

Chapter 5: Assessment of Damages

Jurisdiction

› **North American Free Trade Agreement**

Source

› **Chapter 5: Assessment of Damages** in Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, © Kluwer Law International; Kluwer Law International (2013) pp. 295 - 306

BITs generally include specific provisions on compensation concerning expropriation without alluding to non-expropriatory breaches. Thus, NAFTA Articles 1105, 1102 and 1103 do not give any indication concerning the assessment of compensation in the case of a breach. This section examines how NAFTA tribunals have assessed damages in cases of breach of the FET standard. However, before undertaking such an analysis, we must first examine the basic rules of international law regarding reparation (section §5.01) as well as some of the applicable principles in the specific context of breach of the FET standard (section §5.02).

§5.01. Basic Rules on Reparation under International Law

Article 31 of the I.L.C.'s Articles on State Responsibility provides that a State must make 'full reparation' for any 'injury' caused to another State by an internationally [page "295"](#) wrongful act. The same provision also states that the concept of 'injury' includes 'any damage, whether material or moral, caused by the internationally wrongful act of a State'. Article 34 of the I.L.C. Articles indicates that there are three different methods of reparation: restitution, compensation and satisfaction. The general rule under Article 35 is that a 'State responsible for an internationally wrongful act is under an obligation to make restitution', i.e., 'to re-establish the situation which existed before the wrongful act was committed'. Compensation is considered the appropriate reparatory measure whenever restitution *in integrum* is not possible. I.L.C. Article 36 reads as follows:

1. The 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.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Thus, according to the I.L.C., 'material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation'. The only limitation to compensation as the appropriate reparatory measure is that the damage must be 'financially assessable'.

The I.L.C. Articles include a third type of reparation: 'satisfaction'. Under Article 37(1), '[t]he State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation'. The I.L.C. Commentaries suggest that satisfaction is an exceptional form of reparation for injury. In fact, NAFTA Article 1135 limits the remedies to monetary damages or restitution of property.

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§5.02. Reparation for Breach of the Fair and Equitable Treatment Standard

Restitution in kind is rarely ordered by BIT tribunals. The same is true for satisfaction due to the fact that this method has been considered by many international courts and tribunals as the proper means of reparation for non-material injury caused *directly to a State*. Since investment tribunals (almost always) deal with claims submitted by *investors* (not States), the issue of satisfaction (almost) never arises. The *dictum* of two recent awards has, however, raised the issue of whether a tribunal established under a BIT can remediate *moral damages* suffered by a foreign investor with satisfaction in the form of a declaration of wrongfulness.

The usual form of reparation in investor-State arbitration is monetary compensation. It should be noted that there is some debate in academia surrounding the determination of whether the term 'damages' should be used for non-expropriatory breaches (such as the FET) instead of the word 'compensation'. In any event,

scholars recognize a basic distinction between two situations of a breach of the FET standard which call for different evaluation methods:

- Cases where a violation of the FET standard leads to a *total loss* or deprivation of the investment (section §5.02[A]). [page "297"](#)
- Cases where a violation of the FET standard only results in a *decrease* in the value of the investment (section §5.02[B]).

[A]. Situations where a Breach of the Fair and Equitable Treatment Standard Leads to a Total Loss of the Investment

There are instances where a violation of the FET standard leads to a *total loss* or deprivation of the investment. Since such cases are akin to expropriation, the same valuation method (i.e., 'fair market value') is used.

For instance, in *Metalclad* the tribunal came to the conclusion that Mexico had committed both a violation of Article 1105 and an expropriation. Since the claimant had lost its investment in its entirety, the tribunal held that the valuation method existing for expropriation should be used:

In this instance, the damages arising under NAFTA, Article 1105 and the compensation due under NAFTA, Article 1110 would be the same since both situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment.

The *Metalclad* tribunal then referred to NAFTA Article 1110(2) which 'specifically requires compensation to be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place'. The tribunal also explained that '[n]ormally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis'. It also added that 'where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value'. In this context, any award based on future profits would be wholly [page "298"](#) speculative since in the instant case the landfill had never been operative. The tribunal therefore decided to award Metalclad compensation based on its 'actual investment in the project'.

This approach adopted by the *Metalclad* tribunal is favored by Heiskanen arguing that whenever a tribunal is faced with allegations of breaches of different BIT clauses, it should always, based on the principle of judicial economy, first examine whether an expropriation took place. Whenever this is the case, a tribunal should provide compensation solely based on that breach. It should therefore not be required to further examine any compensation issue related to other alleged BIT breaches. Thus, there would be no point in conducting such an analysis since the investor would have already been fully compensated through a finding of expropriation.

[B]. Situations where a Breach of the Fair and Equitable Treatment Standard Leads to a Decrease in the Value of the Investment

There are other instances where a violation of the FET standard will not lead to a total loss of the investment, but only to a *decrease* in the value of the investment. In such circumstances, the valuation method used for expropriation is not appropriate since the investment still exists. Tribunals have adopted divergent approaches as to how damages should be evaluated in this context. In the following paragraphs, six observations will be made on case law.

First, an investor must have suffered a loss or a damage as a result of a breach of Article 1105 committed by the host State. The burden is on the investor to prove the actual quantum of the losses for which it claims compensation in relation to a breach of the FET standard. Thus, in *Gami*, the tribunal dismissed the investor's FET claim on the ground that the complaint was 'not connected with a demonstration of specific and quantifiable prejudice'. In its award on damages, the *S.D. Myers* tribunal added that the quantum 'must be neither speculative nor too remote'. Yet, the tribunal also mentioned that 'fairness to the claimant requires that the court

or tribunal should approach the task both realistically and rationally'. This comment suggests that the burden of proof for establishing the quantum should not be applied too strictly.


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The *Pope & Talbot* award is the only case where a NAFTA tribunal has quantified the amount of damages resulting solely from a breach of Article 1105 (the *S.D. Myers* tribunal quantified the damages for both violations of Articles 1102 and 1105 and the *Cargill* tribunal examined compensation for breaches of Articles 1102, 1105 and 1106 jointly). As mentioned above, the *Pope* tribunal concluded that the so-called 'verification review episode' breached Article 1105. The tribunal rejected two heads of damages submitted by the investor. It accepted to compensate the investor for two others:

The heads of damages claimed that the Tribunal finds to be recoverable are (1) out of pocket expenses relating to the Verification Review Episode, including the applicable accountants' and legal fees, as well as the fees and expenses incurred by the Investor in lobbying efforts to counter the actions of the SLD and the consequent possibility of reductions in the Investment's export quotas, and (2) out of pocket expenses directly incurred by the Investor with respect to the Interim Hearing held in January 2000.

The tribunal did not explain what these out of pocket expenses connected to the interim hearing were nor did it quantify them. The tribunal awarded the investor USD 461,566 in compensation.

Second, tribunals have highlighted the importance of causation. The *Feldman* tribunal concluded that Mexico had breached Article 1102, but had not committed any expropriation. The tribunal noted that 'what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach'. The same conclusion was also reached by the *S.D. Myers* tribunal. In its first award, the tribunal explained that 'compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached'. In its second award, the tribunal specified, with regards to the issue of causation, that 'compensation should be awarded for the overall economic losses sustained by SDMI that are a proximate result of Canada's measure'. NAFTA Parties have approved these findings.

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Third, tribunals have interpreted the lack of any specific guidance in BITs with respect to the assessment of damages in the context of FET violations as implicitly providing for a certain level of discretion. The conclusion reached by the *S.D. Myers* tribunal is consistent with this analysis:

By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA.

The *Feldman* tribunal also alluded to the 'considerable discretion' that tribunals exercise when assessing damages:

It is obvious that in both of these earlier cases (*Pope* and *SD Myers*), which as here involved non-expropriation violations of Chapter 11, the tribunals exercised considerable discretion in fashioning what they believed to be reasonable approaches to damages consistent with the requirements of NAFTA.

In this context, tribunals have generally turned to customary international law to fill the gap and to determine appropriate compensation in cases not involving expropriation. The starting point of their analysis is typically a reference to the *Chorzow Factory* case and the relevant provisions of the I.L.C. Articles on State Responsibility. NAFTA Parties have acknowledged that tribunals have some discretion in assessing non-expropriatory breaches and that they should rely on these basic international law principles.

Fourth, by hinging on the PCIJ's famous *dictum* in the *Chorzow Factory* case, tribunals have often used the 'differential method' to

calculate damages for non-expropriatory acts. As succinctly putted by the *Lemire* tribunal, 'the purpose of the [page "301"] compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT. This differential method consists of examining the investor's *actual* financial situation and comparing it with 'the one that would have prevailed had the act not been committed'. In other words, the comparison is made with the situation which would have hypothetically prevailed using a 'but for' scenario. One recent example where the 'differential method' was endorsed is that of the *Cargill* award. The tribunal concluded that the appropriate approach to assess damages for violations of NAFTA Articles 1102, 1105 and 1106 was to determine the 'present value of net lost cash flows' that the investor would have garnered 'but for' the Mexican illegal conduct.

Tribunals that have adopted the 'differential method' have also highlighted the importance of according 'full compensation' for the *actual* loss suffered by the investor. Yet, tribunals have often used different *methods* to calculate full reparation. Some tribunals have based their calculation on the amount of out-of-pocket investment actually made by the investor, while others have taken the lost profit valuation of the investment into account. The *PSEG* tribunal rejected the use of the loss of profit approach because the claim involved an infant industry and an unperformed work. Tribunals also seem to be divided with respect to the question whether or not the 'fair market value' method (typically used for expropriation) can also be applied in the context of a violation of the FET standard (this question will be elaborated upon in the following paragraphs).

Fifth, many tribunals have *rejected* the use of the 'fair market value' method in the context of assessment of damages for a violation of the FET standard.

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This was indeed the conclusion reached by *S.D. Myers* tribunal. The tribunal openly doubted that the fair market value method referred to at Article 1110 was the appropriate standard to use in evaluating non-expropriatory damages. The tribunal acknowledged that 'in some non-expropriation cases a tribunal might think it appropriate to adopt the "fair market value" standard' but added that 'in other cases it might not'. In the instant case, however, the tribunal considered that 'the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded'. This is because no expropriation had taken place against the claimant's investment. The tribunal opined that 'fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor'. Having rejected the fair market value method, the tribunal then 'turn[ed] for guidance to international law' and referred to the *Chorzow Factory* case.

There is substantial support for the *S.D. Myers* tribunal's finding that the use of the fair market value method is not appropriate in situations where a breach of the FET standard does not result in a total loss of the investment. Other (non-NAFTA) tribunals have also adopted this position, as have NAFTA Parties. The *Feldman* tribunal also stated that the fair market value method 'necessarily applies only to situations that fall [page "303"] within that Article 1110'. It added that a tribunal should award damages to compensate an investor for its *actual loss* resulting from a non-expropriatory violation.

In contrast with the NAFTA cases of *S.D. Myers* and *Feldman*, non-NAFTA tribunals have often applied the fair market value method in the context of breach of FET. In most cases, the claimants had themselves referred to the fair market value method and this solution had not been contested by the respondents. These tribunals therefore simply applied the valuation method based on the parties' choice. A different situation arose in the *CMS* case where the tribunal held that even though no expropriation had been committed, the 'cumulative nature of the breaches' would be 'best dealt with by resorting to the standard of fair market value'. The tribunal considered that even if 'this standard figures prominently in respect of expropriation', it 'might also be appropriate for breaches different from expropriation if their effect results in important long-term losses'. Other tribunals that have found a violation of the FET standard and that an expropriation had taken place have simply used the fair market value method for the calculation of damages.

Sixth, tribunals have the power to take the investor's behavior into

account when assessing compensation to be awarded. Relevant factors would include any illegal actions committed by the investor, any contributory negligence or its failure to mitigate [page "304" its damages. Tudor argues that 'considering the Investors' conduct when calculating the compensation due for breach of FET is justified in the light of the meaning of fairness and equitableness'. She refers to the following types of investors' conduct that should have an impact on calculating compensation: 'corrupt practices; misrepresentation as to competence; bad business judgement; absence of due diligence, risk assessment, and realistic expectations; bad faith; lack of awareness of or compliance with the regulatory environment; and breach of human rights'. A number of writers, including myself, have recently argued that allegations of human rights violations committed by an investor should have, *inter alia*, an impact on a tribunal's assessment of compensation for damages claimed by that investor. Thus, compensation should be reduced 'proportionally to the investor's violation' of human rights obligations. Moreover, the present author has argued elsewhere that, based on the doctrine of 'clean hands', a tribunal should also be mindful of any human rights violations committed by an investor when deciding a claim's admissibility.

Some arbitral awards have indeed reduced compensation based on the investor's behavior. In *MTD*, the tribunal evaluated at USD 21.5 million the amount for the [page "305" expenditures that could have been avoided by the investor had there been no breach of the FET. However, it also held that Chile could not be held responsible for the consequences of unwise business decisions made by the investor or for its lack of diligence. The tribunal accordingly decided to reduce the amount eligible for compensation by 50%. It has been argued that such a reduction of the amount of compensation may be the result of the tribunal's belief that the investor had failed to establish a causal link for some of the expenditures claimed or that it factored the investor's contributory negligence into its reasoning.

Finally, tribunals also have the power to take into account the circumstances of the host State when awarding damages for breach of the FET.

K. Hobér, *Compensation: A Closer Look at Cases Awarding Compensation for Violation of the Fair and Equitable Treatment Standard*, in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small ed., Oxford U. Press 2010); M. Weiniger, *The Standard of Compensation for Violation of the Fair and Equitable Treatment Standard*, in *Investment Treaty Law, Current Issues II* (F. Ortino ed., 2007); K. Hobér, *Fair and Equitable Treatment: Determining Compensation*, 6 *Transnational Disp. Mgmt.* (2007); B.C. Kaczmarek, *Compensation for Non-Expropriatory Treaty Violations: An Analytical Framework*, 3 *Transnational Disp. Mgmt.* (2006); Kathryn Khamsi, *Compensation for Non-Expropriatory Investment Treaty Breaches in the Argentine Gas Sector Cases: Issues and Implications*, in *The Backlash Against Investment Arbitration: Perceptions and Reality* (Michael Waibel et al., eds., Kluwer Law 2010); Jorge E. Viñuales & Pierre-Yves Tschanz, *Compensation for Non-Expropriatory Breaches of International Investment Law-The Contribution of the Argentine Awards*, 26 *J. Int. Arb.* 729-743 (2009); Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (British IICL 2008); Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford U. Press 2009).

Article 31, *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.ILC (hereinafter 'I.L.C. Articles on State Responsibility').

Article 31(2).

Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001), November 2001, Report of the I.L.C. on the work of its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2) (hereinafter 'I.L.C. Commentaries'), at 264.

According to the I.L.C. Commentaries, *ibid.*, at 264, 'material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation' (emphasis added).

Articles 37(2), 37(3), I.L.C. Articles on State Responsibility, *supra*

n. 2, read as follows: '2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality; 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State'.

I.L.C. Commentaries, *supra* n. 4, at 263 ('[i]t is only in those cases where those two forms [i.e. restitution and compensation] have not provided full reparation the satisfaction may be required').

C. Schreuer & R. Dolzer, *Principles of International Investment Law* 270 (Oxford U. Press 2008). The issue is examined in: Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20(4) *Arb. Int.* 325-332 (2004); Abby Cohen Smutny, *Some Observations on the Principles Relating to Compensation in the Investment Treaty Context*, 22(1) *ICSID Rev.* 4-5 (2007); T.W. Wälde & B. Sabahi, *Compensation, Damages, and Valuation*, in *The Oxford Handbook of International Investment Law* 1058-1059 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., Oxford U. Press 2008).

Second Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, in *Yearbook ILC*, vol. II, Part one (1989) (A/CN.4/425), at 1-59, at para. 136.

It should be added that two recent cases (*Europe Cement Investment & Trade S.A. v. Turkey*, ICSID No. ARB(AF)/07/2, Award, (13 August 2009); *Cementownia 'Nowa Huta' S.A. v. Turkey*, ICSID No. ARB(AF)/06/2, Award, (17 September 2009)) have raised the unprecedented issue of the proper remedy for moral damages suffered by a *State* in international investment law. In both related cases, Turkey sought an award of monetary compensation for moral damages it allegedly suffered with regards to its 'reputation and international standing' as a result of baseless claims filed by the investors. This unusual request by a respondent *State* raises the question whether satisfaction is the appropriate remedy to redress any moral damages suffered by a *State* in the context of international investment law. The question is examined in: P. Dumberry, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes*, 3(1) *JIDS* 205-242 (2012).

Victor Pey Casado and President Allende Foundation v. Chile, ICSID No. ARB/98/2, Award, (8 May 2008); *Joseph Charles Lemire v. Ukraine*, ICSID No. ARB/06/18, Award, (28 March 2011).

See, Dumberry, *supra* n. 10.

Dolzer & Schreuer, *supra* n. 8, at 271.

Some scholars (and some tribunals, see: *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. Argentina* [hereinafter *LG&E v. Argentina*], ICSID No. ARB/02/1, Award, (25 July 2007), para. 38) distinguish the concept of 'compensation' (resulting from a *lawful* expropriation) from that of 'damages' (which is limited to *unlawful* expropriation or *non-expropriatory* breaches). These distinctions are discussed in: Marboe, *supra* n. 1, para. 2.03 ff. Most authors, however, use the term compensation to cover all situations.

The tribunal in *Enron Corporation and Ponderosa Assets, LP v. Argentina*, ICSID No. ARB/01/3, Award, (22 May 2007), para. 361, described the fair market value method as follows: 'the price at which property would change hands between a hypothetical willing and able buyer and an hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market'. Another similar definition is given by the tribunal in *Sempra Energy International v. Argentina*, ICSID No. ARB/02/16, Award, (28 September 2007), para. 405 ('the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts').

C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* 334 (Oxford U. Press 2007); Weiniger, *supra* n. 1, at 199; Ripinsky & Williams, *supra* n. 1, at 92; Christopher Dugan, Noah D. Rubins, Don Wallace & Borzu Sabahi, *Investor-State Arbitration* 579 (Oxford U. Press 2008) (including in this category cases where the violation of the FET standard led to significant losses causing a near-total deprivation of the investment).

Metalclad Corporation v. Mexico, ICSID No. ARB(AF)/97/1, Award, (30 August 2000), para. 113.

Ibid., para. 118.

Ibid., para. 119.

Ibid., para. 120.

Ibid., para. 121.

Ibid., para. 122.

V. Heiskanen, *Arbitrary and Unreasonable Measures*, in *Standards of Investment Protection* 91 (A. Reinisch ed., Oxford U. Press 2008). He refers to case law where the approach was

adopted.

Ibid., at 91.

McLachlan, *supra* n. 16, at 334; Weiniger, *supra* n. 1, at 199; Dugan et al., *supra* n. 16, at 579; Ripinsky & Williams, *supra* n. 1, at 93, 97.

Hobér, *supra* n. 1, at 596 ff.

Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* 137 (Oxford U. Press 2008).

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

Gami Investments, Inc. v. Mexico, UNCITRAL, Final Award, (15 November 2004), para. 83, *see also*, paras. 84–85.

S.D. Myers Inc. v. Canada, Second Partial Award, (21 October 2002), para. 173.

Ibid.

Pope & Talbot Inc. v. Canada, UNCITRAL, Award on Damages, (31 May 2002), paras. 81–84. The value of management time devoted to the claim was rejected because it was a fixed cost and no additional costs in salaries were incurred as a direct result of the verification review episode. The tribunal also examined alleged losses flowing from a seven day shutdown of Pope's three British Columbia mills which were linked to the verification review episode. The tribunal rejected the claim based on the ground that the investor had suffered no loss of profits from the shutdown.

Ibid., para. 85.

Joseph Charles Lemire v. Ukraine, Award, (28 March 2011), para. 252; *LG&E v. Argentina*, Award, (25 July 2007), paras. 45, 58.

Marvin Roy Feldman Karpa v. Mexico [hereinafter *Feldman v. Mexico*], ICSID No. ARB(AF)/99/1, Award, (16 December 2002), para. 194.

S.D. Myers Inc. v. Canada, First Partial Award, (13 November 2000), para. 316. *See also Ibid.*, Second Partial Award, (21 October 2002), paras. 159, 160.

Ibid., Second Partial Award, (21 October 2002), para. 122.

See, for instance: Merrill & Ring Forestry L.P. v. Canada, UNCITRAL, Canada's Counter Memorial, (13 May 2008), para. 795; *International Thunderbird Gaming Corporation v. Mexico* [hereinafter *Thunderbird v. Mexico*], UNCITRAL, Mexico's Escrito de Contestación, (18 December 2003), para. 324; *Cargill, Inc. v. Mexico*, ICSID no. ARB(AF)/05/02, Award, (18 September 2009), paras. 436, 437.

LG&E v. Argentina, Award, (25 July 2007), para. 40; *CMS Gas Transmission Company v. Argentina*, ICSID No. ARB/01/8, Award, (12 May 2005), para. 409.

See, S.D. Myers, Inc. v. Canada, First Partial Award, (13 November 2000), para. 309.

Feldman v. Mexico, Award, (16 December 2002), para. 197.

S.D. Myers Inc. v. Canada, First Partial Award, (13 November 2000), para. 310. *See also, LG&E v. Argentina*, Award, (25 July 2007), para. 30; *Siemens AG v. Argentina*, ICSID No. ARB/02/8, Award and Separate Opinion, (17 January 2007), para. 249.

Case Concerning the Factory at Chorzów (Indemnity), P.C.I.J. Ser. A. No. 17, at 47 (13 September 1928), indicating that reparation must be sufficient to wipe out all the consequences of the illegal act and to 're-establish the situation which would, in all probability, have existed if that act had not been committed'.

See cases examined in: K. Hobér, Fair and Equitable Treatment: Determining Compensation, Comment, in The International Convention on the Settlement of Investment Disputes (ICSID), Taking Stock after 40 Years 81 ff. (Rainer Hofmann, Christian J. Tams eds., Nomos 2007).

See, for instance, Chemtura Corporation v. Canada, Canada's Counter Memorial, (20 October 2008), paras. 952, 953; *Merrill & Ring Forestry L.P. v. Canada*, Canada's Counter Memorial, (13 May 2008), para. 801; *Grand River Enterprises Six Nations, Ltd., et al. v. United States* [hereinafter *Grand River v. United States*], UNCITRAL, US Counter-Memorial, (22 December 2008), at 163-165.

Marboe, *supra* n. 1, paras. 2.105, 3.136, 3.151 ('It can be concluded that a number of different international courts and tribunals have correctly applied the principle of full reparation as formulated by the PCIJ in *Factory at Chorzów* in cases of State responsibility. They calculated the amount of damages by way of the differential method, namely as the difference between the actual and the hypothetical financial situation of the injured person. This usually implies a subjective and concrete valuation approach because the valuation is based on the comparison of the concrete financial situation of the affected individual with and without the unlawful act').

Joseph Charles, Lemire v. Ukraine, Award, (28 March 2011), para. 149. *See also: LG&E v. Argentina*, Award, (25 July 2007), para. 58.

Dolzer & Schreuer, *supra* n. 8, at 272.

Joseph Charles, Lemire v. Ukraine, Award, (28 March 2011), paras. 244, 253.

Cargill, Inc. v. Mexico, ICSID no. ARB(AF)/05/02, Award, (18 September 2009), paras. 432, 444, 447.

MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID No. ARB/01/17, Award, (25 May 2004), para. 238; *LG&E v. Argentina*, Award, (25 July 2007), paras. 31, 58; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, (22 May 2007), para. 359. See also: Ripinsky & Williams, *supra* n. 1, at 88-90; Hobér, *supra* n. 1, at 598.

Hobér, *supra* n. 44, at 101 ('when it comes to the *method* of establishing and calculating "full reparation", customary international law does not provide much guidance. The cases discussed above illustrate that the method chosen depends on, and varies with, the circumstances of each individual case, including, *inter alia*, the nature of the violation of the fair and equitable treatment standard and the kind and nature of the investment in question. Sometimes the starting point might be the amount actually invested, in other cases it might be more appropriate to focus on lost future profits as established by using the DCF method').

PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey, ICSID No. ARB/02/5, Award, (19 January 2007), paras. 313-315. See also *LG&E v. Argentina*, Award, (25 July 2007), paras. 88, 96.

PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey, Award, (19 January 2007), para. 308.

As mentioned above, the tribunal held that the measures taken by Canada were in breach of Articles 1102 and 1105, but did not constitute an expropriation.

S.D. Myers Inc. v. Canada, First Partial Award, (13 November 2000), para. 306. Thus, the drafters of the NAFTA 'did not state that the 'fair market value of the asset' formula applies to all breaches of Chapter 11' and 'they expressly attached [that method] to expropriations' (para. 307).

Ibid., para. 309.

Ibid.

Ibid., para. 308.

Ibid., para. 310.

Ibid., para. 315. The *S.D. Myers* tribunal mentioned that the parties would have the opportunity in a second stage of the proceedings to make submissions on the question of the precise methodology to be used, but added that it was paramount that the approach taken 'should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation' (para. 315). The tribunal also briefly addressed the question of 'double recovery' of damages in cases where a measure breaches more than one BIT provision (para. 318). But in the present case, the tribunal concluded that 'the damages to which SDMI is entitled arising out of Canada's breach of Article 1102 are neither increased nor diminished by its breach of Article 1105' (para. 319). The tribunal ultimately decided in a subsequent award (*S.D. Myers Inc. v. Canada*, Second Partial Award, (21 October 2002), paras. 174, 222, 228) that the appropriate primary measure of compensation for lost profits was the value of the claimant's lost net income stream. The tribunal awarded some CAD 6 million in damages to the investor.

See, for instance, *Nykomb Synergetics Technology Holding AB v. Latvia*, SCC, Award, (16 December 2003), at 53.

See, for instance, *Chemtura Corporation v. Canada*, Canada's Counter Memorial, (20 October 2008), para. 955; *Vito G. Gallo v. Canada*, UNCITRAL, Canada's Counter-Memorial, (29 June 2010), para. 515; *Merrill & Ring Forestry L.P. v. Canada*, Canada's Counter Memorial, (13 May 2008), para. 802; *Grand River v. United States*, US Counter-Memorial, (22 December 2008), at 164, 165; *Thunderbird v. Mexico*, Mexico's Escrito de Contestación, (18 December 2003), paras. 235, 238.

Feldman v. Mexico, Award, (16 December 2002), para. 194.

Ibid.

Marboe, *supra* n. 1, para. 3.154. See, for instance, *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, (22 May 2007), para. 363 ('On occasions, the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation'); *Sempra Energy International v. Argentina*, Award, (28 September 2007), para. 403 (where the tribunal stated that in cases where a non-expropriatory breach caused 'significant disruption to the investment made', it 'might be very difficult to

distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same'); *Azurix Corp. v. Argentina*, ICSID No. ARB/01/12, Award, (14 July 2006), para. 424.

Marboe, *supra* n. 1, para. 3.165.

CMS Gas Transmissions Company v. Argentina, Award, (12 May 2005), para. 410.

Ibid.

Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID No. ARB/98/4, Award, (8 December 2000), para. 118; *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB (AF)/00/2, Award, (29 May 2003), paras. 151, 174, 187, 188. These findings have been contested in doctrine on the ground that 'if tribunals apply the same rules for the assessment of compensation for a breach of fair and equitable treatment as would be applied to an expropriation, then the difference between these two substantive obligations becomes academic' (Zachary Douglas, *The International Law of Investment Claims* 104 (Cambridge U. Press 2009).

Dolzer & Schreuer, *supra* n. 8, at 273; N. Gallus, *The Fair and Equitable Standard of Treatment and the Circumstances of the Host State, in Evolution in Investment Treaty Law and Arbitration* 243 (C. Brown & K. Miles eds., Cambridge U. Press 2011) ('Several investment treaty tribunals have found that, regardless of the actual damage to the claimant, they can adjust the compensation to ensure that it is equitable'); Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 189 (Kluwer 2009).

Article 39, I.L.C. Articles on State Responsibility, *supra* n. 2: 'In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought'.

Tudor, *supra* n. 27, at 222, *see also*, at 212-213, 217 ('Therefore, even though the liability of the State is established objectively, the compensation to be paid to the investor is tailored in such a way as to give each party what it deserves in order to achieve an equitable result').

Ibid., at 218. *See also*, Gabriel Cavazos Villanueva, *The Fair and Equitable Treatment Standard* 89, 189 (VDM Verlag 2008).

Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations under Investment Treaties?*, 4 Yb Int'l Invest. L. & Pol. 585, 592 (2011-2012).

Ioana Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, in *Human Rights in International Investment Law and Arbitration* 342 (P.M. Dupuy, F. Francioni & E.U. Petersmann eds., Oxford U. Press 2009).

Dumberry & Dumas-Aubin, *supra* n. 75, at 593. Thus, while a tribunal would have jurisdiction over the investor's claim, it should nevertheless refuse to hear it based on the investor's breach of human rights obligations. To the extent that recent tribunals have denied admissibility of claims based on bribery or misrepresentations made by the claimant (*see, inter alia, Gustav F.W. Hamster GmbH & Co KG v. Ghana*, ICSID No. ARB/07/24, Award, (10 June 2010), at 123), it is submitted that they should do the same when faced with human rights violations. In other words, the solution that prevailed so far for bribery, should, *a fortiori*, apply when a tribunal finds fundamental human rights abuses by the claimant. In the present author's view, these are precisely the kind of investments not worthy of protection under a BIT. In any event, there is no doubt that a tribunal should find inadmissible a claim submitted by an investor having committed *jus cogens* violations (*Phoenix Action, Ltd. v. Czech Republic*, ICSID No. ARB/06/5, Award, (15 April 2009), para. 78). *See also* P. Dumberry & G. Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13(3) J. World Invest. & Trade 349-372 (2012); P. Dumberry & G. Dumas-Aubin, *The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, 10(1) Transnational Disp. Mgmt. Special Issue: Aligning Human Rights and Investment Protection (2013). More generally, on the question of an investor's conduct in the context of claims for breach of the fair and equitable treatment, *see* Peter Muchlinski, 'Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', 55(3) ICLQ 527-557 (2006).

Iurii Bogdanov v. Moldova, Ad hoc-SCC Arbitration Rules, Award, (22 September 2005), para. 84; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID No. ARB/06/11, Award, (15 October 2012), paras. 681, 687.

MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Award, (25 May 2004), paras. 241-243.

Hobér, *supra* n. 44, at 86.

Gallus, *supra* n. 71, at 243; Tudor, *supra* n. 27, at 208

(Elements that may excuse, justify, or that may have contributed to the behavior of the State may be taken into account only in the last phase of the proceedings, namely the calculation of compensation').

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