggested that equitable considerations may warrant an adjustment (or proportionate reduction) of compensation in order to accommodate additional, countervailing considerations, that relate either to the injured party or the wrongdoer State. As regards to the first category, some tribunals have sought to limit the amount of recoverable compensation by reference to the injured party's conduct that either precedes or follows the wrongful act. For example, in *Himpurna v PLN* the Tribunal applied the doctrine of abuse of right in favour of the respondent, in order to prevent the claimant's contractual rights from being extended 'beyond tolerable norms', also taking into account PLN's status 'as an arm of governmental policy acting in pursuit of the public welfare'. On that basis, it lowered the amount of compensation due referring to 'equitable principles'.[107]

[102] In *Gold Reserve v Venezuela* [615 & 668], the Tribunal awarded over $700 million in damages stating that, given the 'number, variety and seriousness of the breaches' by Venezuela of the FET standard, '[t]he compensation due to Claimant for such breaches should reflect the seriousness of the violation'.

[103] ILC, 'Special Rapporteur Arangio-Ruiz' (n 88) 173 [41].

[104] ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc A/51/10, 63 (Art 45, providing for 'damages reflecting the gravity of the infringement' in cases of gross infringement of the rights of the injured State).

[105] ILC (n 4) 99, commentary to Art 36 [(4)] ('Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character').

[106] *Armed Activities on the Territory of the Congo* [102]; see also *Ahmadou Sadio Diallo* [57]; *Certain Activities Carried Out by Nicaragua in the Border Area* [31].

[107] *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listruik Negara (Indonesia)* (Final Award of 4 May 1999) XXV YBCA 14, 71–3 [237–8] & 92–3 [325–31]. In

Conversely, international tribunals have endorsed the proposition that the amount of compensation must be reduced when the claimant has failed to take 'reasonable steps' to mitigate the injury caused.[108] Failure to mitigate damages has been understood as a matter that is notionally distinct from the contributory fault/negligence of the injured party in the occurrence of the wrongful conduct and the emergence of the harm, which is a matter related to the existence of causal nexus.[109] Insofar as tribunals have based the existence of a 'duty to mitigate damages' upon considerations of fairness,[110] this proposition may be interpreted as a specific form of equitable considerations that comes into play after the occurrence of the harm. In the same vein, the Arbitral Tribunal in the *Loan Agreement* case emphasised the 'equitable character' of the customary norms of compensation, which led the Tribunal to consider not only the 'technical' provisions of the treaty and loan agreements, but also the 'overall circumstances of the case, including the causes of delay, the misunderstandings (…) and generally the specific situation and conduct *of both Parties*, as well as the totality of the relations of amity and co-operation.'[111]

With respect to equitable considerations relating to the wrongdoer State, it is important to note that recent scholars have argued for the reconceptualisation of investment arbitration from a private-law-type arbitration into a form of 'public-law adjudication', which takes into consideration the public functions of the host State *vis-à-vis* its population in furtherance of the public interest and allows for some flexibility to the host State concerned. The public-law paradigm has found expression in

its 'Basis of discussion No 19', the Preparatory Committee of the 1930 Hague Conference also identified the 'provocative attitude' of the injured person as a factor capable of affecting the extent of a State's responsibility: ILC (n 4) 71–2 [(5)].

[108] See, for example, *AIG Capital Partners, Inc and CJSC Tema Real Estate Company Ltd v Kazakhstan* (Award of 7 October 2003) ICSID Case No ARB/01/6 [10.6.4]. In *MTD Equity Sdn Bhd v Chile* (Award of 25 May 2004) ICSID Case No ARB/01/7 [217 & 242–3], the Tribunal decided to reduce damages by 50% to reflect the fact that claimants had taken decisions that increased their risks and amplified their losses. See further *Gabčíkovo–Nagymaros Project* [80]; *Well Blowout Control Claim* (Report and Recommendations of UNCC of 15 November 1996) 109 ILR 479 [54].

[109] *Hulley Enterprises Limited v Russia* (Final Award of 18 July 2014) PCA Case No 2005–03/AA226 [1603].

[110] In *EDF v Argentina* (Award of 11 June 2012) ICSID Case No ARB/03/23 [1301] the Tribunal observed that it would be 'patently unfair to allow Claimants to recover damages for loss that could have been avoided by taking reasonable steps'. In *Middle East Cement Shipping and Handling Co SA v Egypt* (Award of 12 April 2002) ICSID Case No ARB/99/6 [167], the Tribunal held that '[t]he duty to mitigate (…) can be considered to be part of the General Principles of Law'.

[111] *Loan Agreement Between Italy and Costa Rica* [70–1 & 77].

investment arbitration in several ways, such as the principle of proportionality, legitimate expectations and the applicable standard of review.[112] Similar considerations have found their way into the assessment of damages.[113] For instance, it has been suggested that investment tribunals should either weigh the level of compensation against legitimate 'public interest' considerations motivating the unlawful conduct of the host State[114] or consider the circumstances surrounding the wrongful act, such as the occurrence of an armed conflict in the host State's territory.[115]

Within that context, the potentially 'crippling' effect that large sums of compensation may have for a host State's financial subsistence has been suggested as a potential equitable consideration that is relevant to quantum. In his separate opinion in the quantum phase of *CME v Czech Republic*, Sir Ian opined that the principles of compensation must be read within the framework of the BIT and noted that '[i]t would be strange indeed, if the outcome of a [BIT] took the form of liabilities "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population"'.[116] Along similar lines, Paparinskis has argued in favour of an exception to the principle of full compensation, with a view to ensuring that '[r]emedies serve social as well as individual needs': to the extent that the bilateralist precepts of corrective justice that underlain *Chorzów Factory* have gradually evolved in a more communitarian direction, Paparinskis posits that the standard of compensation 'can be changed in line with the broader structural shifts in modern international law'.[117] Indeed, in the *Armed Activities* case the ICJ took note of Uganda's plea that a large amount of compensation would exceed its capacity to pay and seems implicitly to have endorsed the relevance of this legal ground by reference to the award by the Eritrea-Ethiopia Claims

[112] D Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019) 107–39.

[113] cf A Kulick, 'Sneaking Through the Backdoor – Reflections on Public Interest in International Investment Arbitration' (2013) 29(3) Arb Intl 435, 435–7.

[114] While Kulick (n 113) 438, 448 ff does not expressly refer to equity as the basis for 'public interest' considerations, he considers Brownlie's argument in *CME* (n 116) that 'considerations of fairness (…) must find reflection in the eventual calculation of compensation and damages' to be 'quite forceful'.

[115] *AMT v Zaire* [7.16–9]; *Chemin de fer de Sopron-Köszeg contre Autriche et Hongrie* (1929) II RIAA 961, 968; *Junghans (Germany v Romania) (Part Two)* (1940) III RIAA 1883, 1890; France (*Feuillebois) v Mexico* (1929) V RIAA 542, 543.

[116] *CME Czech Republic BV v Czech Republic* (Separate Opinion on the Issues at the Quantum Phase by Ian Brownlie of 14 March 2003) UNCITRAL [33 & 73–7]; see also *Spadafora (Colombia, Italy)* (1904) XI RIAA 1, 9–10.

[117] M Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) MLR 1, 6–8.

Commission (EECC).[118] Ultimately, however, the Court was 'satisfied that the total sum awarded (…) remain[ed] within the capacity of Uganda to pay', although it ordered the payment of the sum in annual instalments, presumably in order to Uganda's ability to meet its people's basic needs.[119]

The foregoing remarks serve to show that equitable considerations are not a monolithic concept but are used as an umbrella term to denote a wide variety of factors and circumstances which have an influence upon quantum. To be sure, a detailed analysis of each these considerations would exceed the limited purpose of this chapter, but a key point stands out: whatever these 'equitable considerations' may be, it is suggested that investment tribunals do not have a *carte blanche* to subvert the customary principle of full reparation on the basis of 'abstract equity'.[120] Indeed, it is well settled that an investment tribunal 'must base its decision on objective and rational considerations which must be stated.'[121] The US' strong objections to the application of equitable considerations in the determination of compensation arising from the *Norwegian Shipowners* case aptly illustrates how an unprincipled application of equity to damages may have serious repercussions on the validity of the arbitral award and the integrity of the process.[122] As Judge Yusuf stated in the *Armed Activities* case,

> Equitable considerations (…) should be understood within the legal framework governing the judicial function of the Court. They cannot serve as the basis to dispense with the applicable rules altogether, or not to provide reasons for their applicability. The Court should have made an attempt at explaining how it intends to apply equity within the general framework of State responsibility and the procedural framework governing the fact-finding procedure before it'.[123]

[118] *Armed Activities on the Territory of the Congo* [109, 407].

[119] ibid [407–8].

[120] *Armed Activities on the Territory of the Congo*, Separate Opinion of Judge Yusuf [28] ('recourse to equitable principles is not unfettered [and] it should not be used to make good the shortcomings in a claimant's case by being substituted for evidence which could have been produced if it actually existed. Nor can equitable considerations be used as an excuse to depart from the Court's judicial function').

[121] Schreuer & ors (n 101) 637 [272]; A Broches 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1973) 136 RdC 333, 394.

[122] *Norwegian Shipowners' Claims (Norway v USA)* (Award of 13 October 1922) I RIAA 307, 331, 339–40; Letter of Secretary of State to the Norwegian Minister at Washington: *Norwegian Shipowners' Claims* 344–6; CP Anderson, 'Letter of the Honorable Chandler P Anderson, American Arbitrator, to the Secretary General of the Permanent Court of Arbitration' reproduced in (1923) 17(2) AJIL 362, 399.

[123] *Armed Activities on the Territory of the Congo*, Separate Opinion of Judge Yusuf [24].

On that basis, it is submitted that, whilst *infra legem* equity may have a bearing on the interpretation of customary norms governing compensation, it is by its nature subject to certain limitations that may either be intrinsic to the 'general framework of State responsibility' or extrinsic to it, appertaining to the 'procedural framework governing the fact-finding procedure' before the respective court or tribunal. We shall examine these two kinds of limitations in turn.

4.1 *Intrinsic Limitations to* infra legem *Equity*

Intrinsic limitations emanate from the nature of equity as a canon of interpretation. As the *Institut de Droit International* noted in 1937, an international judge may be called upon to consider equitable considerations in the interpretation of norms, 'to the extent consistent with respect for the applicable law.'[124] If equity is supposed to operate within the limits of the law, its hermeneutical function must be understood by reference to the limitations applicable to *any* rule of interpretation. As a cognitive exercise, the process of interpretation is ordinarily restrained by the rule to which it relates and its possible meanings.[125] Essentially, any method of interpretation involves the selection of a meaning amongst a spectrum of possible meanings within a conceptual radius defined by the widest possible meaning.[126]

Within that hermeneutical process, *infra legem* equity assists the interpreter in both identifying the outer limits of the norm in question, and in selecting 'among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.'[127] While these analytical choices will not always be clear-cut, it is suggested that a tribunal cannot exceed the conceptual radius of a norm and select a meaning beyond its range on the basis of equitable considerations – for this would result in extending or altering the norm's content into something else.[128] Consequently, in the

[124] IDI, 'Resolution: On the Jurisdiction of the International Judge in Equity' (1937) 40 AIDI 140.

[125] As Hart has observed, every norm contains a 'core of settled meaning' surrounded by a 'penumbra of debatable cases', see HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) HLR 607.

[126] EP Hexner, 'Teleological Interpretation of Basic Instruments of Public International Organizations' in S Engel & R Metall (eds), *Law, State and International Legal Order–Essays in Honor of Hans Kelsen* (Tennessee University 1964) 119, 123; H Kelsen, *The Law of the United Nations* (Stevens & Sons 1950) xiv–xv.

[127] *Continental Shelf* [71]; Weil (n 23) 125.

[128] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229–30. For a detailed discussion of the inherent

South West Africa cases the ICJ rejected the applicants' contention that 'humanitarian considerations [we]re sufficient in themselves to generate legal rights and obligations' from the applicable treaties.[129] To do so would exceed the process of interpretation and result in rectification or revision of the treaty, whereas a court of law 'can take account of moral principles only in so far as these are given a sufficient expression in legal form.'[130]

The interpretative function of equity becomes much more complex in the realm of customary law, precisely because there is no authoritative text to be interpreted.[131] Depending on the availability and specificity of State practice and *opinio juris*, customary rules tend to be much more vague and flexible, leaving some scope for debate regarding the precise limits and content of the rule.[132,133] As Merkouris points out, customary rules exist at such level of abstraction that a further deductive process is required to particularise their meaning to the facts of each case.[134] Thus, customary law affords the decision-maker a wide margin of discretion in interpreting and applying abstract rules to the circumstances of each case. In the absence of textual limitations, it is here that *infra legem* equity has a key role to play by defining the contours of customary law or providing the basis from which to infer potential qualifications.

This does not mean that the output of the interpretative process will vary along with the proverbial foot of the Chancellor.[135] Nor should the application of equitable considerations to customary rules be understood as being 'freed from the moorings of international law (…) drifting towards elusive subjectivism with little room left for the necessary guarantee of the objectivity and predictability of the law.'[136] While *infra legem* equity to some

difficulties in distinguishing the interpretation of customary rules and its possible amendment/modification, Merkouris (n 61) Section VI (on file with the author).

[129] *South West Africa Cases (Second Phase) (Ethiopia v South Africa; Liberia v South Africa)* (Judgment) [1966] ICJ Rep 6 [49].

[130] ibid [91].

[131] C Grauer, 'The Role of Equity in the Jurisprudence of the World Court' (1979) 37 RDUT 101, 116; Akehurst (n 49) 807 fn 36 ('[a] conflict between equity and custom is less likely to arise, because the scope of a customary rule is usually less precise than the scope of a treaty provision').

[132] R Lapidoth, 'Equity in International Law' (1987) 81 ASIL Proc 138, 139.

[133] ibid 139.

[134] Merkouris (n 64) 136–42.

[135] F Orrego Vicuña, 'Le pied du chancelier continue de s'allonger: les principes généraux et l'equité en droit international' in M Kohen, R Kolb & DL Tehindrazanarivelo (eds), *Perspectives of International Law in the 21st Century: Liber Amicorum Professor Christian Dominicè in Honour of his 80th birthday* (Martinus Nijhoff 2012) 69.

[136] Francioni (n 26) [14].

extent involves the exercise of discretion,[137] it forms part of the applicable law and must, therefore, display a minimum degree of consistency. As Jennings observes, no reasonable litigant expects the decision of a court to be predictable; but the range of considerations used for a decision and the procedures or their application should certainly be predictable.[138]

In determining these potential limitations, useful lessons can be drawn from the practice of equitable considerations in other areas of international law. In the *North Sea Continental Shelf* cases, the ICJ explained that the interpretative function of equity was limited by the object and purpose of the customary principles governing the continental shelf and could not result in the *de novo* apportionment of maritime areas on the basis of distributive justice.[139] To hold otherwise would contravene the 'most fundamental of all the rules of law relating to the continental shelf'.[140] In *Libya/Malta*, the Court further stressed the need for consistency and identified potential limitations to the application of equity to maritime delimitation:

> Th[e] justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms.[141]

On that basis, the Court distinguished between those equitable considerations which are 'pertinent to the institution of the continental shelf as it has developed within the law' and may, therefore, qualify for inclusion in the rule (ie, circumstances of a geographical nature), and those 'which are strange to its nature' and cannot be used 'fundamentally' to alter its character.[142] Thus, the Court seems to have recognised certain limitations to the interpretative function of equity as a canon by reference to the content of the rule and its teleology.

The ICJ affirmed this proposition in *Barcelona Traction*, where it rejected Belgium's contention that the customary rule of diplomatic protection should have been extended to a company's shareholders on the

[137] A Pellet, 'Sources of International Law' [1992] *Thesaurus Acroasium*, vol 19, 291.
[138] RY Jennings, 'Equity and Equitable Principles' (1986) XLII Annuaire Suisse 27, 38.
[139] *North Sea Continental Shelf Cases* [18–20].
[140] ibid [19–20, 39].
[141] *Continental Shelf (Libya/Malta)* (Merits) [1985] ICJ Rep 13 [45].
[142] ibid [48].

basis of 'equitable considerations'.[143] In so doing, the ICJ emphasised the nature of the customary right to exercise diplomatic protection and explained that any different interpretation would render inoperable the 'original' right of the State and severely undermine 'the stability which it is the object of international law to establish in international relations.'[144] Thus, the Court implicitly confirmed that equitable considerations cannot be used to justify *any* possible exception within the interpretation of a customary norm in the framework of State responsibility and it is subject to certain limitations stemming from the rule's object and purpose.

Extending this logic to compensation for internationally wrongful acts, it is suggested that equitable considerations cannot contradict the object and purpose of the rule, which is to 'wipe out', as far as possible, 'all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[145] The implications of this point are two-fold. On the one hand, equity cannot circumvent the inherently remedial function of compensation: thus, the invocation of the 'seriousness' of the breach, the 'magnitude' of the damage, or the 'wilful intent' of the host State cannot serve as bases for awarding damages beyond and above the amount of injury suffered by the claimant. Such damages, essentially of an afflictive, punitive or exemplary character are foreclosed under modern international law[146] and an award to that effect might be *contra legem*.[147] At the same time, however, equitable considerations cannot obviate claims for damages altogether: as the PCIJ explained in *Chorzów Factory*, compensation constitutes an 'essential principle contained in the actual notion of an illegal act'. Even if compensation may be adjusted to accommodate a balancing exercise between competing interests at stake, this cannot detract from the core principle that 'the breach of an engagement involves an obligation to make reparation in an adequate form.'[148] A different understanding would essentially transform equity into a circumstance precluding wrongfulness, without a clear legal basis.

Within these two extremes, it is quite difficult to pinpoint the extent to which equity may affect quantum in the abstract. Each factor requires

[143] *Barcelona Traction (Second Phase)* 3 [92]–[101].
[144] ibid [97].
[145] *Chorzów Factory* 47.
[146] *Certain Activities Carried Out by Nicaragua in the Border Area* [31].
[147] cf Venezuela's application to set aside the award in *Gold Reserve* on the basis of having awarded 'punitive damages' under the veil of equitable considerations.
[148] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A No 9, 21.

an independent legal analysis and a careful application of the customary principle to the facts of each case. But this does not mean that equity is a matter of chance.[149] Whilst Radi emphasises the 'casuistic normativity' of equity for the proposition that it is impossible to define *infra legem* equity in general legal terms,[150] international tribunals are required to state the reasons for their decisions, including on their interpretation and application of equity. As the committee stated in *Rumeli* v *Kazakhstan*,

> It is highly desirable that tribunals should minimise to the greatest extent possible the element of estimation in their quantification of damages and maximise the specifics of the ratiocination explaining how the ultimate figure was arrived at.[151]

Within that wider normative process of trial and error, equity may perform its essential role by introducing elements of flexibility and reasonableness into the law, without departing from the object and purpose of the rule being interpreted. As tribunals continue to expand and rationalise the ways in which equity affects their interpretation of the customary standard of compensation, these judicial pronouncements (and the attitude of States to these interpretations) will tend to harden into rules and legal principles, to the effect that 'the freedom to frame arguments and frame the reasoning leading to decisions in the court will be correspondingly reduced.'[152]

4.2 Extrinsic Limitations to Equitable Considerations: Between Alchemy and Science

The duty to state reasons brings us to the next point, which is the extrinsic limitations to the interpretative function of equity. Contrary to intrinsic limitations, extrinsic limitations do not relate from the *content* of the rule being interpreted but rather emanate from the tribunal's adjudicative authority and the procedural framework in which it is bound to operate. When a tribunal resorts to equity, it can neither exceed the scope of its jurisdiction nor can it disregard certain fundamental rules of procedure

[149] Remarks of Mr Roucounas in ILC (n 89) 185 [81].

[150] Y Radi, 'Promenade avec Aristote Dans les Jardins du Droit International: Réflexions sur L'équité et le Raisonnement Juridique des Juges et Arbitres Internationaux' in D Alland, V Chetail, O de Frouville & ors (eds), *Unity and Diversity of International Law* (Brill Nijhoff 2014) 358, 361–2.

[151] *Rumeli Telekom AS & or v Kazakhstan* (Decision of ad hoc Committee of 25 March 2010) ICSID Case No ARB/05/16 [178].

[152] Lowe (n 50) 74–5.

upon which its function is conditioned (cf. Article 52(1)(d) ICSID) – at least not without the validity of its decision being impinged. As a result, in *Klöckner v Cameroon*, the ICSID annulment committee annulled an arbitral tribunal's award for manifest excess of power *inter alia* on the basis that the tribunal had reached an 'equitable estimate' of damages, using 'approximate equivalents', and had, therefore, failed to state reasons as required by Articles 52(1)(e) and 48(3) of the ICSID Convention.[153]

The obligation to state reasons is of key import in the framework of compensation, where equity is typically associated with the lack of sufficient evidence to ascertain the precise extent of the injury.[154] The valuation of injury caused to long-term investments and commercial undertakings is a complex task, that often involves conflicting methodologies and inadequate evidence.[155] While it may be feasible to gauge the amount of *lucrum cessans* on the basis of business records from ongoing concerns, investment disputes frequently arise from still-born projects or failed contracts, where the value of profits can hardly be determined at all. As noted in *Santa Elena v Costa Rica*, investment tribunals enjoy a wide measure of discretion in making an approximation, 'taking into account all relevant circumstances (…) including equitable considerations'.[156]

Nevertheless, equitable considerations in the interpretation of the law must not be confused with the ordinary exercise of arbitral discretion in the appreciation of the facts.[157] As noted in *ADM v Mexico*, 'the assessment of damages for lost profits is not a precise science.'[158] Thus, the discretion of an arbitral tribunal in the calculation of damages arises from the uncertainty of the inquiry into lost profits, involving an inquiry with a counterfactual premise, namely, the consideration of the profits that would have been made if an illegal act – which did in fact occur – had not occurred.[159]

[153] *Klöckner Industrie-Anlagen GmbH & ors v Cameroon & Société Camerounaise des Engrais* (Ad hoc Committee Decision on Annulment of 3 May 1985) ICSID Case No ARB/81/2 [173–6].

[154] Marboe (n 51) 153 [3.343 ff].

[155] *Rumeli Telekom AS v Kazakhstan* [142]; M Whiteman, *Damages in International Law*, vol III (US GPO 1943) 1872.

[156] *Phillips Petroleum v Iran* (Award of 29 June 1989 (Award No 425-39-2)) IUSCT Case No 39, 21 IUSCT 79 [112 & 157]; *Starrett Housing Corporation v Iran* [339]; *Gold Reserve v Venezuela* [686].

[157] In this direction, T Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS' (2021) 22 JWIT 249, 269–70.

[158] *ADM v Mexico* (Decision on Request for Correction, Supplementary Decision, and Interpretation of 10 July 2008) ICSID Case No ARB(AF) 04/05 [36].

[159] ibid.

In order to make these complex factual determinations, the tribunal will have to consider documentary evidence, witness testimony, admissions against interest, as well as expert reports and shall be the judge of the admissibility of any evidence adduced and of its probative value.[160] Inevitably, the assessment of the facts lies within the arbitrator's free evaluation of evidence (also known as the *conviction intime du juge*).[161] While this should be guided by a spirit of fairness, it is difficult to lay down precise legal rules of international law, upon which *infra legem* equity may come to bear as an interpretative canon.

By contrast, equitable considerations might affect the interpretation of the procedural rules governing the fact-finding process,[162] especially since investment tribunals consider themselves not to be bound to adhere to strict judicial rules of evidence.[163] In line with international case-law,[164] tribunals have relied upon equity to suggest that the fact that damages cannot be settled with certainty is no reason not to award damages when a loss has incurred.[165]

In this regard, tribunals have drawn a distinction between the allocation of the burden of proof and the standard of proof. It is well established that the claimant bears the onus to establish the conditions required by substantive law to corroborate a claim for damages.[166] The claimant must not only bring evidence in support of its allegations but must also convince the tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.[167] However, as the ICJ pointed out in *Diallo*, this rule may be applied flexibly in certain cases, especially where the respondent may be in a better position to establish certain facts.[168] Given that tribunals

[160] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (adopted 25 September 1967, entered into force 1 January 1968) Rule 34.

[161] *AAPL v Sri Lanka* (Final Award of 27 June 1990) ICSID Case No ARB/87/3 [56] rules (K-L).

[162] Weeramantry (n 34) [25].

[163] *AAPL v Sri Lanka* [56] rule (K).

[164] *Certain Activities Carried Out by Nicaragua in the Border Area* [35]; *Ahmadou Sadio Diallo* [33]; *Trail Smelter (United States, Canada)* (1941) III RIAA 1920.

[165] *Southern Pacific Properties (Middle East) Limited v Egypt* (Award of 20 May 1992) ICSID Case No ARB/84/3 [215]; *Swisslion DOO Skopje v FYROM* (Award of 6 July 2012) ICSID Case No ARB/09/16 [345]; *Vivendi v Argentina* [8.3.16] ('approximations are inevitable; the settling of damages is not an exact science'); *ADM v Mexico* [38].

[166] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (reprinted, CUP 1987) 327; *Certain Activities Carried Out by Nicaragua in the Border Area* [33].

[167] *AAPL* v *Sri Lanka* [56] rules (I)-(J); *Middle East Cement* [89].

[168] *Ahmadou Sadio Diallo* [15].

have a relative freedom as to the allocation of the burden of proof,[169] equitable considerations may therefore warrant a shifting of the burden of proof, where the establishment of certain facts lies within the power of the respondent,[170] or where a party has impeded access to material evidence.

The *Archer Daniels* Tribunal took this reasoning a step further, noting that 'failure of a claimant to prove its damages with certainty, or to establish its right to the full damages claimed, does not relieve the tribunal of its *duty* to assess damages as best it can on the evidence available' (emphasis added).[171] This 'duty', endorsed by subsequent investment tribunals in compensation proceedings,[172] implies a gradual departure from the adversarial model of arbitration into a more inquisitorial system, a proposition that may have far-reaching implications for investor-State dispute settlement.[173] As Lord Neuberger has observed, 'an increase in arbitral powers must be accompanied by an increased responsibility'.[174] As mega-awards intimating claims over USD one billion plus continue to emerge, it seems likely investment tribunals will assert more control over the assessment of claims that may have serious impact on tax-payers' resources.[175] The progressive recognition of investment arbitration as a

[169] *Metal-Tech Ltd v Uzbekistan* (Award of 4 October 2013) ICSID Case No ARB/10/3 [238–9].

[170] For example, in the *Armed Activities on the Territory of the Congo*, the ICJ reversed the burden of proof with respect to Ituri, where the respondent was an occupying Power, expecting Uganda 'to establish (…) that a particular injury alleged by the DRC in Ituri was not caused by Uganda's failure to meet its obligations as an occupying Power.' In his Separate Opinion [6–21], Judge Yusuf criticised this 'radical reversal of the burden of proof' as unprecedented, imbalanced and inconsistent with the nature of the duty of vigilance incumbent upon the occupying Power as an obligation of due diligence, rather than an obligation of result.

[171] *Archer Daniels* [38].

[172] *Swisslion* [345].

[173] On the non-inquisitorial nature of investment arbitration, see A Mourre, 'Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal' in L Mistelis & S Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer 2009) 207, 229; T Giovannini, 'Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?' in D Baizeau & B Ehle (eds), *Stories from the Hearing Room: Experience form Arbitral Practice (Essays in Honour of Michael E Schneider)* (Kluwer 2015) 59, 68; A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) [3–28].

[174] Ld Neuberger, 'Arbitration and Rule of Law' (Address Before the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) <www.supremecourt.uk/docs/speech-150320.pdf> accessed 1 June 2022.

[175] cf *World Duty Free Company v Republic of Kenya* (Award of 4 October 2006) ICSID Case No Arb/00/7 [181] ('as regards public policy (…) the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world').

form of public law adjudication might require tribunals to take a more active role in quantum, inquiring into possible mitigating circumstances for the assessment of compensation. Thus, when faced with a (relatively modest) claim of about USD 22 million against war-torn Zaire, the *AMT* Tribunal took the formal step of appointing a former World Bank official as an independent expert to evaluate damages suffered by the claimant, invoking 'its discretionary and sovereign power to determine the quantum of compensation'.[176] Such recourse to external expertise may provide as a legitimate alternative when the evidence on the record is not sufficient to justify a precise amount of compensation, as shown in the *Armed Activities* case, where the ICJ relied upon the analyses of two Court-appointed for the purposes of determining compensation for the loss of life and natural resource. However, it may also give rise to objections as unfairly interfering with the allocation of the burden of proof and tilting the balance in favour of one Party to the detriment of the other, contrary to the principles of a fair hearing and equality of arms and outsourcing the tribunal's function to the experts.[177]

On the other hand, investment tribunals have lowered the standard of proof invoking equitable considerations as the basic justification. In *Crystallex v Venezuela*, for example, the Tribunal distinguished between the *existence* of damage as a fact that must be proven 'with certainty' and the precise *quantification* of that damage which is not subject to the same degree of certainty, 'because any future damage is inherently difficult to prove.'[178] Similarly, the Tribunal in *Lemire v Ukraine* observed that 'less certainty is required in proof of the actual amount of damages; for this latter determination claimant only needs to provide a basis upon which the tribunal can, with reasonable confidence, estimate the extent of the loss.'[179] In *Impregilo*, the Tribunal also held that it would be unreasonable to require precise proof of the extent of the damage caused. Instead, reasonable probabilities and estimates would suffice as a basis for compensation.[180] The same principle was expressed by the EECC, which applied a differentiated standard of proof between the merits and the reparation phase:

[176] The expert evaluated *damnus emergens* at USD 4,452,500, but the Tribunal awarded approximately 9 USD million.

[177] *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Order of 8 September 2020) [2020] ICJ Rep 264, Separate Opinion of Judge Sebutinde, 289–91.

[178] *Crystallex v Venezuela* [867–8]; *Tecmed SA v Mexico* [190].

[179] *Lemire v Ukraine* (Award of 28 March 2011) ICSID Case No ARB/06/18 [246].

[180] *Impregilo v Argentina* (Award of 21 June 2011) ICSID Case No ARB/07/17 [371].

> The Commission has required clear and convincing evidence to establish that damage occurred, within the liability parameters of the Partial Awards. However, for purposes of quantification, it has required less rigorous proof. The considerations dictating the 'clear and convincing standard' are much less compelling for the less politically and emotively charged matters involved in assessing the monetary extent of injury.[181]

Again, however, a balance must be struck between competing interests. The function of procedural equity is limited by the requirements of due process from which a tribunal may not detract. As the Iran-US Claims Tribunal recalled in *Amoco*, '[o]ne of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.'[182] In the Tribunal's view, international law does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain.[183] Thus, investment tribunals have generally rejected possible but contingent and indeterminate damages in the absence of evidence.[184] In *Diallo*, the ICJ also affirmed that, whilst an award of compensation relating to loss of future earnings inevitably involves some uncertainty, 'such a claim cannot be purely speculative'.[185] Nevertheless, as the Tribunal held in *Achmea I*, the requirement of proof must not be impossible to discharge. Nor must the requirement for reasonable precision in the assessment of the quantum be carried so far that the search for exactness in the quantification of losses becomes disproportionately onerous when compared with the margin of error.[186] Indeed, compensation matters are not capable of precise quantification because they depend on the exercise of judgmental factors that are better expressed in approximations or ranges.[187] That is particularly so where the absence of evidence is a result of the behaviour of the author of the damage[188] or results from a failure of the claimant to present its case. These are equitable considerations that require a further analysis, depending on the procedural framework governing the arbitral process.

[181] *Eritrea's Damages Claims* [36].
[182] *Amoco International Finance Corp v Iran* [238].
[183] ibid.
[184] *Southern Pacific Properties (Middle East) Limited v Egypt* [189].
[185] *Ahmadou Sadio Diallo* [49].
[186] *Achmea (I) v Slovakia* (Award of 7 December 2012) UNCITRAL, PCA Case No 2008–13 [323].
[187] *Starrett Housing Corporation v Iran* [338–9]; see also *Gold Reserve* [686].
[188] *Rumeli Telekom AS v Kazakhstan* [144–5]; *Sapphire International Petroleums Ltd v NIOC* (Award of 15 March 1963) 35 ILR 136, 187–8.

5 Conclusion

In 1939, Winston Churchill described Russia's foreign policy during World War II as 'a riddle wrapped in a mystery inside an enigma'.[189] There might be no better phrase to describe the use of equitable considerations by investment arbitral tribunals in the process of determining damages for violations of international law. This chapter may have been unable fully to unravel that mystery, but some useful lessons can be drawn. By now, the *Chorzów Factory* standard has been widely recognised as reflecting the customary standard governing reparation, but customary rules do not operate in a legal vacuum. International courts and tribunals have progressively acknowledged the general principle of equity as normative proposition capable of affecting the interpretation of customary norms, including secondary rules governing State responsibility. Even though the ILC avoided to articulate an express rule to that effect, it was well understood that equitable considerations had a role in the determination of compensation either as 'aggravating' or 'mitigating' circumstances.

Yet, *infra legem* equity is not unbound: it is subject to certain limitations that may either be intrinsic to its nature as an interpretative canon, or stemming from the procedural framework governing the function of the tribunal. Within these parameters, equity is not a magic spell that elides rational conceptualisation; to hold otherwise could have serious implications to the interpretative process and undermine the integrity of the procedure itself. And while it may be true that the assessment of damages is not always a precise science,[190] the opposite also holds true: '[e]quitable principles should not be used to make good the shortcomings in a claimant's case by being substituted for evidence which could have been produced if it actually existed: equity is not alchemy.'[191]

[189] D Carlton, *Churchill and the Soviet Union* (MUP 2000) 1.

[190] *ADC Affiliate Limited v Hungary* (Award of 2 October 2006) ICSID Case No ARB/03/16 [521].

[191] *Ahmadou Sadio Diallo*, Declaration of Judge Greenwood [5].