

Article

Crippling Compensation in the International Law Commission and Investor–State Arbitration

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Abstract—Is there an exception to the principle of full reparation in international investment arbitration for cases in which full compensation is crippling for the responsible State or its peoples? The routine presentation and consideration of billion-dollar-plus investment arbitration claims in the first half of 2021 suggests that this subject has not been invented in order to enable it to be written about but is one of considerable importance for the field of international investment law and its actors. The frame of reference in a discussion about compensation in investment law is provided by the law of State responsibility, strongly shaped by the 2001 International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (2001 ILC Articles on State Responsibility), which treat crippling compensation as permissible as a matter of content of responsibility. The argument for the permissibility of crippling compensation explicitly assumed the rarity of such claims; safeguards in primary, secondary, and tertiary rules for the few cases when they did arise; and the enlightened self-interest of States as repeat-playing actors in not making them—and perhaps implicitly scepticism about compound interest and Discount Cash Flow valuation. None of these assumptions holds true in modern investor State arbitration. Nevertheless, the predominant reaction to crippling compensation claims has been silence by tribunals and respondent States, suggestive in legal terms of endorsement of their permissibility in line with the 2001 ILC Articles on State Responsibility. There is some scope for addressing crippling compensation within the 2001 ILC Articles on State Responsibility, both indirectly (challenging the meaningfulness of the question in the first place or considering crippling compensation as part of the general discussion of the content of responsibility) and directly, under the rubrics of circumstances precluding wrongfulness and enforcement. The case can also be made for moving beyond the 2001 ILC Articles on State Responsibility, by emphasising the difference between implementation of responsibility in inter-State and investor–State legal relations or even directly arguing for a change of the applicable customary rule.

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I. INTRODUCTION

Three submissions made in 2020 illustrate the contemporary importance of the question whether the State's (in)capacity to provide compensation has legal relevance in investor–State arbitration:

Pakistan submits that immediate enforcement of the Award would lead to dire consequences to the country at a 'uniquely bad moment in time'. Pakistan emphasizes the hardship it would suffer due to the delicate state of the economy that needed a USD 6 billion IMF [International Monetary Fund] Extended Fund Facility in July 2019. As Pakistan argues, immediate enforcement would entail immediate payment of the full amount of the USD 5.9 billion Award that would have an 'immediate and potentially devastating effect on Pakistan's fragile economy'. Immediate payment would lead to removal of funding for health, social, and welfare programs that would have 'disastrous impacts for the people of Pakistan . . . particularly the most disadvantaged and vulnerable'.¹

Curtis [on behalf of Venezuela]² alludes to the 'punishing effect on Venezuela's economy and its people' of the enforcement of the Award, says that Venezuela's economy is in a crisis of historic proportions and points out that the Award represents 13,5% of the Venezuelan Gross Domestic Product (GDP) of 2019. . . . Curtis clearly admits at the Hearing that Venezuela could not hand over 8,5 billion USD to Conoco.³

In the present context of civil unrest in Ecuador, the consequences of immediate enforcement of US\$411 million are beyond the ordinary consequences of budgetary reallocation and would cause significant and unavoidable economic and social hardship for Ecuador.⁴

Tethyan Copper Company Pty Limited v Pakistan (Tethyan) and *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela (ConocoPhillips)*, from which the first two quotes in the previous paragraph are taken, may be extreme examples. These decisions on their merits combined the highest damages awards ever made by the International Centre for Settlement of Investment Disputes (ICSID) tribunals⁵ and the particular fragility of Venezuela's and Pakistan's economy in 2019 when the awards were rendered,⁶ with 'the ramifications of the COVID-19 pandemic' in 2020 further affecting the capacity for compliance.⁷ But they are not unique. Billion-dollar-plus awards, unknown in investor–

¹ *Tethyan Copper Company Pty Limited v Pakistan*, ICSID Case No ARB/12/1, Decision on Stay of Enforcement of the Award (17 September 2020) para 143.

² The contested question of Venezuela's representation in international dispute settlement is not directly relevant to the argument made in this article; see further *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela*, ICSID Case No ARB/07/30, Order on the Applicant's Request for Reconsideration dated 3 August 2020 on the issue of Venezuela's legal representation (2 November 2020) paras 25–40; *Mobil Cerro Negro Holding, Ltd and ors v Venezuela*, ICSID Case No ARB/07/27, Decision on the Respondent's Representation in this Proceeding (1 March 2021) Section III.

³ *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela*, ICSID Case No ARB/07/30, Award on the Applicant's Request to Continue the State of Enforcement of the Award (2 November 2020) paras 51, 53.

⁴ *Perenco Ecuador Limited v Ecuador*, ICSID Case No ARB/08/6, Decision on Stay of Enforcement of the Award (21 February 2020) para 28.

⁵ *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela*, ICSID Case No ARB/07/30, Award (8 March 2019); *Tethyan Copper Company Pty Limited v Pakistan*, ICSID Case No ARB/12/1, Award (12 July 2019).

⁶ IMF World Economic Outlook, 'Still Sluggish Global Growth' (July 2019) <<https://www.imf.org/en/Publications/WEO/Issues/2019/07/18/WEOupdateJuly2019>> ('The deep humanitarian crisis and economic implosion in Venezuela continue to have a devastating impact, with the economy expected to shrink about 35 percent in 2019') (emphasis in the original); IMF Press Release No 19/264, 'IMF Executive Board Approves US\$6 billion 39-Month EFF Arrangement for Pakistan' (3 July 2019) <<https://www.imf.org/en/News/Articles/2019/07/03/pr19264-pakistan-imf-executive-board-approves-39-month-eff-arrangement>>.

⁷ *Tethyan Stay* (n 1) para 181.

State arbitration before late 2012,⁸ have become less unusual in the last five years,⁹ and even with all the excessive saltiness added to the soup of their likely success, billion-dollar disputes are now completely routine.¹⁰

When considering how these important developments fit within the legal universe, the starting point is that investment law is a field of public international law, and the same generalist rules and assumptions on sources and dispute settlement law apply as they would in any other field of international law.¹¹ In a discussion about compensation in investment law, the frame of reference is provided by the law of State responsibility, which is strongly shaped by the International Law Commission's (ILC's) work that culminated in its 2001 Articles on Responsibility of States for Internationally Wrongful Acts (2001 ILC Articles on State Responsibility).¹² The interaction of international investment law and the law of State responsibility has been, both historically and in recent practice, analytically complicated, and compensation in the 2001 ILC Articles on State Responsibility is no exception. Still, whatever one may have thought about this aspect of the Articles in the aftermath of their adoption,¹³ the *longue durée* perspective should both acknowledge that they were a

⁸ *Occidental Petroleum Corporation, Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012).

⁹ *Crystallex International Corporation v Venezuela*, ICSID Additional Facility Case No ARB(AF)/11/2, Award (4 April 2016); *Unión Fenosa Gas, SA v Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018); *ConocoPhillips Award* (n 5); *Tethyan Award* (n 5); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v India*, PCA Case No 2016-7, Award (21 December 2020).

¹⁰ Eg news items about various stages of billion-dollar claims in the first half of 2021: Lisa Bohmer, 'Prospect of NAFTA Arbitration over US-Canada pipeline could be revived as incoming US Administration cancels the project' *Investment Arbitration Reporter* (18 January 2021); Vladislav Djanic, 'Ukraine is looking for counsel in 3.5 billion USD treaty-based dispute, as sanctions are imposed on Chinese investors' *Investment Arbitration Reporter* (1 February 2021); Lisa Bohmer, 'The Netherlands is facing its first ICSID arbitration, as German energy giant RWE makes good on earlier threats' *Investment Arbitration Reporter* (3 February 2021); Lisa Bohmer, 'Billion-dollar claim against Colombia is dismissed on the merits, but tribunal finds that it lacks jurisdiction over the state's counterclaim' *Investment Arbitration Reporter* (12 March 2021); Damien Charlotin, 'Crimea-related 1 billion award against Russia is set aside, as Paris court finds that the tribunal lacked jurisdiction' *Investment Arbitration Reporter* (30 March 2021); Damien Charlotin, 'French Cour de cassation resurrects USD 1.6 billion award against Venezuela' *Investment Arbitration Reporter* (1 April 2021); Vladislav Djanic, 'Turkey to face new treaty-based claim estimated at 1+ billion USD' *Investment Arbitration Reporter* (29 April 2021); Lisa Bohmer, 'Investor in Damieta port project makes good on earlier arbitration threat' *Investment Arbitration Reporter* (30 April 2021); Vladislav Djanic, 'Gold miner follows up on previous arbitration threat against Kyrgyzstan' *Investment Arbitration Reporter* (17 May 2021); Lisa Bohmer, 'Uncovered: Littop v. Ukraine ECT tribunal recognizes "unclean hands" principle and declines jurisdiction over 6 billion USD case after finding that the investment was tainted by corruption; denial of benefits objection is also upheld' *Investment Arbitration Reporter* (30 May 2021); Vladislav Djanic, 'As foreshadowed, miner brings 27 billion USD claim against African state' *Investment Arbitration Reporter* (7 June 2021); Lisa Bohmer, 'UNCITRAL tribunal in place to hear billion-dollar mining claim against Poland' *Investment Arbitration Reporter* (11 June 2021).

¹¹ Eighteenth Commission of the Institute of International Law, 'Resolution on Legal Aspects of Resource to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties' (13 September 2013) <https://www.idi-iiil.org/app/uploads/2017/06/2013_tokyo_en.pdf> art 1; International Law Commission, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' *Report of the International Law Commission: Seventieth session (30 April–1 June and 2 July–10 August 2018)* UN Doc A/73/10 11 Conclusion 2 Commentary 5, Conclusion 8 Commentaries 17–18, Conclusion 9 Commentaries 3, 15; International Law Commission, 'Conclusions on identification of customary international law' *ibid* 117 Conclusion 8 Commentary 4; Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, 'Means for the settlement of disputes: exchange of information on State practices regarding the use of arbitration' (19 February 2021) UN Doc A/AC.182/2021/L.7 paras 11–12; International Law Commission, 'Draft guidelines on the protection of the atmosphere' (15 May 2021) UN Doc A/CN.4/L.951 Draft guideline 9(1); *Oracon TMT Investment Sarl v Algeria*, ICSID Case No ARB/12/35, Decision on Annulment (17 September 2020) paras 303–16.

¹² International Law Commission, 'Articles on responsibility of States for internationally wrongful acts' *Yearbook of the International Law Commission 2001: Volume II Part 2* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26.

¹³ Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833, 856 ('Decades of work have produced few answers and many more questions'); Rosalyn Higgins, 'Overview of Part Two of the Articles on State Responsibility' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 537, 539 ('The real-life issues that arise relating to compensation are many and complex. Article 36 of the ILC Articles itself side-steps virtually all of these, leaving them unanswered.').

very significant improvement over the questions posed in the 1980s¹⁴ and 1990s,¹⁵ and accept their overwhelming endorsement by international tribunals, including in investment arbitration.¹⁶ When taken together with the deep conceptual discussions on compensation within the ILC and responses by States to that debate, the 2001 ILC Articles on State Responsibility provide the best analytical perspective for the discussion of the place in investor–State arbitration of the concept that, following the ILC’s own terminology, I will call ‘crippling compensation’.¹⁷

Is there an exception to the principle of full reparation in international investment arbitration for cases in which full compensation is crippling for the responsible State or its peoples? This is plainly an important question, for the practice of investment law, conceptual foundations of implementation of State responsibility by non-State actors, and safeguarding the financial capacity of (developing) States to provide public goods. I will address it in four parts, building on earlier research about State responsibility and exploring its applicability to the field of international law most likely to give rise to crippling compensation claims.¹⁸ First, I will address the treatment of crippling compensation by the ILC, with a particular eye to the investment law perspective, explaining the process that concluded with its endorsement of permissibility of crippling compensation in the 2001 ILC Articles on State responsibility (Section II).¹⁹ Secondly, I will discuss the treatment of crippling compensation in investor–State arbitration, predominantly through silence by tribunals and respondent States, suggestive in legal terms of endorsement of the permissibility of crippling compensation adopted by the ILC (Section III). The third and fourth parts address the fit of *ConocoPhillips*- and *Tethyan*-type disputes within the modern law of State responsibility,²⁰ first considering how they might be addressed within the four corners of the 2001 ILC Articles on State responsibility (Section IV) and then exploring the (courageous) argument for moving beyond them on this point (Section V).

¹⁴ Christine Gray, ‘Is There an International Law of Remedies?’ (1985) 54 BYBIL 25 (for the answer, see Christine Gray, *Judicial Remedies in International Law* (Clarendon Press 1990)).

¹⁵ See the not unsympathetic but ultimately devastating assessment by Frank Berman on behalf of the UK: ‘The international law of remedies was piecemeal and undeveloped, which was no doubt due to the current infrequency of recourse to arbitral or judicial settlement of disputes where the nature or extent of the remedy was itself a matter of dispute. Many of the authorities culled by the Special Rapporteur [Arangio-Ruiz] were somewhat old, and there was a legitimate question of how far the guidance they provided remained valid for the current times. It was evident that international tribunals had been heavily influenced by the particular circumstances of individual cases, which showed that circumstances were capable of an almost infinite variety’ (Summary Records of the 24th Meeting of the Sixth Committee (2 November 1993) UN Doc A/C.6/48/SR.24 para 45).

¹⁶ See, most recently, Report of the UN Secretary General, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’ (23 April 2019) UN Doc A/74/83 29–40 (excerpting 46 passages from decisions in investor–State arbitration relying on 2001 ILC Articles on reparation, compensation, interest, and contribution), and further Report of the UN Secretary General, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’ (1 February 2007) UN Doc A/62/62 66–73; Report of the UN Secretary General, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’ (30 April 2010) UN Doc A/65/76 13–18; Report of the UN Secretary General, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’ (30 April 2013) UN Doc A/68/72 27–35; Report of the UN Secretary General, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’ (21 April 2016) UN Doc A/71/80 26–40. However, the increasing number of citations is not necessarily incompatible with Higgins’s criticisms (n 13) (‘Article 36(2) will serve simply as a point of departure, a rule that will be recited before turning to the real problems in this field’).

¹⁷ 2001 ILC Articles (n 12) art 34 Commentary 5.

¹⁸ Martins Paporinskis, ‘A Case against Crippling Compensation in International Law of State Responsibility’ (2020) 83 MLR 1246; Martins Paporinskis, ‘Crippling Compensation in the Law of State Responsibility’ (17 May 2021) *EJIL: Talk!*.

¹⁹ 2001 ILC Articles (n 12) art 34 Commentary 5.

²⁰ See nn 1, 3–5.

The broader claim is two-fold, with some tension between the folds. On the one hand, the position of the 2001 ILC Articles on State Responsibility on permissibility of crippling compensation is consistent with the strong preference of the traditional legal position for reparation to ‘wipe out all the consequences of the illegal act’.²¹ It has also been broadly endorsed by the international legal process of the last 20 years, if mostly by necessary implication. On the other hand, the ILC’s assumptions about the normal operation of international law of compensation were shaped by the second half of the 1990s—an atypical period for investment law, which for the first time since the beginning of the last century did not seem an obvious cause for the most controversial disputes. Permissibility of crippling compensation may thus be good law *and* an introduction of an exception that tweaks the general principle of full reparation away from its exclusive focus on interests of the injured (non-State) actor would be consistent with the broader balance between bilateral and multilateral interests struck by the ILC.²²

II. CRIPPLING COMPENSATION IN THE INTERNATIONAL LAW COMMISSION

From the perspective of modern international law, investment law is a field of primary rules like any other. Consequently, general secondary rules of State responsibility apply to determination of the internationally wrongful act and content and implementation of State responsibility, to the extent that the particular issue falls within their scope and has not been addressed otherwise by *lex specialis*. The better examples from the practice of investment arbitration tribunals and review bodies endorse this conceptual distinction,²³ including on content of responsibility and reparation.²⁴ The line was, however, blurrier in the ILC’s work on compensation—indeed, completely non-existent for the First Special Rapporteur Francisco García-Amador, who conceptualised the topic as relating solely to breaches of primary rules

²¹ *Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ Series A No 17 47, recently endorsed in *Jadhav (India v Pakistan)* [2019] ICJ Rep 418 para 138; *Iran v US*, IUSCT Case No A15 (II:A), A26 (IV) and B43, Partial Award (10 March 2020) para 1787; *The “Enrica Lexie” Incident (Italy v India)*, PCA Case No 2015-28, Award (21 May 2020) para 1082.

²² Martins Paparinskis, ‘The Once and Future Law of State Responsibility’ (2020) 114 AJIL 618, 623, see generally Santiago Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États* (PUF 2005); James Crawford, ‘Multilateral Rights and Obligations in International Law’ (2006) 319 Hague Recueil 331 chs IV–V; Giorgio Gaja, ‘The Protection of General Interests in the International Community’ (2011) 364 Hague Recueil 16 chs VIII–X; Rapporteur of the Twelfth Commission of the Institute of International Law Shinya Murase, ‘Epidemics and International Law’ (2021) <<https://idi-iil.org/app/uploads/2021/05/Report-12th-commission-epidemics-vol-81-year-book-online-session.pdf>> paras 56, 65, 158.

²³ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) fn 17, paras 95–7, fn 78; *MTD Equity Sdn. Bhd. and MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) paras 89, 99; *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) paras 129–34, 144–7; *Tulip Real Estate and Development Netherlands BV v Turkey*, ICSID Case No ARB/11/28, Decision on Annulment (30 September 2015) paras 183–91, 211–20; *EDF International SA and ors v Argentina*, ICSID Case No ARB/03/23, Decision on Annulment (5 February 2016) paras 317–35; *Blusun SA and ors v Italy*, ICSID Case No ARB/14/3, Award (27 December 2016) paras 361, 627; *Mobil Exploration and Development Inc Suc Argentina y Mobil Argentina SA v Argentina*, Caso CIADI No ARB/04/15, Decisión sobre la Solicitud De Anulación (8 de mayo de 2019) paras 94–6, 100, 191; *Venezuela US, Srl v Venezuela*, PCA Case No 2013-34, Partial Award (Jurisdiction and Liability) (5 February 2021) paras 153–5.

²⁴ *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Decision of the *ad hoc* Committee (25 March 2010) para 141; *EDF ibid* para 371; *Quiborax SA y Non-Metallic Minerals SA y Bolivia*, Case CIADI No ARB/06/2, Decisión sobre la Solicitud De Anulación (18 de mayo de 2018) paras 155–62; *William Ralph Clayton and ors v Canada*, PCA Case No 2009-04, Award on Damages (10 January 2019) paras 108–14, 195–205; *Perenco Ecuador Limited v Ecuador*, ICSID Case No ARB/08/6, Award (27 September 2019) paras 74, 344, 359; *Victor Pey Casado and Foundation President Allende v Chile (II)*, ICSID Case No ARB/98/2, Decision on Annulment (8 January 2020) paras 678–81.

on the treatment of aliens.²⁵ But even after the Second Special Rapporteur Roberto Ago's profound transformation of State responsibility into a topic encompassing the broader rubric of secondary rules,²⁶ the work on reparation by post-Ago²⁷ rapporteurs Willem Riphagen²⁸ and Gaetano Arangio-Ruiz was still strongly shaped by the law on the treatment of aliens and investors.²⁹ Indeed, the 2001 ILC Articles on State Responsibility are still influenced by the 'considerable variety' of State and arbitral practice regarding property and investment claims.³⁰ Reading the ILC's work on content of responsibility through the lens of modern investment law debates is therefore often helpful, more so than the conceptual framing of the law of State responsibility as equally attuned to all primary rules may suggest.

This section will address the treatment by the ILC of the topic of crippling compensation, considering in turn the discussion in 1990 (Section II.A), 1995–96 (B), and 1999–2000 (C), with a particular eye to arguments either informed by investment law or presented by actors who were to become influential participants in the field of investment law in the next decades. The key claim is that the ILC's debate most sensitive to the current investment law took place in 1990, with the background shadow thrown by (the demise of) the New International Economic Order (NIEO) informing perspectives of surprising relevance for modern practice. Conversely, the final stages of the first reading in 1995–96, and particularly the second reading in the second half of the 1990s, fell into an odd and atypical lull for investment law, which seems like a completely foreign country. By that time, multilateral contestation of investment law in the United Nations seemed the stuff of obituaries,³¹ while

²⁵ 'Sixth report on State responsibility, by Mr. F.V. García-Amador, Special Rapporteur' (26 January 1961) *Yearbook of the International Law Commission 1989: Volume II* UN Doc A/CN.4/SER.A/1961/Add.1 1 Chapter III ('The reparation of injury caused to the alien'), particularly paras 146–156 ('The reparation of damage to property in general').

²⁶ Alain Pellet, 'Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité' (2021) 414 *Hague Recueil* 18, 489–90.

²⁷ Ago devoted eight reports to issues now addressed under the rubric of the internationally wrongful act (and exhaustion of local remedies, now addressed as an aspect of implementation of responsibility), without reaching the content of responsibility. In any event, he was never particularly interested in compensation, not directly addressed in Roberto Ago, 'Le délit international' (1939) 68 *Hague Recueil* 417, and briefer discussion elsewhere of the role of fault and the distinction between acts and omissions in determining reparation stands in some tension with the implications of his own distinction between primary and secondary rules, Roberto Ago, 'Illecito commissio e illecito omissio nel diritto internazionale' (1938) *Diritto internazionale* 9, 12–16; Roberto Ago, 'La colpa nell'illecito internazionale' (1940) III *Scritti giuridici in onore di Santi Romano* 177, 188. Note, however, the important indirect role of damage, as explained in the key contemporary piece, Attila Tanzi, 'Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?' in Maria Spinedi and Bruno Simma (eds), *United Nations Codification of State Responsibility* (Oceana Publications Inc 1987) 1.

²⁸ The Third Special Rapporteur Willem Riphagen proposed a separate regime on reparation for breach of an obligation concerning the treatment of aliens, 'Second report on the content, forms and degrees of international responsibility (Part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (1 May 1981) *Yearbook of the International Law Commission 1981: Volume II (Part 1)* UN Doc A/CN.4/SER.A/1981/Add.1 (Part 1) 79 art 5; 'Fifth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (4 April 1984) *Yearbook of the International Law Commission 1984: Volume II (Part 1)* UN Doc A/CN.4/SER.A/1984/Add.1 (Part 1) 1 art 7; 'Sixth report on the content, forms and degrees of international responsibility (part two of the draft articles); and "Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes (part three of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (2 April 1985) *Yearbook of the International Law Commission 1985: Volume II (Part 1)* UN Doc A/CN.4/SER.A/1985/Add.1 (Part 1) 3 art 7.

²⁹ The Fourth Special Rapporteur Gaetano Arangio-Ruiz rejected his predecessor's general argument for a special regime for reparation for breaches of primary rules on the treatment of aliens and investors (cf *ibid*); 'Preliminary report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (9 and 22 June 1988) *Yearbook of the International Law Commission 1989: Volume II Part 1* UN Doc A/CN.4/SER.A/1988/Add.1 (Part 1) 6 paras 104–8, 121–2, but the commentaries on restitution adopted by the ILC in the first reading directly engaged with investment law, *Yearbook of the International Law Commission 1993: Volume II Part 2* UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2) 53 art 7 Commentary 15.

³⁰ 2001 ILC Articles (n 12) art 36 Commentary 20.

³¹ A perspective shared by scholars with various attitudes to the NIEO: Thomas Wälde, 'A Requiem for the "New International Economic Order": The Rise and Fall of Paradigms in International Economic Law' in Alfred Rest and

‘arbitration without privity’ was only just taking off³² and was not yet sufficiently appreciated by States and scholars to be raised as a routine hypothetical in the ILC.³³ In short, the permissibility of crippling compensation in the 2001 ILC Articles is not an accidental afterthought but reflects a considered judgement—although one not based on assumptions sensitive to the challenges and dynamics of modern investor–State arbitration.

A. First Reading (1987–91 Quinquennium)

The ILC first addressed crippling compensation in 1990, as part of its work on the first reading of State responsibility. To appreciate its treatment of the argument, it is helpful to take two steps back to situate the particular point in the broader debate on reparation. The first, backdrop principle informing the whole discussion was the timeless call by the Permanent Court of International Justice (PCIJ) in *Factory at Chorzów* for reparation to ‘wipe out all the consequences of the illegal act’.³⁴ The second question related to restitution and was this: how to square the seeming rigour of *restitutio ad integrum* with the general unwillingness in practice to apply this form of reparation to nationalization of foreign-owned property? One response was to have a separate regime on the reparation for breach of an obligation concerning the treatment of aliens, with a lesser obligation of restitution,³⁵ but the ILC members were unenthusiastic about it.³⁶ Arangio-Ruiz suggested instead a general exception of ‘excessive onerousness’, which would come into play when restitution would ‘seriously jeopardize the political, economic or social system of the State’, with a particular eye to nationalizations.³⁷ ILC members broadly supported the policy of replacing restitution and its potential intrusiveness into desirable domestic reforms with compensation³⁸ (with only one member pointing out what seems obvious now: ‘if restitution

others (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (Brill 1998); Antony Anghie, ‘Legal Aspects of the New International Economic Order’ (2014) 6 *Humanity* 145; Christopher RW Dietrich, *Oil Revolution* (CUP 2017) ch 8.

³² Jan Paulsson, ‘Arbitration without Privity’ (1995) 10 *ICSID Rev—FILJ* 232. The first award on the merits in the North American Free Trade Agreement arbitration, a setting that did much to shape contemporary debates about investment law, dates from the very end of the 1990s, and the first case lost by a State from 2020, respectively *Robert Azinian and ors v Mexico*, ICSID Additional Facility Case No ARB(AF)/97/2, Award (1 November 1999); *Metalclad Corporation v Mexico*, ICSID Additional Facility Case No ARB(AF)/97/1, Award (30 August 2000).

³³ For an informed observer’s perspective on effects in other multilateral settings, see Rainer Geiger, ‘Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment’ (2002) 11 *NYU Env LJ* 94, 97.

³⁴ *Factory at Chorzów* (n 21) 47. See Riphagen’s Preliminary Report (n 28) para 31 (‘the words of the often-quoted judgment’); Riphagen’s Second Report (n 28) para 37 (‘almost all writers on the topic refer, with apparent approval, to a passage of the famous judgement’); Arangio-Ruiz’s Preliminary Report (n 29) para 39 (‘reparation responds to the exigency ... defined by the PCIJ in the well-known *Chorzów Factory* case’), also paras 64, 114; also ‘Eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur’ (25 May 1995) *Yearbook of the International Law Commission 1995: Volume II Part 1 UN Doc A/CN.4/SER.A/1995/Add.1 (Part 1)* 51 para 23 (‘the meaning of reparation in international law is expressed in the *Chorzów Factory*’).

³⁵ Riphagen’s Sixth Report (n 28) art 7.

³⁶ For most, there was no difference between the suggested special rule and the general exception of material impossibility in the rule on restitution: *Yearbook of the International Law Commission 1985: Volume I UN Doc A/CN.4/SER.A/1985* 100 paras 35–6 (Calero Rodrigues), 103 para 56 (Flitan), 107 para 28 (Thiam), 114 para 38 (Balanda), 116 para 2 (Sinclair), 128 para 10 (Mahiou), 130 para 27 (Barboza), 133 para 45 (Díaz González), 141 para 3 (Roukounas) and 146 para 38 (Yankov). Some were agnostic (ibid 108 para 37 (Huang); 143 para 15 (Al-Qaysi); 154 para 7 (Jagota)), and very few were in favour (124 para 23 (Njenga)), mostly because of the interlinkage with the rule on exhaustion of local remedies (incorrectly) conceptualised at that point as a substantive rather than a procedural rule (ibid 111 para 17 (Francis); 116 para 5 (Sinclair)). For a helpful recent discussion of the place of exhaustion in various taxonomies, see *Swissbourgh Diamond Mines (Pty) Ltd and ors v Kingdom of Lesotho* [2019] 1 *SLR* 263 paras 205–9.

³⁷ Arangio-Ruiz’s Preliminary Report (n 29) paras 99–108, 132, art 7(1)(c), (2)(b).

³⁸ *Yearbook of the International Law Commission 1989: Volume I UN Doc A/CN.4/SER.A/1989* 48 para 2 (Razafindralambo), 51 para 21 (Mahiou), 62 para 13 (Sepúlveda Gutiérrez), 66 para 53 (Koroma) (‘those conditions

seemed to be excessively onerous, that simply meant . . . that pecuniary compensation would be [excessively onerous] too’).³⁹ Arangio-Ruiz’s proposal was adopted to limit restitution so as to ‘not seriously jeopardize the political independence or economic stability of the State’—with (an unexpected for a contemporary eye) praise for investment protection treaties in the Draft commentary as having minimised the likelihood of such situations.⁴⁰

The question whether the ‘excessive onerousness’ exception applied by analogy to compensation was addressed squarely in 1990, as part of discussion of Arangio-Ruiz’s second report.⁴¹ The very first ILC members to speak made the most thoughtful submissions of the whole decade, building on their work on the NIEO and investment law, and are worth quoting in full. The first was Shi Jiuyong, the Chairperson of the Commission and a future Judge and President of the International Court of Justice (ICJ), who based an argument for limited compensation on sovereign equality and right to development.⁴²

When applied to relations between developed States, the concept of full compensation or reparation by equivalent might not create any problems. When it was demanded of a developing country by a developed country, however, full compensation might prove to be excessively onerous and might deprive the developing country of its right to development. There was no such thing as unlawfulness when it came to the nationalization or expropriation of a foreign enterprise, other than in the case of non-payment of compensation. If, in the event of nationalization, a small developing country had to pay compensation according to the criteria conceived by the Special Rapporteur, that country might become bankrupt, for often the market value of a transnational corporation and its annual profits exceeded the country’s gross national product. That was why the instruments on the new international economic order spoke of ‘appropriate compensation’ in accordance with the legislation of the nationalizing State. It should be remembered that the idea of full, prompt, adequate and effective compensation for nationalization had first been mooted by a great Power during the 1938 Mexican expropriations. Full compensation as conceived by the Special Rapporteur and when demanded of a small country by a big Power was not compensatory, but essentially of a punitive nature. In that connection, the principle of preferential treatment for developing countries should prevail in relations between developed and developing countries. Only thus could reparation by equivalent reflect the principle of the sovereign equality of States—in other words, equality through inequality.⁴³

would appear to apply more particularly to cases in which the act in question related to a concession or a nationalization and in which the injured party was not entitled—saving exceptions—to claim restitution: the sole remedy then lay in damages. The Special Rapporteur was right to adopt that position’) 201 para 69 (Al-Qaysi). But see doubts on various points of taxonomy, 63 para 24 (Hayes), 65 para 43 (Rao); agnostic views in 203 para 82 (Al-Khasawneh); direct criticism in 234 paras 7, 15 (McCaffrey).

³⁹ *Yearbook 1989 Volume I* *ibid* 49 para 12 (Calero Rodrigues). For this ILC member, the issue was rather to be addressed at the level of circumstances precluding wrongfulness, para 13.

⁴⁰ *Yearbook 1993 Volume II Part 2* (n 29) art 7(d) Commentary 17.

⁴¹ ‘Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur’ (9 and 22 June 1989) *Yearbook of the International Law Commission 1989: Volume II Part 1* UN Doc A/CN.4/SER.A/1989/Add.1 (Part 1) 1.

⁴² Judge Shi’s earlier work had addressed the role of developing States in the promotion of the NIEO to rebalance international economic relationships (Jiuyong Shi, ‘The Concept and Scope of International Economic Law’ (1983) Chinese YB Intl L 359, 367–9 (in Chinese)) and investor–State dispute settlement from the perspective of developing States (Jiuyong Shi, ‘Investment Disputes and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1984) Chinese YB Intl L 67, 68, 80–4, 89 (in Chinese)). He was to give a talk on investment treaties in 1992 (*Yearbook of the International Law Commission 1992: Volume II Part 2* UN Doc A/CN.4/SER.A/1988/Add.1 (Part 2) para 386) and sit as a Judge in *Ahmadou Sadio Diallo (Equatorial Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582.

⁴³ *Yearbook of the International Law Commission 1990: Volume I* UN Doc A/CN.4/SER.A/1990/Add. 1 (Part 1) 164 para 57.

The second speaker was Mohamed Bennouna, also a future Judge of the ICJ, who reached a similar conclusion by reasoning backwards from the absurdity of *not* taking into account the capacity and structure of States in dealing with investment claims.⁴⁴

States were not equal in terms of financial and economic capacity. Consequently, unless the end result was to be an absurdity, compensation must necessarily take account of the financial capacity of States. . . . reparation should take account of all the relevant circumstances, including the structure of the States concerned, which differed considerably from one country to another and could have an influence on reparation. Assuming, for example, that a country surrendered its natural resources for 50 years for a paltry sum or concluded contracts that were manifestly contrary to its national interest, should that inevitably give rise to total reparation, including reparation for loss of profits, for the next 50 years? . . . [By reference in particular to *lucrum cessans*,] the general rule laid down in paragraph 3 should be tempered by a reference to equity and to the circumstances of the case, equity now being cited in international jurisprudence as a basis for a rule of law. . . . He agreed with Mr. Shi . . . about the notion of appropriate compensation, which had undergone considerable development over the past 10 to 15 years.⁴⁵

Arangio-Ruiz noted, in summarising the discussion regarding *lucrum cessans*, that ‘the arbitrator was expected to take account in such cases of the different levels of economic development and economic means of States and to proceed on the basis of equity’.⁴⁶ In 1993, the Commission adopted in the first reading draft commentary 8 to the general rule on reparation in line with this discussion: ‘There may be other equitable considerations that might be taken into account in providing 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’.⁴⁷ In short, the early 1990s ILC considered capacity to pay against the particular backdrop of investment law and proposed a balanced solution, articulating the availability of financial resources as one of the relevant criteria in determining compensation but not providing an explicit exception against excessive onerousness of the final amount.

⁴⁴ Judge Bennouna had written on the NIEO and investment law: Mohamed Bennouna, ‘Le nouvel ordre économique international et la doctrine juridique’ (1977) 2 *Revue juridique, politique et économique du Maroc* 33, 38–9; Mohamed Bennouna, ‘International Law and Development’ in Mohamed Bedjaoui (ed), *International Law: Achievements and Prospects* (Nijhoff 1991) 621–2. He was to prepare an outline on ‘The legal conditions of capital investment and agreements pertaining thereto’ as a topic for the ILC (*Yearbook of the International Law Commission 1993: Volume II Part 1 UN Doc A/CN.4/SER.A/1993/Add. 1 (Part 1) 209*); be the First Special Rapporteur on diplomatic protection, including on investment arbitration (‘Preliminary report on diplomatic protection, by Mr. Mohamed Bennouna, Special Rapporteur’ (4 February 1998) *Yearbook of the International Law Commission 1998: Volume II Part 1 UN Doc A/CN.4/SER.A/1998/Add. 1 (Part 1) 309 paras 38–40*); and sit as a Judge in *Ahmadou Sadio Diallo (Equatorial Guinea v DRC)* (Merits) [2010] ICJ Rep 639, Dissenting Opinion of Judge Bennouna 724; *Ahmadou Sadio Diallo (Equatorial Guinea v DRC)* (Compensation) [2012] ICJ Rep 324.

⁴⁵ *Yearbook of the International Law Commission 1990: Volume I UN Doc A/CN.4/SER.A/1990/Add. 1 (Part 1) 168 paras 6, 7, 10, 12.*

⁴⁶ *ibid* 198 para 32. For mostly sympathetic reactions, see 177 para 6 (Al-Khasawneh), 189 para 32 (Solari Tuleda) and 190 para 38 (Al-Baharna). Pellet’s objection to equity seemed methodological rather than substantive: 181 para 44, 196 para 19.

⁴⁷ *Yearbook 1993 Volume II Part 2 (n 29) art 6 bis* Commentary 8. To criticise the ILC members from the developing world for having failed to fully appreciate the implications of secondary rules on compensation, Bhupinder S Chimni, ‘The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective’ (2020) 31 *EJIL* 1211, 1213–14, may thus be unduly harsh. The key factor in the ILC’s eventual decision to reject limitations for crippling compensation was the limited quantity of States’ submissions supportive of this position in the second reading: see the rest of this Section.

B. First Reading (1992–96 Quinquennium)

The ILC next addressed crippling compensation in 1995–96, in the concluding stages of the first reading. This discussion is less helpful for investment law than that considered so far since crippling compensation was now part of the very different debate on criminal responsibility of States, conceptualised at that point as a regime separate from the general (delictual) responsibility.⁴⁸ Arangio-Ruiz initially proposed in 1995 to relax the limitations of reparation in claims against such States, including by dropping the exception of excessive onerousness for restitution discussed in Subsection II.A.⁴⁹ Consequently, the ILC members approached the issue solely with war reparations in mind.⁵⁰ Conversely, in 1996 Arangio-Ruiz raised the possibility of extending ‘the provision safeguarding the vital (physical and moral) needs of the wrongdoing State’s population to the duty to provide compensation’.⁵¹ The point was broadly—although not unanimously—endorsed in the Commission, with further examples on war reparation taken from the United Nations Compensation Commission (UNCC),⁵² and a new third paragraph was added to the general rule on reparation, now expressed in article 42: ‘In no case shall reparation result in depriving the population of a State of its own means of subsistence’.⁵³ Commentary 8, quoted in Subsection II.A, was supplemented by two subparagraphs. Subparagraph 8(a) explained that ‘the amounts required, or the terms on which payment is required to be made should not be such as to deprive the population of a State of its own means of subsistence’, with the language taken from human rights treaties reflecting ‘a legal principle of general application’, while subparagraph 8(b), introduced by the United States member Rosenstock, noted disagreement by ‘some members’.⁵⁴ Three States commented on article 42(3) of the 1996 ILC Draft Articles on State Responsibility in the 1996 United Nations General Assembly’s Sixth Committee (Sixth Committee). Bahrain and Italy supported it in general terms,⁵⁵ while John Crook on behalf of the United States criticised it with an eye to investment protection (and, one imagines, recent and pending Iran–United States Claims Tribunal (IUSCT) cases by nationals of the United States against Iran):⁵⁶

⁴⁸ Nina HB Jørgensen, *The Responsibility of States for International Crimes* (OUP 2000). The concept of criminal responsibility of States was later rejected by the ILC and the ICJ, respectively: 2001 ILC Articles (n 12) Part Two Chapter III Commentaries 6–7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 para 170.

⁴⁹ ‘Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur’ (9, 24 and 29 May 1995) *Yearbook of the International Law Commission 1995: Volume II Part 1 UN Doc A/CN.4/SER.A/1995/Add.1 (Part 1)* 3 paras 21–27, 140 art 16(2), (3). Compensation was not addressed directly, since no specific limitation for excessive onerousness of compensation had been provided for: *ibid* para 28.

⁵⁰ *Yearbook of the International Law Commission 1995: Volume I UN Doc A/CN.4/SER.A/1995 91 para 31 (Lukashuk)*, 92 paras 36–7 (Tomuschat).

⁵¹ ‘Eighth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur’ (14 and 24 May 1996) *Yearbook of the International Law Commission 1996: Volume II Part 1 UN Doc A/CN.4/SER.A/1996/Add.1 (Part 1)* 1 para 15.

⁵² See Timothy J Feighery, Christopher S Gibson and Trevor M Rajah (eds), *War Reparations and the UN Compensation Commission* (OUP 2015). Again, no ILC member raised the investment law perspective: *Yearbook of the International Law Commission 1996: Volume I UN Doc A/CN.4/SER.A/1996/Add.1 153 para 19 (Calero Rodrigues)*, 239 paras 17 (Villagrán Kramer), 18 (Bennouna), 20 (Tomuschat), 21 (Robinson), 22 (Pambou-Tchivounda) and 25 (Calero Rodrigues).

⁵³ ILC, ‘Draft articles on State responsibility’ *Yearbook of the International Law Commission 1996: Volume II Part 2 UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2)* 58 art 42(3) (art 42 was the renumbered former art 6 *bis*, n 47).

⁵⁴ *ibid* Commentaries 8(a), (b); *Yearbook 1996 Volume I (n 52)* 240 para 19.

⁵⁵ Bahrain, Summary Records of the 34th Meeting of the Sixth Committee (7 November 1996) UN Doc A/C.6/51/SR.34 para 49 (Al-Baharna); Italy, Summary Records of the 36th Meeting of the Sixth Committee (8 November 1996) UN Doc A/C.6/51/SR.36 para 3 (Leanza).

⁵⁶ *Eg Ebrahimi v Iran*, IUSCT Case No 560-44/46/47-3, Final Award (12 October 1994) paras 88, 95; *ibid* Separate Opinion of Judge Allison; *Vivian Mai Takavoli and ors*, IUSCT Case No 578-832-3, Award (23 April 1997); *ibid*

Obviously, that qualification to the rule of full reparation was highly subjective and vulnerable to abuse. It offered an easy escape for potential expropriators or others who had committed wrongful acts and who sought to avoid responsibility for their actions. . . . It was well established in international law, and confirmed in the recent practice of States and decisions of international tribunals, that full reparation (particularly in the case of expropriation), must be prompt, adequate and effective. Responsibility could not be qualified by the means or asserted lack of means of the State that committed a wrongful act.⁵⁷

The treatment of crippling compensation in the first reading can be summarised in three points: first, in 1990–93 equitable considerations were identified as a relevant criterion in valuation to address investment claims; secondly, in 1995–96 UNCC’s practice focused the attention on war claims and a limitation of reparation was introduced; thirdly, reactions in State practice were mixed, and the United States specifically identified investment protection law as a ground for concern. The methodological difference between 1990–93 and 1995–96 is consistent with the proposition that the ILC articulated secondary rules by generalising the solution provided by what seemed at that point the most relevant regime of primary rules: for investment law and expropriation, the permanent sovereignty and NIEO debates suggested a criterion of valuation;⁵⁸ for war claims, the UNCC was a model for a compensation cap.⁵⁹

C. Second Reading (1997–2001 Quinquennium)

In 1997, the ILC appointed James Crawford, another future Judge of the ICJ, as the (Fifth) Special Rapporteur, with a view to completing work on the second reading by the end of the quinquennium.⁶⁰ In his Third Report, Crawford challenged the first reading’s approach to the crippling compensation, arguing that in most cases the amounts awarded were not sufficiently large to raise concerns, in exceptional cases such as the UNCC the mode of payment could be calibrated to address the issue, and in extreme circumstances the plea of necessity or *force majeure* could be envisaged:⁶¹

A robust answer to these concerns [about crippling compensation] is that they are exaggerated, that compensation is only payable where loss has actually been suffered as a result (direct, proximate, not too remote) of the internationally wrongful act of a State, and that in such cases there is no justification for requiring the victim(s) to bear the loss. Moreover if States wish to establish limitation of liability regimes in particular fields of ultrahazardous activity (e.g. oil pollution, nuclear accidents) they can always do so. In

Concurring and Dissenting Opinion of Judge Allison para 2. John Crook was also the US agent before the IUSCT, John Crook, ‘The US and International Claims and Compensation Bodies’ in Cesare Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP 2009) 297.

⁵⁷ Summary Records of the 35th Meeting of the Sixth Committee (7 November 1996) UN Doc A/C.6/51/SR.35 paras 5–6.

⁵⁸ See nn 42–45; Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962), UN Doc A/5217 art 4; Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974), UN Doc A/RES/S-6/3201 art 4(e); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974), UN Doc A/RES/29/3281 art 2(2)(c).

⁵⁹ See n 52; UN Doc S/RES/687 (1991) para 19; UN Doc S/RES/705 (1991) para 2 (‘compensation to be paid by Iraq (as arising from section E of resolution 687) shall not exceed 30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq’). A more tentative influence is primary rules on liability for lawful acts, a topic discussed in parallel which provided in practice for ceilings on compensation and was conceptualised as similar to responsibility for wrongful acts: Barboza’s Eleventh Report (n 34) paras 23–25.

⁶⁰ *Yearbook of the International Law Commission 1996: Volume II Part 2* UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2) 9 para 16, 58 para 161.

⁶¹ ‘Third report on State responsibility, by Mr. James Crawford, Special Rapporteur’ (15 March, 15 June, 10 and 18 July and 4 August 2000) *Yearbook of the International Law Commission 1995: Volume II Part 1* UN Doc A/CN.4/SER.A/1995/Add.1 (Part 1) 3 paras 41–2.

particular, the consistent outcome of orderly claims procedures (whether they involve lump-sum agreements or mixed claims commissions or tribunals) has been a significant overall reduction of compensation payable compared with amounts claimed. According to this view [to which Special Rapporteur is inclined to agree] there is no case for a general provision on the subject.⁶²

In the 2000 session, Crawford elaborated these points,⁶³ and the future Judge of the ICJ Simma (and probably future Judge and President Tomka) endorsed the approach in general terms.⁶⁴ But most ILC members were sympathetic to *some* limitation of compensation, whether expressed as rules on reparation⁶⁵ or circumstances precluding wrongfulness.⁶⁶ Yet again, investment law and arbitration, despite mention regarding compound interest⁶⁷ and in parallel discussion on diplomatic protection⁶⁸ (and increased engagement in the practice by members of the ILC)⁶⁹ played no explicit role, and the rare hypotheticals came from war reparations.⁷⁰ At most, occasional nods to developing States could be reflective of Shi and Bennouna's arguments from a decade ago.⁷¹

One might have expected this discussion to lead to a strong endorsement of the first reading's position on crippling compensation. The explanation for why that was not the case must be sought in reactions by States, where the positions advocated seem to reflect a mixture of historical experience with war reparations and contemporary expectations regarding economic injury claims.⁷² The United States and the United Kingdom strongly challenged any exception to full reparation, emphasising respectively its potential for abuse⁷³ and lack of clarity,⁷⁴ and France, Japan, Australia, and Israel added briefer expressions of disapproval.⁷⁵ Conversely, Chile and the Czech Republic spoke in support of the exception in the Sixth Committee.⁷⁶ Only Germany submitted a detailed statement directly to the ILC in support of the

⁶² *ibid* paras 163, 164 (footnote omitted).

⁶³ *Yearbook of the International Law Commission 2000: Volume I* UN Doc A/CN.4/SER.A/1996 5 paras 17–18, 24 para 49, 174 para 14.

⁶⁴ *ibid* 13 para 20 (Simma); possibly 27 para 9 (Tomka).

⁶⁵ *ibid* 19 para 7 (Hafner), 20 para 16 (Economides), 21 para 23 (Lukashuk), 24 para 50 (Galicki), para 55 (Rao), 188 para 6 (Economides), 192 para 23 (Momtaz).

⁶⁶ *ibid* 10 para 55 (Pellet); 23 para 44 (Yamada); possibly para 47 (Hafner).

⁶⁷ *ibid* 182 para 24 (Crawford).

⁶⁸ *ibid* 37 paras 6, 14, 36 (Dugard), 49 para 21 (Pellet).

⁶⁹ By the time of the 2000 ILC discussion, Crawford had already won his first investment arbitration as counsel and received his first appointment as an arbitrator: respectively *Tradex Hellas SA v Albania*, ICSID Case No ARB/94/2, Award (29 April 1999) and *Mondeo International Ltd v US*, ICSID Additional Facility Case No ARB(AF)/992/, Award (11 October 2002) paras 14–15. As counsel, Crawford was later to be involved in some of the key cases discussed in this article: for Eritrea, before the Eritrea–Ethiopia Claims Commission (n 88), and for the investor in *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV and ConocoPhillips Company v Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) paras 26, 62, 66.

⁷⁰ *Yearbook 2000 Volume I* (n 63) 23 para 43 (Yamada), para 47 (Hafner); particularly for Crawford (see n 62).

⁷¹ Eg Lukashuk: *ibid* 21 para 23; 23 para 44 (Yamada). In a recent inter-State arbitration, an arbitrator who had been an ILC member during the second reading noted that '[s]ome members [of the ILC] were concerned about the developing countries' ability [to pay reparations]': *The Duzgit Integrity Arbitration (Malta v Sao Tomé and Príncipe)*, PCA Case No 2014-07, Award on Reparations, Dissenting Opinion of Judge Kateka (18 December 2019) paras 25, 26.

⁷² Eg submission by the Czech Republic against crippling compensation in late 2000 (n 77) and initiation of proceedings against it earlier in the same year that were to eventually render the largest investment arbitration award: *CME Czech Republic BV v Czech Republic*, UNCITRAL Case, Partial Award, 13 September 2001 paras 2, 30–9; also n 85.

⁷³ *Yearbook of the International Law Commission 1998: Volume II Part 1* UN Doc A/CN.4/SER.A/1998/Add.1 (Part 1) 146.

⁷⁴ *ibid* 145 para 3.

⁷⁵ France (*ibid* 146); Japan (*Yearbook of the International Law Commission 1999: Volume II Part 1* UN Doc A/CN.4/SER.A/1999/Add.1 (Part 1) 108 para 1; Australia (Summary Records of the 23rd Meeting of the Sixth Committee (2 November 1999) UN Doc A/C.6/54/SR.23 para 43); Israel (*ibid* para 60).

⁷⁶ Summary Records of the 22nd Meeting of the Sixth Committee (20 December 1999) UN Doc A/C.6/54/SR.22 para 25 (Chile); Summary Records of the 15th Meeting of the Sixth Committee (24 October 2000) UN Doc A/C.6/55/SR.15 8 para 47 (Czech Republic).

exception—but even this support was limited to war reparations and not ‘arbitral awards that concerned individuals’ where ‘the principle of full reparation has been applied’, the latter point plausibly applicable to investment protection law and arbitration.⁷⁷ While the Drafting Committee did not explain the rationale of the Commission’s thinking on the issue,⁷⁸ the 2001 ILC Articles on State Responsibility are entirely consistent with Crawford’s position on crippling compensation, responding to the concern ‘that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned’ solely by ‘exclud[ing] damage which is indirect or remote’.⁷⁹ Importantly, no States objected to this position in the 2001 Sixth Committee or in other settings, even those that had spoken out against crippling compensation.⁸⁰ By necessary implication, confirmed by the backdrop of the ILC debates and submissions by States, the 2001 ILC Articles on State Responsibility stand for the proposition that the content of responsibility regarding compensation is not affected by the financial capacity of the State, in investment law just as (and perhaps, as per the United States and Germany, more so than) any other field of international law.

III. CRIPPLING COMPENSATION IN INVESTOR–STATE ARBITRATION

Four authorities inform the discussion of crippling compensation in investor–State arbitration, each peculiar in its own way. First, the 1999 *Himpurna v Indonesia* Award likened a claim for lost profits ‘in pursuit of an agreement which has become an instrument of oppression [to] stepping on the shoulders of a drowning man. The Arbitral Tribunal finds that it would be insufferable, and therefore an abuse of right’.⁸¹ The Award’s ‘stepping on the shoulders of a drowning man’ metaphor as part of a broader discussion of economic crises in the developing world seems relevant for crippling compensation,⁸² but its weight as an authority is limited by both the dispute’s essentially contractual character and applicable domestic law⁸³ and recent devastating dismissal by the tribunal’s own eminent chair.⁸⁴ Secondly, the 2003 separate opinion by arbitrator Ian Brownlie in the *CME v Czech Republic (CME)* case took as the starting point the proposition that ‘[e]ven States which have been held responsible for wars of aggression and crimes against humanity are not subject to economic ruin’, concluding that ‘[i]t would be strange indeed, if the outcome of

⁷⁷ *Yearbook 1998 Volume II Part 1* (n 73) 146 para 2.

⁷⁸ *Yearbook 2000 Volume I* (n 63) 389 paras 22, 29–30.

⁷⁹ 2001 ILC Articles (n 12) art 34 Commentary 5.

⁸⁰ Cf the critical remarks by States on other aspects of the ILC work: Frédérique Coulée, ‘Pratique française du droit international 2001’ (2001) 47 *AFDI* 555, 571–3; Geoffrey Marston (ed), ‘United Kingdom Materials on International Law 2001’ (2001) 72 *BYBIL* 551, 641–2, 644–52; ‘Draft Articles on State Responsibility: Comments of the Government of the United States of America (March 1, 2001)’ in Sally J Cummins and David P Stewart (eds), *Digest of United States Practice in International Law 2001* (Office of the Legal Adviser United States Department of State 2002) 364–80.

⁸¹ *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara*, Final Award, (4 May 1999) *Yearbook Commercial Arbitration 2000—Volume XXV* (Van den Berg (ed); Jan 2000) para 343 (emphasis in the original).

⁸² *ibid* respectively paras 204–6 (discussing *The ‘Société Commerciale de Belgique’ (Belgium v Greece)* [1939] *PCIJ Rep Series A/B No 78* 160), 41, 237–8, 275, 295–6, 317–18, 331, 333.

⁸³ *ibid* para 35.

⁸⁴ Jan Paulsson, *The Unruly Notion of Abuse of Rights* (CUP 2020) xii, 61–7.

acceptance of a bilateral investment treaty took the form of [such] liabilities'.⁸⁵ The challenge for this argument is the uncertainty over its technical character—the 2001 ILC Articles on State Responsibility and their nomenclature are not mentioned once⁸⁶—and how it affected valuation.⁸⁷ Thirdly, in 2009 the Eritrea–Ethiopia Claims Commission (EECC) noted its concern that the huge damages sought by both States, both absolutely and in relation to their respective economic capacities, could be crippling, and considered, albeit without ultimately deciding, the possibility of capping compensation awards so as not to excessively compromise States' ability to meet peoples' basic needs.⁸⁸ Fourthly, a number of decisions by ICSID annulment committees from 1988 onwards may be reflecting 'but of course' assumptions in the second half of a much-quoted phrase that '[p]overty as such is not a circumstance justifying a stay any more than it would justify non-payment of an award'.⁸⁹ However, the most important contribution of investor–State arbitration to the debate is, with a nod to Sherlock Holmes, 'the curious incident of the dog in the night-time': the apparent absence of any recent examples where respondent States would have argued against crippling compensation in investment arbitration, despite leading scholarship routinely cited by parties and tribunals⁹⁰ sympathetically identifying relevant authorities.⁹¹ Indeed, even though adjudicators and counsel of the EECC are the 'who's who' of modern investment arbitration, its decisions discussed above have been completely ignored in the latter setting.⁹²

It is helpful to approach this mystery in two steps: first, why did the dog do nothing in the night-time? Secondly, what are the legal implications? Why, then, has no State argued that custom provides for an exception to the principle of full compensation when it is crippling? The absence of certain creative arguments in investor–State arbitration is sometimes explicable by path-dependence as well as the challenge for (some) States to take a long-term view due to limited resources, outsourcing of legal services to various counsel of various quality, and the lack of an institutional in-house

⁸⁵ *CME Czech Republic BV v Czech Republic*, UNCITRAL Case, Separate Opinion on the Issues at the Quantum Phase by Arbitrator Brownlie (14 March 2003) paras 77–8. Brownlie was a leading author on war reparations: Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 142–3, 147.

⁸⁶ Brownlie was a member of the Commission during the second reading of the 2001 ILC Articles but their terminology and analytical distinctions did not play a major role in his pragmatic approach to State responsibility; see, eg, a conference contribution from the same period: Ian Brownlie, 'State Responsibility and the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004); and generally Ian Brownlie, *Principles of Public International Law* (6th edn OUP 2003) pt VIII.

⁸⁷ *CME* Brownlie (n 85) para 81 ('These considerations, significant as they are, do not necessarily render the commercial approach in all respects legally redundant, and it is relevant to examine its approach on its own terms'), and the paragraphs that follow, which critically examine the Discount Cash Flow (DCF) method and its relevance in light of treaty language but do not obviously refer to or rely upon the earlier concerns about crippling effects.

⁸⁸ *Final Award—Eritrea's Damages Claims* (2009) 26 RIAA 505 paras 18–24; *Final Award—Ethiopia's Damages Claims* (2009) 26 RIAA 631 paras 18–24.

⁸⁹ From *Maritime International Nominees Establishment v Guinea*, ICSID Case No ARB/84/4, Interim Order No 1: Guinea's Application for Stay of Enforcement of the Award (12 August 1988) para 27; to *Karkey Karadeniz Elektrik Uretim AS v Pakistan*, ICSID Case No ARB/13/1, Decision on the Stay of Enforcement of the Award (22 February 2018) fn 133 (with further references).

⁹⁰ Eg, recently, *Perenco Ecuador Limited v Ecuador*, ICSID Case No ARB/08/6, Decision on Annulment (28 May 2021) paras 454, 465.

⁹¹ Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2008) 355–8.

⁹² The meaningfulness of silence is further underscored by discussion of the EECC's awards in recent inter-State proceedings, including by counsel who are themselves well-known investment arbitrators: *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Reparations owed by the Parties) Memorial of Uganda on Reparation (vol I, 28 September 2016) ch 2.E; Counter-Memorial of Uganda on Reparation (vol I, 6 February 2018) chs 1.III, 4.IV; Verbatim Record CR 2021/7 (22 April 2021 at 11.30 am) 17 paras 24–8 (Byaruhanga on behalf of Uganda); Verbatim Record CR 2021/11 (28 April 2021 at 3 pm) 13 paras 6–7 (Forteau on behalf of the DRC), 28 paras 29–30 (Sands on behalf of the DRC); Verbatim Record CR 2021/12 (30 April 2021 at 3 pm) 67 paras 24(4), 26 (Pellet on behalf of Uganda). The contiguity of the issues is reflected in reliance on Papanikis 'A Case' (n 18), which addresses State responsibility in both inter-State and investor–State settings; Verbatim Record CR 2021/12 *ibid* fn 287 (Pellet).

memory. But these explanations do not fit disputes where challenges of crippling compensation claims could have been plausibly presented. In these cases, States were represented by experienced counsel, often explicitly raising the very significant effects that compensation might have on the capacity of States to provide basic public goods to argue for stay of enforcement.⁹³ The more plausible explanations include, non-exhaustively: the ever-increasing authority of the 2001 ILC Articles on State Responsibility and the shadow thrown by their endorsement of the permissibility of crippling compensation; unwillingness to suggest by implication the acceptability of non-crippling damages; weightier countervailing reasons unrelated to the legal merits that make a formal introduction of such an argument unattractive, due to likely reactions by either domestic or international actors; increased risk for the enforcement stage if determination of crippling character of a particular amount of compensation were to require identification of assets held by the State⁹⁴—or indeed satisfaction with receptiveness of tribunals to the substance of such arguments, even if not their technical characterisation. What are the legal implication of the lack of objection? To adopt the technical terminology of determination of custom by the ILC, a crippling investor–State arbitration claim plainly ‘affects—... unfavourably—the interests or rights of the State failing or refusing to act’. Also, within the investor–State procedural framework ‘the State concerned must have had knowledge of the practice ... and ... it must have had sufficient time and ability to act’. Consequently, ‘failure by a State to react’ may ‘serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice’.⁹⁵ In short, the apparent lack of any post-*CME* challenge to crippling compensation claims counts as endorsement by States of the position taken by the ILC that crippling compensation is permissible as a matter of custom.⁹⁶

IV. CRIPPLING COMPENSATION WITHIN THE 2001 ILC ARTICLES ON STATE RESPONSIBILITY

Crippling compensation claims in investor–State arbitration can be addressed within the 2001 ILC Articles on State Responsibility in four ways—two directly and two indirectly—none of which is entirely satisfactory. The first indirect response accepts the basic point that crippling compensation is a permissible form of reparation, if loss caused by the wrongful act is indeed of such magnitude. It is, however, not concerned by that position due to the pragmatic expectation that in dispute settlement the real effect of rules and decisions⁹⁷ is to throw the legal shadow on the eventually

⁹³ See nn 1, 2–4, 90. In *Perenco v Ecuador*, the State raised economic and social hardship in relation to stay of enforcement, as quoted in the first paragraph of this article (*Perenco Stay* (n 4) para 28), but not on the merits of arbitration or annulment (*Perenco Award* (n 24); *Perenco Annulment* (n 90)). The *ConocoPhillips* and *Tethyan* annulment proceedings are pending so it remains to be seen whether States will raise the argument in some form.

⁹⁴ I am grateful to John Daley for drawing my attention to the relevance of enforcement practicalities.

⁹⁵ 2018 ILC Conclusions on custom (n 11) Conclusion 10 Commentary 8. The ILC accepted that reactions by States to acts of private actors such as investors (or lack thereof, as in this case) may sometimes be relevant to the formation or expression of rules of customary international law: Conclusion 4(3) Commentary 8.

⁹⁶ For a plausible glimpse of change in perceptions, of the lack of engagement with crippling compensation in Borzu Sabahi, Kabir Duggal and Nicholas Birch, ‘Principles Limiting the Amount of Compensation’ in Christina Beharry (ed), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill 2018); with Ripinsky and Williams a decade earlier (n 91).

⁹⁷ John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP 1999) 5.

negotiated solution.⁹⁸ In short, the response challenges the meaningfulness of the question in the first place. The second indirect response considers crippling compensation as part of the general discussion of the content of responsibility, and critically evaluates the sufficiency of reasoning on applicable law, causality and particularly valuation,⁹⁹ found lacking in the review process of some of the largest damages awards.¹⁰⁰ The stronger version of the response, presented with different emphasis in some of the recent scholarship driven—or at least coloured—by concerns about crippling compensation, challenges the mainstream approach to valuation in more general terms.¹⁰¹ The two responses directly related to crippling compensation address, first, circumstances precluding wrongfulness; secondly, enforcement. I will consider these arguments in turn.

The perspective of circumstances precluding wrongfulness was prominent in the ILC discussions of crippling compensation, and Crawford accepted that ‘[i]n extreme circumstances one might envisage the plea of necessity or force majeure as a basis for delaying payments which have become due’.¹⁰² The first reaction may well be that that arbitral practice on necessity in relation to breaches of investment obligations, while varied in content and quality,¹⁰³ is virtually uniform in construing custom so that the possibility of successful invocation is minimal.¹⁰⁴ But Crawford’s argument was analytically different from all these cases in that he envisaged preclusion of wrongfulness for the breach of the secondary obligation to provide full reparation, rather than the underlying primary obligation.¹⁰⁵ In other words, the argument is *not* that necessity precludes wrongfulness for the underlying unlawful expropriation or breach of fair and equitable treatment but that a current crisis provides

⁹⁸ Robert Y Jennings and Arthur Watts, *Oppenheim’s International Law: Peace* (vol I, 9th edn Longmans) 532 fn 16 (‘If a state literally does not have, and cannot borrow, the sums necessary, those facts will have to be taken into account in arriving at a political solution.’). For recent examples, see Lisa Bohmer, ‘Breaking: Germany and Vattenfall Settle Long-Running Arbitration Dispute Arising from Nuclear Phase-Out’ *Investment Arbitration Reporter* (5 March 2021); Lisa Bohmer, ‘Renewed Settlement Leads to Discontinuation of \$2+ Billion Egyptian Gas Case’ *Investment Arbitration Reporter* (14 March 2021). For others, the shadow thrown by investment law is precisely the problem, Martti Koskeniemi, ‘It’s not the Cases, It’s the System’ (2017) 18 *JWIT* 343.

⁹⁹ *ConocoPhillips Jurisdiction and Merits* (n 69) Dissenting Opinion of Arbitrator Abi-Saab (19 February 2015) Section II; *Victor Pey Casado and Foundation “Presidente Allende” v Chile (II)*, ICSID Case No ARB/98/2, Award (13 September 2016) paras 205–6, 217–36; *TECO Guatemala Holdings LLC v Guatemala*, ICSID Case No ARB/10/23, Decision on Annulment (5 April 2016), paras 127–38, 183–98; *Tidewater Investment SRL Tidewater Caribe, CA v Venezuela*, ICSID Case No ARB/10/5, Decision on Annulment (27 December 2016) paras 173–223; and generally 2001 ILC Articles (n 12) arts 31, 36; Beharry (n 96) (‘Valuation Considerations’).

¹⁰⁰ *Eg Occidental Petroleum Corporation, Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment (2 November 2015) paras 282–91; *Venezuela Holdings BV and ors*, ICSID Case No ARB/07/27, Decision on Annulment (9 March 2017) paras 137–88; *Rusoro v Venezuela*, Cour d’Appel de Paris, 29 January 2019 (reversed by Cour de Cassation, 31 March 2021); *Perenco Annulment* (n 90) paras 466–70.

¹⁰¹ Steven Ratner, ‘Compensation for Expropriation in a World of Investment Treaties’ (2017) 111 *AJIL* 7; Emma Aisbett and Jonathan Bonnitcha, ‘A Pareto-Improving Compensation Rule for Investment Treaties’ (2021) 24 *J Intl Economic L* 181; Jonathan Bonnitcha and Emma Aisbett, ‘Against Balancing: Revisiting the Use/Regulation Distinction To Reform Liability and Compensation Under Investment Treaties’ (2021) 42 *Michigan J Intl L* 231; Toni Marzal, ‘Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS’ (2021) 22 *JWIT* 249.

¹⁰² Crawford’s Third Report (n 61) para 41.

¹⁰³ Martins Paparinskis, ‘Circumstances Precluding Wrongfulness in International Investment Law’ (2016) 31 *ICSID Rev—FILJ* 484, 497–9.

¹⁰⁴ From the two publicly available decisions accepting necessity, the first is unhelpful due to conflation of primary and secondary rules, *LG&E Energy Corp and ors v Argentina*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) Section E.2; and the second questions the applicability of circumstances precluding wrongfulness reflected in the 2001 ILC Articles in investment arbitration in the first place so is not directly relevant to the point of principle: *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 709–32, fn 245.

¹⁰⁵ Crawford’s Third Report (n 61) para 42.

‘a basis for delaying payments which have become due’ under secondary obligations of compensation.¹⁰⁶ Such a plea directed at secondary obligations of compensation may be somewhat easier to satisfy (with ‘somewhat’, admittedly, carrying considerable weight),¹⁰⁷ but it raises hard questions about the proper forum where the argument could be presented. Is that a plea that the State could make to the very tribunal awarding compensation (‘if you find that State X is under an obligation to pay \$Y compensation, adjudge and declare that X’s obligation to pay \$Y [n/Y] is delayed until the end of the current state of necessity’)? Or should the State formally acknowledge a breach of an obligation to comply with the award due to necessity (and perhaps offer the home State to approach an inter-State adjudicator for determination of whether it exists)?¹⁰⁸ Or, indeed, should the State raise the argument during enforcement procedures in domestic courts?¹⁰⁹ None of these options fits easily within the procedural framework of modern investment law.

The perspective of enforcement has featured, unsurprisingly, in decisions regarding stay of enforcement, where ICSID annulment committees have accepted in principle the relevance of ‘catastrophic consequences’ for the State but seem less enthusiastic in recent years about its application in practice.¹¹⁰ For example, the *Perenco Ecuador Limited v Ecuador* Annulment Committee noted, in response to Ecuador’s argument quoted in the first paragraph of this article, the absence of ‘particular harm beyond the inherent or normal effects of an adverse ICSID award’ and lack of proof that budgetary reallocations if the stay were lifted would be more onerous than if it were maintained.¹¹¹ Two more recent decisions to consider the issue seem, however, to take a different perspective. In *Tethyan Copper*, the Committee accepted that, ‘[u]nlike other cases where the amounts have been smaller and the circumstances less specific, the potential severity of hardship to Pakistan in such a situation [of full payment on an immediate basis] have been sufficiently particularized’.¹¹² However, the practicalities of enforcement meant that Pakistan ‘would [not] suffer the severe hardship on an immediate basis’.¹¹³ The *ConocoPhillips* Committee made a broader point:

The problem [of ‘catastrophic consequences’] by far exceeds the question of a continuation of the stay which the Committee has to resolve. The answer is not so much in the hands of the Committee, but in those of the competent enforcement court or authority mentioned at Article 54(3) of the ICSID Convention which may decide on a stay or adjustments of payment in circumstances permitted by the laws concerning the execution of judgements that would not be inconsistent with the ICSID Convention.¹¹⁴

¹⁰⁶ James Crawford, *State Responsibility: The General Part* (CUP 2013) 483. Necessity in plausibly crippling compensation claims could also be invoked regarding breaches of primary rules: *Unión Fenosa Gas* (n 9) Section VIII.

¹⁰⁷ 2001 ILC Articles (n 12) art 25 Commentaries 7–8.

¹⁰⁸ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (done 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 arts 27(1), 64.

¹⁰⁹ See the sceptical attitude of domestic courts regarding circumstances precluding wrongfulness, BVerfG, Order of the Second Senate of 8 May 2007—2 BvM 1-5/03, 1, 2/06; *Ukraine v The Law Debenture Trust Corporation Plc* (Rev 1) [2018] EWCA Civ 2026 (14 September 2018) paras 187–9.

¹¹⁰ Cf Christoph Schreuer and others, *The ICSID Convention: A Commentary* (CUP 2010) 1071, 1075; with *Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5, Decision on Stay of Enforcement of the Award (31 August 2017) para 83; *Karkey* (n 89) para 112.

¹¹¹ *Perenco Stay* (n 4) para 76.

¹¹² *Tethyan Stay* (n 1) para 151.

¹¹³ *ibid* para 157, and generally paras 152–6.

¹¹⁴ *ConocoPhillips Stay* (n 3) para 54; ICSID Convention (n 108) art 54(3) (‘Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought’).

Locating protection from crippling compensation at the level of (domestic) enforcement and not anterior determination of quantum, suggested by the focus of *Tethyan* and *ConocoPhillips* committees on practicalities and flexibilities of domestic process, is broadly consistent with the systemic balance on the point struck in the inter-State law of responsibility. By analogy, the 2001 ILC Articles on State Responsibility leave the amount of compensation unaffected while imposing limitations on countermeasures for implementation of inter-State responsibility, employing the same ‘means of subsistence’ language in the latter setting that the 1996 Draft Articles had used for excluding crippling compensation.¹¹⁵ If countermeasures and enforcement of arbitral awards play the same role for implementing responsibility in respectively inter-State and investor–State legal relations,¹¹⁶ it would be consistent with the ILC’s logic to protect the responsible actor at that stage in investment law as well. At the same time, acceptance that ‘severity of hardship’ and ‘catastrophic consequences’ will flow from compliance with obligation of full compensation challenges the assumptions underpinning the balance struck by the 2001 ILC Articles on State Responsibility. Unlike what the ILC thought during the second reading (Subsection II.C above), crippling compensation claims in investor–State arbitration are *not* contained by qualifications in primary rules, tweaks at the level of international dispute settlement or the egoistically enlightened interest of the inter-State order in self-preservation. That the best argument is the hope for its slow (*Tethyan*) or incomplete (*ConocoPhillips*) implementation shows how normatively unappealing the principle of full reparation through full compensation in these cases has become. Finally, the Delphic nod to ‘adjustments of payment in circumstances permitted by the laws concerning the execution of judgements that would not be inconsistent with the ICSID Convention’ remains to be elaborated in due course.¹¹⁷ In short, while not excluding certain particularly creative paths, the 2001 ILC Articles on State Responsibility, as understood and applied by mainstream practice, do not provide obvious and straightforward answers for how to deal with crippling compensation claims.

V. CRIPPLING COMPENSATION BEYOND THE 2001 ILC ARTICLES ON STATE RESPONSIBILITY

The previous section argued that the 2001 ILC Articles on State Responsibility do not obviously resolve crippling compensation—unless the answer is that the obligation to provide full compensation in investment law is, as a practical matter, not affected by its crippling character. This section will consider in turn two arguments for moving beyond the 2001 ILC Articles on State Responsibility: first, that State responsibility permitting crippling compensation is not applicable in investor–State arbitration; secondly, if it is applicable, outlining the avenues for changing the rule. Before considering those arguments, however, it is helpful to pull back and reflect how arguments against crippling compensation fit within the broader legal process. The 2001 ILC Articles on State Responsibility may well have adopted a different

¹¹⁵ 2001 ILC Articles (n 12) art 50(1)(b) Commentary 7; cf 1996 ILC Draft Articles (n 53) art 42(3). See also Crawford *General Part* (n 106) 482–3.

¹¹⁶ See generally Martins Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) 79 BYBIL 264 Sections III, IV.

¹¹⁷ Generally George Bermann, ‘Understanding Article 54’ (2020) 35 ICSID Rev—FILJ 311 Section V. See, perhaps relevantly, the US Department of the Treasury, ‘Venezuela-Related Sanctions’ <<https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/venezuela-related-sanctions>>.

approach, if, eg, by the time of the key 2000 discussion Judges Shi and Bennouna had not left the Commission for international judicial positions or States critical of crippling compensation had engaged with the issue directly, consistently, and in greater numbers. But at the end of the day, the 2001 ILC Articles on State Responsibility say what they say.¹¹⁸ Even more importantly for determination of custom, until recently,¹¹⁹ the ILC’s position has rarely been challenged by States or international tribunals;¹²⁰ and the sole critical judicial authority has never even been mentioned by another adjudicator.¹²¹ Indeed, few other propositions in international law have been endorsed as widely and deeply in the last decade as the broader principle of full reparation within which the permissibility of crippling compensation is situated.¹²² Even those concerned about crippling compensation may well think that the challenge is too thorny to resolve at the level of general secondary rules, with the decentralised (arbitral) dispute settlement setting and its incomplete overlap of parties and confidentiality rules making identification of satisfactory answers very hard indeed.¹²³ From this perspective, the debate is a worthwhile one—but the many hard questions suggest that the argument is better articulated at a different analytical level, focusing instead on scope and content of primary rules, the proper shape of mechanisms of dispute settlement, or even larger assumptions of the law of State responsibility.¹²⁴

How to argue against the position of permissibility of crippling compensation in investor–State arbitration at the level of general secondary rules? The starting point is that Part Two of the 2001 ILC Articles on State Responsibility, which includes the provisions on compensation, is ‘without prejudice’ to rules applicable in investor–State arbitration.¹²⁵ Quite what that signifies is a point of reasonable disagreement,¹²⁶ but on one reading the structural differences between inter-State and investor–State legal relations may be taken into account to tweak and readjust inter-State rules for the latter setting.¹²⁷ First, Crawford’s argument for permissibility of crippling compensation explicitly assumed the rarity of such claims; safeguards in primary,

¹¹⁸ David Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority’ (2002) 96 AJIL 857.

¹¹⁹ See n 92.

¹²⁰ Paparinskis ‘A Case’ (n 18) 1264–74.

¹²¹ *Eritrea’s Damages Claims* (n 88) paras 19–23; *Ethiopia’s Damages Claims* (n 88) paras 19–23.

¹²² *EDF* (n 23) para 371 (‘principle [that the purpose of damages is to place the injured party, as nearly as possible, in the position which it would have occupied had the wrongful act not occurred] is so well established in international law as to require no discussion’); and further 2013 UNSG Compilation Report (n 16) 27–30; 2016 UNSG Compilation Report (n 16) 27–30; 2019 UNSG Compilation Report (n 16) 29–33.

¹²³ *Yearbook 1998 Volume I* (n 44) 145 para 3 (the UK) (‘it is not clear what level of financial hardship is contemplated, nor how it is to be determined if that level has been reached in any particular case. Is the level the same for all States, for example? And is it permissible to take into account assets held abroad by States? Moreover, if ability to pay is the real issue . . . , it is difficult to see why that should not be a factor in all cases, whether or not it is argued that there is a risk of the population losing its means of subsistence’).

¹²⁴ On one (cynical) reading, the problem with arbitral practice is not that it misreads the relevant law of State responsibility but that it takes it too seriously, failing to appreciate that the unspoken counterpart of the rigorous principle of full reparation is its rarity of implementation through compensation in formalised dispute settlement, virtually never outside standing institutions, eg International Law Commission, ‘Draft principles on the protection of the environment in relation to armed conflicts’ *Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019)* UN Doc A/74/10 211 Draft principle 9 Commentaries 5–8.

¹²⁵ 2001 ILC Articles (n 12) art 33(2).

¹²⁶ Martins Paparinskis, ‘Investment Treaty Arbitration and the (New) Law of State Responsibility’ (2013) 24 EJIL 617, 635–40.

¹²⁷ *MTD* (n 23) para 99; *Quiborax SA and ors v Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) paras 554–61, also 2001 ILC Articles (n 12) art 35 Commentary 9; *Nord Stream 2 AG v EU*, PCA Case No 2020-07, EU Counter-Memorial on the Merits (3 May 2021) Section 4.1.; Zachary Douglas, ‘Investment Treaty Arbitration and ICSID’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 819–21.

secondary, and tertiary rules for the few cases when they did arise; and the enlightened self-interest of States as repeat-playing actors not to push the inter-State legal order to the post-Versailles brink through ruinous claims¹²⁸—and perhaps implicitly scepticism about compound interest and Discounted Cash Flow (DCF) valuation.¹²⁹ None of these holds true in modern investor–State arbitration.¹³⁰ Secondly, when the ILC did consider the possibility of crippling investment claims against developing States, it called for ‘equitable considerations [to] be taken into account in providing full reparation, particularly in cases involving an author State with limited financial resources’.¹³¹ Thirdly, limiting compensation at the level of the content of rules of State responsibility on reparation would be consistent with the ILC’s treatment of the parallel secondary obligations of restitution and satisfaction when excessive impact on the responsible actor was demonstrated,¹³² and reflective of uncertainty discussed at Section IV whether excessive quantum can be realistically addressed elsewhere in investment arbitration process. (The response is that these are perfectly plausible arguments but they first have to be made by the relevant actors and accepted by the broader community, and so far there is little sign of even the former.)

How to argue for a change of international law so as to preclude crippling compensation? The starting point is that permissibility of crippling compensation is a dispositive customary rule and can be modified. The key mechanism that generates State practice on the issue at the moment is investor–State arbitration, and the most important change is for States to start challenging the principle of crippling compensation in individual disputes (cf Earth 1.0 where ‘no States have challenged crippling compensation in investment arbitration since *CME*’ with Earth 2.0 where ‘Ecuador, Egypt, Pakistan, Venezuela, and others have consistently argued against the permissibility of crippling compensation’.)¹³³ Whether or not these challenges are accepted, pleadings will count towards the widespread practice necessary for generating a new rule (and litigators can afford to be somewhat opportunistic, since investor–State tribunals have gone against the grain of the 2001 ILC Articles on State Responsibility on a number of smaller points of reparation).¹³⁴ Indeed, since crippling compensation has been explicitly raised before the ICJ,¹³⁵ *not* arguing the issue increasingly makes States an outlier in the international legal process. Treaty texts, particularly on investment obligations likely to give rise to crippling compensation claims, may be drafted so as to contain an express statement on what parties accept as customary (eg ‘compensation [assessed by income-based methods] may not be crippling’ or ‘valuation criteria shall include, as appropriate, the limited financial resources of the State’),¹³⁶ and other creative means of rapidly expressing support for custom may be explored.¹³⁷ The challenge can also be raised in appropriate multilateral settings,

¹²⁸ See nn 61–63.

¹²⁹ 2001 ILC Articles (n 12) art 36 Commentaries 26, 32; art 38 Commentaries 8–9.

¹³⁰ Eg the decision employing DCF and compound interest by a Crawford-chaired tribunal: *BayWa re Renewable Energy GmbH and ors v Spain*, ICSID Case No ARB/15/16, Award (25 January 2021) paras 51, 62.

¹³¹ See Subsection II.A.

¹³² Crawford’s Third Report (n 61) paras 144, 193; 2001 ILC Articles (n 12) arts 35(b), 37(3).

¹³³ Ingo Venzke and Kevin Jon Heller, *Contingency in International Law* (OUP 2021).

¹³⁴ See nn 127–128.

¹³⁵ See Uganda in *Armed Activities*, materials at n 92.

¹³⁶ 2018 ILC Conclusions (n 11) Conclusion 11(1)(a) Commentary 5. For an example of a treaty setting out secondary rules on valuation, see 2018 Netherlands model Investment Agreement <<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden/modeltekst-voor-bilaterale-investeringsakkoorden.pdf>> art 12(5).

¹³⁷ CAHDI, ‘Declaration on Jurisdictional Immunities of State Owned Cultural Property’ (23 March 2017) <https://www.coe.int/en/web/cahdi/news-cahdi/-/asset_publisher/FL6bNvghtkKV/content/declaration-on-jurisdictional-immun>

particularly the Sixth Committee;¹³⁸ the ILC, where ‘Compensation under international law’ has been suggested as a possible long-term topic;¹³⁹ and the United Nations Commission on International Trade Law (UNCITRAL).¹⁴⁰ Finally, an important criterion for characterisation of practice as ‘general’ in the determination of custom is whether it is consistent.¹⁴¹ Perhaps the following model clause could be used as a starting point for formulating submissions against crippling compensation:

Compensation award must be limited to ensure that the ultimate financial burden imposed on a State is not so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people’s basic needs.^N

^N *Final Award – Eritrea’s Damages Claims* (2009) 26 RIAA 506 para 22; *Final Award – Ethiopia’s Damages Claims* (2009) 26 RIAA 631 para 22. See also ILC, ‘Draft articles on State responsibility’ *Yearbook of the International Law Commission 1996: Volume II Part 2* UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2) 58, Art 42(3) Commentary 8; *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara Final Award*, 4 May 1999, *Yearbook Commercial Arbitration* 2000 paras 201–212, 318–344; *CME Czech Republic BV v Czech Republic*, UNCITRAL Case, Separate Opinion on the Issues at the Quantum Phase by Arbitrator Brownlie, 14 March 2003 paras 77–80; *The Duzgit Integrity (Malta v São Tomé and Príncipe)*, PCA Case no 2014–07, Dissenting Opinion of Judge Kateka on the Award on Reparation, 18 December 2019 paras 25–26; *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Reparations owed by the Parties) Verbatim Record CR 2021/7 (22 April 2021 at 1130 am) 17 paras 24–28 (Byaruhanga on behalf of Uganda); Verbatim Record CR 2021/12 (30 April 2021 at 3 pm) 67 paras 24(4), 26 (Pellet on behalf of Uganda).

A claim formulated in these terms, while arguing for a change from existing rules, is coherent with the international legal order in the broader sense¹⁴² and thus more likely to be accepted by the legal process than some of the wholesale critiques.¹⁴³

It is important, however, to acknowledge the hard questions that would arise if sufficient practice were to be generated for customary law. Is the ‘crippling’ qualification related to the functioning of the State, the needs of the peoples, or both? Is there a *de minimis* standard below which no State may be beggared, is ‘crippling’ relative to pre-compensation well-being, or does it apply solely by reference to the amount awarded? In practical terms, with what should the compensation claim be compared?¹⁴⁴ Can the argument against crippling compensation be invoked when the primary rule protects

ities-of-state-owned-cultural-property>; Pacific Islands Forum Secretariat, ‘2020 Regional Conference on Securing the Limits of the Blue Pacific: Legal Options and Institutional Responses to the Impacts of Sea-Level Rise on Maritime Zones, in the Context of International Law: Summary and Outcomes’ (9–11, 17 September 2020); ‘Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council’ (16 March 2021) UN Doc S/2021/247.

¹³⁸ The triannual discussion forum on the 2001 ILC Articles, most recently 2019 <https://www.un.org/en/ga/sixth/74/resp_of_states.shtml>.

¹³⁹ Secretariat, ‘Long-term programme of work’ (31 March 2016) UN Doc A/CN.4/679/Add. 1 paras 35–41.

¹⁴⁰ UNCITRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021)’ (17 March 2021) UN Doc A/CN.0/1050 para 72.

¹⁴¹ 2018 ILC Conclusions (n 11) Conclusion 8(1) Commentaires 5–8.

¹⁴² Vaughan Lowe, ‘The Iraq Crisis: What Now?’ (2003) 52 ICLQ 859, 862.

¹⁴³ *Perenco Award* (n 24) para 69 (‘The Tribunal found the debate over “opportunistic” and “efficient” breach, however interesting to economists, legal theorists and judges in the United States, to be of no real value to the Tribunal and irrelevant to its task of deciding the quantum of damages’). Cf some of the scholarly critiques at n 101.

¹⁴⁴ Eg the estimated total national product measured on a purchasing power parity basis, by reference to the Human Development Report, *Eritrea’s Damages Claims* (n 88) para 18; *Ethiopia’s Damages Claims* (n 88) para 18; <<http://hdr.undp.org/>>; Gross Domestic Product or State budget, *ConocoPhillips Stay* (n 2) para 51 (Venezuela); consolidated annual public funding, *Armed Activities* Verbatim Record CR 2021/7 (n 92) 18 para 28 (Byaruhanga on behalf of Uganda). See also the publicly available data and benchmarks from the somewhat comparable sovereign debt context, ‘Joint World Bank-IMF Debt Sustainability Framework for Low-Income Countries’ (17 March 2021); ‘Debt Relief Under

objects, eg expropriation, and reparation could in principle take the form of restitution.¹⁴⁵ How can the rule be operationalised in the decentralised arbitral dispute settlement setting with incomplete overlap of parties and strong confidentiality rules? Is it relevant whether the crippling effect of compensation materialised at the moment when responsibility was incurred, invoked, determined by a third party, or at a later point (such as enforcement)? Is the reason for the inability to pay relevant, eg political, economic or health crises,¹⁴⁶ or the extent to which the policy choices of the State contributed to them?¹⁴⁷ In analytical terms, do these arguments go to general rules on content of State responsibility or shape special rules on responsibility implemented by (certain) non-State actors? Is it better to think of crippling compensation as a(n internal) relevant consideration to be taken into account in the valuation process or a(n external) adjustment to its amount (Subsections II.A–B)? At the end of the day, is (a certain part of) the compensation awarded in *Tethyan* and *ConocoPhillips* ‘crippling’?

These are not trivial questions, and while some answers are easier, others follow neither from first principles nor consensus in State or arbitral practice. The best way to think about them, in my view, is to acknowledge, first, that in the treatment of vague rules it is common for the international legal process to leave identification of relevant considerations and practicalities of their application to determination by State, institutional, and judicial practice¹⁴⁸—a systemic choice that is not without its costs and works better on some occasions than others.¹⁴⁹ The second point is that tribunals should proceed with an eye to the background question of the sole supportive judicial authority ‘whether it [is] necessary to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people’s basic needs’.¹⁵⁰ The principle of contribution to injury is a somewhat analogous and not discouraging example of what investment arbitration-driven process of elaboration and application of a responsible actor-favourable vague principle on content of responsibility looks like.¹⁵¹ The third point relates to the tribunals. The judicial function of the ICJ played a considerable role in arguments about crippling compensation in the *Armed Activities on the Territory of the Congo* case, between Philippe Sands on behalf of the Democratic Republic of Congo and Alain Pellet on behalf of Uganda.¹⁵² While the basic structure of classic international dispute settlement such as arbitration is bilateral, even at its most private it also pursues public functions,¹⁵³ which could plausibly include taking into account the important

the Heavily Indebted Poor Countries (HIPC) Initiative’ (23 March 2021). I am grateful to Anne van Aaken for a discussion of these issues.

¹⁴⁵ *Yearbook 1998 I* (n 44) 145 para 4 (the UK).

¹⁴⁶ Cf arguments at nn 1, 2–4.

¹⁴⁷ See a summary on different approaches in arbitral practice to (non-)contribution as a general principle, *Mobil* (n 23) paras 81–104.

¹⁴⁸ Eg Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013); Stéphanie Marsal and Francesco Palermo, ‘Commentary of Article 3 of the Framework Convention for the Protection of National Minorities’ in Rainer Hofmann, Tove H Malloy and Detlev Rein (eds), *The Framework Convention for the Protection of National Minorities: A Commentary* (Brill 2018); S McCaffrey, *The Law of International Watercourses* (3rd edn OUP 2019) ch 9; Massimo Lando, *Maritime Delimitation as a Judicial Process* (CUP 2019).

¹⁴⁹ Martti Koskenniemi, ‘Peaceful Settlement of Environmental Disputes’ (1991) 60 *Nordic J Intl L* 73.

¹⁵⁰ *Eritrea’s Damages Claims* (n 88) para 22; *Ethiopia’s Damages Claims* (n 88) para 22.

¹⁵¹ 2001 ILC Articles (n 12) art 39; *Occidental Award* (n 8) paras 663–87; *Copper Mesa Mining Corporation v Ecuador*, PCA Case No 2012-2, Award (15 March 2016) paras 6.91–6.102; *Perenco Award* (n 24) paras 344–63; Daphné Dreyssé, *Le comportement de la victime dans le droit de la responsabilité internationale* (Daloz 2021).

¹⁵² *Armed Activities* Verbatim Record CR 2021/11 (n 92) 28 para 30 (Sands on behalf of the DRC); Verbatim Record CR 2021/12 (n 92) 67 para 24(4) (Pellet on behalf of Uganda).

¹⁵³ Vaughan Lowe, ‘The Function of Litigation in International Society’ (2012) 61 *ICLQ* 209.

interest of the international community in the survival of the sovereign State as its basic building block.¹⁵⁴ For example, the EECC, composed of Commissioners who were (to become) leading investment arbitrators, considered a possible cap to crippling compensation even though neither Eritrea nor Ethiopia raised that challenge—and indeed had both positively argued for compensation that the Commission suspected to be crippling.¹⁵⁵ When crippling compensation claims are raised in investor–State arbitration, the normative contiguity of a peremptory norm of general international law (*jus cogens*)¹⁵⁶ may require tribunals knowledgeable in (international) law¹⁵⁷ to at least draw parties’ attention to the possibly relevant legal issues.¹⁵⁸

VI. CONCLUSION

Is there an exception to the principle of full reparation in international investment arbitration for cases in which full compensation is crippling for the responsible State or its peoples? The routine presentation and consideration of billion-dollar-plus investment arbitration claims in the first half of 2021 suggests that this subject has not been invented in order to enable it to be written about but is one of considerable importance for the field of international investment law and its actors.¹⁵⁹ This article has answered the question by making four points. First, the frame of reference in a discussion about compensation in investment law is provided by the law of State responsibility, strongly shaped by the 2001 ILC Articles on State Responsibility. The permissibility of crippling compensation in this document is not an accidental afterthought but reflects a considered judgement. Special Rapporteur Crawford’s argument for the permissibility of crippling compensation underpinning that judgement explicitly assumed the rarity of such claims; safeguards in primary, secondary, and tertiary rules for the few cases when they did arise; and the enlightened self-interest of States as repeat-playing actors not to push the inter-State legal order to the post-Versailles brink through ruinous claims—and perhaps implicitly scepticism about compound interest and DCF valuation. Secondly, none of these assumptions holds true in modern investor–State arbitration. Nevertheless, and perhaps surprisingly, the predominant reaction to crippling compensation claims has been silence by tribunals and respondent States, suggestive in legal terms of determination of custom of endorsement of their permissibility in line with the 2001 ILC Articles of State Responsibility. Thirdly, there is some scope for addressing crippling compensation within the Articles, both indirectly (challenging the meaningfulness of the question in the first place or considering crippling compensation as part of the general discussion of

¹⁵⁴ Bernhard Graefrath, ‘Responsibility and Damages Caused: Relationship between Responsibility and Damages’ (1984) 185 Hague Recueil 17, 292; generally *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 96; Martti Koskenniemi and Ville Kari, ‘Sovereign Equality’ in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50* (CUP 2020) 166.

¹⁵⁵ *Eritrea’s Damages Claims* (n 88) paras 19–23; *Ethiopia’s Damages Claims* (n 88) paras 19–23.

¹⁵⁶ International Law Commission, ‘Draft conclusions on peremptory norms of general international law (*jus cogens*)’ *Report of the International Law Commission: Seventieth session (29 April–7 June and 8 July–9 August 2019)* UN Doc A/74/10 142 Annex Draft conclusion 23 Annex h (‘The right of self-determination’). By analogy, *Methanex v US*, Final Award of the Tribunal on Jurisdiction and merits (3 August 2005) Part IV—Chapter C para 24; *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras 77–8.

¹⁵⁷ *Infinito Gold Ltd v Costa Rica*, ICSID Case No ARB/14/5, Award, 3 June 2021 para 280.

¹⁵⁸ Generally see Attila Tanzi, ‘On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings’ (2020) 33 *Leiden J Intl L* 57.

¹⁵⁹ See n 10.

the content of responsibility) and directly, under the rubrics of circumstances precluding wrongfulness and enforcement. Fourthly, the case can also be made for moving beyond the 2001 ILC Articles on State Responsibility, whether by emphasising the difference between implementation of responsibility in respectively inter-State and investor–State legal relations or directly arguing for a change of the applicable customary rule.

The overall claim made in the article is that an introduction of an exception that tweaks the general principle of full reparation away from its exclusive focus on interests of the injured (non-State) actor would be consistent with the broader balance between bilateral and multilateral interests struck by the ILC. It is important not to overstate this claim. The 2001 ILC Articles on State Responsibility have significantly influenced the international legal process, particularly on the law of reparation.¹⁶⁰ Recognition of an exception for crippling compensation in departure of the ILC's position would have its costs, both in the literal sense of allocation of resources for formation of general practice that is sufficiently consistent across different international settings, and systemic concerns about the uncertainty of the scope and content of the exception and means of its implementation in the decentralised arbitral setting. But the lack of an exception to crippling compensation also has very significant practical implications for States, not paralleled in terms of sheer routineness of such disputes by other fields of international law. The mainstream reading of current law and institutions does not obviously provide for realistic and systemically less intrusive alternative solutions that would address the issue at other stages of the legal argument, whether relating to primary rules, valuation or enforcement. Recognition of the impermissibility of crippling compensation in investment arbitration, while moving beyond the textual expression of the 2001 ILC Articles, is coherent with the international legal order in the broader sense, particularly its shift towards a more multilateral conception that recognises interests beyond those of the injured actor.¹⁶¹ Such a conception of State responsibility would also be ultimately (more) respectful of the balance struck by the ILC and one of the most influential international lawyers of our times: Special Rapporteur and Judge James Crawford.

¹⁶⁰ See UNSG Compilation Reports at n 16.

¹⁶¹ See n 22.