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THE WORLD COURT'S INFLUENCE ON CONTEMPORARY INVESTMENT LAW

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I. Introduction

The World Court is not an investment court. Over the course of the last century, it has addressed inter-state disputes that reflect the breadth and diversity of international law, from armed activities in the Congo and Nicaragua to questions concerning the guardianship of infants. Only a fraction of its proceedings concern disputes about state interference with foreign investments. And yet, the decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) feature prominently in investment jurisprudence: according to Fauchald's empirical study, one in two awards refers to it in one way or another.[1] Alain Pellet agrees, noting that ICSID tribunals 'systematically refer to the Court's jurisprudence' and 'show a particular deference to it'.[2] Many of these references reflect the embeddedness of international investment law (IIL) and arbitration in general international law: PCIJ and ICJ statements on principles of interpretation are widely cited, as is their caselaw on procedural issues common to all dispute settlement regimes, on the legal effects of interim measures, or on meta-questions such as the requirements for the identification of customary international law.[3]

Our discussion in the following leaves these aspects to one side. It adopts a narrower focus, asking how the World Court has contributed to IIL as a special regime of contemporary international law. We identify three main contributions. First, the World Court's jurisprudence has accentuated limits to investment protection under general international law and Friendship

[1] OK Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis' (2008) 19 EJIL 301, 340 (covering 98 decisions rendered between 1998-2006).

[2] A Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Review 223, 230 and 239.

[3] eg *Saluka Investments BV v Czech Republic*, PCA, Partial Award (17 March 2006) para 254; *Hochtief AG v Republic of Argentina*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) para 95; *United Parcel Service of America Inc v Canad*a, UNCITRAL, Award on Jurisdiction (22 November 2002) para 84; and further Pellet (n 2) 231 –32.

Commerce and Navigation (FCN) treaties. This may have been one factor favouring the emergence of a special regime of international investment agreements (IIAs). Second, occasional ICJ and PCIJ pronouncements offer clues as to the interpretation of select IIA provisions. Investment tribunals rely on such pronouncements as additional authority; however, the World Court's influence remains limited. Third, pronouncements by the PCIJ laid down general principles of a regime on reparation, which the International Law Commission (ILC) later consolidated. In the absence of express provisions in investment treaties, this general regime has shaped investment jurisprudence on damages.

II. The World Court and the Emergence of Contemporary Investment Law

The World Court's first contribution concerns the architecture of contemporary IIL, defined by a large number of IIAs and a dedicated system of investor-state dispute settlement. The reasons leading to the emergence of this special regime are manifold. In this process, the World Court's jurisprudence may have played *some* role. It emphasised limits to investment protection based on general international law and traditional instruments of protection – which suggested that effective protection would better be based on a special regime.

The World Court's jurisprudence, as described in these introductory lines, is not a systematic body of caselaw. It comprises a handful of decisions in diverse investment disputes. These reached the Court via the ordinary jurisdictional channels – i.e. based on special agreements, compromissory clauses or optional clause declarations.[4] They reached it as inter-state cases, brought by the investor's state of nationality by way of diplomatic protection.[5] Compared to contemporary investor-state dispute settlement, this process (itself shaped by the World Court's jurisprudence[6]) was cumbersome. But occasionally, home states did bring proceedings on behalf of their investors. The ICJ's record in dealing with such disputes was not encouraging to investors –according to FA Mann, it was 'particularly chilling'.[7] Two aspects stand out: the cautious handling of claims based on internationalised contracts and the Court's restrictive approach to shareholder rights.

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[4] Statute of the International Court of Justice, 33 UNTS 993, Arts 36 and 37 (ICJ Statute).
[5] ibid Art 34.
[6] See notably *Mavrommatis Palestine Concessions (Greece v UK)* (Jurisdiction) PCIJ Ser A No 2.
[7] FA Mann, 'Foreign Investment in the International Court of Justice: The ELSI Case' (1992) 86 AJIL 92.

A. A Cautious Approach to Internationalised Contracts

The first aspect takes us into a by-gone era, of investment protection via internationalised contracts. For nearly half a century, claims that investment contracts should be governed by international law were a central feature of debates. In the pre-BIT era, this seemed an ingenuous strategy to ringfence contractual rights against host state interference.[8] In the *Lena Goldfield* arbitration, this strategy paid off, as an arbitral tribunal considered a private concession agreement to be governed partly by international law: 'a gigantic first step …, almost equivalent to the caveman's discovery of fire'.[9]

In the subsequent evolution of the internationalisation movement – from the gold fields of Siberia via oil-rich Libya into today's 'noble ventures' of umbrella clause litigation before ICSID tribunals[10] – the ICJ did not play the lead role, but made one crucial pronouncement. This came in the 1951–1952 *Anglo-Iranian Oil Co.* case, brought by the UK in response to Iran's unilateral termination of a pre-war oil concession. Britain relied on Iran's optional clause declaration, submitted in 1932 and limited to disputes about treaties and conventions 'subsequent to the ratification of this declaration'.[11] According to the UK, the 1933 concession was such a subsequent treaty: it was …

> at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments. … [I]t must be considered to be within the meaning of the term 'treaties or conventions' contained in the Iranian Declaration.[12]

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[8] For insightful contributions see, eg, M Kamto 'La notion de contrat d'Etat: une contribution au débat' (2003) Revue de l'Arbitrage 719; E Paasivirta, *Participation of States in International Contracts and Arbitral Settlement of Disputes* (Helsinki, Finish Lawyers' Publishing Company 1990). J Ho, *State Responsibility for Breaches of Investment Contracts* (CUP 2019) offers a comprehensive account.
According to Sornarajah, the internationalisation of contracts could be seen as 'a continuation of … the structures of extractive colonialism', see M Sornarajah, 'The Battle Continues: Rebuilding Empire through Internationalization of State Contracts' in J von Bernstorff and P Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford, Oxford University Press, 2019) 175, generally and 190.

[9] See VV Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 ICLQ 747, 772. See also D Müller, '*Ad hoc* Investment Arbitration Based on State Contracts: From *Lena Goldfields* to the Libyan Oil Arbitrations', in H R Fabri and E Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart 2022) 21.

[10] Jean Ho distinguishes between 'panoptic internationalisation' (drawing on the wider context) and the more recent form of 'umbrella clause internationalisation' (drawing on a treaty provision): Jean Ho (n 8) 181. Our discussion remains 'panoptic'.

[11] See *Anglo-Iranian Oil Co. (UK v Iran)* (Jurisdiction) [1952] ICJ Rep 93, 103–07 (*Anglo-Iranian Oil Co.*), and Section III(A) below. For a comprehensive account see D Lustig, *Veiled Power: International Law and the Private Corporation, 1886-1981* (Oxford, Oxford University Press, 2020) 144–78.

[12] *Anglo-Iranian Oil Co.* (n 11) 111–12.

This was, as James Crawford has observed, 'a deliberate attempt to internationalize development contracts in the context of the oil industry' and to bring them within the ICJ's jurisdiction.[13] However, the ICJ 'would have none of it'.[14] Adopting a 'formalist interpretive approach',[15] it viewed the concession as

> nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract .... Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company.[16]

The upshot of this, as noted by Doreen Lustig, was that 'corporations, even if significantly owned by states, ... were excluded from the (formal and informal) interference of international legal institutions' operating in the state-to-state world.[17] This did not mark the end of the internationalisation movement. But it foreclosed a potential jurisdictional variant, and it entrenched the divide between (internationalised) contracts and treaties. Since 1952, that point has not been re-argued. The ICJ's decision in *Anglo-Iranian Oil Co.* contained the "fire" discovered in *Lena Goldfields*.

B. Strict Limitations on Shareholder Claims under General International Law

The second limitation is more obvious. It concerns the capacity of states to exercise diplomatic protection on behalf of investors. As noted above, in proceedings before the World Court, nationality is the nexus that transforms a wrong done to an individual or legal person into an injury of the state. Looked at from the perspective of IIL, one aspect of the World Court's jurisprudence spelling out the requirements of this nexus stands out. Through a series of decisions, the Court has clarified that under general international law, only a particular type of commercial interest can be taken up in diplomatic protection claims. More specifically, the general regime protects interests *of* a corporation or company, but only exceptionally

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[13] J Crawford, 'International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration' in R Hofmann and CJ Tams (eds), *International Investment Law and General International Law* (Baden-Baden, Nomos, 2011) 19. This attempt was significantly bolstered by the fact that the British Government had been closely involved in the negotiation of the 1933 concession and was the largest shareholder in the company.
[14] ibid.
[15] Lustig (n 11) 169.
[16] *Anglo-Iranian Oil Co.* (n 11) 112.
[17] Lustig (n 11) 177.

interests *in* a corporation or company, including those of shareholders. As the ILC would later note:

> The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders.[18]

i. The ICJ's Pronouncements on Shareholder Protection

This 'fundamental principle' was articulated in the ICJ's 1970 *Barcelona Traction* judgment.[19] In it, the Court rejected claims, by Belgium, in respect of harm done to a Canadian company controlled by Belgian shareholders. This seemingly straightforward proposition (a state cannot bring claims on behalf of foreign firms) was occasioned by a dramatic dispute: a Spanish businessman, with the help of Spanish authorities, succeeded in taking over a foreign-owned utility company.[20] The judgment, rendered after decades of pleadings on the merits, turned on the technical question of Belgium's (lack of) standing, which the Court rejected in a three-step reasoning.[21]

First, drawing support from the approach in national legal systems,[22] the ICJ insisted on the distinction between a corporation and its shareholders: The former 'enjoys an independent existence ... [T]he interests of the shareholders are both separable and indeed separated from those of the company'.[23]

Second, the ICJ clarified that under international law, a company possessed the nationality of the State in which it was incorporated, provided there was some tangible connection.[24] On that basis, there were two relevant nationalities: that of the company (Canadian), and that of its controlling shareholders (Belgian).

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[18] ILC, Draft Articles on Diplomatic Protection (2006) II(2) YbILC 39, para 1 (Art 11).

[19] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962*) (Judgment) [1970] ICJ Rep 3 (*Barcelona Traction*). As with the *Anglo-Iranian Oil Co* case, Lustig's account is instructive, see Lustig (n 11) 201–5.

[20] For details see J Brooks, 'Annals of Finance: Privateer' *The New Yorker* (New York, 21 May 1979) at 42, and *The New Yorker* (New York, 28 May 1979) at 42.

[21] The following builds on CJ Tams and A Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781.

[22] *Barcelona Traction* (n 19) para 38: as 'international law had not established its own rules', it was 'called upon to recognize' the domestic distinction between corporation and shareholder.

[23] ibid para 45.

[24] The Court did not require a 'genuine link' but spoke of a 'close and permanent connection' between company and state: see *Barcelona Traction* (n 19) para 71; cf *Nottebohm (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4, 23.

Third, crucially, harm suffered by a company and its shareholders was to be exclusively allocated to the former: '[A]lthough two entities may have suffered from the same wrong, it is only one entity whose rights have been infringed'.[25] Moreover, in case of 'an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim'.[26]

This third step in particular simplified the claims process. It meant that interests in a company were absorbed into those of the company. The Court justified this, *inter alia,* by warning that 'opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations'.[27] Yet under the Court's 'rigid'[28] approach, the right to bring claims was 'divorced' from the underlying interests.[29] What remained, for shareholders (and their states of nationality) to pursue were limited rights directly vested in them as shareholders, among them 'the right to any declared dividend, the right to attend and vote at general meetings [and] the right to share in residual assets of the company upon liquidation' [30] – rather meagre substitutes.

All this, to reiterate, reflected the position under general international law (as seen by the ICJ). Voluntary agreements could go further, and increasingly did: the Court noted that, 'whether in the form of multilateral or bilateral treaties between states, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments' (as well as in regional human rights law).[31] However, 'the [conventional] law on the subject has been formed in a period characterized by an intense conflict of systems and interests'[32] and did not easily trickle down into general international law.

Half a century onwards, the 'fundamental principle'[33] remains central. The ICJ affirmed it in the *Diallo* case, in which Guinea espoused claims of a Guinean businessman imprisoned in the Democratic Republic of the Congo (DRC).[34] While Guinea could assert violations of Mr Diallo's individual rights, the key question was whether it could also defend his business

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[25] *Barcelona Traction* (n 19) para 44.
[26] ibid para 88.
[27] ibid para 49.
[28] RB Lillich, 'Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona' (1971) 65 AJIL 522, 523.
[29] See Sep Op Fitzmaurice, *Barcelona Traction* (n 19) 77–78.
[30] *Barcelona Traction* (n 19) paras 46–47.
[31] ibid paras 90 and 91.
[32] ibid para 89.
[33] ILC, Draft Articles on Diplomatic Protection (n 18).
[34] *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582 (*Diallo*).

interest as sole shareholder of two companies incorporated in the DRC. Unlike in *Barcelona Traction,* the claims in *Diallo* were brought against the state of incorporation (DRC), which had allegedly violated rights of a national company, and Guinea argued that it could exercise diplomatic protection by substitution.

In its judgment, the Court rejected Guinea's claim. First, as per *Barcelona Traction,* company rights were to be taken up by the company's state of nationality, not by that of the shareholder. Second, this was true even in claims directed against the state of nationality: there was insufficient evidence 'at least at the present time …[of] an exception in customary international law allowing for protection by substitution'.[35]

The fact that, in between *Barcelona Traction* and *Diallo,* contemporary IIL had blossomed, left the Court unperturbed:

> the fact that various international agreements … have established special legal regimes governing investment protection, … is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.[36]

Diallo thus marked a divide between the general regime of claims premised on injury to companies, and the 'special legal regimes governing investment protection'.[37]

ii. Their Influence on Contemporary Investment Law

The combined impact of the *Barcelona Traction* and *Diallo* judgments has been significant. Both reflect a restrictive approach to the protection of commercial interests under general international law, which today is widely accepted. But this acceptance has come at a price: the general regime has been hollowed out by the decade-long practice of agreeing on 'special legal regimes governing investment protection'.[38]

The World Court's jurisprudence provides no more than a faint echo of this – but an echo there is: in the *ELSI case,* brought on the basis of the 1948 US-Italian FCN Treaty, a Chamber of the

[35] ibid paras 89-90.

[36] ibid para 90. For the earlier debate see, eg, A Al Faruque, 'Creating Customary International Law Through Bilateral Investment Treaties. A Critical Appraisal' (2004) 44 Indian JIL 292; SM Schwebel, 'Investor-State Disputes and the Development of International law - The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proc 27.

[37] *Diallo* (n 34) para 90. The Court followed up on this divide (in terms of a substantive rule this time) more recently in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* [2018] ICJ Rep 507, para 162.

[38] *Diallo* (n 34) para 90.

Court recognized the US right to act on behalf of a US company in respect of injury sustained by its Italian subsidiary.[39] While the US claims failed on the merits, one cannot help but notice how little space the Chamber devoted to the question of standing. The most plausible reason for this is that the Chamber considered the FCN Treaty to recognise a broader range of shareholder rights than general international law: seen in this light, *ELSI* illustrates how particular treaties protecting commercial interests of foreigners can opt out of the general regime set out in *Barcelona Traction* and *Diallo*.[40]

The real hollowing-out has taken place elsewhere, though: it is a result of the "BIT revolution" in IIL. A quick glance at the definitional clauses of standard IIAs is sufficient to realise how decisively contemporary IIL has moved away from the general approach to corporate nationality. Shares in a company are inevitably included among the assets protected as investments;[41] and the heated discussions about outer limits of protected interests are a world away from Belgium's and Spain's arguments about standing in *Barcelona Traction.* Half a century onwards, the special legal regimes of investment protection have quite obviously left behind anything remotely resembling the ICJ's 'rigidity'[42] in construing the general law of claims. At the same time, it is difficult to avoid the impression that investment jurisprudence, 'by opening the door to competing [investment] claims' by a wide range of stakeholders, has indeed 'create[d] an atmosphere of confusion and insecurity in international economic relations'.[43]

Whatever the difference, courts and tribunals administering the two separate regimes are aware of the gap. Just as the ICJ, in *Diallo,* felt safe to treat the special regime of investment protection as an *aliud*, so investment tribunals have not felt constrained by general rules of nationality. The number of awards that briefly mentions *Barcelona Traction,* only to move on from it immediately, is legion. The statement in *Camuzzi* reflects a common approach: 'whatever may have been the merits of Barcelona Traction, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed concerns the contemporary concept of direct access for investors to dispute resolution by means of arbitration between

[39] *Elettronica Sicula SpA (USA v Italy)* (Judgment) [1989] ICJ Reports 15 (*ELSI*). As Judge Oda noted in his Separate Opinion (ibid 83) the distinction between shareholder rights and rights of the company – 'so clearly expounded' in *Barcelona Traction* – required fuller analysis.

[40] For pertinent comment see, e.g., Z Douglas, *The International Law of Investment Claims* (CUP 2009) 408–13.

[41] *Pars pro toto,* see Art 1(1)(b) of the 2008 German Model BIT; Art 1 of the 2014 Canada Model FIPA ('investment'); Art 1(b)(ii) of the 2003 Indian Model BIT; Art 1(2)(a) of the 2000 Turkey Model BIT.

[42] Lillich (n 28).

[43] *Barcelona Traction* (n 19) para 49.

investors and the State'.[44] Similarly, in *Teinver*, the Tribunal found '*Barcelona Traction*'s discussion of shareholder rights ... inapposite to the circumstances of the present case ... as the [ICJ's] decision was made in the absence of the specific framework of a BIT'.[45] The net result, aptly described by Pellet, is that 'with regard to the protection of shareholders, ICSID tribunals unanimously greet the jurisprudence of the ICJ, … but … then hide behind the *lex specialis* dogma'.[46]

Fifty years after *Barcelona Traction,* and 30 years after the beginning of treaty-based investment arbitration, two separate regimes have emerged, and their respective starting points for determining corporate nationality are worlds apart.

C. Interim Conclusions

The preceding sections cover two very different questions, but in one respect, point in the same direction. They show that the World Court, in a number of decisions, was not favourably disposed towards claims brought on behalf of foreign investors. In *Anglo-Iranian Oil Co.*, the Court gave short shrift to the UK's attempt to portray an internationalised contract claim as a treaty dispute: an attempt to bring contractual rights within the World Court's jurisdictional remit ended before it had really begun. In *Barcelona Traction* and *Diallo,* the Court admitted diplomatic protection claims in defence of commercial interests only within narrow limits, notably dismissing the right of shareholders (and their states of nationality) to present claims for harm done to the company.

In what respect do these holdings matter to contemporary IIL? As we noted at the outset, their effect is elusive: we do not seek to argue that there is a direct link between the ICJ's refusal to accept claims in a handful of disputes, and the emergence of IIL in its contemporary variation. Such a claim would require a lot more empirical work. But we would advance a more modest claim, which echoes Mann's statement cited above: in the pre-IIA period, outside of instances of contract-based arbitration, 'international litigation arising from disputes of a commercial character [was] ... far from encouraging to investors'.[47] The ICJ's decisions 'highlighted some

[44] *Camuzzi International SA v Argentina*, ICSID Case No ARB/03/2, Decision on Jurisdiction (11 May 2005) paras 141–42.
[45] *Teinver et al v Argentina*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) para 218.
[46] Pellet (n 2) 234.
[47] Mann (n 7) 92 (Mann adds 'unfortunately').

of the procedural and substantive inadequacies with the diplomatic protection model in safeguarding shareholder interests'.[48]

This did not mean that IIL had to enter its BIT era: its 'incremental, partly accidental emergence' reflects a curious mix of 'Rational Design [and] Accidental Evolution'.[49] But the experience of occasional World Court litigation may have prompted those interested in enhancing investment protection to pursue new paths. The new path eventually chosen has certainly led away from *Lena Goldfield* contract-based arguments: 'The BIT phenomenon involves … a rejection of the internationalization of contracts'[50]. As far as shareholder rights are concerned, the ICJ's restrictive approach may well have been an incentive to seek solutions via special treaties: in Lustig's phrase, 'the Court [in *Barcelona Traction*] effectively left investors with little choice but to look elsewhere for protection and seek remedy in alternative forums'.[51] This certainly was the solution favoured by Mann who (writing after *ELSI*) placed his faith in a new generation of treaties: 'Probably the most important lesson is that the treaties have to be so drafted as to entitle the foreign investor to make claims in respect of acts suffered by a domestic company substantially owned by him'.[52]

For better or worse, this call has been heeded. The number of treaties so entitling foreign investors – around 300 at the time of the *ELSI* judgment – has increased almost ten-fold since then, and BITs and other IIAs have come to dominate contemporary IIL. Very few of them envisage recourse to the ICJ. So does the World Court's jurisprudence hold any lesson for their interpretation? To this question we now turn.

III. The ICJ and Treaty Standards

In assessing the ICJ's influence on standards contained in IIAs, we leave the ICJ's "home turf". IIAs make up a special regime of investment protection, based on formally separate but closely related treaties. This special regime was meant to overcome the perceived limitations of

[48] A Newcombe/L Paradell, *Law and Practice of Investment Treaties* (Kluwer 2009) 39.

[49] J Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Z Douglas/J Pauwelyn/H Vinuales (eds), *The Foundations of International Investment Law* (OUP 2014) 42 and 11.

[50] Crawford (n 13) 19.

[51] Lustig (n 11) 214. See further Newcombe/Paradell (n 48) 38: the 'uncertainties and inadequacies [of ICJ decisions] may have provided compelling rationales for the development of IIAs'. See also S El Boudouhi, 'Barcelona Traction Re-Imagined: The ICJ as a World Court for Foreign Investment Cases?' in I Venzke and KJ Heller (eds), *Contingency in International Law* (OUP 2021) 406.

[52] Mann (n 7) 100.

traditional international law partly shaped by the ICJ. In this realm of IIAs, the ICJ is not accorded any formal role – and as *Diallo* indicates, the Court is fully aware of this. Instead, IIAs rely on domestic litigation and international arbitration, which has become the main forum of clarification and legal development.

All of this points to a limited role for the World Court in relation to treaty standards. It is limited not because investment tribunals or other law-interpreters do not trust the World Court – but for simple reasons of "supply and demand". Especially for protection standards that are peculiar to IIAs, "demand" is virtually non-existent: the more we move into the depths of written IIL, the more detailed the regulation, the denser the investment jurisprudence, the less need and room there is for guidance from the World Court. "Supply" is equally scarce: a century of World Court adjudication yields little on, say, the asset-based definition of an "investment" and does not clarify whether, in the absence of specific representations, an investor can legitimately rely on the stability of the host state's regulatory framework.

Pellet's overall assessment reflects these considerations: 'generally speaking', he notes that investment tribunals are more likely to refer to the World Court when addressing 'procedural issues … or questions of general international law rather than when dealing with investment protection standards'.[53] Yet matters are not absolute. At least some IIA provisions do refer to general international law or have put into written form standards that preexist the BIT era; and many of them are formulated in an open-ended manner. In construing such provisions, occasional pronouncements by the World Court can inform the analysis. The subsequent sections illustrate this process by identifying two representative World Court contributions.[54]

A. Most-favoured Nation Clauses and Dispute Settlement

Debates about the scope of MFN clauses provide a first example. Whether the MFN clause of an investment treaty can be invoked to broaden access to dispute settlement is much discussed

[53] Pellet (n 2) 239–40.

[54] Our discussion looks at World Court pronouncements that have left a tangible legacy in investment jurisprudence; it is illustrative rather than exhaustive. In particular, the following discussion does not explore the fate of important PCIJ pronouncements on the scope of expropriation, among them the clarification that an interference with 'favourable business conditions and goodwill' did not amount to an expropriation (Oscar Chinn (UK v Belgium) PCIJ Rep Series A/B No 63, 88), but that intangible rights were in principle protected (Certain Polish Interests in Polish Upper Silesia (Germany v Poland) (Merits) PCIJ Ser A No 7, 44).

among investment lawyers and tribunals.[55] These debates often rely on treaty-specific and investment-specific arguments—including the wording of clauses and the context in which they appear. However, both sides in the debate have anchored their position to a broader normative context and, as part of that, have considered three ICJ judgments: *Ambatielos*, *US Nationals in Morocco,* and *Anglo-Iranian Oil Co.*

i. ICJ Pronouncements

Anglo-Iranian Oil Co. has been mentioned already, insofar as it reflected the ICJ's cautious take on internationalised contracts and the problems arising from the temporal limitation of Iran's 1932 optional clause declaration.[56] In addition to the 1933 oil concession, the UK also considered Iran to have violated bilateral treaties concluded in 1857 and 1903 – but these obviously predated Iran's declaration. The UK sought to bypass the temporal limitation by relying on two other treaties concluded by Iran with Denmark and Turkey in 1934 and 1937 respectively, coupled with the broadly worded MFN clauses contained in its own treaties of 1857 and 1903.[57] The Court was not convinced. It held that, in applying Iran's optional clause, the focus had to be on the treaty containing the MFN clause – this was the 'basic treaty', and it had to postdate the optional clause declaration.[58] In addition, the Court rejected the British argument that if Denmark could bring disputes before the Court by virtue of its treaty with Iran and the UK could not, then the UK would not enjoy MFN status: 'the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters'.[59]

This would remain the only express ICJ pronouncement on MFN treatment and the establishment of jurisdiction. The two other cases looked at MFN clauses from the perspective of substantive rights. The *US Nationals in Morocco* case concerned the scope of US consular jurisdiction over its citizens and protégés in the French Zone of Morocco. The US claimed that through the MFN clauses in its 1836 Treaty with Morocco it was entitled to enjoy

[55] See, eg, Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails' (2011) 2 JIDS 97; S Schill, 'Allocating Adjudicatory Authority: Most-Favoured Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas', ibid 355. For a recent account see E Stoppioni, 'Jurisdictional Impact of Most Favoured Nation Clause' (January 2017) *MPEiPro*.

[56] See Section II(A).

[57] *Anglo-Iranian Oil Co.* (n 11) 108–9.

[58] ibid 109–10.

[59] ibid 110.

comprehensive consular jurisdiction, as Morocco had granted such to Great Britain and Spain in later treaties. This argument was bound to fail. At the time of the dispute, Great Britain and Spain had already renounced their treaty rights – so, the US claim would have privileged it over Great Britain and Spain, whereas MFN clauses aimed at 'fundamental equality without discrimination', not preferential treatment.[60] And in that, they could not operate as 'a form of drafting by reference'.[61]

The ICJ's pronouncement in the *Ambatielos*[62] case was more limited still. As the Court noted, Greece and the UK disagreed on the scope of a clause promising MFN treatment in 'all matters relating to commerce and navigation': Greece relied on the clause to invoke provisions in treaties between the UK and third states relating to the administration of justice, whilst the UK claimed the clause could not be extended beyond its express subject-matter.[63] As in *US Nationals,* the MFN clause was invoked to 'import' into the basic treaty substantive rights. Unlike in *US National*s, the ICJ in *Ambatielos* left the matter open, holding that the dispute was to be decided by a Commission of Arbitration. However, in their joint dissenting opinion, Judges McNair, Basdevant, Klaestad and Read upheld the British view.[64] (By contrast, the Commission of Arbitration, held that a limited MFN clause could cover administration of justice, as the issues could be viewed as belonging to the same general matter [the *ejusdem generis* rule]. However, that did not help Greece much: insofar as the UK had granted other nations a substantive right to treat their nationals fairly, it had merely agreed to apply in relation to them its national laws.[65])

ii. Their Reception in Investment Jurisprudence

What has been the impact of this 'MFN jurisprudence' on investment arbitration? Two things are clear: First, the ICJ's decisions have been referred to by arbitral tribunals, as part of a

[60] *Rights of Nationals of the United States of America in Morocco (France v USA)* (Judgment) [1952] ICJ Rep 176, 192 (*US Nationals in Morocco*).

[61] ibid 191–92.

[62] *Ambatielos (Greece v UK)* (Merits) [1953] ICJ Rep 10.

[63] ibid 21–22.

[64] Diss Op McNair, Basdevant, Klaestad and Read, ibid, 34.

[65] *The Ambatielos Claim (Greece, UK)* RIAA XII (6 March 1956) 83, 106–9.

"general theory" of MFN clauses.[66] And second, such guidance has not resulted in a consistent jurisprudence; instead, tribunals continue to disagree on the proper reading of MFN clauses. Curiously, *both* sides in that debate have sought to anchor their findings in the ICJ's jurisprudence. This has involved a fair share of misunderstandings, as the subsequent analysis of two landmark cases, *Mafezzini v Spain* and *Plama v Bulgaria*, illustrates.[67]

Maffezini was the first investment case to accept that MFN clauses applied to conditions attached to the tribunal's jurisdiction, and it did so even though the MFN clause was not self-standing, but was included in the provision guaranteeing fair and equitable treatment. Perhaps surprisingly, the *Maffezini* tribunal supported its approach by reference to the ICJ's caselaw. It noted (correctly) that the MFN debate was 'familiar to international lawyers and scholars'.[68] Drawing on the *Anglo-Iranian Oil Co.* case, it used the concept of the "basic treaty" to define the issues to which the MFN clause applies – and which, in the case of a BIT, comprised substantive rights and access to arbitration.[69] Did this mean that the MFN clause applied to both, even though it was contained in one of the provisions guaranteeing substantive rights? The tribunal asserted that the ICJ had 'indirectly…touched upon' the question when considering the scope of US consular jurisdiction in *US Nationals in Morocco*. It did not mention the fact that consular jurisdiction as discussed in *US Nationals in Morocco* was a substantive right accorded to the home state, unrelated to dispute settlement. It did not mention either that in *Anglo Iranian Oil Co.,* the ICJ had considered the MFN clause to 'ha[ve] no relation whatever to jurisdictional matters';[70] and ignored the joint dissent of Judges McNair, Basdevant, Klaestad and Read in the ICJ's *Ambatielos* case. Instead, the *Maffezini* tribunal relied on the Commission of Arbitration's report in *Ambatielos* – and from this, derived the very broad proposition that 'the protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment of traders covered by the clause'[71]. This rather selective engagement with the caselaw set the stage: 'It

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[66] *Wintershall v Argentina*, ICSID Case No ARB/04/14, Award (8 December 2008) paras 96–106. ILC, Second Report on the most-favoured-nation clause, by Mr Endre Ustor, Special Rapporteur (9 March/18 May 1970) UN Doc A/CN.4/228 and Add.1, paras 6–7.

[67] For a fuller account see Stoppioni (n 55) MN 7–8.

[68] *Emilio Agustín Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000) para 43 (*Maffezini*).

[69] ibid para 45. In *Garanti Koza LLP*, dissenting Arbitrator Boisson de Chazournes reached the opposite result: *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on Jurisdiction (3 July 2013) Dissenting Opinion, para 67 and fn 64.

[70] *Anglo-Iranian Oil Co.* (n 11) 110 [emphasis added].

[71] *Maffezini* (n 68) para 50.

is *in the light of this background* that the operation of the most favored nation clause in bilateral investment treaties must now be considered'.[72] The rest is, as they say, history.

If *Maffezini* heavily relied on (a selective reading of) the ICJ's caselaw, the award in *Plama*[73] was mostly tailored to the specifics of investment treaty interpretation. To this, the Tribunal added its own, more balanced, analysis of the ICJ cases: it did not bypass the ICJ's most obvious dictum (viz that an MFN clause 'ha[d] no relation whatever to jurisdictional matters' in *Anglo-Iranian Oil Co.*[74]), and noted that 'in the view of the International Court of Justice, an MFN provision does not operate as an automatic incorporation by reference'.[75] The more equivocal approach in *Ambatielos* was acknowledged,[76] but the tribunal emphasised that the case concerned the 'administration of justice', … in the sense of denial of justice in the domestic courts' – not a jurisdictional issue.[77] This analysis suggested that the earlier precedents 'do not provide a conclusive answer to the question'[78] – a cautious assessment, but sufficient to confirm the tribunal's holding that MFN clauses would only extend to questions of dispute settlement if the treaty clearly and unambiguously said so.

iii. The Influence of the Court's Jurisprudence

In later awards, the presence of the ICJ pronouncements has faded, but not completely disappeared; perhaps one could say that, once investment tribunals had addressed the matter, demand for an ICJ pronouncement decreased. In the subsequent debate, there is limited room in between the *Maffezini* and *Plama* camps: while the wording of MFN clauses may permit nuance[79], on the general question – do MFN clauses, as a general matter, cover questions of dispute settlement? – subsequent tribunals are typically divided between the two approaches. For present purposes, the difference between the two decisions is not as sharp; in fact, in their respective treatment of the ICJ's jurisprudence, there is common ground: the two decisions

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[72] ibid para 51.

[73] *Plama Consortium Ltd v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) (*Plama*). See already, equally briefly, *Salini Construttori SpA and Italstrade SpA v Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (9 November 2004) para 106.

[74] *Plama* (n 73) para 214.

[75] ibid para 213.

[76] ibid para 215.

[77] ibid para 215.

[78] ibid para 217.

[79] See *ICS Inspection and Control Services Limited (UK) v The Republic of Argentina*, UNCITRAL, PCA Case No 2010-9, Decision on Jurisdiction (17 December 2009) para 275.

illustrate the power and limits of ICJ pronouncements as an 'anchor' for investment decisions on treaty standards. Three points stand out:

(i) Both tribunals were clearly keen to anchor their decisions in the wider discourse and to assert (convincingly or not) that their outcomes fit within the "general theory" of the MFN clause. What is more, both intuitively accepted the ICJ's jurisprudence as a relevant factor in the development of this general theory. In that sense, *Plama*, *Maffezini* and their epigones reflect the influence of the ICJ on the interpretation of investment treaty clauses that draw on preexistent standards.

(ii) Neither *Maffezini* nor *Plama* blindly followed the ICJ: its decisions were useful, perhaps persuasive, pointers, but operated within the regular framework of treaty interpretation. That framework (vague and general though it may be) controls, and determines how much room there is to look to a general theory shaped in non-investment caselaw. What is more, neither tribunal considered the ICJ to have a monopoly on the development of the general theory: the *Ambatielos* report mattered as well, and for the *Maffezini* tribunal it mattered more.

(iii) Finally, both tribunals referred to the ICJ's caselaw *as they read it.* The same cases were read differently, nudging the *Maffezini* tribunal towards an expansive reading, while confirming the restrictive reading in *Plama*. This suggests that when anchoring their decisions in the Court's jurisprudence, investment tribunals choose, select — and occasionally misconstrue. The ICJ can do little about that: it pronounces on legal issues, but does not have the 'last word'.[80] It is investment tribunals that do the anchoring.

B. Defining "Arbitrary Conduct"

Our second illustration confirms, and to some extent nuances, these points. It concerns the attempt, by an ICJ Chamber, to give meaning to the concept of "arbitrariness", which has been used as an anchor by a significant number of arbitral awards.

[80] A Pellet and D Müller, 'Article 38' in A Zimmermann, CJ Tams, K Oellers-Frahm, C Tomuschat (eds), *The Statute of the International Court of Justice. A Commentary*, 3rd edn (Oxford, OUP 2019) MN 336.

i. The Chamber's Pronouncement

The relevant case is *ELSI*, one of the few disputes brought before the ICJ on the basis of an FCN treaty. Under Article 1 of the Supplementary Agreement to the US-Italian FCN treaty, the 'corporations … of either High Contracting Party shall not be subject to arbitrary or discriminatory measures within the territories of the other High Contracting Party'.[81] The US argued that the requisition of ELSI's factory by the Mayor of Palermo constituted such arbitrary and discriminatory measure injuring the US corporation. Having rejected the claim based on discrimination,[82] the Chamber examined whether the requisition was arbitrary – and made two pertinent pronouncements. First, it distinguished between arbitrariness under international law and unlawfulness under domestic law:

> [T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law… by itself, and without more, unlawfulness cannot be said to amount to arbitrariness.[83]

Second, the Chamber offered a definition of arbitrariness:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law…It is a willful disregard of due process of law, an act which shocks or at least surprises, a sense of juridical propriety.[84]

Assessed against that standard, the requisition order – made by the competent authority, and subject to appeal before the local court – was not deemed arbitrary.[85]

ii. Reception in Investment Jurisprudence

These relatively succinct pronouncements by the ICJ Chamber on arbitrariness have fallen on fertile ground, mainly because many treaty standards, in one way or another, preclude arbitrary conduct.[86] Some treaties, like the US-Italian treaty, rule out arbitrary measures; in others,

[81] *ELSI* (n 39) para 120.
[82] ibid para 122.
[83] ibid para 124.
[84] ibid para 128.
[85] ibid para 129.
[86] Our discussion in the following concerns *ELSI's* pronouncements on the meaning of "arbitrariness". We do not address the Court's prior determination that 'unlawfulness under domestic law does not necessarily mean unlawfulness under international law' (and, conversely, 'lawfulness under domestic law does not guarantee lawfulness in international law'), on which investment tribunals also often rely but which reflects a rule of general international law—namely international law's autonomy from domestic law (codified in art 3 of the Articles on

arbitrariness is a feature of other standards, such as FET, expropriation or the rule against denial of justice.

Over the course of the past three decades, the succinct definition put forward by the ICJ's Chamber has been relied on in all these contexts. It became an instant success when, less than a year after the *ELSI* judgment, the tribunal in the resubmitted *Amco Asia v Indonesia* case relied on it. In its view, the Chamber's distinction between unlawfulness under domestic law and arbitrariness under international law was 'equally germane' to the question of denial of justice – so that the Claimant had to show a 'wilful disregard of due process of law'.[87] Since then, reference to *ELSI* has been a constant feature in investment awards dealing with similar issues, and the Chamber's pronouncement has 'contributed to the clarification of the concept of arbitrariness in international law'.[88]

Such subsequent tribunals have engaged with *ELSI* in different ways, illustrating its "anchoring" function. Dealing with a self-standing treaty standard which prohibits arbitrary and/or discriminatory measures or treatment, some tribunals use *ELSI* without adding much of their own analysis. *Noble Ventures v Romania* is a useful illustration: the tribunal simply acknowledged that the BIT did not contain a definition of what is 'arbitrary' and then turned to *ELSI*: 'Regarding arbitrariness, reference can … be made to the decision of the ICJ in the *ELSI* case.'[89] It then reiterated and applied *ELSI's* definition, finding no violation. *LG&E* and *El Paso* similarly considered *ELSI*'s definition to reflect "arbitrariness" 'under international law'.[90]

Other cases have invoked the *ELSI* definition, but added further elements. *Genin* is an obvious example: the tribunal focused on part of the definition ('a wilful disregard of due process of law' and offence to a 'sense of juridical propriety'), but insisted that in order to be arbitrary, a governmental measure had to be taken in bad faith.[91] In the context of NAFTA, *ELSI* has also been used "creatively". Once the NAFTA Free Trade Commission had clarified that Article 1105 NAFTA 'd[id] not require treatment in addition to or beyond that which is required by the

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the Responsibility of States for Internationally Wrongful Acts: ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries' (2001) II(2) YbILC 31, 37 (Art 3 commentary) ('ARSIWA Commentary'))—and does not pertain to investment law as a special regime.

[87] *Amco Asia v Indonesia*, ICSID Case No ARB/81/1, Award in Resubmitted Proceedings (31 March 1990) paras 136–37 (*Amco Asia*).

[88] P Tomka, 'Elettronica Sicula Case' (February 2007) *MPEPIL*, para 23.

[89] *Noble Ventures Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) paras 175–79.

[90] *LG&E v Argentina*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) paras 156–57 (*LG&E*); *El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) para 319.

[91] *Alex Genin v Republic of Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001) para 371, referencing *Amco Asia* (n 87) and its reliance on *ELSI* (n 34).

customary international law minimum standard of treatment of aliens',[92] the tribunal in *Pope&Talbot* put forward the *ELSI* definition as a reflection of that minimum standard. It did so in an attempt to overcome the exacting standard enunciated in the 1926 *Neer* claim (requiring bad faith and an outrage), suggesting that *ELSI* 'permits a bit less injury to the psyche of the observer, who need no longer be outraged, but only surprised by what the government has done'.[93] But the tribunal's assertion that in *ELSI,* 'the International Court of Justice has moved away from the *Neer* formulation'[94] remained unsubstantiated. Both *Genin* and *Pope&Talbot* illustrate the risk of taking nebulous standards out of context.

In the subsequent jurisprudence, these more creative uses of the *ELSI* pronouncement no longer seem so prominent. In later awards under NAFTA, tribunals have continued to refer to the *ELSI* standard, but no longer sought to use it to downplay the *Neer* standard.[95] As noted in *Cargill,* the Chamber's pronouncement 'though not based on the NAFTA, has been accepted by at least two of the State Parties to the NAFTA as the "best expression" of arbitrariness'.[96] Awards rendered outside NAFTA point in the same direction: to illustrate, in *Azurix*, the tribunal noted that in interpreting the term 'arbitrary', '[t]he findings of other tribunals, and in particular the ICJ, should be helpful'.[97] It then found that *ELSI's* definition was close to the ordinary meaning of the word.[98]

iii. The Impact of the Court's Pronouncements

What does this jurisprudence tell us about the impact of the Court on IIL? In two basic respects, it reinforces points made in relation to our first illustration, viz the ICJ's jurisprudence on MFN clauses: (i) ICJ pronouncements have no binding authority, but (ii) they are attractive anchor

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[92] Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, 31 July 2001), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

[93] *Pope&Talbot v Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002) para 64.

[94] ibid para 63.

[95] *Mondev v USA*, ICSID Case No ARB(AF)/99/2, Award (11 February 2002) para 127; *Loewen and Loewen v USA*, ICSID Case No ARB(AF)98/3, Award (26 June 2003) paras 131 – 32; *ADF Group v USA*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) para 190; *Cargill v Mexico*, ICSID Case No ARB(AF)/05/2, Award (18 September 2009) para 291 (*Cargill*).

[96] *Cargill* (n 95) para 291.

[97] *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Award (14 July 2006) paras 391–92.

[98] ibid.

points for investment tribunals who consider that a reference to ICJ jurisprudence will lend credibility to their awards.

This may not fully account for the success of the *ELSI* pronouncements. Three further considerations seem at play. The first takes us back to our introductory considerations about supply and demand. Regularly working with 'arbitrariness' as a concept but never clearly articulating what it meant, IIL clearly had demand for a definition, and the ICJ's jurisprudence supplied it. The second goes to the relative openness of the *ELSI* pronouncement. In defining arbitrariness, the ICJ Chamber articulated an intuitively plausible standard that gave some meaning to a vague treaty clause; simultaneously, it remained sufficiently vague: if the *ELSI* case has 'contributed to the clarification of the concept of arbitrariness in international law',[99] then not the least this is because the Chamber's pronouncement remains malleable. And finally, the fate of *ELSI* illustrates a particular quality of ICJ pronouncements. Precisely because the ICJ is not a specialised court, but is considered a guardian of generalist international law, its jurisprudence is taken to reflect the state of general international law. The experience with *ELSI* suggests that this particular quality — which has been described as a mainstreaming of special areas of international law[100] — is shared even by tribunals/arbitrators that seek to ascertain the meaning of a *treaty* clause prohibiting arbitrary measures. And so, this second example also illustrates that, while its effect on the interpretation of investment treaty standards is limited, ICJ pronouncements occasionally have a significant influence.

IV. Remedies

Remedies are a defining feature of investment disputes.[101] Cases turn on remedies, and not just in the trite sense that these embody the outcome of a tribunal's decision. The dominant remedy sought in investment arbitration – damages – is frequently addressed in a dedicated phase of the proceedings. It is governed by highly technical principles of valuation and calculation, and remains, to the uninitiated, 'guère moins spéculatifs et tout aussi obscurs que les prophéties de Nostradamus'.[102] What is more, the amount of compensation awarded in some disputes has

[99] Tomka (n 88).

[100] e.g., B Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 JIDS 3, 7.

[101] I Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, OUP 2017) 2.

[102] I Seidl-Hohenveldern, 'L'évaluation des dommages dans les arbitrages transnationaux' (1987) 33 AFDI 7, 24.

fuelled concerns about IIL's (real and perceived) investor bias and has prompted calls for a 'rethinking [of] the quantification of damages in international investment arbitration'.[103]

All this is far removed from the practice of the World Court, which has rarely awarded compensation.[104] And yet, it is with respect to reparation that the World Court has most clearly contributed to contemporary IIL. The reason for this is simple: IIAs tend to say little on questions of remedies. Many of them prescribe a standard of compensation (often requiring compensation to be full, prompt and effective), but this is formulated as a condition for expropriation to be lawful, not as a form of reparation for treaty breaches.[105] Investment law, therefore, has a lot of demand for guidance.[106] And despite the limited number of damages awards rendered by the World Court, its jurisprudence supplies general principles. Consolidated in the ILC's work on state responsibility, these general principles have become a point of reference for investment tribunals who seek to anchor their decisions in a general law of remedies and ascertain the rules applicable when awarding reparation.

A. General Principles of Reparation: The PCIJ's Pronouncements

The World Court's key statements on reparation were made almost a century ago, in the *Factory at Chorzów* case, which concerned Poland's takeover of a German-owned nitrate factory in Upper Silesia.[107] Having found the taking to be in breach of the Geneva (Upper Silesia) Convention of 1922,[108] the PCIJ was concerned with Germany's claim for reparation. In this respect, it made three pronouncements, which have shaped subsequent debates.

First, reparation was a natural consequence of an illegal act:

[103] T Marzal, 'We Need to Talk about Valuation in ISDS' (*Verfassungsblog*, 5 March 2020) <https://verfassungsblog.de/we-need-to-talk-about-valuation-in-isds/>.

[104] The ICJ has only done so in *Corfu Channel (UK v Albania)* (Compensation) [1949] ICJ Rep 244; *Diallo* (n 34) (Compensation) [2012] ICJ Rep 324; *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua)* (Compensation) [2018] ICJ Rep 15; and *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Reparations) Judgment of 9 February 2022 at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf>.

[105] See Section IV(B). But see for a discussion of this T Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS' (2021) 22 Journal of World Investment and Trade 249

[106] IIL is not exceptional, treaties in many fields omit to spell out remedies. As Chester Brown notes '[t]he absence of clear provisions … has led international courts to consider the practice of other international tribunals in the awarding of remedies': C Brown, *A Common Law of International Adjudication* (OUP 2007) 186.

[107] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Ser A No 17 (*Factory at Chorzów*).

[108] *Certain German Interests* (n 54).

> [I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation… reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.[109]

Second, reparation aimed to establish the *status quo sine*:

> [It] must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[110]

Third, compensation for expropriation followed a different logic: The 'principles … determin[ing] the amount of compensation due for an act contrary to international law' were different from those governing the payment of compensation for lawful expropriation.[111] In the latter case, the standard of compensation was set to 'fair compensation' or the 'just price' of what has been lawfully expropriated, consisting 'of the value of the undertaking at the moment of dispossession plus interest to the day of payment'.[112] By contrast, compensation for unlawful takings needed to cover both the value of the property at the time of the indemnification as well as any loss sustained as a result of its illegal seizure.[113]

These three pronouncements are at the level of principles that do not translate into readily-applicable rules. However, as principles, they have found general acceptance. Of particular relevance in this is the ILC's work on state responsibility, which (in line with the first

[109] *Factory at Chorzów* (n 107) 29. See also *Factory at Chorzów* (Jurisdiction) PCIJ Ser A No 9, 21.

[110] Factory at Chorzów (n 107) 47. Our focus in the following is on damages. The second Chorzów pronouncement remains influential also for its assertion of a hierarchy between the two most common modes of reparation: the PCIJ's preference for restitution over compensation (the latter being available only if restitution "is not possible") does not square easily with the fact that, in Chorzów, Germany had only demanded compensation. However, it has shaped the ILC's subsequent work on state responsibility, which in Art 36 ARSIWA accepts restitution's 'primacy as a matter of legal principle': see ARSIWA Commentary (n 86) 99; and further CG Gray, Judicial Remedies in International Law (Oxford, Clarendon 1987), 95 et seq. Investment tribunals have not often engaged with the question of hierarchy, but have at times clarified that restitution could in principle be awarded: see eg Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) para 79; and further S Hindelang, 'Restitution and Compensation – Reconstructing the Relationship in Investment Treaty Law', in Hofmann/Tams (n 13) 161; U Kriebaum, 'Restitution in International Investment Law' ibid 201.

[111] *Factory at Chorzów* (n 107) 46.

[112] ibid 46–47.

[113] ibid 48.

pronouncement) views the duty to make reparation as a 'new legal relation[] that arise[s] from the commission … of an internationally wrongful act' ,[114] and in Article 31, stipulates that states incurring responsibility are under a 'duty to make "full reparation" in the *Factory at Chorzów* sense'.[115] The ICJ itself has regularly affirmed the PCIJ's *Chorzów* pronouncements, which it described, in its 2004 *Wall* opinion, as having 'laid down' 'the essential forms of reparation in customary law'.[116]

B. Their Reception in Investment Arbitration

In investment arbitration, the *Chorzów Factory* judgment is a constant point of reference. As Ursula Kriebaum states, it is 'probably the PCIJ's judgment most frequently referred to in investment arbitration',[117] often in conjunction with the ILC's provision on reparation.[118] A nuanced analysis suggests that all three pronouncements set out in the preceding section play some role in contemporary IIL.

The PICJ's *first* pronouncement – that reparation is the natural consequence of an illegal act, which does not need to be expressly articulated – is the basis of nearly all investment decisions awarding damages: as IIAs do not address the consequences of breaches, reparation can only be ordered if it 'is the indispensable complement of a failure to apply a convention'.[119] That this is so is today accepted as a matter of course, and few tribunals feel the need to spell it out. Echoes of the first *Chorzów* pronouncement can be heard in the *Biwater Gauff* award, in which the tribunal observed that '[f]or claims other than expropriation … the BIT does not offer any guidance for evaluating the damages' – and then immediately continued that 'this does not

[114] ARSIWA Commentary (n 86) para 3(f) (General commentary).

[115] ibid 91, para 3 (Art 31).

[116] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 152.

[117] U Kriebaum, 'The PCIJ and the Protection of Foreign Investments' in M Fitzmaurice and CJ Tams (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013) 161 (then noting that '[n]o fewer than forty-eight decision and awards refer to *Chorzów*'). According to Marboe ((n 101) 417ff) between 2008-2017, 30 awards (out of 63 she examined) explicitly referred to *Chorzów* in calculating compensation.

[118] e.g. *LG&E* (n 87) Award on Damages (25 July 2007) para 31, where the Tribunal agreed 'with the Claimants that the appropriate standard for reparation under international law is "full" reparation as set out by the Permanent Court of International Justice in the Factory at Chorzów case and codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts'.

[119] *Factory at Chorzów* (n 107) 29.

mean that compensation is excluded', but meant that 'the common starting point is the broad principle articulated in the well known *Factory at Chorzów* case'.[120]

The PCIJ's *third* pronouncement – distinguishing between compensation owed in the case of expropriation on the one hand, and damages for treaty breaches on the other, as well as between the relevant valuation date in each case[121] – has had a more chequered history. To reiterate, many BITs do spell out the measure of compensation owed for an expropriation to be lawful. Perhaps attracted by such express provisions, a number of investment tribunals over time 'assessed damages for both lawful and unlawful expropriation using the standard of compensation [expressly stated] in the relevant BIT'.[122] Awards such as *SD Myers* or *ADC v Hungary* put matters straight: they clarified the limited reach of the express treaty standard of compensation: in the words of *ADC,*

> [t]he BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation.[123]

Outside instances of lawful expropriation, the path towards the general standard as enunciated in *Chorzów Factory* is clear: 'the Tribunal is required to apply the default standard contained in customary international law' – which 'is set out in the decision of the PCIJ in the *Chorzów Factory* case'.[124] While not all tribunals have followed this approach, the need to distinguish between different methods of calculating damages is (as noted in a recent award) 'increasingly recognized in international practice'.[125] This can be seen as a late affirmation of the distinction foreshadowed in the third *Chorzów* pronouncement.

[120] *Biwater Gauff v Tanzania*, ICISD Case No ARB/05/22, Award (24 July 2008) para 776. See also DA Desierto, 'Expropriation Cases', in Fabri and Stoppioni (n 9) 343-358.

[121] J Branson, 'Damages in Investment Arbitration—A Revolutionary Remedy or Reward for Rich Corporations at the Expense of the World's Poor?' (2016) 3 Journal of Damages in International Arbitration, 23 argues that in the PCIJ's statement regarding the different valuation dates 'modern tribunals have *clung* to in justifying the right shift in valuation dates'.

[122] B Sabahi and C Guzman, 'Award on Damages' (August 2019) MPEIPro, para 7: e.g. *CMS Gas Transmission Company ('CMS') v Argentina*, ICSID Case No ARB/01/8, Final Award (12 May 2005) para 410.

[123] *ADC v Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 481.

[124] ibid para 483-484. See also *SD Myers v Canada*, UNCITRAL (1976), Partial Award (13 November 2000) paras 307–10.

[125] *Caratube International Oil Company LLP v Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012) para 1082; and further *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 326 (*Quiborax*); *Teinver* (n 45) Award (21 July 2017) paras 1088–92; *Siemens AG v Argentina*, ICSID Case No ARB/02/8, Award (6 February 2007) paras 352–53; *Compañía de Aguas del Aconquija SA and Vivendi SA v Universal Argentina,* ICSID Case No ARB/97/3, Award (20 August 2007) paras 8.2.3–8.2.5. Marboe (n 101) 407.

This leaves the *second Chorzów* pronouncement, viz the PCIJ's robust statement that reparation 'must as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.[126] Of the three pronouncements, this has arguably left the most significant legacy. Two aspects stand out. The first concerns the method of calculating damages. Tribunals are required to compare the actual situation to a hypothetical scenario in which the state has acted lawfully.[127] This in turn has meant that damages are not limited to the value of an investment at the time of the taking; subsequent increases in value can be recovered, and tribunals have regularly relied on *Chorzów Factory* to justify their decision to take them into account in their calculation.[128] The second legacy is perhaps best described as the "spirit" of the *Chorzów Factory* judgment.[129] While the PCIJ's pronouncement came with caveats ('as far as possible', 'in all probability'), its general thrust[130] was clear: reparation means 'full reparation', and it is not merely designed to allay problems, but to 'wipe out all the consequences' of the wrongful conduct, including those that a mere restitution in kind would not cover. What is more, in assessing how such consequences were best to be wiped out, the PCIJ commissioned different valuations, all the while emphasising that it had 'every right' to determine which would best suit the 'obvious aim of implementing the general principle … [of] full reparation'.[131] This was, in other words, a judgment emphasising the rights of the aggrieved party and the discretion of a court in choosing how best to remedy it.[132] And over the course of the past decades, investment tribunals seem to have acted in that spirit. As reparation is meant to be 'full', there is no a priori limitation on the damages that can be compensated – "all negative consequences of the wrongful act" are to be remedied.[133] The diversification on valuation methods need not be recounted here: in refining

[126] *Factory at Chorzów* (n 107) 46–47. According to Marboe (n 101) 303–04: 'The investment arbitration cases involving national court and arbitral decisions show that the principle of full reparation under the *Chorzów Factory* is regularly referred to as the appropriate standard.'

[127] And they have regularly done so on the basis of the *Factory at Chorzów*, Marboe (n 101) 95.

[128] e.g. *Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award (7 February 2017) para 326; Quiborax (n 125) para 370; as well as ConocoPhillips v Venezuela, ICSID Case No 07/30, Award (8 March 2019) para 259 (referencing arguments suggesting a focus on the date of the expropriation before adding: 'The Chorzów Judgment does not support such an understanding').

[129] WM Reisman/RD Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2003) 74 BYIL 115, 135 and 148 have called this the '*Chorzów Factory's* imperative'.

[130] Not everything in the *Chorzów Factory* judgment pointed in this direction: cf *Occidental v Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment (2 November 2015) paras 282–96 (drawing on *Chorów Factory* to clarify that, in the calculation of damages, 'injury resulting to third parties should … be excluded' (para 289).

[131] *Quiborax* (n 125) paras 375–76.

[132] See the recognition of such discretion in *Rumeli v Kazakhstan*, ICSID Case No ARB/05/16, Decision on Annulment (25 March 2010) para 179(5).

[133] *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) para 151. But see the discussion in M Paparinskis, 'A Case against Crippling Compensation in International Law of State

methods for establishing the fair market value and notably in embracing the DCF method,[134] investment tribunals have 'dramatically developed'[135] the practice of damages, and asserted their right to 'select the appropriate method [of valuation], basing its decision on the circumstances of each individual case'.[136] In the maze of contemporary damages jurisprudence, '[t]he devil' (as noted by the *Tenaris* tribunal) 'alas, is in the detail'.[137] However, the emphasis, in *Chorzów Factory,* on full reparation and the discretionary use of valuation methods has enabled tribunals to present the dramatic developments as a finetuning that remained true to the PCIJ's foundational decision and to largely ignore concerns that the *Chorzów* principles had been 'imperfect[ly]' applied.[138]

C. The Impact of the Court's Pronouncements

The preceding section highlights the influence of a string of interrelated judicial statements made nearly a century ago. Formulated before the consolidation of the modern law of State responsibility, the PCIJ's *Chorzów* pronouncements have influenced the general understanding of reparation and the standards of compensation. And while the work of the ILC translated the pronouncements into a series of draft articles, it has not eclipsed the formative judgment, whose 'vitality [if anything] was energized' by the ILC's work.[139]

Chorzów Factory has radiated into many fields of international law, but nowhere have its effects been felt more clearly than in IIL. There is a quantitative side to this: as Sabahi and Guzman emphasise 'the majority of modern awards on damages involving the *Factory at Chorzów* principle have been rendered in investor State Arbitration'.[140] But more than that, no other field of international law has had such a demand for guiding statements on reparation – which is central to IIL and yet, curiously, not addressed in investment treaties.

Responsibility' (2020) 83 *Modern Law Review* 1246; M Paparinskis, 'Crippling Compensation in the International Law Commission and Investor-State Arbitration' (2021) *ICSID Review* (advance copy).

134 See the helpful account in S Ripinsky and K Williams, Damages in International Investment Law (BIICL 2008) 181–259. See also I Marboe, 'Reparation Cases: Applicable Principles in International Investment Arbitration', in Fabri and Stoppioni (n 9) 443.

135 Sabahi and Guzman (n 122) para 82.

136 *Crystallex International Corporation* v Venezuela, ICSID Case No ARB(AF)/11/2, Award (4 April 2016) para 886.

137 *Tenaris v Venezuela*, ICSID Case No ARB/11/26, Award (29 January 2016) para 521.

138 D Desierto, 'The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions' (2017) 55 Columbia J Trans'l Law 395.

139 See *BG Group Plc. v Argentina*, UNCITRAL, Final Award (24 December 2007) para 426.

140 Sabahi and Guzman (n 122) para 13.

From the preceding discussion, it is clear that the different pronouncements serve different functions. The first (describing the duty to make reparation as an 'indispensable complement of a failure to apply a convention'[141]) is today taken for granted. The third (distinguishing between compensation for lawful expropriation and damages for unlawful tribunals in their quest to delimit the scope of application of treaty-based compensation standards – a process that is not complete, but well under way. The second (emphasizing the need for full reparation) has facilitated the enormous development of the contemporary damages jurisprudence: notably, it has increased the flexibility of tribunals who today can choose between a wide range of valuation methods which are sometimes said to 'pertain to the realm of economics'[142], but in reality reflect crucial choices of decision-makers.[143] This is the most significant and most controversial legacy of the *Chorzów Factory* judgment.

V. Outlook

The World Court's influence on IIL is not easily summarised; and definitely not in the confines of one single chapter. It cuts across many aspects of the field and has varied over time. Our discussion points to a basic division between the IIL of the pre-BIT era, and the contemporary variation dominated by treaty-based arbitration. It suggests that in cases like *Anglo-Iranian Oil Co.* and *Barcelona Traction,* the World Court emphasised limits to investment protection under general international law – and that later cases such as *ELSI* and *Diallo* did not mark a radical departure.

The World Court's impact on IIL in the contemporary BIT era is of a different character. The dynamic, special regime of investment law relies on express treaty standards; it has (notably in ISDS) a powerful instrument for clarifying and developing the law; and, it envisages no formal role for the World Court. Unsurprisingly, the Court's role is most clearly felt where the special regime fails to provide express rules: this explains the vitality of the PCIJ's *Chorzów* pronouncements, which have helped fill a glaring drafting gap in modern IIAs, viz remedies. In clarifying the scope of written treaty standards, World Court pronouncements have a lesser role. Our discussion shows that, in engaging with PCIJ and ICJ jurisprudence, investment tribunals have a lot of leeway – which occasionally leads to unexpected re-

[141] *Factory at Chorzów* (n 107) 29.
[142] Sabahi and Guzman (n 122) para 42.
[143] See Marzal (n 105) generally.

interpretations of the ICJ’s caselaw. But at the same time, investment tribunals consider it advantageous to anchor their decisions in the PCIJ’s and ICJ’s caselaw. This continuing appeal reflects the World Court’s special status in the contemporary universe of dispute settlement bodies.