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PhD in: International Law and Economics

Cycle: 28th

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Date 30 January 2017

ACKNOWLEDGMENTS

I would like to thank my partner Caterina and my family for the unconditional support and for being next to me during joy and the difficult times. Thank you for the unconditional love, the respect, and for all the lessons. The distance has only brought us closer. I dedicate this dissertation to you.

I am grateful to my friends and colleagues in Florianópolis and those scattered around the world for the incredible memories.

Thanks Professor Arno Dal Ri Júnior for encouraging me to pursue this Ph.D degree. Thank you very much, Professor Manlio Frigo, my tutor during the Ph.D program, for believing in me and for all the support given since we first met in Florianópolis until today. It all started because of you. Thank you very much for the opportunity.

I am thankful to Professor Giorgio Sacerdoti, my supervisor during the DISSETTLE Research Project, for giving me the chance to contribute as a Marie Curie Fellow. Having the chance to work with you was a unique and rewarding experience. Also, thank you, Geraldo Vidigal Neto, my friend and DISSETTLE colleague. I have always appreciated your advices.

I am particularly grateful to some of my professors at GW Law School. Thank you, Judge Thomas Buergenthal for your incredible generosity and support. I will carry the title "Thomas Buergenthal Scholar" with pride and I will work to preserve your legacy. Thank you, Dean Susan Karamanian, for believing in me, your commitment, and your inspiring professionalism. Thank you very much, Professor Sean Murphy, for giving me the chance to be your research assistant. It was a matter of pride and honour to work for you.

Thank you very much, Judge Cançado Trindade, for having selected me as your law clerk at the ICJ. Thank you for the sensibility and for showing me the passion behind your work. Your lessons were not only for my career, but also for my life. Muito obrigado. Also, thank you, Judge Bhandari, for allowing me to work with you and for the experiences you have shared with me. You are an incredible human being and it was an honour to have clerked for you.

A special thanks to Hugo Siblesz and Brooks Daly. Thank you for giving me the opportunity to join the PCA and allow me to grow. Thank you very much for the trust and the support. In particular, thank you Brooks for giving continuous inspiration, motivation, and guidance.

The author will be forever grateful to all of you.

Mauritius, 30 November 2016.

"In the end, it may well be that the never-ending pursuit of efficiency turns out to be, socially speaking, less grandiose and appealing than the never-ending quest for justice, but it will be just as unavoidable. No more and no less."[1]

"What is needed is not prescriptions for an ideal world, but practical proposals."[2]

[1] Héctor Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart, 2003), p. 237.
[2] J.G. Merrils, *International Dispute Settlement*, 4th ed. (CUP, 2005), p. 328.

DISCLAIMER

The views expressed in this dissertation are solely those of the author in his private capacity and do not in any way represent the views of any entity with which the author is or has been affiliated.

ABSTRACT

This dissertation addresses the impact of the separation of the merits and quantum phases, or simply quantum bifurcation, on the procedural efficiency of contemporary interstate dispute settlement proceedings. Procedural efficiency refers to the rationalization of dispute settlement proceedings in terms of time and costs. It is a principle that supports the effective settlement of international disputes, especially in cases in which a party seeks reparation in the form of monetary payment. Concerns with efficiency of the proceedings are on the rise in international practice. Contemporary arbitration rules often impose an obligation on the arbitrators and the parties to conduct the proceedings efficiently. International courts have relied on efficiency considerations to address procedural issues, usually through the application of the principle of sound administration of justice. Quantum bifurcation may cause a considerable impact on procedural efficiency. During the early 20th Century, interstate disputes have consistently addressed and decided claims for compensation during a single phase of the proceedings. However, since the case *Factory at Chorzów,* international courts and tribunals have changed that approach. International adjudicators have separated the analysis of the issues of merits from those of quantum and have postponed the assessment and calculation of damages to a later phase of the proceedings following a decision on liability. In contemporary interstate disputes, parties and adjudicators have ignored the impact of quantum bifurcation on procedural efficiency. In the context of investor-State arbitration, tribunals and commentators have addressed the impact of bifurcation on the efficiency of proceedings extensively. Scholars have challenged the assumption that bifurcation always improves efficiency. Arbitration practitioners have concluded that the issue of whether or not to bifurcate shall be discussed at an early stage of the proceedings, be decided on a case-by-case basis, and consider the impact on procedural efficiency. The same analysis can be applied to interstate disputes. However, one must take into account the particularities of interstate disputes, such as the political aspects surrounding the dispute and the need for ceremonial-tainted proceedings. These elements are inherent to interstate dispute settlement and may affect the parties' procedural strategies and choices. Hence, the analysis of whether or not to bifurcate in interstate adjudication shall include, if possible at an early stage of the proceedings, the assessment of the reasonableness of the request to bifurcate, the review of the applicable law on calculation of damages and the standard of evidence to be applied, and a *prima facie* analysis of the evidence to be examined to calculate damages and the *fumus boni iuris* of the claimant's case. As default, the parties and adjudicators should be inclined to opt for a single phase proceeding. Quantum bifurcation, on the other hand, may be determined in cases in which the evidence to be examined is complex and voluminous, the parties request a precise assessment of the damages, the tribunal appoints experts to assist with the calculation of damages, or a disputing party has failed to present its case during the regular course of the proceedings.

Keywords: interstate dispute settlement, procedural efficiency, bifurcation, damages and compensation.

LIST OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ARSIWA Commentary	Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries
CPR Protocol	International Institute for Conflict Prevention & Resolution's protocol on determination of damages in international arbitration
CUP	Cambridge University Press
DSB	WTO's Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EECC	Eritrea Ethiopia Claims Commission
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-United States Claims Tribunal
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
WTO	World Trade Organization

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1. INTRODUCTION

Courts and tribunals are universally expected to be efficient and effective.[3] Their main objective is to settle disputes by delivering a fair and binding decision taken on the basis of the law applicable. However, the ability of a court to deliver justice may be undermined if it does not act promptly and provide a remedy in an expedite manner. Thus, it is generally in the interest of the injured party, but also of the whole adjudicative system, that the court and tribunal act in an efficient manner.

Efficiency is a more significant issue in cases in which an international court or tribunal is asked to address a claim of compensation for damages. Claim for compensation is perhaps the most commonly sought form of reparation in international practice.[4] In such disputes, the claimant party expects to be awarded an amount adequate to repair the damages incurred or injuries suffered. However, any dispute settlement mechanism has its own costs, including, *mutatis mutandis*, the so-called "administrative costs",[5] which are directly proportional to the time the award or judgment take to be rendered. Thus, it is assumed that the longer the proceedings, the higher the costs incurred by the disputing parties.[6]

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[3] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 8; Merrils, *International Dispute Settlement*, p. 328.

[4] International Law Commission, *Yearbook of the International Law Commission*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.* U.N. vol. II, Part Two 2001, (2001) ("ARSIWA Commentary"), p. 99.

[5] Robert Cooter and Thomas Ulen, *Law & Economics*, 6th ed. (Boston: Pearson, 2012), p. 385. The commentators define administrative costs as "the sum of the costs to everyone involved in passing through the stages of a legal dispute, such as the costs of filing a legal claim, exchanging information with the other party, bargaining in an attempt to settle, litigating, and appealing."

[6] This assumption is based on the fact that lawyers are usually paid on the basis of hours of work. As noted by the International Chamber of Commerce, "[p]arty costs (including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration) make up the bulk (83% on average) of the overall costs of the proceedings." See ICC Commission Report, *Decisions on Costs in International Arbitration*, Issue 2, 2015, p. 3, available at: http://www.iccwbo.org/Data/Policies/2015/Decisions-on-Costs-in-International-Arbitration/, accessed on 28 November 2016. Similarly, arbitrators and institutions providing secretarial support are usually paid by each

As assumed by two commentators, "the economic objective of procedural law is to minimize the sum of administrative costs […]".[7] Accordingly, international courts and tribunals shall act and conduct the proceedings in a manner to promote the procedural efficiency of courts and tribunals and thus safeguard the effectiveness of the relief sought. International courts and tribunals have been paying attention to the issue. Section 2 of this dissertation seeks to identify the state of efficiency considerations in international adjudication. For that purpose, Section 2 reviews whether treaties establishing the contemporary international adjudicative bodies, statutes and procedural rules, provide references to efficiency consideration and, if yes, in which context. Moreover, Section 2 seeks to identify to which extent international adjudicators rely on efficiency considerations and in which circumstances they apply such considerations when addressing procedural issues and making decisions.

Furthermore, this study reviews the procedural aspects of interstate cases in which contemporary international courts and tribunals have awarded compensation for damages.[8] Although compensation is said to be the most commonly sought form of reparation,[9] international courts and tribunals have only awarded compensation in few interstate disputes.[10] In those disputes, international adjudicators have adopted different approaches to

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hour of work. See for example the PCA's Schedule of Fees and Costs available at: https://pca-cpa.org/fees-and-costs/, accessed on 28 November 2016.

[7] Cooter and Ulen, *Law & Economics*, p. 385.

[8] For the purposes of this academic work, "contemporary international courts and tribunals" refer to the interstate arbitration tribunals established under the auspices of the PCA, the PCIJ, the ICJ, ECtHR, the IACtHR, the IUSCT, the ITLOS, investor-State arbitration tribunals, and the Dispute Settlement Mechanism of the WTO. The current dissertation does not address efficiency of international criminal tribunals, such as the International Criminal Court.

[9] See fn. 4.

[10] The ICJ has only awarded compensation in two cases since its creation in 1946, *i.e.* the cases *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).* The number of cases in which the ICJ has awarded compensation is minimal when compared to the number of cases brought to the World Court. From 22 May 1947 to 16 September 2016, 164 cases were entered in the ICJ's General List. See http://www.icj-cij.org/docket/index.php?p1=3, accessed on 16 September 2016. Similarly, the ITLOS has received 25

assess damages and address claims for compensation which may considerably impact the overall efficiency of the proceedings.

During the first half of the 20th Century, international adjudicators have addressed issues of merits and those related to calculation of damages in a single phase of the proceedings. This was the case in historic interstate arbitrations under the auspices of the Permanent Court of Arbitration ("PCA") and in the dispute *S.S. Wimbledon* before the Permanent Court of International Justice ("PCIJ"). However, in the case *Factory at Chorzów*, the PCIJ adopted a different approach; it postponed the assessment of damages to a subsequent phase of the proceedings following the judgment on the merits. In other words, the PCIJ bifurcated the merits and quantum phases. Such an approach was followed by the PCIJ's successor, the International Court of Justice ("ICJ"), in its first case *Corfu Channel.* Section 0 reviews the procedural aspects of the mentioned cases before the PCA, PCIJ and ICJ conducted during the first half of the 20th Century after providing preliminary considerations concerning the obligation to repair under international law. Moreover, Section 0 analyses the motivations behind the decision to postpone the analysis of quantum issues in *Factory at Chorzów*.

In more recent interstate disputes, *i.e.* initiated after 1950, international courts and tribunals have continued to adopt different approaches concerning the question of whether or not to bifurcate the merits and quantum proceedings. Section 0 reviews the procedural aspects of interstate arbitrations since 1950, including interstate arbitration proceedings conducted in

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applications to date and has awarded compensation in only two cases, *i.e. The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)* and *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*. See ITLOS' list of cases at https://www.itlos.org/cases/list-of-cases/, accessed on 27 November 2016. The ECtHR has received 20 interstate applications to date and only in the case *Cyprus v Turkey (Just Satisfaction)* the ECtHR has determined the respondent State to pay monies under Article 41 (just satisfaction) of ECHR. See ECtHR's list of interstate applications at http://www.echr.coe.int/documents/interstates_applications_eng.pdf, accessed on 27 November 2016. See also fn. 519 for the list of interstate applications to the ECtHR.

the context of the Eritrea Ethiopia Claims Commission ("EECC") and the Iran-United States Claims Tribunal ("IUSCT"). In addition, it is reviewed the cases in which international courts have awarded monies as a form of reparation, namely the ICJ case *Diallo*, in which the World Court followed the approach adopted in *Corfu Channel*; the cases *M/V Saiga (No. 2)* and the *M/V Virginia G* before the International Tribunal for the Law of the Sea ("ITLOS"); and the interstate case before the European Court of Human Rights ("ECtHR"), *Cyprus v. Turkey*. At the end of Section 0, it is provided an overview on pending disputes currently addressing and assessing damages before arbitral tribunal under the aegis of the PCA, the ICJ, and the ECtHR. It is noted that the parties and adjudicators have favoured the separation of the merits and quantum phases.

The bifurcation of proceedings can have an impact on the efficiency of the proceedings. Investor-State arbitration tribunals and commentators on international arbitration have addressed the merits and demerits of bifurcating proceedings, including the question of whether bifurcation improves efficiency and, if yes, in which circumstances. Section 5 reviews decisions, scholarly writings and empirical studies addressing the merits and demerits of bifurcation in investor-State arbitrations and their practice on the issue. Furthermore, Section 5 addresses the particularities of interstate adjudication – which are not usually present in investor-State arbitration disputes – that may influence the parties' procedural choices and efficiency assessment, such as the political sensitiveness of interstate disputes and the need for ceremonial-tainted proceedings.

Finally, Section 6 provides conclusions on the impact of bifurcating the merits and quantum proceedings on the procedural efficiency of interstate disputes. Recommendations are finally provided to litigant parties and international adjudicators to assess whether or not to bifurcate the proceedings and to identify the ideal circumstances.

2. PROCEDURAL EFFICIENCY IN INTERNATIONAL ADJUDICATION

The drafters of the statutes and rules of international tribunals have acknowledged, in different levels, efficiency as standard to be followed by adjudicators, institutions, and the parties throughout the proceedings. In addition, international adjudicators have been relying on economic and efficiency considerations when deciding legal issues, especially those of procedural nature.

2.1 PRELIMINARY CONSIDERATIONS

The concept of efficiency falls within the spectrum of economics and even under this spectrum, it may take many forms. In general, efficiency constitutes the parameter that assesses the proper allocation of limited resources.[11] In other words, efficiency translates the best possible manner of performing or functioning with the least amount of time and costs.

Law and economics scholars have relied on efficiency to assess the performance of domestic courts.[12] As explained by a commentator, "[c]ourts are social institutions that use

[11] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 27. For an overview of the various concepts of efficiency used to analyse legal issues, see Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization', *Hofstra Law Review* 8, no. 3 (1980), http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/3. The concepts of efficiency addressed include a review of *inter alia* the notions of "productive efficiency", "wealth maximisation", "pareto efficiency", and others.

[12] For a comparative analysis of domestic jurisdictions, see W. Wedekind, ed., *Justice and Efficiency: General Reports and Discussions* (Kluwer Law and Taxation, 1989). Fix-Fierro refers to studies conducted in Western jurisdictions, namely Chile, Brazil, England and Wales, Italy, Spain, United States, and others. See Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, pp. 1-2, citing Antonio J. Amadeo Murga, 'La Justicia Apelativa En Puerto Rico: Una Crise Crónica', *Revista Del Colegio de Abogados de Puerto Rico* 54, no. 2 (1993): 1–86; Maria Rosaria Ferrarese, *L'instituzione Difficile. La Magistratura Tra Professione E Sistema Politico* (Napoli: Edizione Scientifiche Italiane, 1984); Vittorio Denti, 'Riflessioni Sulla Crisi Della Giustizia Civile', *Sociologia Del Diritto* XIII, no. 2–3 (1986): 59–79; Irving R. Kaufman, 'Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts', *Fordham Law Review* LIX, no. 1 (1990): 1–38; Consejo General del Poder Judicial, 'Libro Blanco de La Justicia' (Madrid: CGPJ, 1997); Patrice Garant, 'La Crise de La Justice: Épidermique Ou Profonde', *Windsor Yearbook of Access to Justice* 14 (1994): 255–68; Carlos Peña Gonzalez, 'Los Abogados Y La Administración de Justicia: Resultados de Una Encuesta Sobre Funcionamento Del Poder Judicial', in *Proposiciones Para La Reforma Judicial*, ed. Eugenio Valenzuela S. (Santiago de Chile: Centros de Estudios Públicos, 1991), 367–95; José Eduardo Faria, 'A Crise No Poder Judiciário No Brasil', *Justiça E Democracia. Revista Semestral de*

scarce social resources. They produce a service called 'adjudication'". As such, courts are subject to efficiency and economics analyses.[13]

Courts play an organizational role in the society as they enable the enforcement of rights. From an economic perspective, courts are institutions that help reduce "transactions costs",[14] as third-party enforcement is costly.[15] Courts may as well generate transaction costs from the costs associated with the courts' operation and the judicial process.[16] Thus, courts play an economic role, especially when they adjudicate on economic matters and controversies with direct economic consequences.[17]

Following the rationale that courts are social institutions subject to efficiency analysis, Buscaglia and Dakolias elaborated on the term "court efficiency", which translate into "how well resources are used in generating court output".[18] As adjudication process is costly and its resources are limited, it is of the interest of the disputing parties and stakeholders to promote the efficiency of a given court. Disputing parties evaluate whether resorting to courts are the best alternative in terms of time and costs, and whether there is a less costly solution, which includes settlement and also the abandonment of the claim.[19]

Informações E Debates 1 (1996): 18–64; Paul Michalik, 'Justice in Crisis: England and Wales', in *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, ed. A.A.S. Zuckerman (OUP, 1999), 117–65.

[13] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 237.

[14] Ibid., p. 18, which provides the definition of "transactions costs" as "the costs 'of measuring the valuable attributes of what is being exchanged and the costs of protecting rights and policing and enforcing agreements". On "transactions costs", see also Cooter and Ulen, *Law & Economics*, p. 88-ss; and William J. Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice', *University of Pennsylvania Journal of International Economic Law* 17, no. 4 (1996): pp. 995–1068.

[15] Douglas C. North, *Institutions, Institutional Change and Economic Performance* (CUP, 1990), p. 58.

[16] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 25, citing North, *Institutions, Institutional Change and Economic Performance*, p. 32.

[17] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 18.

[18] Edgardo Buscaglia and Maria Dakolias, 'Judicial Reform in Latin America Courts: The Experience in Argentina and Ecuador', *World Bank Technical Paper 350*, 1996, pp. 1 and 7.

[19] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 25.

A commentator explained that, from an economic point of view, a court will be an efficient institution "if the gains from facilitating exchange relationships are not offset by the costs associated with the operation of the judicial process as a whole".[20] An inefficient court may cause various forms of social problems, since it may generate significant costs that obstruct access to justice and create sociological implications.[21] As noted by the same commentator, "[…] policymakers around the world seem to agree more and more that […] judicial reform, and consequently court efficiency, are increasingly important".[22] He further noted that the debates concerning economic rationale have become intrinsic to legal and judicial systems,[23] including the operation of the judicial process and "the institutional role performed by adjudication in society to the organisational context of judicial decisions". The commentator concluded that efficiency has become "an inseparable part" of the expectations to the legal system.[24]

In the same direction, international law scholars and practitioners have warned for the often time-consuming and costly proceedings before international courts.[25] Merrills has

[20] Id.

[21] Ibid., pp. 6-9. Fix-Fierro explained that economic growth may be affected due to: (i) the loss of property-right value due to the absence of predicable enforcement of rules; (ii) the additional transactions costs of contracting in an environment with a dysfunctional adjudicative system; and (iii) corruption, citing Buscaglia and Dakolias, 'Judicial Reform in Latin America Courts: The Experience in Argentina and Ecuador', p. 1.

[22] Ibid., p. 19.

[23] In the context of dispute settlement, adjudicators often rely on efficiency considerations to address and decide legal matters. As famously stated by Posner, this is the case of common law courts, which seek economic efficiency in their decisions. See Richard A. Posner, *Economic Analysis of Law*, 4th ed., 1992, pp. 251-261. Benvenisti argued that efficiency, in the context of efficient allocation of resources among States, "has been all along the driving force behind the development of international law in general, and customary international law in particular." See Eyal Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency', in *The Impact of International Law on International Cooperation: Theoretical Perspectives*, ed. Eyal Benvenisti and Moshe Hirsch (CUP, 2004), 85–116, p. 115. Trachtman noted that adjudicators often rely on efficiency considerations to interpret treaty provisions. See Joel P. Trachtman, *The Economic Structure of International Law* (Harvard University Press, 2008), pp. 146-149. Trachtman also addresses efficiency in relation to jurisdiction, treaty interpretation and performance of international organizations. See Ibid.

[24] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 235.

[25] Elihu Lauterpacht has shown his concerns over the time taken by the ICJ to dispose of cases and the inadequacy of its own funding. See Elihu Lauterpacht, 'Principles of Procedure in International Litigation', in *Recueil Des Cours*, vol. 345 (Brill, 2011), 387–530, p. 454.

noted that international litigation would be more attractive to States if costs could be reduced.[26] Other studies have addressed ways to reduce the overall time of the proceedings.[27]

The efficiency of courts may be improved by changing their organizational structure.[28] For example, a court may reduce the scope of their jurisdiction; decrease the amount of pleadings and appeals, if applicable; and apply flexible legal standards. Such reforms demand the change of applicable laws and therefore may require the exhaustion of a given legislative process. Changing the structure of international courts and tribunals is cumbersome route since these institutions are usually established by multilateral treaties and thus the amendment of such instruments is subject to an often burdensome procedure.[29] Accordingly, it is possible to achieve greater efficiency by reviewing the procedures of the adjudicative process adopted by courts and search for means to improve its overall efficiency.

[26] Merrils, *International Dispute Settlement*, p. 328. The commentator welcomed the initiatives of international bodies to establish funds to support and provide resources to States that lack legal expertise or money. He referred to *inter alia* the creation of UN Trust Fund in 1989 to assist States in settling their disputes through the ICJ and the PCA Financial Assistance Fund. Concerning the UN Trust Fund, see 28 ILM, 1989, p. 1584. For a reaction to the creation of Trust Fund, see T. Bien-Aime, 'A Pathway to The Hague and beyond: The United Nations Trust Fund Proposal', *NYUJ Int. L. & Politics* 22 (1991): 671. Although the funds help States to minimize the costs they incur with the litigation, international courts and tribunal may also work on their efficiency in order to reduce costs to all parties. Similarly, the PCA has established its Financial Assistance Fund "which aims at helping developing countries meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA." See https://pca-cpa.org/en/about/structure/faf/, accessed on 25 30 November 2016.

[27] See for example D. W. Bowett et al., 'The International Court of Justice: Efficiency of Procedures and Working Methods', *ICLQ Supplement* 45/1 (January 1996).

[28] International organizations and their bodies have also given concern to its efficient functioning. See United Nations Security Council, S/2006/507, dated 19 July 2006 and S/2010/507, dated 26 July 2010. In both documents, the introductory Note by the President of the Security Council makes direct reference to the Security Council's efforts to enhance the efficiency and transparency of its work. See also the case of ICSID. The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides that "simplicity and economy consistent with the efficient discharge of the function of the Centre" characterize ICSID's structure. See ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, IBRD, 18 March 1965, Section IV, para. 18.

[29] Unless otherwise provided, the amendment of multilateral treaties shall be governed by Article 40 of the Vienna Convention on the Law of the Treaties. See Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980.

An important element of procedural law is to reduce administrative costs[30] and thus improve efficiency.

As simply defined by Lauterpacht, a procedure "tells us how things are done".[31] With greater depth, Fix-Fierro defined procedure as "a structured set of acts carried out by persons performing special roles (plaintiff, defendant, judge, and attorney) with the purpose of producing a binding decision that will dispose of a legal controversy".[32] Such procedural acts are regulated by laws and legal rules enacted by competent institutions.

A distinction may be drawn between organisational procedure and adjudication procedure. Organisational procedure relates to the tasks required to support, carry out, and implement the organisation's objective. In case of organisations such as courts and tribunals, their main objective is to settle disputes through a binding decision to be rendered on the basis of the applicable law. However, international courts and tribunals may also have other objectives beyond international dispute settlement, including the development of international law through its case-law and the promotion of world peace generally. Organisational procedure thus concerns the structure and the functioning of the international court or tribunal which are provided by the statutes or legal instrument agreed upon by the parties to a treaty or convention, and not necessarily to the disputing parties or adjudicators directly.

Adjudication procedure concerns the tasks carried out by specific individuals (claimants, respondents, registries or secretariats, and the adjudicators) with the purpose of organising the litigation process based on the applicable procedural rules. This kind of procedure concerns the parties' submissions, the organization of hearings, and the format of evidence to be admitted. Adjudication procedures are more flexible than organisational

[30] See fn. 7.
[31] Lauterpacht, 'Principles of Procedure in International Litigation', p. 403.
[32] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 185.

procedures. In addition, rules may grant substantial discretionary power to the tribunal to modify the proceedings according to the needs of the case.[33]

Kolb has adopted a similar distinction when he defined the term "procedure". In his view, the term covers,

> [i]n its widest and generic sense, […] (i) all devices devoted to the enforcement of the rules of substantive law and (ii) the rules determining the organisation, the competence and the functioning of the organs existing to achieve that goal. In the context of judicial proceedings, the term "procedure" *lato sensu* covers all rules relating to international judicial action. These include the rules governing the composition of the court, questions of competence and admissibility, the objective and subjective conditions for bringing a claim, as well as the modalities according to which the case will be dealt with.
>
> In its narrowest sense, the term "judicial procedure" relates only to that last element. It thus comprises all rules and principles regulating the manner in which the proceedings (le procès) are conducted. Procedure in this narrow sense concerns the way by which the parties' requests are dealt with by the court, from the institution of proceedings until the moment of the final decision (and including subsequent requests for the interpretation or revision of judgments, etc.).[34]

Organisational procedure thus relates to the structure of the international court or tribunal, which was agreed upon by its constituents. Therefore, they are less susceptible to changes and improvements than adjudication procedure. The same legal texts agreed by the member states also provide provisions concerning adjudication procedure. However, these legal texts usually grant discretionary power to the courts and tribunals with regard to many of the adjudication procedures, such as the procedure to appoint an expert to assist with evidence. Since adjudication procedures are flexible and they have varied in different cases, their impact on the final outcome of a dispute can be better assessed. This study thus focuses on adjudication procedure or "judicial procedure", as pointed out by Kolb.[35] Yet, since

[33] See Section 2.2 below.
[34] Robert Kolb, 'General Principles of Procedural Law', in *The Statute of the International Court of Justice: A Commentary*, ed. Andreas Zimmermann, Karin Oellers-Frahm, and Christian Tomuschat (OUP, 2006), 793, pp. 795-796.
[35] Ibid., pp. 795-796.

organisational procedure generally concern structural aspects of how litigation is conducted by international courts and tribunals, attention will also be paid to this kind of procedure but in a complementary manner.

The assumption is that dispute settlement proceedings should be as simpler, faster and cheaper as possible.[36] However, there are limitations, since a "[p]rocedure can never become speedy enough because, as autonomous social systems, they create their own particular social time and rhythm."[37] In addition, adjudication procedure is limited by the law and legal rules applicable to the proceedings, which may require the observance of a pre-established timeline.

The pursuit for procedural efficiency is also justified due to the emerging relevance of procedural issues in the contemporary international dispute settlement mechanisms. The multiplication of international courts and tribunals has brought procedural questions to the spotlight. Since more than one tribunal may have jurisdiction to address a particular case,[38] disputing parties will consider the costs and the time to settle the dispute (i.e., the tribunal's efficiency) in order to choose the most attractive jurisdiction. Therefore, international courts and tribunals have also to improve its efficiency if they wish to remain attractive and relevant in the eyes of potential litigants.

Efficiency considerations applied to legal issues often raise issues concerning legitimacy and whether justice and fairness may be affected by the reduction of costs and time

[36] A.A.S. Zuckerman, 'A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice', *Journal of Law and Society* 22, no. 2 (1995): 155–88, p. 158.
[37] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 236.
[38] On the proliferation of international tribunals and its consequences, see Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Grotius Publications, 1991), Chapter 2; Gilbert Guillaume, 'The Future of International Judicial Institutions' 44, no. 4 (1995): 848–62, p. 848; Hugo Caminos, 'The Creation of Specialised Courts: The Case of the International Tribunal for the Law of the Sea', in *Liber Amicorum Judge Shigeru Oda*, ed. Nisuke Ando, Edward McWhinney, and Rüdiger Wolfrum (Kluwer, 2002), 569–74, pp. 569-667; and Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003).

of legal proceedings. The debate regarding efficiency versus justice and fairness is not new.[39] While justice and fairness remain the priority of any dispute settlement mechanism, an inefficient court may undermine its overall objective, *i.e.* to settle the dispute in an effective manner.

The question that often remains is what is the proper balance between efficiency and fairness?[40] As pointed out by a commentator, courts are expected to settle disputes in a "just, speedy, and inexpensive manner."[41] However, there are difficulties whenever one tries to define terms such as "dispute settlement", "just", "speedy", and "inexpensive" with precision:[42]

> "speediness" may come at the expense of "justice" (for example, if speediness benefits one party and disadvantages the other); unlimited access to the courts may result in considerable backlogs and delay; "justice" may demand the possibility of a slow, costly appeal process; while a court proceeding, even if it is regarded as just, speedy and inexpensive, may not be able to "settle" the underlying dispute at all.[43]

Scholars have addressed the issue of balancing fairness and efficiency by arguing that efficiency is part of social justice[44] and an "efficient breach" may translate into the best outcome, sometimes at expanse of a legal right.[45] This dissertation does intend to resolve the conflict between fairness and efficiency. However, it acknowledges that the primary goal of

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[39] Wedekind, *Justice and Efficiency: General Reports and Discussions*. In the context of reparations to victims of international conflicts, the UNCC – which processed numerous claims from victims of the Iraqi invasion in Kuwait in the early 1990s and rendered millions of compensation in a short span of time – was criticized for its "rough justice" approach. See David D. Caron and Brian Morris, 'The UN Compensation Commission: Practical Justice, Not Retribution', *European Journal of International Law* 13, no. 1 (2002): 183–99; and Francis E. McGovern, 'Dispute System Design: The United Nations Compensation Commission', *Harv. Negot. L. Rev.* 14 (2009): 171–93.

[40] In the context of arbitration, see Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration', *Groningen Journal of International Law* 3, no. 1 (2015): 110–24; William W. Park, 'Procedural Evolution in Business Arbitration: Three Studies in Change', in *Arbitration of International Business Disputes* (OUP, 2006), 4–67, pp. 48-57.

[41] Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, p. 8.

[42] Ibid.

[43] Ibid.

[44] See Guido Calabresi, 'An Exchange: About Law and Economics: A Letter to Ronald Dworkin', *Hofstra Law Review* 8, no. 3 (1980): 553–62; Coleman, 'Efficiency, Utility, and Wealth Maximization'.

[45] On "efficient breach", see Posner, *Economic Analysis of Law*.

international dispute settlement is to achieve a fair resolution of disputes taken on the basis of law. Still, in order to achieve a successful outcome, the dispute settlement mechanism shall pay consideration to an efficient procedure.

2.2 STATUTORY REFERENCES TO EFFICIENCY

As noted by commentators, "a provision saying the arbitration shall be conducted efficiently might give an arbitrator the implied authority" to decide many aspects of a dispute settlement proceeding, including questions of whether or not to bifurcate proceedings or the limitation of the scope of document production.[46] Efficiency considerations may be foreseen in legal texts establishing international courts and tribunals, and also in their statutes and rules.[47] In the context of international arbitration, institutional arbitration rules may also include efficiency as a reference to be followed by the tribunals and disputing parties.

Most of the treaties establishing the contemporary international courts, and also their statutes and rules, do not generally refer to efficiency considerations.[48] The few examples that

[46] Mark W. Friedman; Filip De Ly; Luca G. Radicati di Brozolo. International Law Association's Committee on International Commercial Arbitration Report for the Biennial Conference in Washington D.C., April 2014, p. 15, available at http://www.ila-hq.org/download.cfm/docid/C3C11769-36E2-4E93-8FDA357AA1DABB2F, accessed on 17 May 2016.

[47] As noted by Elihu Lauterpacht, "principles of international procedural law can be found in international conventions (such as the statutes, rules of procedure, and other constitutive instruments of international courts and tribunals); rules developed in the customary practice of international tribunals; general principles of law; and, as a subsidiary means for the determination of procedural rules, judicial decisions and the writings of high qualified publicists." See Lauterpacht, 'Principles of Procedure in International Litigation', pp. 405-406. For an overview over the general principles of law in international adjudication, see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius, 1987); Gaetano Morelli, *Nuovi Studi Sul Processo Internazionale* (Milano: Giuffrè, 1972).

[48] Convention for the Establishment of a Central American Court of Justice', 2 AJIL, 1 Special Suppl (1908) 231; Covenant of the League of Nations, 29 April 1919, [1919] UKTS 4 (Cmd. 153); Permanent Court of International Justice, Series D. No. 1, Statute of the Court, Rules of Court (as amended on July 31st, 1926); Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945; Statute of the International Court of Justice (26 June 1945) 3 Bevans 1179; 59 Stat 1055; 33 UNTS No 993, entered into force 24 October 1945; Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222, 312 ETS 5, entered into force 3 September 1953; International Court of Justice, Rules of Court, adopted 14 April 1978, and amendments (available on http://www.icj-cij.org, visited 3 February 2016); American Convention on Human Rights (22 November 1969) 1144 UNTS 123, entered into force 18 July 1978; *Estatuto de La Corte Centroamericana de Justicia*, signed 10

do refer to efficiency adopt different or more limited terms, as in the case of the dispute settlement mechanism of the World Trade Organization ("WTO"). The Dispute Settlement Understanding of the WTO ("DSU"), while it does not refer to efficiency, provides in its Article 3.3 for "the prompt settlement of situations".[49]

The ECtHR has adopted practice directions which aim the improvement of its efficiency, as expressly stated in paragraph 16 of the ECtHR Rules of the Court Practice Directions of 2016. Such paragraph provides that, in case concerning individual applications under Article 34 of the European Convention of Human Rights ("ECHR"), the ECtHR may give directions "to facilitate the effective and speedy processing of applications".[50]

Two newer international legal instruments expressly refer to efficiency in their framework: (i) the Protocol to the African Charter on Human and Peoples' Rights on the

December 1992; Statute of the International Tribunal for the Law of the Sea (Annex IV of UN Convention on the Law of the Sea adopted 10 December 1982) 1833 UNTS 3, entered into force 16 November 1994; *Convenio de los Estatutos de la Corte Centroamericana de Justicia Estatutos de la Corte Centroamericana de Justicia*, certified in Managua on 16 December 1994; Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401, entered into force 1 January 1995; Olivos Protocol for the Solution of Controversies in the Mercosur, 18 February 2002, 2251 UNTS 244; International Tribunal for the Law of the Sea, Rules of the Tribunal, 17 March 2009 (available on https://www.itlos.org, accessed on 3 February 2016); Rules of Procedure of the Inter-American Court of Human Rights, approved 28 November 2009; European Convention on Human Rights, Rules of Court, 1 June 2015 (available on http://www.echr.coe.int, accessed on 3 February 2016).

[49] Article 3.3 of the DSU reads as follows: "3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401, entered into force 1 January 1995.

[50] ECtHR Practice Directions of 1 January 2016. Practice direction issued by the President of the ECtHR in accordance with Rule 32 of the Rules of ECtHR on 1 November 2003 and amended on 22 September 2008, 24 June 2009, 6 November 2013 and 5 October 2015. This practice direction supplements Rules 45 and 47, available at: http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf Accessed on 9 April 2016. Concerns with efficiency are also present in other European courts like the European Court of Justice and the European Free Trade Association (EFTA) Court, which modified their statutes to among other things promote efficiency. See Richard Plender, 'Procedure in the European Courts: Comparisons and Proposals', in *Recueil Des Cours*, vol. 267, 1997, 9–343, p. 337.

Establishment of the African Court on Human and Peoples' Rights;[51] and (ii) the Rome Statute of the International Criminal Court.[52]

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights provides a reference to efficiency in its article 26(1). Under that provision, States are bound to assist the African Court with any hearing of submission and enquiry "for the efficient handling of the case".[53] The Rome Statute, on the other hand, provides in its Article 112 that, one of the duties of the Assembly of State Parties is "to enhance [the International Criminal Court]'s efficiency and economy."[54]

In the context of procedural rules in arbitration, the references to efficiency are widespread, with the exception of older instruments like: (i) the International Law Commission ("ILC")'s Model Rules on Arbitral Procedure;[55] (ii) the founding legal texts of the Iran-U.S. Claims Tribunal and its rules of procedure;[56] (iii) the International Centre for Settlement of Investment Disputes ("ICSID") Convention;[57] and (iv) the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL") of 1976 ("1976

[51] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).
[52] Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF 183/9, entered into force 1 July 2002.
[53] Article 26(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights reads as follows: "1. The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case." See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).
[54] Other references to efficiency are provided in the Rome Statute. Article 39(2)(c) and (4), which provide specific procedures than can be adopted in order to safeguard "the efficient management of the [International Criminal Court]" in case its workload so requires. Article 56(1)(b) provides measures that can be adopted during a particular investigation proceeding "to ensure the efficiency and integrity of the proceedings". See fn. 52.
[55] Model Rules on Arbitral Procedure with a general commentary. *Yearbook of the International Law Commission*, 1958, vol. II.
[56] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 ILM 230; Iran-US Claims Tribunal Rules of Procedure, 1 Ir-USCTR 57.
[57] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966.

UNCITRAL Rules").[58] Although the 1976 UNCITRAL Rules do not expressly promote efficiency of arbitral proceedings, the drafters of the UNCITRAL Rules of 2010 ("2010 UNCITRAL Rules")[59] included a provision providing that the proceedings shall be conducted in an efficient manner. The United Nations General Assembly ("UNGA")'s Resolution No. A/RES/65/22, which adopted the 2010 UNCITRAL Rules, trusted the revised rules to "significantly enhance the efficiency of arbitration" conducted under the UNCITRAL Rules.[60] Accordingly, the UNGA noted that:

> the preparation of the [2010 UNCITRAL Rules] was the subject of due deliberation and extensive consultations with Governments and interested circles and that the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes […].[61]

Article 17(1) of the 2010 UNCITRAL Rules embodies the most significant reference to the need of procedural efficiency as it confirms that arbitral tribunals have discretion to conduct the proceedings. Article 17(1) specifically states that, in exercising its discretion, the arbitral tribunal is bound "to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."[62] As pointed by two commentators, the duty to act efficiently

> may serve as a useful reminder that the parties have a right – in addition to the right to equal treatment and an opportunity to present their cases – to an arbitral process that is conducted expeditiously, cost-effectively, fairly and efficiently.[63]

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[58] United Nations Commission on International Trade Law Rules Arbitration Rules, UN Doc A/31/98; 31st Session Supp No 17, UN General Assembly, 1976.
[59] United Nations Commission on International Trade Law Rules Arbitration Rules (revised), UN Doc A/65/465; 53rd session, UN General Assembly 65/22, entered into force 15 August 2010.
[60] UN Doc A/65/465; 53rd session, UN General Assembly 65/22.
[61] Ibid.
[62] United Nations Commission on International Trade Law Rules Arbitration Rules (revised), UN Doc A/65/465; 53rd session, UN General Assembly 65/22, entered into force 15 August 2010.
[63] David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed. (OUP, 2013), p. 34, referring to UNCITRAL, 40th Session, UN Doc A/CN.9/614, n 5, at 17, para. 76.

The first part of article 17(1) of the 2010 UNCITRAL Rules[64] reflects article 15(1) of the 1976 UNCITRAL Rules.[65] The second part of article 17(1) of the 2010 UNCITRAL Rules was added, according to Daly et al., to make the duty of efficiency explicit.[66] The PCA's Arbitration Rules of 2012, which is based on the 2010 UNCITRAL Rules,[67] also provides a provision imposing a duty on the arbitral tribunal to act efficiently.[68]

At least two of the pending interstate arbitrations conducted under the auspices of the PCA as of early 2016 have foreseen in their rules of procedure that arbitral tribunals have a duty to exercise their discretion in a "fair and efficient" way, in order to "avoid unnecessary delay and expense".[69]

[64] Article 17(1) of the 2010 UNCITRAL Rules reads as follows: "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." See United Nations Commission on International Trade Law Rules Arbitration Rules (revised), UN Doc A/65/465; 53rd session, UN General Assembly 65/22, entered into force 15 August 2010.

[65] Article 15(1) of the 1976 UNCITRAL Rules provides the following: "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." See United Nations Commission on International Trade Law Rules Arbitration Rules, UN Doc A/31/98; 31st Session Supp No 17, UN General Assembly, 1976.

[66] Brooks W. Daly, Evgeniya Goriatcheva, and Hugh A. Meighen, *A Guide to the PCA Arbitration Rules* (OUP, 2014), p. 66.

[67] Ibid., p. 12.

[68] See article 17(1) of the PCA Arbitration Rules of 2012. The wording of article 17(1) of the PCA Arbitration Rules of 2012 is identical to article 17(1) of the 2010 UNCITRAL Rules. See Ibid, pp. 65-66.

[69] *The Arctic Sunrise Arbitration (Netherlands v Russia)*, Award on the Merits, PCA Case Nº 2014-02, 14 August 2015, Article 10(1), available at: http://www.pcacases.com/web/view/21, last accessed on 30 March 2016; *Philippines v. China*, PCA Case Nº 2013-19, Rules of Procedure dated 27 August 2013, Article 10(1), available at: http://www.pcacases.com/web/view/7, last accessed on 30 March 2016. The other pending interstate cases under the PCA in early 2016 are: (i) *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, initiated on 26 June 2015; (ii) *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, initiated on 22 October 2013; (iii) *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)* initiated on 23 April 2013; and (iv) *Arbitration Between the Republic of Croatia and the Republic of Slovenia* initiated in 2012. See: http://www.pcacases.com/, last accessed on 9 April 2016. The rules of procedure of the following pending cases are confidential: *The Duzgit Integrity Arbitration*; *Arbitration under the Timor Sea Treaty*; and *Arbitration Between the Republic of Croatia and the Republic of Slovenia*. The rules of procedure of the arbitration *The "Enrica Lexie" Incident* do not refer expressly to efficiency. See *The "Enrica Lexie" Incident, Italy v. India*, PCA Case Nº 2015-28, Rules of Procedure dated 19 January 2016, available at: http://www.pcacases.com/web/view/117, last accessed on 16 April 2016.

The North American Free Trade Agreement ("NAFTA"), in its Chapter 11, Article 1126(2), provides that the tribunal may consider the efficiency of the proceedings in the specific context of consolidation of proceedings. Under that article, the consolidation of proceedings may be authorized by the tribunal "in the interests of fair and efficient resolution of the claims".[70] As the tribunal in *Softwood Lumber Cases* stated, "efficiency in the sense of procedural economy is the operative goal of consolidation under Article 1126".[71]

Other arbitral institutions have provided in their rules provisions imposing a duty on the tribunal and the parties to conduct the proceedings in an efficient manner. The London Court of International Arbitration ("LCIA")'s Arbitration Rules trust the arbitral tribunal the duty to act efficiently when conducting the proceedings at its discretion. The 1998 version of the LCIA Arbitration Rules provide that it is the arbitral tribunal's general duty, applicable at all times, "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."[72] Furthermore, the 1998 LCIA Arbitration Rules also

[70] Article 1126(2) of the NAFTA, Chapter 11, reads as follows: "Article 1126: Consolidation […] 2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties […]". See North American Free Trade Agreement (17 December 1992) US Gov't Printing Office (1992), entered into force 1 January 1994.

[71] *Softwood Lumber Cases, Canfor Corporation v United States*, Order of the consolidation tribunal, IIC 349 (2005), (2005) 15(5) World Trade Arbitration Materials 171, Ad Hoc Tribunal (UNICTRAL), 7 September 2005, para. 124.

[72] Article 14.1 of the LCIA Arbitration Rules of 1998 reads as follows: "The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times: (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute. Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties." See LCIA Arbitration Rules of 1998, effective 1 January 1998.

provide a general obligation upon the parties to "do everything necessary for the fair, efficient and expeditious conduct of the arbitration".[73]

The LCIA Arbitration Rules of 2014 has added more efficiency-related concerns to the proceedings. Under the 2014 version of that rules, one concern that may influence the selection of a potential arbitrators to a case is her or his capacity to conduct the proceedings in an efficient manner. Article 5.4 of the LCIA Arbitration Rules of 2014 requires potential arbitrators to inform the LCIA *inter alia* whether they are ready, willing, and able "to ensure the expeditious and efficient conduct of the arbitration".[74] The same article seeks also to avoid issues with arbitrators that have conflicting schedules which impose difficulties on the timetable of the arbitration. Moreover, Article 10.2 of the LCIA Arbitration Rules of 2014 provides that the LCIA Court may find an arbitrator unfit if that member of the tribunal "does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry."[75]

The LCIA Arbitration Rules of 2014, under article 14, paragraphs 4 and 5, also imposes a duty upon the arbitral tribunal and the parties to act efficiently when adopting

[73] Article 14.2 of the LCIA Arbitration Rules of 1998 reads as follows: "Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration." See LCIA Arbitration Rules of 1998, effective 1 January 1998.

[74] Article 5.4 of the LCIA Arbitration Rules of 2014 reads as follows: "Before appointment by the LCIA Court, each arbitral candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present); the candidate shall also agree in writing fee-rates conforming to the Schedule of Costs; the candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; and (ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. The candidate shall furnish promptly such agreement and declaration to the Registrar." See LCIA Arbitration Rules of 2014, effective 1 October 2014.

[75] Article 10.2 of the LCIA Arbitration Rules of 2014 reads as follows: "The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry." See LCIA Arbitration Rules of 2014, effective 1 October 2014.

procedures and conducting the arbitration.[76] The wording of the provision reproduces the drafting of Article 14, paragraphs 1 and 2, of the LCIA Arbitration Rules of 2012.[77] In addition, Article 18.4 of the LCIA Arbitration Rules of 2014 provides that the arbitral tribunal may withhold approval of any intended change or addition to a party's legal representatives if the tribunal concludes that the said change or addition may affect *inter alia* "the efficiency resulting from maintaining the composition of the Arbitral Tribunal", and the likely costs and waste of time connected with such an addition or change.[78]

The Stockholm Chamber of Commerce ("SCC")'s Arbitration Rules of 1999 and 2007, including the SCC's Expedited Arbitration Rules of 2007 and 2010, do not provide expressly that the proceedings shall be conducted in an efficient manner. Instead, those rules provide discretion to the arbitral tribunal to conduct the proceedings in an "impartial, practical and expeditious manner".[79] However, the apparent absence of efficiency considerations in the

[76] Article 14, paragraphs 4 and 5, of the LCIA Arbitration Rules of 2014 read as follows: "14.4 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute. 14.5 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties." See LCIA Arbitration Rules of 2014, effective 1 October 2014.

[77] See fns. 72 and 73.

[78] Article 18.4 of the LCIA Arbitration Rules of 2014 reads as follows: "The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition." See LCIA Arbitration Rules of 2014, effective 1 October 2014.

[79] Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce, adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2010, article 16(1); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2010, article 19(1); Rules for Expedited Arbitrations, adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2007, article 19(2); Arbitration Rules, adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2007, article 19(2); Rules of the Arbitration

SCC arbitration rules should soon change. The draft SCC arbitration rules of 2017 and their expedited version, which are not yet in force, give substantial weight to efficiency considerations in the conduction of the proceedings. Both draft rules expressly impose a duty on the SCC, tribunal and the disputing parties to conduct the proceedings in an efficient manner.[80] Moreover, both draft versions provide that decisions over procedural issues shall regard *inter alia* efficiency concerns. Those procedural issues include: issues of fact or law by way of summary proceedings;[81] and costs of arbitration.[82]

The International Chamber of Commerce ("ICC")'s Rules of Arbitration of 2012 provide several references to efficiency as an on-going concern during the arbitration proceeding.[83] The directions apply to both the arbitral tribunal and the parties.

Article 4(3)(h) of the ICC Rules of Arbitration of 2012 provides that the claimant, when submitting its request for arbitration, may provide documents or information with its request "as may contribute to the efficient resolution of the dispute."[84] Article 5(1)(f) and 5(5)(d) of the same rules provide an identical direction to a respondent willing to respond to

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Institute of the Stockholm Chamber of Commerce, adopted by the Stockholm Chamber of and in force 1 April 1999, article 20(3).

[80] See Article 2(1) of both SCC Draft Arbitration Rules 2017, Draft for public consultation, 26 April 2016 and SCC Draft Rules for Expedited Arbitration 2017, Draft for public consultation, 26 April 2016, which provide the following: "Article 2 General conduct of the participants to the arbitration (1) Throughout the proceedings, the SCC, the Arbitrator and the parties shall act in an efficient and expeditious manner." See also Articles 23(2) and 28(3) of the SCC Draft Arbitration Rules 2017, Article 9 of the Appendix I of the SCC Draft Arbitration Rules 2017, Articles 24(2) and 29(3) of the SCC Draft Rules for Expedited Arbitration 2017, and Article 9 of the Appendix I of the SCC Draft Rules for Expedited Arbitration 2017.

[81] See Article 39(3) of the SCC Draft Arbitration Rules 2017 and Article 40(3) of the SCC Draft Rules for Expedited Arbitration 2017.

[82] See Articles 50(3)(6) and 51 of both SCC Draft Arbitration Rules 2017 and SCC Draft Rules for Expedited Arbitration 2017.

[83] Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012, ICC Publication 865-2 ENG.

[84] Article 4(3)(h) of the ICC Rules of Arbitration of 2012 reads as follows: "all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration. The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute." See Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012, ICC Publication 865-2 ENG.

claimant's request or file a counter-claim.[85] Article 7(2)(c), on the other hand, applies the same direction to a party filing a request to join the arbitration.[86]

The provisions concerning the conduct of the arbitration under the ICC Rules of Arbitration of 2012 do not refer directly to efficiency. Instead, the wording adopted provides that the "arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[87] Thus, the ICC Rules of Arbitration of 2012 also impose a general obligation upon the arbitral tribunal and the parties "to make every effort" to conduct the arbitration in "expeditious and cost-effective manner".[88] Differently from the other arbitration rules cited above, such as the UNCITRAL, PCA, LCIA and SCC rules, the ICC Rules of Arbitration of 2012 refer expressly to the "complexity and value of the dispute"[89] as considerations that may

[85] Article 5(1)(f) of the ICC Rules of Arbitration of 2012 reads as follows: "any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration. The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute." Article 5(5)(d) reads as follows: "where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made. The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute." See Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012, ICC Publication 865-2 ENG.

[86] Article 5(1)(f) of the ICC Rules of Arbitration of 2012 reads as follows: "[…] The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute." See Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012, ICC Publication 865-2 ENG.

[87] Article 22 of the ICC Rules of Arbitration of 2012 reads as follows: "1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. 2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. 3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information. 4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. 5) The parties undertake to comply with any order made by the arbitral tribunal." See Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012, ICC Publication 865-2 ENG.

[88] See fn. 87.

[89] Id.

affect the conduct of the proceedings and therefore their efforts to act in an "expeditious and cost-effective manner".[90]

Other mechanisms have similarly provided references to the need of efficient proceedings in different degrees, such as the case of international claims and compensation commissions.

The United Nations Compensation Commission ("UNCC") was established with a goal to process claims against Iraq and to compensate victims of the Iraqi invasion and occupation of Kuwait between 1990 and 1991. The UNCC used funds obtained from Iraq, as mandated by the Security Council.[91] It has particular features and might not be regarded as an example of international adjudication.[92]

The procedural rules of the UNCC does not provide expressly that the proceedings shall be conducted in an efficient manner.[93] However, Caron and Morris note that efficiency was a guiding principle to the approach taken by the UNCC to process the claims brought to it.[94] Efficiency was a growing concern during its reform of the procedures in 2000.[95]

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[90] Id.

[91] About the UNCC, see Richard B. Lillich, ed., *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (Transnational Publishers, 1995); Marco Frigessi di Rattalma and Tullio Treves, eds., *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999).

[92] "The [UNCC] is not a court or an arbitral tribunal before which the parties appear […]." See *Report of the Secretary-General pursuant to paragraph 19 of Security Council Resolution 687 (1991)*, S/22559 of 2 May 1991, para. 20. The compensation is not awarded under the frame of an adversarial proceeding as it is in international adjudication. However, this study also focus on the experience of the UNCC because it exercised a quasi-judicial function of assessing damages, perform fact-finding tasks, apply evidentiary principles, evaluate losses, and resolve disputed claims that are relevant to the questions before the present research. See Ibid.

[93] Governing Council Decision 10, S/AC.26/1992/10 of 26 June 1992.

[94] Caron and Morris provide the following: "the guiding principle to the approach taken by the UNCC to the A, B and C claims was one of 'practical justice'; that is, a justice that would be swift and efficient, yet not rough. The Commission placed these claims on a fast track, resolving them through 'mass claims processing' techniques, including clearly defined evidentiary standards and fixed amounts of damages for various forms of injury." See Caron and Morris, 'The UN Compensation Commission: Practical Justice, Not Retribution', p. 188. The authors also refer to the contributions of Lillich, *The United Nations Compensation Commission: Thirteenth Sokol Colloquium*.

[95] In the occasion, the working group in charge concluded the following: "the work of the Commission to date has proceeded in a fair and efficient manner". See Decision concerning the review of current UNCC procedures

The UNCC procedural rules, which provided low evidentiary standards to assess the value of the losses,[96] favoured the use of "simple documentation". As noted by Ali and Walter, this very low evidentiary standard was justified by the extremely high number of claims, the difficulty in providing evidence, and reaching a precise valuation.[97]

The EECC was established to process losses arising out of the conflict between Eritrea and Ethiopia, adopted a different procedural structure in comparison to the UNCC. The procedures of the EECC followed an adversarial approach, in which the claims of damages would be processed and decided through binding arbitration.[98] The agreement between Eritrea and Ethiopia, which established the EECC, provided in its Article 5(10) that the EECC should be authorized to adopt methods of "efficient case management and mass claims processing as it deems appropriate" in order to "facilitate the expeditious resolution of [the] disputes".[99]

The EECC adopted its own rules of procedure,[100] which was based on the 1992 PCA Optional Rules for Arbitrating Disputes between Two States.[101] The rules of procedure

taken by the Governing Council of the United Nations Compensation Commission at its 101st meeting, S/AC.26/Dec.114, 7 December 2000, Annex, para. 2.

[96] See Article 35(2) of the Provisional Rules for Claims Procedures in Governing Council Decision 10, S/AC.26/1992/10 of 26 June 1992.

[97] Arif H. Ali and Marguerite C. Walter, 'Principles of Valuation Taken from the UNCC Perspective', in *War Reparations and the UN Compensation Commission: Designing Compensation after Conflict*, ed. Timothy J. Feighery, Christopher S. Gibson, and Trevor M. Rajah (OUP, 2015), 81–101, p. 90

[98] See Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, signed 12 December 2000, A/55/686-S/2000/1183, 13 December 2000, Article 5(1). For an overview of the Eritrea-Ethiopia Claims Commission, see C. Tofan and W. van der Wolf, eds., *Eritrea-Ethiopia Claims Commission: Permanent Court of Arbitration 2009* (International Courts Association, 2010); Sean D. Murphy, Won Kidane, and Thomas R. Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* (OUP, 2013); Sean D. Murphy, 'The Eritrean-Ethiopian War (1998-2000)', in *International Law and the Use of Force: A Case-Based Approach*, ed. Olivier Corten and Tom Ruys (OUP, forthcoming), https://ssrn.com/abstract=2856670.

[99] See Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, signed 12 December 2000, A/55/686-S/2000/1183, 13 December 2000, Article 5(10).

[100] See Eritrea-Ethiopia Claims Commission, Rules of Procedure of 1 October 2001, In: Tofan and van der Wolf, *Eritrea-Ethiopia Claims Commission: Permanent Court of Arbitration 2009*, pp. 25-38.

[101] See Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, signed 12 December 2000, A/55/686-S/2000/1183, 13 December 2000, Article

provided broad discretion to the EECC to address claims and conduct the proceedings.[102] The same rules also provided that, in procedures for individual consideration of claims, the EECC would contemplate "interest of economy and efficiency" when considering whether it should rule on a plea concerning its jurisdiction as a preliminary question or at the final award.[103]

2.3 EFFICIENCY IN INTERNATIONAL CASE LAW

When deciding procedural issues, international adjudicators have relied on the principle of judicial economy[104] and procedural economy, which relate to the principle of sound administration of justice.[105] Adjudicators have taken decisions on the basis of efficiency considerations in the context of international arbitration.

2.3.1 International courts and tribunals of general jurisdiction

International dispute settlement mechanisms have affirmed the existence of a general duty to decide a dispute in an "economic" manner. The ICJ judgment on preliminary

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5(7). With regard to the PCA's rules, see Permanent Court of Arbitration, *Permanent Court of Arbitration: Basic Documents (Conventions, Rules, Model Clauses & Guidelines)* (PCA, 1999).

[102] Article 10 of the rules of procedure reads as follows: "1. Subject to these Rules, the Commission may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given a full opportunity of presenting its case in accordance with these rules. 2. The Commission shall decide whether to hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials." See Eritrea-Ethiopia Claims Commission, Rules of Procedure of 1 October 2001, In: Tofan and van der Wolf, *Eritrea-Ethiopia Claims Commission: Permanent Court of Arbitration 2009*, pp. 25-38.

[103] See Article 27(2) of the rules of procedure, which reads as follows: "The Commission should consider whether, in the interests of economy and efficiency, it should rule on a plea concerning its jurisdiction as a preliminary question. However, the Commission may proceed with the arbitration and rule on such a plea in its final award." See Eritrea-Ethiopia Claims Commission, Rules of Procedure of 1 October 2001, In: Ibid., pp. 25-38.

[104] Sereni did not classify the "principle of judicial economy" as a "principle" in its legal sense. According to him, the "principle of judicial economy" is simply a "common sense rule" and not a "principle". See Angelo Piero Sereni, *Principî Generali Di Diritto E Processo Internazionale* (Milano: Giuffrè, 1955), p. 89. However, as it will be show below, several authorities have referred to "judicial economy" as a principle. See for example *Abyei Arbitration, Sudan v The Sudan People's Liberation Movement/Army,* Award, PCA, 48 ILM 1258 (2009), 22 July 2009, para. 422.

[105] For a broader picture of the principle of sound administration of justice in the context of the ICJ, see Robert Kolb, 'General Principles of Procedural Law', in *The Statute of the International Court of Justice: A Commentary*, ed. Andreas Zimmerman et al., 2nd ed. (OUP, 2012), 871–908, pp. 884-890.

objections in *Croatia v. Serbia* provided that "judicial economy" was "an element of the requirements of the sound administration of justice". The ICJ relied on such considerations for disregarding jurisdictional defects that could had been remedied by subsequent action of the parties.[106] Similarly, in the ICJ Order of 10 March 1998 in the *Oil Platforms* case, the ICJ recalled the principle of sound administration of justice in order to rule on the respective claims of the disputing parties in a single set of proceedings.[107] The ICJ noted that it should not "lose sight of the interest of the Applicant to have its claims decided within a reasonable period of time".[108] Previously, the ICJ had affirmed in its Order of 17 December 1997 in the *Bosnia Genocide case* that "procedural economy" was part of the principle of sound administration of justice.[109]

The tribunal in the *Abyei Arbitration*, conducted under the auspices of the PCA, recognized the existence of a "general principle of economy" by which adjudicative authorities should make decisions that aim the promotion of "efficiency in the conduct of adjudicatory proceedings".[110] In this case, the tribunal was asked to delimitate a new boundary in the Abyei region. The disputing parties to the case expressly chose expedited proceedings.[111] The *Abyei* tribunal further referred to the "principle of economy" in order to settle procedural issues raised during the proceedings.[112]

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[106] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v Serbia*, Judgment, Preliminary Objections, General List No 118, ICGJ 25 (ICJ 2008), 18 November 2008, para. 89.
[107] *Oil Platforms case, Islamic Republic of Iran v. United States of America*, Counter-Claim, Order of 10 March 1998, ICJ Reports 1998, paras. 33 and 43, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Yugoslavia,* Order, Counter–Claims, [1997] ICJ Rep 243, ICGJ 69 (ICJ 1997), 17 December 1997, para. 31.
[108] *Oil Platforms case*, para. 43.
[109] *Bosnia Genocide case,* Order of 17 December 1997, para. 30.
[110] *Abyei* Award, para. 422. The *Abyei* tribunal makes reference to international case law that applied the principle of economy. See fn. 834 of the *Abyei* Award.
[111] See Arbitration Agreement between the Government of Sudan and the Sudan's People Liberation Movement/ Army on Delimiting the Abyei Area dated 7 July 2008, available at: http://archive.pca-cpa.org/Abyei%20Arbitration%20Agreementff25.pdf?fil_id=1117, last accessed on: 9 April 2016. The disputing parties deposited an arbitration agreement with the PCA on 22 July 2008 and the award was finally rendered on

Economy considerations have also been applied in the context of the WTO's dispute settlement mechanism. As held by the Appellate Body in *US – Continued Suspension*, the objective of the WTO dispute settlement system is "achieving prompt settlement of disputes".[113] Accordingly, the WTO Appellate Body has made express references to the need of resolving the dispute in an economic manner.[114] In *US – Cotton*, the Appellate Body affirmed that "panels may exercise judicial economy and refrain from addressing claims beyond those necessary to resolve the dispute".[115] Similarly, the Appellate Body held in *US – Wool Shirts and Blouses* that Panels "need only address those claims which must be addressed to resolve the matter in issue in the dispute".[116]

In addition to references to judicial economy, the WTO dispute settlement system has applied efficiency considerations when seized by procedural issues. In *US – Continued Suspension*, the European Communities alleged that the United States should have withdrawn its retaliatory measures since it had removed the measures found to be inconsistent in another dispute, *i.e*. the *EC - Hormones* case. The Appellate Body addressed the question of whether the complaint should have been brought to the panel proceedings under Article 21.5 of the DSU or to a new panel proceedings as a new dispute. The Appellate Body decided such procedural issue on the basis of procedural efficiency. The Appellate Body recalled that recourse to Article 21.5 panel is "a more efficient use of the dispute settlement system" than

11 July 2009. See *Abyei* Award. See also Brooks Daly, 'The Abyei Arbitration: Procedural Aspects of an Intra-State Border Arbitration', *Leiden Journal of International Law* 23 (2010): 801–23.

[112] See *Abyei* Award.

[113] *United States – Continued Suspension of Obligations in the EC – Hormones Dispute, Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, Report of the Appellate Body, WT/DS320/AB/R**,** WT/DS321/AB/R, 16 October 2008, para. 344.

[114] On the application of judicial economy considerations by the WTO Appellate Body, see Alberto Alvarez-Jiménez, 'The WTO Appellate Body's Exercise of Judicial Economy', *Journal of International Economic Law* 12, no. 2 (2009): 393–415.

[115] See *United States — Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R, 3 March 2005, para. 718, referring to *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, Report of the Appellate Body, WT/DS276/AB/R, 30 August 2004, para. 133.

[116] *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the Appellate Body, WT/DS33/AB/R, p. 19; DSR 1997:1, 323, p. 339.

the establishment of new panel proceedings.[117] For the Appellate Body, an Article 21.5 panel would benefit from their knowledge and expertise from serving the original panel in *EC – Hormones*, and thus concluded that such a panel would be in a position to adjudicate the complaint within a shorter period than the regular panel proceedings.[118] Similarly in *China – Rare Earths*, the WTO Appellate Body also referred expressly to efficiency considerations to make procedural decisions and set deadline for third-party submissions in the concerned proceedings.[119]

Adjudicators have relied on efficiency considerations in their individual capacity, in the context of their dissenting or separate opinions on procedural decisions taken by the majority.

At the ICJ, Judge Morelli dissented from the majority in the judgment on preliminary objections in the case *Barcelona Traction*[120] on the basis of economy considerations. The proceedings in the case were instituted by an application of 19 June 1962 in which the Belgian Government sought reparation for damages claimed to have been caused to Belgian nationals, who were shareholders in the Canadian Barcelona Traction Company, by the conduct of various organs of the Spanish State. The Spanish Government raised four preliminary objections. On the first preliminary objection, the respondent argued that the applicant had informed the ICJ on 23 March 1961 that it would not continue with the

[117] *US – Continued Suspension*, para. 343. The Appellate Body referred to its decision in *US – Softwood Lumber IV (Article 21.5 – Canada)* as follows: "First, the composition of an Article 21.5 panel is, in principle, already determined—wherever possible, it is the original panel. These individuals will be familiar with the contours of the dispute, and the experience gained from the original proceedings should enable them to deal more efficiently with matters arising in an Article 21.5 proceeding 'against the background of the original proceedings'. Secondly, the time-frames are shorter—an Article 21.5 panel has, in principle, 90 days in which to issue its report, as compared to the six to nine months afforded original panels." See *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada - Recourse by Canada to Article 21.5 of the DSU*, Report of the Appellate Body, WT/DS257/AB/RW, 5 December 2005, para. 71.
[118] *US – Continued Suspension*, para. 344.
[119] *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, Report of the Appellate Body, WT/DS431/ABR; WT/DS432/AB/R; and WT/DS433/AB/R, 7 August 2014, para. 1.19.
[120] *Barcelona Traction, Light and Power Company, Limited, Belgium v Spain (New Application, 1962), Belgium v Spain*, Preliminary Objections, Judgment, [1964] ICJ Rep 6, ICGJ 151 (ICJ 1964), 24 July 1964.

proceedings and therefore the applicant was precluded from bringing the case. On the second preliminary objection, respondent argued that the treaty signed between the disputing parties, which served as jurisdictional basis for the applicant's case, referred to the PCIJ and not the ICJ and thus the relevant provision had lapsed with the dissolution of the PCIJ in 1946. On the third preliminary objection, the respondent challenged the applicant's legal capacity to protect the Belgian interests on behalf of which it had submitted its claim. On the fourth preliminary objection, the respondent claimed that the applicant failed to exhaust local remedies. The ICJ rejected the first preliminary objection, and the second. It joined the third and the fourth objections to the merits, under Article 62, paragraph 5, of the Rules of Court.[121]

Judge Morelli dissented from the majority's judgment on preliminary objections and criticised the procedural approach adopted by the ICJ. According to him, the ICJ should have addressed only the second objection at the stage of the proceedings that were in place. Morelli argued that the World Court, when addressing such procedural issues, "may be guided by various criteria", which include "criteria of economic".[122] On Morelli's view, the ICJ has freedom to determine the order to approach procedural issues[123] and thus he defended the ICJ's discretion to decide the procedure to be followed on the basis of economy and convenience.[124]

The use of economy considerations to address procedural issues was once again mentioned in the context of the ICJ in the joint-dissenting opinions of Judges Aguilar-Mawdsley and Ranjeva in the case *Arbitral Award of 31 July 1989*.[125] In such join-dissenting

[121] *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment.
[122] Ibid., Dissenting Opinion of Judge Morelli, pp. 96-97 (p. 98-99), para. 2.
[123] Id.
[124] Ibid., para. 6
[125] *Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal*, Judgment, [1991] ICJ Rep 53, ICGJ 90 (ICJ 1991), 12 November 1991.

opinion, the judges pointed that international adjudicators should consider the "principle of procedural economy" when settling disputes as follows:

> This principle [of procedural economy] requires that judges to whom a problem has been submitted should seek for the means enabling the whole of the dispute to be resolved, at the earliest possible date and at the lowest possible cost to the parties. Given the very complex nature of international litigation, it appears to us advisable that the international judge should take these practical ideas into consideration.[126]

In the dispute concerning the delimitation of the continental shelf between the States of Libya and Malta, the ICJ addressed the procedural issue of whether to grant Italy's request to intervene under Article 62 of the Statute of the ICJ.[127] In this case, different ICJ judges, including Judges Schwebel, Oda, and Mbaye, relied on economy considerations and adopted different views on whether intervention could promote the "procedural economy of means",[128] the "economy of litigation",[129] "judicial economy",[130] and "economy of international justice".[131]

In the *Bosnia Genocide* case, the Vice-President Judge Weeramantry dissented from the majority in the ICJ's Order of 17 December 1997 on the basis of "judicial economy". In such an order, the ICJ addressed *inter alia* whether or not it should accept Yugoslavia's counter-claim of genocide against the claimant Bosnia and Herzegovina. The majority accepted the counter-claim.[132] Vice-President Weeramantry, however, had the view that Yugoslavia's counter-claim concerned different factual circumstances as compared to Bosnia's claim. As stated by him on the factual circumstances of the counter-claim, "the

[126] Ibid., Joint Dissenting Opinion of Judges Aguilar-Mawdsley and Ranjeva, para. 13.
[127] *Continental Shelf, Libyan Arab Jamahiriya v Malta*, Judgment, Application to Intervene, [1984] ICJ Rep 3, ICGJ 117 (ICJ 1984), 21 March 1984.
[128] Ibid., para. 42; Ibid., Separate Opinion of Judge Mbaye, para. 52; Ibid., Dissenting Opinion of Judge Schwebel, para. 10.
[129] *Continental Shelf*, Dissenting Opinion of Judge Oda, paras. 6-7.
[130] Ibid., para. 18.
[131] Ibid., para. 31.
[132] *Bosnia Genocide Case*, Order, Counter–Claims.

alleged murderers are different, the victims are different, the motivations are different, and the times and venues are not coincidental" and thus the enquiry into Yugoslavia's claim demands "a separate fact–finding process".[133] As such, Vice-President Weeramantry considered "judicial economy"[134] to conclude that it would have been practical and convenient to proceed with Bosnia's application and leave Yugoslavia's counter-claim the subject of a separate proceeding.[135] In his opinion, such an approach would have given both the disputing parties "the benefit of an expeditious hearing and a concentration of the [ICJ]'s attention upon their respective claims and allegations, uncluttered by voluminous evidence extraneous to the particular subject–matter of each case."[136]

In the ICJ's Advisory Opinion case on the *Legality of the Threat or Use of Nuclear Weapons*, Judge Oda defended in his Dissenting Opinion that the Court should have denied the request for Advisory Opinion "on account of considerations of judicial economy". Judge Oda expressed his concern that the question put before the ICJ in the matter was of a general nature and an abuse of right. He believed that, in case the ICJ started to accept questions of a general nature, the ICJ could be overloaded and its main and real function – to settle disputes between States – would be in risk.[137]

2.3.2 Investor-State arbitration

In the context of investment-State arbitration, the reliance on efficiency considerations is common. The tribunal in *European American Investment Bank AG* acknowledged and relied on "the general principles of fairness and procedural economy" to

[133] Ibid., Dissenting Opinion of Vice-President Weeramantry, para. 36.
[134] Ibid., para. 46.
[135] Ibid., para. 56.
[136] Id.
[137] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8 July 1996, Dissenting Opinion of Judge Oda, para. 53.

decide whether a late plea was justifiable.[138] The tribunal in *ConocoPhillips* recognized that an adjudicative body has a duty to ensure and safeguard efficiency.[139] Likewise, the tribunal in *Thunderbird* noted in one of its procedural orders that "a balance must be struck between the interest of the Arbitral Tribunal in uncovering the truth of the matters at issue in the arbitration, and the efficiency of the arbitral proceedings".[140]

In order to decide procedural issues, tribunals frequently refer to economy and efficiency considerations. The NAFTA tribunal in *Grand River* relied on both judicial economy and efficiency[141] to grant the claimants motion to amend their claim.[142] The tribunal did not draw a difference between the terms "judicial economy" and "efficiency".

The tribunal in *Beccara* relied on efficiency considerations to decide on whether minutes and records of a hearing should have been publicized. For the tribunal, the publication of such minutes and records were likely to endanger the proper unfolding of the proceedings and the publication would therefore compromise the efficiency of the hearing, which could render the resolution of the dispute more difficult.[143] The tribunal assumed that an inefficient hearing could create obstacles to the process of dispute resolution. Moreover, the *Beccara* tribunal held that the disclosure of the minutes and records were to be restricted, unless the disputing parties otherwise agree.[144]

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[138] *European American Investment Bank AG v Slovakia,* Second Award on Jurisdiction, PCA Case No 2010-17, IIC 681 (2014), 4 June 2014, para. 118.
[139] *ConocoPhillips Petrozuata BV and ors v Venezuela*, Decision on Respondent's Request for Reconsideration and Dissenting Opinion, ICSID Case No Arb/07/30, IIC 643 (2014), 10 March 2014, p. 56.
[140] *International Thunderbird Gaming Corporation v Mexico*, Procedural Order No. 2, IIC 138 (2003), Ad Hoc Tribunal (UNCITRAL), 31 July 2003, p. 2.
[141] *Grand River Enterprises Six Nations Limited and ors (on behalf of Native Wholesale Supply) v United States*, Decision on Objections to Jurisdiction, IIC 128 (2006), ICSID, 20 July 2006, para. 100.
[142] Ibid., paras. 100-102.
[143] *Beccara and ors v Argentina*, Procedural Order No 3 (Confidentiality Order), ICSID Case No ARB/07/5, IIC 418 (2010), 27 January 2010, para. 98.
[144] Ibid., para. 100.

The tribunal in *Biwater Gauff* also addressed the question of whether the minutes of the hearing should be publicized. The tribunal in *Biwater Gauff* adopted the same approach as the one in *Beccara*, by denying the disclosure of the minutes on the basis that the publication had the potential to affect the procedural integrity and the efficiency of the hearing.[145]

In *Renco*, the tribunal rejected respondent's request to rule that the claimant has waived its right to respond to three arguments raised by respondent in its preliminary objection that were not addressed by claimant. The tribunal denied the respondent's request and held that all of the legal argument should be addressed at the same time. The tribunal reasoned its decision solely on fairness and procedural efficiency.[146]

Arbitral tribunals repeatedly base their orders to bifurcate the proceedings on the basis of efficiency and economy considerations. The tribunal in *Emmis* addressed respondent's request to bifurcate the proceedings between jurisdiction and merits phase. The tribunal granted the request after having "anxiously considered the issue of procedural efficiency".[147] The tribunal in *BIVAC* postponed the analysis of an objection to jurisdiction raised by the respondent after the hearing on jurisdiction on the basis that a decision on the matter at that stage "would have been inconsistent with basic principles of due process and procedural economy".[148]

In the arbitration *Tallin*, the parties and the tribunal agreed that the decision on whether or not the proceedings should be bifurcated between jurisdictional and merits phase

[145] *Biwater Gauff (Tanzania) Limited v Tanzania*, Procedural Order No 3 (Confidentiality), ICSID Case No ARB/05/22, IIC 31 (2006), 29 September 2006, para. 155.
[146] *Renco Group Incorporated v Peru*, Decision regarding respondent's requests for relief, ICSID Case No UNCT/13/1, IIC 716 (2015), 2 June 2015, paras. 66-69.
[147] *Emmis International Holding, BV and ors v Hungary*, Decision on Respondent's Application for Bifurcation, ICSID Case No ARB/12/2, IIC 599 (2013), despatched 13 June 2013, para. 48.
[148] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Paraguay*, Further decision on objections to jurisdiction, ICSID Case no ARB/07/9, IIC 564 (2012), 9 October 2012, para. 25.

ought to be based on considerations of procedural economy, as argued by the respondent, or efficiency, as stated by the claimants. As noted by the tribunal:

> the parties […] agree that economy and efficiency entail a consideration of the impact of bifurcation on the overall time and costs of the proceedings, which includes considering whether and how the success of a jurisdictional challenge would obviate or otherwise impact the conduct of a subsequent merits phase. The Tribunal agrees.[149]

The *ad hoc* tribunal in *Glamis Gold* refused a request to bifurcate the proceedings because it would not contribute to the tribunal's efficiency, avoid expenses for the parties, and be practical.[150]

The *Suez* tribunal determined the bifurcation of the merits and quantum proceedings, and rendered its decision on liability before assessing the damages. The reason given by the tribunal was judicial economy, referring to the complexity of the case and the voluminous nature of the record in this case. The tribunal chose an expert to assist with the damages assessment. According to the *Suez* tribunal, such the bifurcation would enable the tribunal to better define the scope of the mission of the independent expert chosen to assist the tribunal with its damage determination.[151]

The tribunal in *Suez* also referred to efficiency considerations when it allowed *amicus curiae* submissions in the proceedings and set the timetable for the filing.[152] Similarly, the tribunal in *Polis Fondi* allowed the respondent to file a counterclaim as it would promote the efficiency in the arbitration by allowing the same issues to be litigated and considered

[149] *United Utilities (Tallin) BV and Aktsiaselts Tallinna Vesi v Estonia*, Procedural Order No 2, Decision on Respondent's Request for, ICSID Case No ARB/14/24, IIC 715 (2015), 17 June 2015, para. 16.
[150] *Glamis Gold Ltd v United States*, Procedural Order No 2, IIC 118 (2005), Ad Hoc Tribunal (UNCITRAL), 31 May 2005, para. 16.
[151] *Suez and ors v The Argentina Republic*, Decision on Liability, ICSID Case No ARB/03/19, IIC 443 (2010), 30 July 2010, para. 272.
[152] *Suez and ors v The Argentine Republic*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission, ICSID Case No ARB/03/19, IIC 233 (2007), 12 February 2007, paras. 26-27.

altogether in the proceedings.[153] On the question of challenge of arbitrators, the tribunal in *EDF International* denied a challenge on the basis that *inter alia* the grounds of the request would have affected the stability and efficiency of the arbitration.[154]

In the *ADM/Tate & Lile* case, the tribunal addressed a consolidation request from the respondent State. The claimants of different proceedings rejected the consolidation request alleging that they were fierce competitors and thus the consolidation of the proceedings would result in a very slow and complex proceedings in order to protect the confidentiality of their sensitive information.[155] The tribunal denied the consolidation request because "a consolidation order cannot be in the interests of fair and efficient resolution of the claims".[156] The tribunal concluded that two tribunals could handle two separate cases more efficiently than a single tribunal where the claims are direct and major competitors.[157]

The issue of procedural efficient is often raised by the disputing parties in the context of international investment arbitration to reason a request of procedural nature. For instance, in the case *Itera*, the claimants have relied on efficiency to request the tribunal to hear altogether different claims against the same respondent, which were allegedly ancillary, pursuant to Article 46 of the Washington Convention and Rule 40 of the ICSID Rules. The tribunal denied that efficiency considerations are by themselves decisive for whether or not a claim shall be accepted as an ancillary claim under the two provisions cited. The *Itera* tribunal

[153] *Polis Fondi Immobiliari di Banche Popolare SGRpA v International Fund for Agricultural Development (IFAD)*, Final Award, PCA Case No 2010-8, ICGJ 465 (PCA 2010), 17 December 2010, paras. 192-194.
[154] *EDF International SA and ors v Argentina,* Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ICSID Case No ARB/03/23, IIC 353 (2008), 25 June 2008, paras. 121-124.
[155] About the topic of confidentiality and transparency in international arbitration, see Malatesta, Alberto, and Rinaldo Sali, eds. *Rise of Transparency in International Arbitration*. JurisNet, 2013.
[156] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Incorporated v Mexico*, Order of the Consolidation Tribunal, ICSID Case No ARB(AF)/04/5, IIC 17 (2005), despatched 20 May 2005, para. 9.
[157] Ibid., paras. 9 and 20.

finally denied claimants' request noting that it had doubts about whether claimants' claim would promote efficiency.[158]

The respondent in the case *Saluka* relied on economy and efficiency considerations in order to argue that the tribunal should exercise its jurisdiction over the counterclaim advanced by the respondent.[159] In the same case, the claimant requested the tribunal to postpone the analysis of issues of quantification to a separate phase of the proceedings in order to assure its efficiency.[160]

The respondent State in the case *British Caribbean Bank* reasoned its request to stay or dismiss the arbitration proceedings on efficiency grounds noting that two pending actions before the courts of the respondent State could negatively affect the arbitration proceedings.[161]

2.4 CONCLUSION ON PROCEDURAL EFFICIENCY IN INTERNATIONAL DISPUTE SETTLEMENT

There is a trend towards the inclusion of efficiency considerations in the modern instruments establishing international courts and the newer set of procedural rules.

Procedural efficiency has been generally ignored by the drafters of most of the instruments establishing the existing international courts, namely the ICJ, ITLOS, IACtHR, and ECtHR. The exceptions are the newer instruments, like the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights and the Rome Statute of the International Criminal Court. Also, the

[158] *Itera International Energy LLC and Itera Group NV v Georgia*, Decision on Admissibility of Ancillary Claims, ICSID Case No ARB/08/7, IIC 401 (2009), 3 December 2009, despatched 4 December 2009, para. 100.
[159] *Saluka Investments BV v Czech Republic*, Decision on Jurisdiction, ICGJ 367 (PCA 2004), 7 May 2004, para. 24.
[160] *Saluka*, paras. 169 and 506-510.
[161] *British Caribbean Bank Limited (Turks & Caicos) v Belize*, Final Award, PCA Case No 2010-18, ICGJ 485 (PCA 2014), 19 December 2014, para. 180.

WTO's DSU promotes the prompt resolution of situations. However, it does not mean that those international courts and tribunals do not rely on efficiency or economy considerations. Kolb has claimed that the "procedure of the ICJ (as others) is based on the principle of procedural economy".[162] As similar conclusion may be reached with respect to the ITLOS, since its Statute and Rules of Court are based on the ICJ's.[163] The ECtHR, although its rules do not refer to efficiency, has issued practice directions which do point to the need of procedural efficiency.

The trend towards the inclusion of a provision on efficiency considerations is clearer in the context of arbitration rules. While instruments like the ICSID Convention, Rules of the Iran-U.S. Claims Tribunal, and the 1976 UNCITRAL Arbitration Rules do not refer to efficiency, the more recent set of arbitration rules, like the 2010 UNCITRAL Arbitration Rules, the PCA rules of 2012, the ICC rules of 2012, and the LCIA rules of 2014, have included in different degrees efficiency considerations. Recent interstate arbitration cases have also referred to efficiency considerations in their procedural directions.[164]

The aforesaid trend reflects a growing concern over the efficient conduct of international dispute settlement proceedings. International disputes remain time-consuming and costly. Consequently, there is a concern over unnecessary prolongations of procedures that can increase the costs even more. In arbitration, the prompt resolution of the dispute is one of its main features and therefore it is reasonable to expect that an arbitral tribunal will conduct proceedings in an efficient manner. Moreover, drafters of arbitration rules are aware of the growing concern over the efficient conduction of proceedings and have included

[162] Kolb, 'General Principles of Procedural Law', 2012, p. 892.
[163] Caminos, 'The Creation of Specialised Courts: The Case of the International Tribunal for the Law of the Sea'.
[164] See fn. 69.

provisions referring to efficiency in the legal texts in order to adapt and increase their attractiveness.

Notwithstanding the lack of references to efficiency in legal instruments like the statute and rules of the ICJ, the ICSID Convention, and the DSU, adjudicators under these set of rules have acknowledged, referred to, and applied different degrees of efficiency considerations when confronted by procedural issues.

The ICJ in the *Croatia Genocide* case affirmed the existence of the principle of "judicial economy" as "an element of the requirements of the sound administration of justice".[165] A number of ICJ judges have similarly affirmed the existence of such a principle and relied on economy considerations to confront procedural issues.[166] In the context of ICSID arbitration, the tribunal in *ConocoPhillips* affirmed the existence of a general duty to ensure and safeguard efficiency.[167] Other ICSID tribunals have relied on efficiency considerations to address and decide procedural issues.[168]

The principle of economy or judicial economy has to be distinguished from the principle of efficiency in international dispute settlement. Under the WTO system, judicial economy has a defined meaning. It allows the adjudicators to refrain from addressing claims

[165] *Croatia Genocide Case*, Judgment, Preliminary Objections, para. 89.
[166] Judge Morelli noted that procedural issues "may be guided by various criteria", which include "criteria of economic". See *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, Dissenting Opinion of Judge Morelli, pp. 96-97 (p. 98-99), para. 2. Other terms used by ICJ judges are: (i) "procedural economy of means", see *Continental Shelf*, para. 42; ibid., Separate Opinion of Judge Mbaye, para. 52; *Continental Shelf*, Dissenting Opinion of Judge Schwebel, para. 10; (ii) the "economy of litigation", see *Continental Shelf*, Dissenting Opinion of Judge Oda, paras. 6-7; (iii) "judicial economy", see *Continental Shelf*, Dissenting Opinion of Judge Oda, para. 18; and (iv) "economy of international justice", see *Continental Shelf*, Dissenting Opinion of Judge Oda, para. 31.
[167] *ConocoPhillips*, p. 56.
[168] Examples of ICSID tribunals that have relied on efficiency considerations include the tribunals in *Beccara, Biwater Gauff, Emmis, BIVAC, Tallin, Suez, EDF International,* and *ADM/Tate & Lile.*

that are beyond those necessary to resolve the litigation.[169] In other dispute settlement systems, judicial economy has been applied differently and in distinguished manners.

The ICJ relied on the principle of judicial economy to remedy procedural issues that could unreasonably extend the time of the proceedings.[170] In investment arbitration, tribunals have been applying judicial economy in a similar manner. In *Grand River*, the tribunal relied on both judicial economy, but also on efficiency, to resolve a procedural issue.[171] The tribunal did not draw a distinction between both concepts. Following a similar path, the tribunal in *Suez* applied both judicial economy and efficiency to decide procedural matters and remained silent on the meaning of both terms.[172]

The definition of judicial economy in international law is not settled.[173] The tribunals in *Grand River* and *Suez* seem to suggest that the terms judicial economy and efficiency are interchangeable or at least complementary. A commentator defined judicial economy in international adjudication as a principle that "requires the judge to obtain the best result in the management of a controversy with the most rational and efficient use possible of his or her powers".[174] According to him, the principle of judicial economy is "a fundamental canon of adjudication", which works like directives and provide guidance to adjudicators.[175] He noted that international courts and tribunals have been applying the principle of judicial economy in

[169] See *United States — Subsidies on Upland Cotton*, para. 718, referring to *Canada – Wheat Exports and Grain Imports*, para. 133. See also *US – Wool Shirts and Blouses*, p. 19.
[170] *Croatia Genocide Case*, Judgment, Preliminary Objections, paras. 85-89.
[171] *Grand River*, paras. 100-102.
[172] *Suez and ors v Argentina*, Decision on Liability, para. 272; and *Suez and ors v Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission, paras. 26-27.
[173] A commentator has argued that scholars have paid little attention to judicial economy, noting that only few authors have inquired about its nature and real content. Thus, no comprehensive sense of the term has been provided. See Fulvio Maria Palombino, 'Judicial Economy and Limitation of the Scope of the Decision in International Adjudication', *Leiden Journal of International Law* 23 (2010), p. 912.
[174] Palombino, 'Judicial Economy and Limitation of the Scope of the Decision in International Adjudication', p. 909.
[175] Ibid., p. 912.

the form of judicial limitation of the scope of the decision,[176] which is consistent with the WTO approach on the principle.[177]

The *Abyei* tribunal reviewed the application of the "principle of economy", referring to the application of "judicial economy" by international courts and tribunals. Although the *Abyei* tribunal did not draw its own conclusion on the concept of judicial economy, it understood that that principle is part of the general aim to promote "efficiency in the conduct of adjudicatory proceedings".[178]

Two commentators have argued that the concept of "judicial economy" under the WTO dispute settlement – *i.e.* scope limited to the issues necessary to settle the dispute – is part of its broader sense of "efficiency in the operation of the courts and the judicial system".[179] The commentators concluded that the concept of judicial economy under the WTO is more restricted than the concept under national law.[180]

[176] Ibid., pp. 912-913. The commentator reviews the jurisprudence of: (i) PCIJ and ICJ; (ii) the "European Union judicial decision-makers"; (iii) ECtHR and IACtHR; (iv) International Criminals Tribunals for Rwanda and for the former Yugoslavia; and (v) WTO dispute settlement. See Ibid., pp. 912-922. The author does not review the ICJ use of judicial economy in *Croatia Genocide Case* as the date of publication of the article (2010) precedes the date of the publication of the ICJ judgment (2015). The commentator, however ignores arbitration awards in his paper, including the *Abyei* award and its reference to the principle of economy, which was published on 2009.

[177] See Jan Bohanes and Andreas Sennekamp, 'Reflections on the Concept of "Judicial Economy" in WTO Dispute Settlement', in *The WTO at Ten: The Contribution of the Dispute Settlement System*, ed. Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (CUP, 2006), 424–49, pp. 424-449.

[178] *Abyei* Award, para. 422. The *Abyei* tribunal makes reference to international case law that applied the principle of economy. See *Abyei* Award, fn. 834. See also the definitions of judicial economy provided by English language law dictionaries at fn. 180 below.

[179] Bohanes and Sennekamp, 'Reflections on the Concept of "Judicial Economy" in WTO Dispute Settlement', p. 449.

[180] Ibid., p. 447, referring to Black's Law Dictionary, ed. 7th, ed. B.A. Garner, West Group, 1999, p. 851, which defines judicial economy as "efficiency in the operation of the courts and the judicial system; […] the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources". The authors also refer to the German-language term "Verfahrensökonomie" as used in German and Austrian law. A very similar definition of "judicial economy" is provided by another English language law dictionary: "Judicial economy [means] the most efficient use of judicial resources: often used as the rationale underlying doctrines in civil procedure such as permissive joinder or res judicata, and sometimes offered as the justification for a judge's decision in a particular case." See Steven H. Gifis, *Law Dictionary*, 6th ed. (Barron's, 2010), p. 294.

The NAFTA tribunal in *Softwood Lumber Cases* also reviewed the application of the term judicial economy in international law.[181] The tribunal in *Softwood Lumber Cases* analysed the term "efficient resolution of the claims" under Article 1126(2) and confronted it with the expression "judicial economy". After reviewing the international jurisprudence, the tribunal concluded that judicial economy carries conflicting meanings in international law.[182] The tribunal considered the definition of judicial economy under the WTO and rejected its application to the request under Article 1126 of NAFTA. For the tribunal, the term of "efficient resolution of the claims" related to "procedural economy" and not "judicial economy".[183]

For the consolidation tribunal, the efficiency requirement under that provision is a fact-driven standard.[184] The determination of what is efficient under that provision is not "an accounting exercise of drawing up a matrix of comparative advantages and disadvantages and applying relative weighing factors".[185] The tribunal described the efficiency analysis in the context of consolidation as a comparison with the "situation as it exists, and would continue to exist […]".[186] Among the factors to be considered cited by the consolidation tribunal are: "(i) time; (ii) costs; and (iii) avoidance of conflicting decisions".[187] The tribunal described the three factors as follows:

> Factor (i), time, includes consideration of the status of the Article 1120 [of NAFTA, Chapter 11,] arbitrations for which a party seeks consolidation and of the delay, if any, that might result in the resolution of the claims. In that connection, the differences in stages in the Article 1120 proceedings may constitute a relevant aspect. Factor (ii), costs, involves an assessment of the costs to all parties involved. Factor (iii), avoidance of conflicting decisions,

[181] *Softwood Lumber Cases,* Order of the consolidation tribunal. The tribunal was established to address a consolidation request under Article 1126(2) of NAFTA. See fn. 70.
[182] *Softwood Lumber Cases*, para. 76.
[183] Ibid., para. 183.
[184] Ibid., para. 124.
[185] Id.
[186] Ibid., para. 126.
[187] Id.

> requires a consideration of whether conflicting decisions on common questions of law or fact, that are before the 1120 Tribunals, can arise.[188]

While "time" and "costs" are the determinant factors, the factor "avoidance of conflicting decisions" is particular to the consolidation analysis. The third factor can be understood as a fairness analysis of the potential outcome of the consolidation decision.[189]

A fairness analysis is a requirement under Article 1126(2) of NAFTA. According to the consolidation tribunal, it seeks to balance the interest of the parties involved with the tribunal's determination of what is procedurally efficient in a particular situation.[190] Independently of that provision, any efficiency consideration analysis in the context of international dispute settlement is bound by a fairness and due process analysis. The tribunal in *Softwood Lumber Cases* provided a balancing analysis of the efficiency requirement and fairness noting that:

> a balance needs to be struck between a hearing that is longer for one party but at the same time shorter for another. It may also happen that what is procedurally less efficient for one party is procedurally more efficient for another. In that respect, the procedural economy that will redound to the benefit of a disputing State Party is another relevant factor […].[191]

The analysis of the meaning "efficient resolution of the claims" by the consolidation tribunal in *Softwood Lumber Cases* provides a valuable tool to understand and approach the principle that proceedings shall be conducted in an efficient manner.

In conclusion, procedural efficiency involves the rationalization of the proceedings in terms of time and costs.[192] It is a fact-driven standard, since it involves an analysis of the current status of the proceedings and a projection of potential time and costs to be incurred by

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[188] Id.
[189] The *Softwood Lumber Cases* tribunal addressed the factor at paras. 130-133.
[190] *Softwood Lumber Cases,* Order of the consolidation tribunal, para. 125.
[191] Id.
[192] See *United Utilities (Tallin) BV*, para. 16.

the disputing parties. The definition is close to the one of "procedural economy", as provided by Kolb in the context of the ICJ. According to the commentator, procedural economy

> requires from the judge that he or she attempts – within the four corners of the Statute, the Rules [of the ICJ] and the ordinary ways of dealing with normally susceptible sovereign States – to move towards the end of the procedure through the most direct, simple, practical and time-sparing paths at his or her disposal.[193]

While efficiency considerations' main objective is to preserve resources of the many stakeholders to a dispute, its broader purpose is also to guarantee a fair dispute resolution and a prompt and effective remedy to the injured party. The effectiveness of the remedy will depend on the time of the proceedings and the costs related to the same. Aware of that issue, the parties and adjudicators in investor-State arbitration proceedings have relied on efficiency considerations to address procedural matters. Procedural efficiency is a standard that has to be applied by international courts and tribunals to guarantee the effectiveness of its decisions and shall be understood as part of a greater principle of sound administration of justice.

[193] Kolb, 'General Principles of Procedural Law', 2012, p. 893. Kolb provides the following practical examples: "[The adjudicator] should be at pains to join the claims where appropriate; not to require a new application if the default can be easily cured within the old application; not to prolong the debates about irrelevant arguments; not to refer to the merits stage aspects which can, and thus should, be decided at the preliminary stage; to use the orders and interlocutory decisions in a useful way; *etc*."

3. PROCEDURAL ASPECTS OF DAMAGE CALCULATION IN EARLY INTERSTATE ADJUDICATION

Under international law, an injured party is entitled to seek reparation for the damages it has incurred as a result of an international wrongful act, including in the form of compensation. Both material and non-material injuries are compensable under international law.

Between the 19th and 20th Centuries, States have requested arbitration tribunals and claims commissions to calculate and award compensation for damages caused to properties of the State or incurred by its nationals through the exercise of diplomatic protection.[194] The procedural aspects of cases involving awards of damages were very similar during that period. At that time, the adjudicators would address both the merits and the quantum aspects of the case in a single phase of the proceedings and would thus award a single award on all the issues submitted to the tribunal. The single phase approach was adopted by historic arbitration tribunals under the PCA and the PCIJ in the case *S.S. Wimbledon.*

However, following its judgment in the case *S.S. Wimbledon*, the PCIJ would follow a different approach. In *Factory at Chorzów*, the PCIJ postponed the analysis of the quantum aspects of the case and decided to first address and render its judgment solely on the merits of the dispute. Following the its judgment on the merits, the PCIJ reopened the proceedings to

[194] Marjorie M. Whiteman, *Damages in International Law* (Washington: United States Government Printing Office, 1937); Jackson H. Ralston, *The Law and Procedure of International Tribunals : Being a Résumé of the Views of Arbitrators upon Questions Arising under the Law of Nations and of the Procedure and Practice of International Courts*, 2nd ed. (Stanford University Press, 1926); Jackson H. Ralston, *International Arbitral Law and Procedure : Being a Résumé of the Procedure and Practice of International Commissions, and Including the Views of Arbitrators upon Questions Arising under the Law of Nations* (Ginn, 1910). See also ARSIWA Commentary, p. 102, item 18. With respect to historic evolution of institute of diplomatic protection, see Manlio Frigo, 'Notas Sobre a Evolução Histórica Do Instituto Da Proteção Diplomática No Sistema Da Organização Das Nações Unidas', *Seqüência* 61 (2010), pp. 11-ss.

assess the damages resulting from the international wrongful act. The same procedural approach was adopted by the PCIJ's successor, the ICJ, in its first case, the *Corfu Channel.*

3.1 PRELIMINARY CONSIDERATIONS ON THE OBLIGATION TO REPAIR UNDER INTERNATIONAL LAW

The obligation to provide reparation is a customary international law that has been affirmed and applied by the contemporary international courts and tribunals, including interstate arbitration tribunals under the auspices of the PCA, the PCIJ, the ICJ, the ITLOS, the ECtHR, the Inter-American Court of Human Rights ("IACtHR"), the IUSCT. These bodies have awarded monies to an injured party in order to repair damages resulting from international wrongful acts.[195]

The customary international law obligation to provide reparation has been codified by the ILC in its Articles on Responsibility of States of International Wrongful Acts ("ARSIWA").[196] Article 31 of the ARSIWA provides that, as general rule of customary international law, a State is under an obligation to fully repair injuries resulted from an action in breach of an international law obligation:

> Article 31. Reparation
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

[195] C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987); Rosalyn Higgins, 'Remedies and the International Court of Justice: An Introduction', in *Remedies in International Law: The Institutional Dilemma*, ed. Michael D. Evans (Hart Publishing Oxford, 1998); Ian Brownlie, 'Remedies in the International Court of Justice', in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, ed. Malgosia Fitzmaurice and Vaughan Lowe (CUP, 1996), 557–66; Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (OUP, 2005).

[196] See fn. 4. For a deeper analysis, see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002); James Crawford, Alain Pellet, and Simon Olleson, eds., *The Law of State Responsibility* (OUP, 2010); James Crawford, *State Responsibility: The General Part* (Cambridge: CUP, 2013); Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission', *British Yearbook of International Law*, September 2015, 10.1093/bybil/brv001.

The obligation to repair is also enshrined in the United Nations Convention for the Law of the Sea ("UNCLOS"), in its article 304.[197]

Article 31 of the ARSIWA provides a broad scope to the meaning of "injury". According to the ARSIWA Commentary, "injury" under Article 31 includes "any damage, whether material or moral, caused by the international wrongful act of a State".[198] According to the ARSIWA Commentary, the broad meaning of the term "injury" is intended to cover both material and moral damages in a wide sense, but it also intends to exclude "merely abstract concerns or general interests of a State which is individually unaffected by the breach".[199] It further explains that "material damage" refers to "damage to property or other interests of the State and its nationals which is assessable in financial terms",[200] while "moral damages"[201] means "individual pain as suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life".[202]

Article 31 of the ARSIWA enshrines the full reparation principle stated by the PCIJ in the case *Factory at Chorzów*. As noted by the PCIJ in that decision, "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[203]

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[197] United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994. Article 304 of UNCLOS reads as follows: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."
[198] Ibid., p. 91.
[199] Ibid., p. 91-2.
[200] Ibid., p. 92.
[201] Moral damages to States are excluded from the scope of compensated injuries, which is the subject matter of another type of remedy, namely satisfaction provided in article 37. See Ibid., pp. 98-9.
[202] Ibid., p. 92.
[203] *Factory at Chorzów*, *Germany v Poland*, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13 September 1928, p. 47.

The principle of full reparation provided by the PCIJ translates the customary international law that requires a State in breach of international obligation to repair the damages it has caused. As has been noted by the international jurisprudence:

> [t]he most important principle of international law relating to the violation, by a State, of a treaty obligation is 'that the breach of an engagement involves an obligation to make reparation in an adequate form' (see the judgment of the Permanent Court of International Justice in the case of *Factory at* Chorzów (Jurisdiction), Judgment No. 8, 1927, PCIJ, Series A, No. 9, p. 21).[204]

The case *Factory at Chorzów* is a leading international case on the issue of reparation[205] and its *dictum* has been adopted by a number of international tribunals and courts, such as the ITLOS[206], ECtHR[207], IACtHR[208], and arbitration tribunals under the ICSID,[209] IUSCT,[210] and Chapter 11 of the NAFTA.[211]

The ARSIWA provides that a State may seek reparation for an injury in three forms: (i) restitution; (ii) compensation; and (iii) satisfaction. The three forms of reparation may be granted either singly or in combination.[212] A State responsible for an international wrongful act shall make restitution in order to re-establish the situation which existed prior to the breach of its international obligations, unless that restitution is not "materially impossible" or "does not involve a burden out of all proportion to the benefit deriving from restitution

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[204] *Case of Cyprus v. Turkey (Just satisfaction)*, Judgment of 12 May 2014, ECtHR, Grand Chamber, Application no. 25781/94, paras. 41-42.
[205] Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP, 2009), p. 27.
[206] *M/V Saiga (No. 2) (St. Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS, para. 170.
[207] *Papamichalopoulos v. Greece*, Judgment of 31 October 1995, ECtHR Ser A, No. 330-B, para. 36.
[208] *Velazquez-Rodriguez*, Compensatory Damages (Art. 63(1). American Convention on Human Rights), Judgment of July 21, 1989 IACtHR (Ser. C) No. 7 (1990), para. 25.
[209] *Metaclad Corp v. Mexico*, Award, 40 ILM 35 (2001), 25 August 2000, para. 122.
[210] *Tippets et al v. TAMS-AFFA et al*, 6 IUSCT Reports (1984) 219, p. 225.
[211] *SD Myers v. Canada* Award (Second Partial Award), 8 ICSID Reports 124 (2005), 21 October 2002, para. 94. With regard to the remedies available under NAFTA, see Mara Valenti, 'Controversie Commerciali O Controversie Sugli Investimenti? Una Distinzione Che Fa La Differenza Sul Piano Dei Rimedi Disponibili Anche in Ambito NAFTA', *Rivista dell'Arbitrato* 4 (2008): 139–52. For a critical analysis, see also Susan L. Karamanian, 'Dispute Settlement under NAFTA Chapter II : A Response to the Critics in the United States', in *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP, 2009), 395–418.
[212] Article 34 of the ARSIWA.

instead of compensation."[213] If damage is not made good by restitution, the State responsible for an international wrongful act shall compensate for the damage causes thereby.

The ARSIWA Commentary defines compensation as:

> the financially assessable damage suffered by the injured State or its nationals. … [C]ompensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. … Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach [footnotes omitted].[214]

As provided by the ARSIWA, the compensation "shall cover any financially assessable damage including loss of profits insofar as it is established."[215]

The international obligation to provide reparation in the form of compensation has been widely acknowledged and applied by the contemporary international courts and tribunals. As provided by international case-law, "[…] 'it is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it'".[216] The same authority has noted that "[i]t is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered".[217]

The ARSIWA, in its comments to Article 34, provides that "[c]ompensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote."[218] Also, compensation "is not concerned to

[213] Article 35 of the ARSIWA.
[214] ARSIWA Commentary, p. 99.
[215] Article 36 of the ARSIWA.
[216] *Case of Cyprus v. Turkey (Just satisfaction),* paras. 41-42, referring to *Gabčikovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25 September 1997, p. 81, para. 152.
[217] *Case of Cyprus v. Turkey (Just satisfaction),* paras. 41-42, referring to *Fisheries Jurisdiction Case, Federal Republic of Germany v. Iceland*, Merits, ICJ Reports 1974, 25 July 1974, pp. 203-205, paras. 71-76.
[218] Ibid., p. 96.

punish the responsible State, nor does compensation have an expressive or exemplary character".[219]

According to article 36, paragraph 2, of the ARSIWA, compensation shall cover any damage which is capable of being evaluated in financial terms "including loss of profits insofar as it is established". Accordingly, financially assessable damages include:

> both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.[220]

The dispute settlement mechanisms have adopted divergent approaches to address the calculation of the damages claimed. This is a consequence of the different procedural rules applied by each international dispute settlement mechanism, the diversity of the substantive law applied, the various heads of damages of each case, and other particularities, such as the amount and quality of evidence provided by the litigant parties.

The dispute settlement system of the WTO[221] does not provide the remedy of reparation,[222] as the remedies under the WTO are understood to be "prospective" or "forward-looking".[223] The ARSIWA Commentary notes that the "focus of the WTO dispute settlement mechanism is on cessation rather than reparation".[224]

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[219] Ibid., p. 99.
[220] Id.
[221] For an overview of the functioning of the dispute settlement mechanism under the WTO, see Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 3rd ed. (CUP, 2013), pp. 156-311. See also Giorgio Sacerdoti, 'The Dispute Settlement System of the WTO in Action: A Perspective on the First Ten Years', in *The WTO at Ten: The Contribution of the Dispute Settlement System*, ed. Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (CUP, 2006), 35–57.
[222] Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules Are Rules – Toward a More Collective Approach' 94 (2000): 335–47, p. 339; Marco Bronckers and Naboth van den Broek, 'Financial Compensation in the WTO Improving the Remedies of WTO Dispute Settlement' 8, no. 1 (2005): 101–26, doi:10.1093/jielaw/jgi006, p. 101; Rachel Brewster, 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement', *George Washington Law Review* 80 (2011): 102–58, p. 102.
[223] The conclusion derives from the wording of Article 19.1 of the DSU, which reads as follows: "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall

Although the WTO practice shows that Panels and the WTO Appellate Body often apply international law principles,[225] it is understood that the DSU "has contracted out of the general international law on State responsibility"[226] with respect to remedies.

The DSU foresees in its Article 22.1 compensation as a remedy.[227] However, compensation under the DSU is characterized as a "temporary remedy", like the remedy of suspension of concession and obligations under Article 22.2 of the DSU.[228] The compensation under the DSU has distinguished features in comparison with the remedy of same name under the ARSIWA. As noted by two commentators, compensation under the DSU is "(1) voluntary, i.e. the complainant is free to accept or reject compensation; and (2) forward looking, i.e. the compensation concerns only the nullification or impairment (i.e. the harm) that will be suffered in the future."[229]

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recommend that the Member concerned bring the measure into conformity with that agreement." However, as noted by a commentator, it does not mean that WTO Panels and the Appellate Body are not required to make retrospective assessments of a measure in breach of WTO law. See Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective', *European Journal of International Law* 16, no. 3 (2013): 505–34.

[224] ARSIWA Commentary, footnote 431.

[225] See James Cameron and Kevin R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', *ICLQ* 50, no. 2 (2001): 248–98.

[226] Peter van den Bossche, The Law and Policy of the World Trade Organization – Text, Cases and Materials, 2nd ed. (CUP, 2008), p. 230.

[227] Article 22.1 of the DSU reads as follows: "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements." See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401, entered into force 1 January 1995.

[228] Article 22.2 of the DSU reads as follows: "If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements." See Ibid.

[229] Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, p. 200.

According to Article 22.2 of the DSU, compensation is only applicable when a party fails to bring the measure found to be inconsistent with WTO law into compliance or otherwise comply with the recommendations and ruling within the "reasonable period of time" under Article 21.3 of the DSU. Article 22.2 further provides that the concerned parties shall enter into negotiations "with a view to developing mutually acceptable compensation". If the parties fail to reach an agreement on compensation, the concerned party may request the WTO's Dispute Settlement Body ("DSB") to suspend concessions or other obligations.

As noted by two commentators, among the two temporary remedies under the WTO system – compensation and suspension of concession and obligation –, compensation is "the less important" and a "hardly used" remedy.[230] The only "final remedy" for breach of WTO law is the withdrawal (or modification) of the WTO-inconsistent measure.[231]

3.2 AWARDS OF DAMAGES IN INTERSTATE ADJUDICATION IN THE EARLY 20TH CENTURY

A claim for indemnity against a State shall fulfil some particular conditions. Whiteman explains that in each instance a claim must indicate: "(a) an international wrong on the part of the respondent state and (b) an injury, loss, or damage on the part of the

[230] Id.

[231] Id., referring to Article 3.7 of the DSU, which provides the following: "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures." See *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

claimant."[232] Whiteman adds that "the injury or loss may have been sustained directly by the claimant state itself or indirectly through an injury or loss suffered by a national of that state."[233] The range of injuries or losses that may be compensable is thus broad. Accordingly, the ARSIWA Commentary provides that the principles and approaches around the assessment of damages "will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome".[234]

Due to the variety of types of compensable damage under international law, a uniform procedure to approach evidence on damage presented by the parties would limit the analysis of the adjudicator. The assumption is that the procedure to assess damages should be flexible, thus providing to the adjudicators discretion to conduct the damages assessment proceedings.[235]

3.2.1 Historic interstate arbitrations under the PCA

Arbitration was widely used by States to settle their disputes during the 19th and early 20th centuries.[236] Those proceedings usually concerned disputes involving incidents with vessels and losses incurred by its national.[237] Often, States would establish "mixed claims

[232] Marjorie M. Whiteman, *Damages in International Law* (Washington: United States Government Printing Office, 1937), p. 284.
[233] Id.
[234] Id.
[235] *Mutatis mutandis*, a commentator has noted that "damage assessment as they are presently conducted by investment tribunals involve a substantial degree of discretion" in the context of international investment arbitration. See Gabrielle Kaufmann-Kohler, 'Compensation Assessments: Perspectives from Investment Arbitration', in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, ed. Chad B. Bown and Joost Pauwelyn (CUP, 2010), 623–40, p. 634.
[236] United Nations, *Report of International Arbitral Award* / *Recueil des sentences arbitrales*, I-XXIX, available on-line at: http://legal.un.org/riaa/
[237] See Whiteman, *Damages in International Law*; P. Hamilton et al., eds., *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports* (Kluwer, 1999)..

commissions" by which the adjudicators would address claims of damages.[238] Those proceedings were simpler in comparison to the contemporary interstate disputes. The umpires of the mixed claims commissions would address several claims put forward by individuals and would award damages on an *ex aequo et bono* basis.[239] The analysis of evidence was limited and the umpire would usually apply national law of one of the States in concern.[240]

The popularity of arbitration to settle interstate dispute during the end of the 19th Century paved the way for the creation of the PCA in 1899.[241] The PCA has been the institution responsible for administrating nearly all interstate arbitration initiated since its creation.[242]

Arbitral tribunals under the PCA have administrated interstate arbitrations which addressed claims of damages and later awarded reparation in the form of compensation. The cases were: (i) *The Pious Fund of Californias;* (ii) *Canevaro Claim*; (iii) *The Manouba Case*; (iv) *The Carthage Case*; and (v) *Norwegian Shipowners' Claims*.[243] In all those cases, the

[238] See for example the St Croix River Commission, established in 1794 pursuant to Article 5 of the Treaty of Amity, Commerce and Navigation of 1794 between the United States and Great Britain ("Jay Treaty"); British Debts Commission, established in 1794 pursuant to Article 6 of the Jay Treaty; Maritime Claims Commission, established in 1794 pursuant to Article 7 of the Jay Treaty; Alabama Claims Commission, established on 8 May 1871; Mixed Claims Commission (France-Venezuela), established on 27 February 1903 pursuant to the Washington Protocol; Mixed Claims Commission Italy-Venezuela, established on 13 February and 7 May 1903 pursuant to a protocol of 27 February 1907; German-American Mixed Claims Commission, established on 10 August 1922; General Claims Commission, established on 8 September 1923. See fn. 236.

[239] For an overview of the concept of *ex aequo et bono* and its applicability in the context of international dispute settlement, see Markus Kotzur, 'Ex Aequo et Bono', *Max Planck Encyclopedia of Public International Law*, July 2009; Louis B. Sohn, 'Arbitration of International Disputes Ex Aequo et Bono', in *International Arbitration - Liber Amicorum for Martin Domke*, ed. Martin Domke and Pieter Sanders (Nijhoff, 1967), pp. 330-.

[240] The International Bureau of the Permanent Court of Arbitration, ed., *Institutional and Procedural Aspects of Mass Claims Settlement Systems: Papers Emanating from the PCA International Law Seminar on December 9, 1999* (Kluwer Law International, 2000); Howard M. Holtzmann and Edda Kristjánsdóttir, eds., *International Mass Claims Processes: Legal and Practical Perspectives* (OUP, 2007).

[241] Hague Peace Conference *Conférence internationale de la paix: La Haye 18 mai–29 juillet 1899* (Nijhoff La Haye 1907). Article 16 of the Hague Convention of 1899 provides that "[…] arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle."

[242] Hamilton et al., *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports*.

[243] *The Pious Fund of Californias, United States v Mexico*, Award, (1902) IX RIAA 1, ICGJ 409 (PCA 1902), 14 October 1902; *Canevaro Claim, Italy v Peru*, Award, (1912) 11 RIAA 397, (1912) 6 AJIL 746, ICGJ 400 (PCA

tribunals adopted one common procedural approach; each tribunal assessed the merits of the dispute and awarded damages in the same award. In other words, the tribunals did not postpone the analysis of the quantum to a later stage following the analysis of the merits.

3.2.1.1 The Pious Fund of Californias

The Pious Fund of Californias case was the first arbitration brought to the PCA since its establishment in 1899. By a *compromis* signed on 22 May 1902 between the United States and Mexico, both States agreed and determined that the differences which existed between them would be settle by arbitration. The United States claimed, for the benefit of the Archbishop of San Francisco and the Bishop of Monterey, from Mexico annuities related to the "Pious Fund of the Californias".[244] In order to decide the dispute, the arbitrators in the case relied on "international treaties and the principles of international law".[245]

The tribunal rendered an award on 14 October 1902. It held that Mexico was liable to pay annuities to the United States in the amount of 43,050.99 Mexican dollars and found that Mexico had failed to pay thirty-three annuities. In the same award, the tribunal assessed the quantum of the award by simply multiplying the amount of each annuity for the number of times Mexico had failed to pay, *i.e.* thirty-three. Accordingly, the tribunal determined Mexico to pay 1,420,682.67 Mexican dollars to the United States.[246]

1912), 3 May 1912; *The Manouba Case, France v Italy*, Award, ICGJ 397 (PCA 1913), 6 May 1913; *The 'Carthage', France v Italy*, Award, ICGJ 398 (PCA 1913), 6 May 1913; *Norwegian Shipowners' Claims, Norway v United States*, Award, (1922) I RIAA 307, ICGJ 393 (PCA 1922), 13 October 1922.

[244] *The Pious Fund of Californias*, para. 2 [paragraph numbers added by OUP].

[245] Ibid., para. 10.

[246] Ibid., paras. 18-22.

3.2.1.2 Canevaro Claim

In the *Canevaro Claim*, Italy and Peru agreed on 25 April 1910 to initiate an arbitration on whether Peru was required to pay the sum of 43,140 pounds sterling, plus the legal interest on the said amount, representing debts owed to Italian nationals in light of modifications in the Peruvian domestic law.[247] On its award dated 3 May 1912, the tribunal noted that the total amount due by the Peru was 77,000 pounds sterling and that only 35,000 pounds had been paid.[248] The tribunal further concluded that interest was applicable and thus allocated interest at a rate provided in Peruvian domestic law.[249] Thus, the tribunal acknowledged the existence of a debt in the amount of 43,140 pounds.[250]

3.2.1.3 The Manouba Case and *The Carthage*

The arbitrations *The Manouba Case* and *The Carthage* were two proceedings initiated by France against Italy pursuant to an agreement dated 26 January 1912 and a *compromis* dated 6 May 1912. In the first case, the tribunal was asked to determine whether the Italian naval authorities acted lawfully when they captured and temporary seized the French steamer "Manouba" on 18 January 1912, and arrested twenty-nine Ottoman passengers who were on board. In addition, the disputing parties asked the tribunal to assess the pecuniary consequences resulting from the decision, if any.[251] In *The Carthage*, the tribunal was asked to determine whether the same authorities acted lawfully when they captured and temporary seized the French steamer "Carthage" on 16 January 1912, and any pecuniary consequences incurred as a result of that event.[252]

[247] *Canevaro Claim*, para. 1[paragraph numbers added by OUP].
[248] Ibid., paras. 11-13.
[249] Ibid. paras. 57-59.
[250] Ibid., para. 13.
[251] *The Manouba Case*, paras. 1 and 12 [paragraph numbers added by OUP].
[252] *The Carthage*, paras. 1 and 14 [paragraph numbers added by OUP].

In *The Manouba Case,* France claimed the payment of: (i) one franc, as moral reparation for the offense against the honor of the French flag; (ii) one hundred thousand francs, as penalty and reparation for the political and moral injury resulting from Italy's wrongful international acts; (iii) one hundred and eight thousand, six hundred and one francs, seventy centimes, for indemnities claimed by the private individuals interested in either the steamer or in its voyage; and (iv) the allocation of interest at the rate of four per cent *per annum* to accrue upon the expiration of a period of three months from the date of the award.[253] Italy claimed that no pecuniary obligation was due to France.[254]

The tribunal in *The Manouba Case* rendered the award on 6 May 1913. It found that the Italian naval authorities were not in their right in proceeding to the capture of the French vessel. Thus, Italy was liable for damages incurred in relation to the delay occasioned to the vessel. The tribunal held that the remaining actions carried out by Italian officials, including the arrest of the Ottoman passengers, were lawful.[255]

In order to assess the damages for the delay occasioned to the "Manouba" by its unwarranted capture, the tribunal took into account the amount requested by France and balanced the sum with: (i) the fact that the captain of the steamer was also responsible for the delay because he refused to surrender the twenty-nine Ottoman passengers; (ii) the fact that the vessel was not taken entirely off its original course; and (iii) the expenses incurred by Italy in guarding the detained vessel.[256] Furthermore, the tribunal fixed at four thousand francs the amount of compensation for the ones with interest in the vessel and its voyage.[257]

[253] *The Manouba Case,* para. 9 [paragraph numbers added by OUP].
[254] Ibid., para. 10.
[255] Ibid., para. 20.
[256] Ibid., paras. 30-32.
[257] Ibid., para. 32.

The tribunal rejected France's claim for compensation for moral and political injury and the offense against the French flag. According to the tribunal, an arbitral award by itself constitutes a severe penalty.[258]

In *The Carthage*, France sought compensation in the amount of: (i) one franc, for the offense against the French flag; (ii) one hundred thousand francs, as reparation for the moral and political injury resulting from Italy's wrongful acts; and (iii) five hundred and seventy-six thousand, seven hundred and thirty-eight francs, twenty-three centimes, for the losses and damages claimed by private parties interested in the steam and its voyage.[259] France also requested the allocation of interest at the rate of four per cent per annum to the sums charged in case of non-payment by Italy before the expiration of a period of three months from the day of the award.[260] Italy claimed that no pecuniary or other consequence should be imposed upon itself because the acts carried by the Italian naval authorities were lawful.[261]

On 6 May 1913, the same date of the award in *The Manouba Case*, the tribunal in *The Carthage* held that Italy was not within its rights in proceeding to the capture and temporary seizure of the "Carthage".[262] The tribunal also found that Italy was liable for the damages incurred by private parties interested in the vessel and its voyage as a result of the unlawful capture and temporary seizure.[263] The tribunal fixed the amount of indemnity as follows: (i) seventy-five thousand francs, for the owner of the "Carthage", the "*Compagnie Générale Transatlantique*"; (ii) twenty-five thousand francs, for the aviator named Duval and his associates, whose aeroplane was on board of the "Carthage" at the moment of capture and temporary seizure; and (iii) sixty thousand francs, for passengers and shippers. In total, the

[258] Ibid., paras. 22-24.
[259] *The Carthage,* para. 6 [paragraph numbers added by OUP].
[260] Ibid., para. 8.
[261] Ibid., para. 10.
[262] Id.
[263] Ibid., paras. 36-37.

tribunal awarded to France the amount of one hundred and sixty thousand francs. The tribunal did not allocate interest to the sum awarded.[264]

As in *The Manouba Case*, the tribunal in *The Carthage* rejected France's claim of damages for the offense against the French flag and for the moral and political injury resulting from the wrongful acts carried out by the Italian authorities.[265]

Both tribunals in *The Manouba Case* and in *The Carthage* tribunal did not provide details on how the damages were assessed. The tribunal in *The Manouba Case* cited a number of factors that it took into account to calculate the damages.[266] However, it did not provide an estimation of the impact of each of the factors in the assessment of the damages. In *The Carthage,* the award provided that the amounts were fixed following the analysis of "the concurring explanations of two of [the tribunal's] members".[267] Accordingly, the lack of reasoning in both awards seems to suggest that the damages in both cases were assessed on an *ex aequo et bono* basis.[268]

3.2.1.4 Norwegian Shipowners' Claims

Under a special agreement dated 30 June 1921, the United States and Norway decided to settle, through arbitration, certain claims of Norwegian subjects against the United States arising out of certain requisitions and taking of properties by the "United States Shipping Board Emergency Fleet Corporation" without making just compensation. The special agreement of 30 June 1921 provided that the arbitral tribunal would decide the aforesaid claims "and determine what sum if any shall be paid in settlement of each claim". In

[264] Ibid., para. 38.
[265] Ibid., paras. 30-35.
[266] *The Manouba Case,* paras. 30-32 [paragraph numbers added by OUP].
[267] *The Carthage,* para. 38 [paragraph numbers added by OUP].
[268] With respect to awards on an *ex aequo et bono* basis, see fn. 239.

addition, the tribunal would examine any claim of certain American citizens, the "Page Brothers", against "any Norwegian subject in whose behalf a claim is presented under the present Agreement, arising out of a transaction in which such claim is based". The tribunal would determine "what portion of any sum that may be awarded to such claimant shall be paid to such American citizens". The agreement also provided that any amount granted shall bear interest at the rate of six per cent *per annum* from the date of the rendition of the award until the date of payment.[269]

A total of fifteen claims submitted by Norway were addressed by the tribunal. The total amounts finally claimed by Norway in respect of the fifteen claims, without adding interest, corresponded to $ 13,223,185.00.[270] The United States, on the other hand, declared its willingness and desire to make just compensation in the total amount of $ 2,679,220. The United States also requested the payment of $ 22,800 with respect to the Page Brothers' claim, the validly of which was denied by Norway.[271]

In its award, the tribunal found that the Norwegian claimants had their property expropriated by the United States[272] and thus just compensation was owed to them.[273] For the tribunal, "[j]ust compensation implies a complete restitution of the *status quo ante*".[274] In addition, the tribunal noted that such compensation is measured by the fair actual value of the property taken, at the time and place it was taken, and in view of all the surrounding circumstances. With regard to the surrounding circumstances, the tribunal noted that it should

[269] *Norwegian Shipowners' Claims*, para. 4 [paragraph numbers added by OUP].
[270] Ibid., para. 15.
[271] Ibid., para. 17.
[272] Ibid., para. 115.
[273] Ibid., paras. 116 and 141.
[274] Ibid., para. 133.

examine whether the claimants' property was taken for public use and whether the taking was necessary.[275]

As noted by the tribunal, both disputing parties shared the common ground that just compensation should be "liberally awarded", and that it should be based upon "the net value of the property taken".[276] However, the tribunal stated that it had been "somewhat difficult to fix the real market value of some of [the] shipbuilding contracts [in concern]."[277] The tribunal noted that, because of the First World War, there was a growing scarcity of ships, which contributed to make speculative shipbuilding transactions possible and unavoidable. Also, certain countries imposed standard prices and requisitioned ships for use during the war.[278] In this respect, the tribunal stated that "abnormal circumstances, speculative prices, etc., cannot form the legal basis of compensation in condemnation awards."[279] Accordingly, the tribunal decided that it would assess the value of the properties *ex aequo et bono*.[280]

In assessing the net amount of compensation, the tribunal took into account several circumstances pertaining to the net value of the property requisitioned or taken by the United States, including:

> the date of each contract or sub-contract between shipbuilder and shipowner; the technical characteristics and qualities of each contract (type and dead weight tonnage of the ship; its speed etc.; the reputation, experience, technical and financial situation of the shipyard); the legal value of the contract, namely the liens, rights and interests in each original contract, etc.; the original contract (or sub-contract) price; the progress (and brokerage) payments made by each of the parties on the original contract price; the date of delivery promised in the contract; the date of delivery which was expected at or about the date of the general requisition order and about the date of the effective requisition of each contract as far as these can be ascertained; the various elements pertaining to the value and degree of completion of the tangible objects of completion as: for instance, the percentage of materials

[275] Ibid., para. 117.
[276] Ibid., para. 143.
[277] Ibid., para. 144.
[278] Ibid., paras. 144-145.
[279] Ibid., para. 146.
[280] Ibid., para. 144.

> ordered, and the percentage of materials on hand; the date at which the keel was laid, before or after the general requisition; and the date when the ship was launched; the contracts, settlements, etc. made by the United States and by Norwegian or other shipowners, or by third parties, whether governments or private persons, whether with shipowners or shipbuilders, for the construction or purchase or hire of ships; the statistics, reports and opinions of experts produced by the Parties; the Award of the United States Claims Committee on the present claims; the reports of the Ocean Advisory Committee on just compensation for certain American ships lost in the service of the government; etc.[281]

With regard to the allocation of interest, the tribunal awarded a lump sum to each claimant for a period of five years from the date of expropriation. The lump sums were included in the total amounts of compensation awarded in respect of each claim.[282]

Concerning the United States' claim for damages incurred by the Page Brothers, the tribunal held that the American subject had no claim against Norway or against any Norwegian subject because the United States was the actual responsible for the losses incurred. The tribunal further noted that it did not have jurisdiction to address the issue of whether the Page Brothers had any claim against the United States. Nonetheless, the tribunal concluded that it would be just and equitable to determine the United States to retain the sum of $ 22,800 out of the amount awarded to Norway, so that this sum could be paid to the Page Brothers. The tribunal understood that the Page Brothers would had been paid in that amount by the concerned Norwegian subject had the expropriations not occurred.[283]

In conclusion, the tribunal in *Norwegian Shipowners' Claims* awarded to Norway the total amount of $ 11,995,000. Out of that amount, the United States was entitled to retain the sum of $ 22,800 in benefit of the Page Brothers.[284]

[281] Ibid., para. 153.
[282] Ibid., para. 159.
[283] Ibid., paras. 161-170.
[284] Ibid. para. 171.

3.2.2 The PCIJ case *S.S. Wimbledon*

Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of the PCIJ. Its first session was held in 1922.[285] The PCIJ awarded damages in the case *S.S. Wimbledon* until it was dissolved in 1946. As in the historic arbitrations under the PCA, both the analysis of the merits and the assessment of damages were conducted in a single phase of the proceedings.

The *S.S. Wimbledon* case concerns a dispute commenced by the United Kingdom and others against Germany over the refusal, by German authorities, to grant to the steam ship "Wimbledon" free access to the Kiel Canal on 21 March 1921.[286] The claimants applied to the PCIJ on 16 January 1923 and claimed compensation for material losses incurred as a result of the German refusal at the estimated sum of "174.082 Frs. 86 centimes, with interest at six per cent per annum from March 20th, 1921."[287] Such an amount represented the sum of different heads of damages, which included costs with demurrage, fuel and loss of profit.[288] During the course of the proceedings, the claimants reduced the amount of the claim to "165.749.35".[289]

Following two rounds of written submissions and a five-day public sitting,[290] the PCIJ rendered its judgment on 17 August 1923 and found that the German authorities "were wrong in refusing access to the Kiel Canal to the S.S. 'Wimbledon'". Thus, the respondent State was "bound to make good the prejudice sustained by the vessel and her charterers as the result of this action."[291]

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[285] Covenant of the League of Nations, 1919. See Manley Ottmer Hudson, *La Cour Permanente de Justice Internationale* (Pédone, 1936).
[286] *The SS 'Wimbledon', United Kingdom and ors v Germany*, Judgment, (1923) PCIJ Series A no 1, ICGJ 235 (PCIJ 1923), 17 August 1923.
[287] Ibid., para. 2.
[288] Ibid., paras. 51-52.
[289] Ibid., paras. 52-53.
[290] Ibid., paras. 3-10.
[291] Ibid., para. 62.

The PCIJ, in the same judgment, decided the merits of the dispute and assessed the quantum of the compensation. The PCIJ estimated that the losses amounted to "140, 749 frs. 35 centimes" and awarded the same sum as compensation, allocating interest at 6 per cent per annum from the date of its judgment.[292] To reach that sum, the PCIJ relied on the calculations provided by the claimants, most of which were not disputed by the respondent.[293] However, the PCIJ reduced the amount claimed because it found that some heads of damages were not a direct consequence of the international wrongful act and thus should not be compensated.[294]

3.3 THE SEPARATION BETWEEN MERITS AND QUANTUM PHASE IN EARLY INTERSTATE ADJUDICATION

The PCIJ addressed another claim for compensation in the case *Factory at Chorzów*, although it did not award compensation because the disputing parties settled before a judgment on remedies was rendered. In that case, the PCIJ innovated on the procedural aspects related to a claim for compensation in international dispute settlement. The PCIJ, differently from what it did in the case *S.S. Wimbledon,* postponed the analysis of the amount to be awarded to a phase following its judgment on the merits. The PCIJ's approach in *Factory at Chorzów* is also a deviation from the established practice of the arbitration tribunals under the PCA.

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[292] Id.

[293] As noted in the judgment: "[a]s regards the first three items of the claim, which refer to the sums payable for freight during eleven days demurrage and two days deviation and the cost of fuel, the Court approves the estimates submitted. The respondent has not questioned their correctness ; moreover these estimates are for the most part borne out by the evidence produced during the proceedings." See Ibid., para. 54.

[294] As provided in the judgment: "The fourth item, which relates to the claim for repayment of the share of the vessel in the general expenses of the Company, has been contested by the respondent ; the Court considers that he is justified in doing so. The expenses in question are not connected with the refusal of passage. The Court has arrived at the same conclusion with regard to the claim for Government stamp duty and other costs of recovery included under the same heading." Ibid., paras. 55-56.

The approach to separate the merits and the quantum phase was later followed by the ICJ in its first case, the *Corfu Channel.* The PCIJ, as the predecessor of the ICJ, has profoundly influenced the structure and the practice of the principal judicial organ of the United Nations.[295]

3.3.1 *Factory at Chorzów*

In the *Factory at Chorzów* case, the applicant State instituted proceedings at the PCIJ on 8 February 1927,[296] following the PCIJ's judgment in *Certain German interests in Polish Upper Silesia.*[297] For the applicant, the respondent should have provided reparation because of its attitude towards the companies "*Oberschlesische Stickstoffwerke A.—G*". (hereinafter designated as the "Oberschlesische") and "*Bayerische Stickstoff werke A.—G*". (hereinafter designated as "Bayerische") when it took possession of the nitrate factory situated at Chorzów. Such an attitude had been declared by the PCIJ in its judgment in *Certain German interests in Polish Upper Silesia* a breach of international law.[298]

The applicant requested the payment of 59.400.000 Reichsmarks for the injury caused to Oberschlesische and 16.775.200 Reichsmarks for the injury to the Bayerische plus interest at 6 per cent per annum.[299] The amounts were later updated by the applicant as follows: the compensation to be paid (i) to Oberschlesische should be "75.920.000

[295] *Legacies of the Permanent Court of International Justice*, vol. 13, Queen Mary Studies in International Law (Nijhoff, 2013).
[296] *Factory at Chorzów, Germany v Poland*, Jurisdiction, Judgment, PCIJ Series A No 9, ICGJ 247 (PCIJ 1927), 26 July 1927, para. 1 [paragraph numbers added by OUP].
[297] In this case, the PCIJ found that the Polish Government, by taking possession of the nitrate factory situated at Chorzów, breached the Convention concerning Upper Silesia concluded at Geneva on 15 May 1922, between Germany and Poland. See *Certain German interests in Polish Upper Silesia*, *Germany v Poland*, Merits, Judgment, (1926) PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25 May 1926, Permanent Court of International Justice, referring to Convention between Germany and Poland relating to Upper Silesia (League of Nations) 9 LNTS 465, 118 BSP 365.
[298] *Factory at Chorzów (Jurisdiction),* para. 1 [paragraph numbers added by OUP], referring to *Certain German interests in Polish Upper Silesia*.
[299] *Factory at Chorzów (Jurisdiction),* para. 1.

Reichsmarks, plus the present value of the working capital (raw materials, finished and half-manufactured products, stores, etc.) taken over […]"; and (ii) to Bayerische should be 20.179.000 Reichsmarks.[300] The respondent disputed the PCIJ's jurisdiction to address the claim filed on 8 February 1927. However, the objection was dismissed by the PCIJ on 26 July 1927.[301]

Following the PCIJ's judgment on jurisdiction dismissing the respondent's objection to jurisdiction,[302] the applicant State sought a provisional measure of interim protection with the objective of obtaining a declaration that the respondent State should pay 30 million Reichsmark within one month from the date of the order sought. The application was dismissed by the PCIJ on the basis that the applicant was actually pursuing to obtain an interim judgment in favour of a part of the claim formulated in the proceedings instituted on 8 February 1927.[303]

The applicant State claimed – after having undergone a series of modifications and amendments to its claim[304] – compensation in the total amount of 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 per cent as from 3 July 1922, until the date of judgment, for losses incurred by Oberschlesische; and 20,179,000 Reichsmarks for losses incurred by Bayerische.[305]

The PCIJ addressed the claim for reparation to Oberschlesische and Bayerische following two rounds of written submissions and a five-day hearing.[306] The PCIJ received "numerous documents either as annexes to the documents of the written proceedings or in the

[300] Ibid., para. 2.
[301] Ibid.
[302] Id.
[303] *Factory at Chorzów, Germany v Poland*, Order, Indemnities, (1927) PCIJ Series A no 12, ICGJ 250 (PCIJ 1927), 21 November 1927.
[304] *Factory at Chorzów*, Judgment, Merits, paras. 7-27 [paragraph numbers added by OUP].
[305] Ibid., paras. 12-13.
[306] Ibid., paras. 1-6.

course of the hearings, or, lastly, in response to requests made or questions put by the Court. (Annex [to the judgment]).” [307]

The judgment on the merits in *Factory at Chorzów* was rendered on 13 September 1928. The PCIJ held that the respondent was “under an obligation to pay, as reparation to the [claimant], a compensation corresponding to the damage sustained by [Oberschlesische and Bayerische]”, to be fixed as a lump sum.[308] In that judgment, the PCIJ stated its now well-known prince of full reparation *dictum* as follows:

> The essential principle contained in the actual notion of an illegal act—-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is 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. 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.[309]

The PCIJ did not calculate the damages claimed by the applicant and did not award compensation. Instead, the PCIJ reserved the fixing of the amount of this compensation for a future judgment.[310] The PCIJ stated that it would seek “further enlightenment in the matter” of damages assessment before giving any decision as to the compensation to be paid by the respondent. For that, the PCIJ arranged for the holding of an expert enquiry, in accordance with Article 50 of the PCIJ’s Statute,[311] which was suggested by the applicant.[312]

In its Order dated 13 September 1928, the PCIJ provided the arrangements for the expert enquiry to enable the PCIJ to fix the amount of the indemnity to be paid by the

[307] Ibid., para. 39.
[308] Ibid., paras. 181(1) and (7).
[309] Ibid., para. 124.
[310] Ibid., para. 181(8).
[311] Statute of the Permanent Court of International Justice (Permanent Court of International Justice (historical) [PCIJ]) 6 LNTS 389, PCIJ Series D No 1, Ch.III Procedure.
[312] *Factory at Chorzów*, Judgment, Merits, para. 135.

respondent to the claimant under the terms of the aforesaid judgment in *Factory at Chorzów* of same date.[313] The expert enquiry would consider the full reparation principle laid down in the PCIJ's judgment of 13 September 1928 and assess what would be the value of the properties in concern on the date of the judgment had the wrongful act not occurred.[314]

As laid down in the Order dated 13 September 1928, the expert enquiry would be entrusted to a committee composed by three experts appointed by the President of the PCIJ. The disputing parties would have the right to appoint an assessor each, who would take part in the work of the committee in an advisory capacity. The elected experts would choose the chairman from among themselves.[315]

The committee of experts would have access to the full record of the proceedings related to the *Factory at Chorzów* case.[316] The committee of experts would also be entitled to ask for the production of "any document and any explanations which it may consider useful for the fulfilment of its tasks".[317] It would be entitled to ask for any facilities that it would deem useful to fulfil its task, including inspecting the premises.[318] The report of the committee had to be reasoned and it would be transmitted to the PCIJ and the disputing parties. Then, the PCIJ would hold a hearing with the disputing parties and the experts to address their report.[319] The fees of the experts would be fixed by the President and be paid by the Registrar of the PCIJ at the conclusion of the enquiry.[320]

[313] *Factory at Chorzów, Germany v Poland*, Order, Indemnity, (1928) PCIJ Series A No 17, ICGJ 256 (PCIJ 1928), 13 September 1928.
[314] Ibid., para. 2 [paragraph numbers added by OUP].
[315] Ibid., para. 3
[316]Ibid., para. 6.
[317] Ibid., para. 7.
[318] Ibid., para. 8.
[319] Ibid., para. 9.
[320] Ibid., para. 10.

Before the PCIJ could conclude the calculation of damages proceedings, it was communicated that on 27 November 1928 the parties agreed to settle their dispute concerning the factory at Chorzów. Thus, the PCIJ declared the proceedings in relation to that case terminated on 25 May 1929.[321]

3.3.2 *Corfu Channel*

The ICJ was asked to award compensation in its very first case, the *Corfu Channel*. In that dispute, the United Kingdom claimed that Albania was responsible for the incident which occurred in the Corfu Channel on 22 October 1946, when two British destroyers struck mines, the explosion of which caused damage to these vessels and loss of life.[322] Following the dismissal of preliminary objections to the ICJ's jurisdiction raised by Albania,[323] the ICJ appointed experts to assist with the analysis of the facts and evidence provided by the parties, including "information and documents available related to the damages suffered by the [British vessels]".[324] The ICJ refused to receive certain documents provided by the disputing parties as they were not presented in an original and complete form, as required by the Rules of the Court in force at the time.[325]

Following two-rounds of written submissions on the merits,[326] the experts provided their report on 8 January 1949,[327] during the course of a lengthy public sitting.[328] The experts,

[321] *Factory at Chorzów, Germany v Poland*, Order, Interim Measures of Protection, (1929) PCIJ Series A no 19, ICGJ 258 (PCIJ 1929), 25 May 1929.
[322] *Corfu* Channel, *United Kingdom v Albania*, Judgment, Preliminary Objection, (1948) ICJ Rep 15, ICGJ 198 (ICJ 1948), 25 March 1948, para. 3 [paragraph numbers added by OUP].
[323] *Corfu Channel*, Judgment, Preliminary Objection.
[324] *Corfu Channel*, *United Kingdom v Albania*, Order, Expert Opinion, (1948) ICJ Rep 124, ICGJ 197 (ICJ 1948), 17 December 1948, para. I(3).
[325] *Corfu Channel*, *United Kingdom v Albania*, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9 April 1949, para. 10 [paragraph numbers added by OUP], referring to International Court of Justice Rules of Court, Part III Proceedings in Contentious Cases, Section C Proceedings before the Court, Subsection 1 Institution of Proceedings, Articles 48 and 43(1).
[326] *Corfu Channel*, Judgment, Merits, para. 4 [paragraph numbers added by OUP].
[327] Ibid., para. 12.

following an investigation trip to Albania and Yugoslavia, provided their second report on 8 February 1949.[329] Members of the Court posed question to the experts[330] and representatives of the disputing parties provided oral comments to their reports during the public sitting. The disputing parties also filed written observations in relation to the report of 8 February 1949.[331]

The claimant State asked the ICJ to adjudge and declare *inter alia* that the respondent was "under an obligation […] to make reparation in respect of the breach of its international obligations". The claimant stated that the losses suffered amounted to £ 875,000, which encompassed the damages incurred by the vessels and compensation for the pensions and other expenses incurred by the Government of the United Kingdom in relation to the deaths and injuries of naval personnel.[332] Albania disputed its responsibility and, for the first time during the proceedings, argued that the ICJ would not have jurisdiction to assess the amount of compensation.[333]

In its judgment on the merits dated 9 April 1949, the ICJ found *inter alia* that Albania was responsible for the damages incurred by the United Kingdom in the Corfu Channel on 22 October 1946, including the damage and loss of human life that resulted therefrom.[334] The ICJ dismissed Albania's objection to its jurisdiction to assess the amount of compensation. The ICJ postponed the analysis of the quantum to be compensated. It noted that, during the proceedings on the merits, "[the respondent did not state] which items, if any,

[328] As provided in the judgment on the merits, "[p]ublic sittings were held by the [ICJ] on the following dates : November, 1948, 9th to 12th, 15th to 19th, 22nd to 26th, 28th and 29th ; December, 1948, 1st to 4th, 6th to 11th, 13th, 14th and 17th ; January, 1949, 17th to 22nd. In the course of the sittings from November 9th to 19th, 1948, and from January 17th to 22nd, 1949, the Court heard arguments by [the disputing parties]. In the course of the sittings from November 22nd to December 14th, 1948, the Court heard the evidence of the witnesses and experts called by each of the [disputing parties] in reply to questions put to them in examination and cross–examination on behalf of the [disputing parties], and by the President on behalf of the [ICJ] or by a Member of the Court." See Ibid., para. 9.
[329] Ibid., para. 12.
[330] Id.
[331] Ibid., para. 13.
[332] Ibid., para. 14.
[333] Ibid., para. 58.
[334] Ibid., para. 108.

of the various sums claimed it contests, and the [claimant did not submit] its evidence with regard to them." The ICJ thus concluded that "further proceedings on this subject [were] necessary".[335]

Following the judgment on the merits dated 9 April 1949, the ICJ invited Albania to provide comments on the United Kingdom's memorial of 1 October 1947, with respect to the various amounts claimed. After that, each disputing party would provide their respective replies.[336] However, in its comments to the claimant's memorial, Albania stated on 29 June 1949 that it did not accept the ICJ's jurisdiction to calculate the damages, irrespective of the judgment on the merits rendered on 9 April 1949.[337] The United Kingdom filed its reply observations. Albania did not file a reply.[338] A public hearing was held on 17 November 1949 and Albania did not attend and made no submissions.[339] At the public hearing, the claimant reduced the amount of damages claimed from £ 875,000 to £ 843,947. The sum broke down as follows: (i) damages in respect of the vessel "Saumarez" in the amount of £ 700,087; (ii) damages in respect of the vessel "Volage" in the amount of £ 93,812; and (iii) damages in respect of deaths and injuries of naval personnel in the amount of £ 50,048.[340]

Noting that Albania had failed to present its case, the ICJ designated, in its Order of 19 November 1949, two experts to examine the figures and estimates stated by the claimant regarding the amount of its claim for the damages to the British vessels.[341] Although not stated by the ICJ in its judgment, the fact that Albania refused to appear during the quantum

[335] Ibid., paras. 68-69.
[336] *Corfu Channel*, *United Kingdom v Albania*, Judgment, Compensation, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15 December 1949, para. 6 [paragraph numbers added by OUP].
[337] Ibid., para. 8.
[338] Ibid., para. 9.
[339] Ibid., para. 12.
[340] Ibid., para. 11.
[341] *Corfu Channel*, *United Kingdom v Albania*, Order, Compensation Due from Albania to the United Kingdom: Appointment of Expert, (1949) ICJ Rep 237, ICGJ 200 (ICJ 1949), 19 November 1949, paras. 7 and 13(1)-(2) [paragraph numbers added by OUP]. See also *Corfu Channel*, Judgment, Compensation, para. 13 [paragraph numbers added by OUP].

phase could support the ICJ's decision to appoint experts to assess the damages. In that manner, the experts would provide an impartial opinion and an additional point of view. Accordingly, the ICJ would avoid rendering a judgment on the quantum based solely on evidence and arguments provided by the claimant.

The report of the experts was filed by 2 December 1949.[342] The expert assessment provided that the damages to the British vessels amounted to a total of £ 807,581.[343] This figure was higher than the claimants' assessment of the damages suffered by the vessels, *i.e.* £ 793,899, being £ 700,087 in respect of "Saumarez" and £ 93,812 in relation to "Volage".[344] The expert sustained that the United Kingdom's calculation was "a fair and accurate estimate of the damage sustained."[345]

The ICJ invited the disputing parties to provide their comments by 10 December 1949.[346] The experts were summoned to a meeting to provide comments to certain questions from the Members of the Courts. The answers were communicated to the disputing parties.[347] On 6 December 1949, the United Kingdom stated that the expert assessment should be taken as a fair and accurate estimate of the damage.[348]

The ICJ considered that the amounts submitted by the United Kingdom in relation to the damages to the vessels were reasonable and the claim well founded. The international court noted that, according to the experts, the claimant's calculation was a fair and accurate estimation of the damages sustained by the British vessels.[349] Also, the ICJ noted that it could

[342] *Corfu Channel*, Judgment, Compensation, para. 14 [paragraph numbers added by OUP].
[343] Ibid., paras. 22-26.
[344] Ibid., para. 11.
[345] Ibid., para. 26.
[346] Ibid., para. 14.
[347] Ibid., para. 15.
[348] Ibid., para. 16.
[349] Ibid., para. 26.

not award more than the amount asked by the United Kingdom.[350] Concerning the claims in respect of deaths and injuries of naval personnel, the ICJ agreed with the amount of £ 50,048 claimed by the United Kingdom, stating that the expenditure was proved by documents.[351] Accordingly, the ICJ accepted the United Kingdom's claim for compensation in its integrity and awarded damages in the amount of £ 843,947.[352]

3.4 CONCLUSION

The *Factory at Chorzów* is a landmark case in the matter of reparation under international law.[353] The PCIJ judgment on the merits in that case is often cited as the expression of the customary international law obligation to provide full reparation, as codified by the ILC in Article 31 of the ARSIWA. However, the same judgment is less remembered as the leading decision in which a contemporary international dispute settlement body has separated the analysis of the merits and the quantum phases of the dispute.

The PCIJ decided to postpone the analysis of the quantum in *Factory at Chorzów* in order to seek further clarification in the matter of damages assessment. The PCIJ understood that it would need the assistance of experts to address and quantify the alleged damages.[354] Thus, the PCIJ invoked Article 50 of its Statute[355] and arranged the holding of an expert enquiry.[356]

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[350] Ibid., para. 24.
[351] Ibid., paras. 27-29.
[352] Ibid., para. 30.
[353] Marboe, *Calculation of Compensation and Damages in International Investment Law*, p. 27; See also Manuel A. Abdala and Pablo T. Spiller, 'Chorzów's Standard Rejuvenated: Assessing Damages in Investment Treaty Arbitrations', *Journal of International Arbitration* 25, no. 1 (2008): pp. 103–20; Abby Cohen Smutny, 'Compensation Due in the Event of an Unlawful Expropriation: The "Simple Scheme" Presented by Chorzów Factory and Its Relevance to Investment Treaty Disputes', in *Practising Virtue: Inside International Arbitration*, ed. David D. Caron et al. (OUP, 2015), pp. 626 et seq.
[354] *Factory at Chorzów*, Judgment, Merits, para. 135 [paragraph numbers added by OUP].
[355] See fn. 311.
[356] *Factory at Chorzów*, Judgment, Merits, para. 135 [paragraph numbers added by OUP].

The decision to postpone the assessment of damages had an impact on the overall procedural efficiency of the case, as the disputing parties would have to make new submissions, address new claims and review evidence. The PCIJ determined the constitution of a panel comprising three experts.[357] Although the Registry of the PCIJ would incur the experts' fees,[358] the disputing parties themselves would have to hire and appoint assessors, who would join the other three experts appointed by the President of the PCIJ.[359] Thus, it is assumed that the disputing parties would in any event incur additional expenses with the extended proceedings.

The ICJ in *Corfu Channel* adopted a similar approach with respect to damage assessment. Like the PCIJ in *Factory at Chorzów*, the ICJ also requested the advice of experts in order to assess the damages alleged by the claimant. However, the ICJ postponed the assessment of the damages because the respondent failed to specify which items of the sums claimed it was contesting. Also, the ICJ noted that the claimant failed to submit evidence with regard to the damages claimed.[360]

The decision to postpone the analysis of the merits also impacted the overall procedural efficiency of the case *Corfu Channel*. The ICJ requested new submissions from the parties, following its judgment on the merits. The reports submitted by the experts were made available to the parties for comments. In addition, another hearing was held.[361] The judgment on compensation was rendered in December 1949, nearly 8 months after the judgment on the merits.[362] When the judgment on the merits was rendered, the *Corfu Channel* was still the

[357] *Factory at Chorzów,* Order, Indemnity, para. 3 [paragraph numbers added by OUP].
[358] Ibid., para. 10.
[359] Ibid., para. 3.
[360] *Corfu Channel,* Judgment, Merits, paras. 68-69 [paragraph numbers added by OUP].
[361] *Corfu Channel,* Judgment, Compensation, paras. 6, 9, 12 and 14 [paragraph numbers added by OUP].
[362] See *Corfu Channel,* Judgment, Merits, and *Corfu Channel,* Judgment, Compensation.

only case ever brought to the ICJ.[363] One could assume that the ICJ was in position to concentrate all its attention and effort in that case, and thus be able to work exclusively on that matter.

Both *Factory at Chorzów* and *Corfu Channel* cases deviated from the practice of addressing issues of liability and quantum during a single phase of the proceedings. In both cases, the courts decided to separate both procedural phases and postpone the assessment of the damages due to particular circumstances, including issues of insufficient evidence and unclear submissions addressing the issues of damages. Therefore, the main motivation behind the postponement of the analysis of the issues of quantum was to give an additional opportunity for the disputing parties to present their case since the evidence and submissions then provided were insufficient. In addition, another particular characteristic of both cases concerns the fact that the courts in both cases appointed experts to assist in the evaluation of the damages following the judgment on the merits. An expert analysis would provide a more detailed estimation of the heads of damages in issue and would give an additional point of view to the adjudicators.

[363] The second application to the ICJ was made also by the United Kingdom in a case concerning fisheries against Norway on 28 September 1949. See *Fisheries, United Kingdom v Norway*, Merits, Judgment, [1951] ICJ Rep 116, ICGJ 196 (ICJ 1951), 18 December 1951.

4. THE SEPARATION BETWEEN MERITS AND QUANTUM PHASE IN CONTEMPORARY INTERSTATE DISPUTES

During the second half of the 20th Century, two mechanisms to address mass claims based on arbitration rules were established, namely the IUSCT and the EECC. The former dispute settlement mechanism has addressed claims for compensation put forward by Iranian or U.S. private entities against either Iran or the United States. The arbitral tribunals under the IUSCT have also addressed interstate claims. The latter was established under the PCA to decide claims for loss, damage or injury by either Eritrea or Ethiopia against the other related to an armed conflict between the two countries. The two States were entitled to submit claims on their own behalf and on behalf of their nationals, or in appropriate circumstances, persons of Ethiopian or Eritrean origin who were not nationals.

New international courts and tribunals have been established.[364] The ECtHR was established in 1959 and the ITLOS in 1996. Differently from the PCIJ and its successor, the ICJ, the ECtHR and ITLOS were not designed as courts of general jurisdiction. Instead, they have been created to address legal questions arising under specific legal regimes, respectively disputes involving violations of human rights[365] and law of the sea matters. Despite the proliferation of international courts and tribunals,[366] the ICJ experienced an increase in its case load during the second half of the 20th century.[367]

[364] See Antônio Augusto Cançado Trindade, *Os Tribunais Internacionais Contemporâneos* (Fundação Alexandre de Gusmão, 2013); Jean Allain, *A Century of International Adjudication:The Rule of Law and Its Limits* (Asser Press, 2000); Thomas Buergenthal, 'International Law and the Proliferation of International Courts', in *Cursos Euromediterráneos Bancaja de Derecho Internacional* (Valencia: Tirant Lo Blanch, 2001), pp. 29–43.
[365] On the concept of "human rights", see Thomas Buergenthal, 'Human Rights', *Max Planck Encyclopedia of Public International Law*, 2007. On the development of human rights, current state, and influence, see Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a new 'Jus Gentium'*, 2nd ed. (Nijhoff, 2013); Antônio Augusto Cançado Trindade, *A Visão Humanista Do Direito Internacional* (Del Rey, 2013).
[366] See Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law', *ICSID Review* 21, no. 1 (2006): 126–31.
[367] Shabtai Rosenne, *The Law and Practice of the International Court: 1920-2005*, 4th ed. (Nijhoff, 2006).

After a dormant period that started during the First World War, the number of interstate disputes before the PCA would increase again with the entry into force of the UNCLOS on 16 November 1994.[368]

By the end of the 20th century, compensation remained one of the preferred forms of reparation sought by States in international dispute settlement.[369] The IUSCT, EECC, ICJ, ECtHR, ITLOS, and arbitration tribunals under the PCA have addressed interstate claims for damages and awarded compensation. These mechanisms have, however, adopted different approaches regarding the procedural question of whether or not to separate the analysis of merits and quantum proceedings.

4.1 INTERSTATE ARBITRATIONS

In the context of the IUSCT, at least three compensation awards were rendered in interstate arbitration proceedings between Iran and the United States.[370] Under the auspices of the PCA, the EECC assessed and rendered two awards on damages involving both Eritrea and Ethiopia.[371] In the majority of those proceedings, the tribunal chose to separate the merits and the quantum phases.

[368] Under Annex VII of UNCLOS, arbitration is the default mechanism in case the parties are not able to agree on the method of dispute settlement.
[369] See fn. 4.
[370] *The United States of America v The Islamic Republic of Iran*, Award, IUSCT Case No. B36 (574-B36-2), 3 December 1996; *The Islamic Republic of Iran v The United States of America*, Award, IUSCT Case No. A27 (586-A27-FT), 5 June 1998; and *The Islamic Republic of Iran and United States of America*, Award, IUSCT Case No. A15(IV) and A24 (590-A15(IV)/A24-FT), 2 July 2014.
[371] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, Final Award, PCA, 17 August 2009; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, Final Award, PCA, 17 August 2009.

4.1.1 Iran-United States Claims Tribunal

The IUSCT was established in 1981 by the General Declaration of the Government of Algeria of 19 January 1981,[372] which enshrined an agreement between Iran and United States to put an end on the incidents related to the seizure of the Embassy of the United States in Tehran on 4 November 1979, which included the detention of Americans citizens. The United States agreed to terminate the economic sanctions it had imposed on Iran on 14 November 1979 which had frozen around eight billion dollars in assets from Iran in the United States.[373]

Both Iran and the United States agreed to establish an alternative mechanism to resolve claims involving nationals of one State against the other State. The two countries chose arbitration as the means to resolve these claims. Thus, the IUSCT was established, comprising three arbitrators appointed by each State and three chairmen chosen by agreement of the party-appointed arbitrators.[374] The proceedings would be conducted under the UNCITRAL Arbitration Rules unless both States or the IUSCT decide otherwise.[375]

The IUSCT was given the mandate to address: (i) any outstanding claims by United States nationals against Iran and the entities controlled by Iran; (ii) any outstanding claims by Iranian nationals against the United States and entities controlled by the United States; and (iii) counterclaims arising out of the same contract, transaction or occurrence as a claim.[376] In addition, the IUSCT was given jurisdiction to address disputes between Iran and the United

[372] Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"), 19 January 1981, 1 IUSCT Reports, p. 3.
[373] George H. Aldrich, 'The Iran-United States Claims Tribunal', in *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports*, ed. P. Hamilton et al. (Kluwer, 1999), 206–45, p. 206.
[374] Ibid., pp. 206-207.
[375] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 ILM 230 ("Claims Settlement Declaration"), Article III, para. 2.
[376] Claims Settlement Declaration, Article II, paras. 1-2.

States in relation to: (i) certain contractual claims between Iran and the United States; and (ii) the interpretation or performance of the Algiers Declarations.[377]

While the majority of the claims filed with the IUSCT concerned individuals and companies against Iran or the Unites States,[378] the IUSCT has received requests from either Iran or the United States to render an award on the interpretation of the Algiers Declarations or to decide whether a party to an agreement had breached its obligations under the same instrument.[379] The IUSCT has calculated and awarded damages in the context of interstate disputes in the cases *B36 (United States v. Iran); A27 (Iran v. United States);* and *A15/A24 (Iran v. United States).*[380]

4.1.1.1 B36 (United States v. Iran)

In the case *B36,* filed on 19 January 1982, the United States sought the payment of USD 23,297,059.45 from Iran for the alleged failure to pay amounts due under two contracts signed between the two countries in 1945 and 1948 relating to the purchase of certain U.S. surplus military property. The United States also sought the allocation of interest to the

[377] General Declaration, paras. 16-17; and Claims Settlement Declaration, Article II, para. 3, and Article VI, para. 4. "Algiers Declarations" encompass a number of documents, including the General Declaration and the Claims Settlement Declaration. See George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (OUP, 1996), pp. 541-551.
[378] *Communiqué No. 16/1,* IUSCT, 9 May 2016, available at: http://www.iusct.net/, accessed on 21 October 2016.
[379] For an overview, see Aldrich, 'The Iran-United States Claims Tribunal', pp. 243-245, referring to: Decision No. DEC 1-A2-FT, 13 January 1982, 1 Iran-U.S. C.T.R., p. 101; Decision No. DEC 12-A1-FT, 3 August 1982, 1 Iran-U.S. C.T.R., p. 189; Award No. 108-A16/582/591-FT, 25 January 1984, 5 Iran-U.S. C.T.R., p. 57; Decision No. DEC 31-A18-FT, 6 April 1984, 5 Iran-U.S. C.T.R., p. 251; Decision No. DEC 37-A17-FT, 18 June 1985, 8 Iran-U.S. C.T.R., p. 189; Interlocutory Award No. ITL 63-A15-FT, 20 August 1986, 12 Iran-U.S. C.T.R., p. 40; Award No. 306-A15(I:G)-FT, 4 May 1987, 14 Iran-U.S. C.T.R., p. 311; Decision No. DEC 62-A21-FT, 4 May 1987, 14 Iran-U.S. C.T.R., p. 324; Interlocutory Award No. ITL 78-A15(I:C)-FT, 12 November 1990, 25 Iran-U.S. C.T.R., p. 247; and Award No. 529-A15(II:A and II:B)-FT, 6 May 1992.
[380] See fn. 370.

claimed amount.[381] Iran denied any obligation to pay the amounts under the contracts signed in 1945 and 1948.[382]

Following the exchange of written submissions, a hearing in this case was held on 6 December 1995.[383] The IUSCT, in its award dated 3 December 1996, found that it did not have jurisdiction to address the United States' claim under the contract signed in 1945.[384] With respect to the claims related to the 1948 contract, the IUSCT concluded that the amount of USD 21,389,845.47 had not been paid by Iran and there was no evidence of any partial payment.[385] The IUSCT dismissed Iran's invocation of the rule of odious debts to avoid the responsibility for the debt[386] and the application of the principle of extinctive prescription with respect to certain claims.[387] Thus, the IUSCT awarded the United States the amount of USD 21,389,845.47, and allocated interest.[388]

4.1.1.2 A27 (Iran v. United States)

The case *A27* concerned the alleged breach of United States obligations' under the Algiers Declarations. On 18 July 1985, Iran requested the IUSCT to determine whether the United States violated the Algiers Declarations by failing to satisfy awards rendered by the IUSCT in favour of Iran against nationals of the United States.[389] Iran referred to the refusal of United States' domestic courts to enforce the IUSCT's partial award in the case "Avco Corporation and Iran Aircraft Industries, et al."[390] Iran also adduced undue delay by United

[381] *B36*, para. 1.
[382] Ibid., para. 2.
[383] Ibid., para. 5.
[384] Ibid., para. 41.
[385] Ibid., para. 46.
[386] Ibid., para. 57.
[387] Ibid., para. 75.
[388] Ibid., paras. 76-80 and section IX.
[389] *A27*, para. 6.
[390] Ibid., para. 3, referring to *Avco Corporation and Iran Aircraft Industries, et al.*, Partial Award No. 377-261-3, reprinted in 19 IUSCT Reports, 18 July 1988, p. 200.

States courts to enforce the IUSCT's award in "Gould Marketing, Inc. and Ministry of Defence of the Islamic Republic of Iran".[391] The United States denied any liability.[392]

Iran sought compensation in the amount of: (i) USD 3,513,086.03, which represented the amount that the IUSCT awarded the Iranian parties in the case "Avco"; and (ii) USD 48,914, comprising legal expenses Iran incurred in connection with the "Avco" enforcement in the United States. In addition, Iran sought the payment of USD 344,767.80, which represented the sum of arbitration costs the IUSCT awarded Iran in twenty-four other awards that were not enforced in the United States. Iran sought the allocation of interest on all claimed amounts.[393]

Following the exchange of written submissions, a hearing was held on 27 and 28 February 1996.[394] The IUSCT rendered its award on 5 June 1998. It held that the United States violated its obligations under the Algiers Declarations by failing to ensure that a valid award of the IUSCT, *i.e.* the Avco award, be treated as final, binding, valid, and enforceable in the United States.[395] Thus, the United States was held liable for the damages incurred by Iran and thus concluded that it should compensate Iran for the amount of the award in Avco, *i.e.* USD 3,513,086.03.[396] The IUSCT held that Iran was entitled to pre-judgment interest on that amount corresponding to the sum of USD 1,529,395.62 and simple post-judgment interest to be applied until the date of the payment.[397]

The IUSCT dismissed Iran's claim of compensation for the legal expenses it incurred in pursing the enforcement of the award in Avco because the IUSCT understood that Iran

[391] *A27*, para. 3, referring to *Gould Marketing, Inc. and Ministry of Defence of the Islamic Republic of Iran*, Award No. 136-49/50-2, reprinted in 6 IUSCT Reports, 29 June 1984, p. 272.
[392] *A27*, para. 3.
[393] Ibid., para. 4.
[394] Ibid., para. 5.
[395] Ibid., para. 71.
[396] Ibid., para. 75.
[397] Ibid., paras. 76 and 78.

would have incurred such expenses irrespective of the United States' breaches.[398] It also dismissed Iran's claim relating to the twenty-four cost awards.[399]

4.1.1.3 A15/A24 (Iran v. United States)

The IUSCT case *A15/A24* concerned a dispute initiated by Iran against the United States. On 25 October 1982, Iran filed its claim in the case A15(IV), and on 5 August 1988 it presented its claim in the case A24. The cases were consolidated for joint-proceedings on 18 November 1991.[400] Both claims concerned the alleged breach of the United States' obligations under the Algiers Declarations to terminate litigation and to prohibit re-litigation in American courts of claims already decided by the IUSCT.[401]

Iran provided eight claims, identified as A through H.[402] Claim C was terminated by an award on agreed terms.[403] On 28 December 1998, the IUSCT rendered a Partial Award in which it dismissed Iran's claims B, E, F, and a portion of G in case A15.[404] The IUSCT concluded that the United States breached its obligations under the Algiers Declarations with respect to Iran's claims A, D, G, and H. Claim A concerned 84 cases brought against Iran in courts in the United States; claim D concerned nine lawsuits in courts in the United States; claim G concerned six attachments which remained in effect and restrained Iranian assets in the United States; and claim H concerned two judgments rendered by courts in the United States.[405]

[398] Ibid., para. 77.
[399] Ibid., para. 82.
[400] *A15(IV) and A24 (590-A15(IV)/A24-FT),* para. 5.
[401] Ibid., paras. 6-8.
[402] Ibid., para. 6.
[403] Award on Agreed Terms *Islamic Republic of Iran and United States of America,* Award No. 568-A13/A15 (I and IV:C)/A26 (I, II and III)-FT, reprinted in 32 IUSCT Reports, 22 February 1996, p. 207.
[404] *A15(IV) and A24 (590-A15(IV)/A24-FT),* p. 105.
[405] Ibid., paras. 194, 196, 202-204.

By failing to terminate and prohibit re-litigation, Iran had incurred losses as the result of the legal proceedings carried out in American courts related to claims A, D, G, and H.[406] With respect to case A24, the IUSCT similarly concluded that United States breached its obligations under the Algiers Declarations and thus Iran was entitled to damages.[407] The IUSCT postponed the determination of the nature and the amount of Iran's damages, if any, to a subsequent phase of the proceedings.[408]

By its order of 23 April 1999, the IUSCT established the schedule for pleadings and evidence, including documents of 179 United States court legal proceedings at issue and "thousands of associated documents" such as invoices.[409] The disputing parties filed their written submissions and evidence between 15 March 2001 and 2 July 2007. A hearing took place from 24 to 27 September 2012. Post-hearing submissions were filed by the disputing parties on 30 October 2012.[410]

Iran sought a total of USD 1,731,210.24, comprising: (i) USD 620,352.91 for total expenses incurred by Iran in litigating specific United States court cases; and (ii) USD 1,110,857.33 for litigation expenses paid by Iran to its United States attorneys that were not directly related to specific cases.[411]

In its award dated 2 July 2014, the IUSCT quantified Iran losses and awarded the following amounts: (i) USD 70,144.39, for specific litigation expenses incurred with respect to 44 cases related to claim A and six attachments related to claim G; (ii) USD 56,070.32, for specific litigation expenses incurred for appearances or filing documents in United States courts related to claim D; (iii) USD 7,152.34, for legal expenses incurred by Iran in relation to

[406] Ibid., paras. 214 A (a)-(d), (g)-(h).
[407] Ibid., paras. 214 (B).
[408] Ibid., para. 214 A (a)-(d), (g)-(h), and (B).
[409] Ibid., para. 249.
[410] Ibid., paras. 24-30.
[411] Ibid., para. 143.

two court judgments rendered by United States courts related to claim H; (iv) USD 134,794.72, encompassing losses for legal expenses not directly related to specific cases, such as monitoring services expenses and "other losses"; and (v) USD 574,306.37 as pre-judgment interest. Accordingly, the IUSCT awarded in total USD 842,468.14 and allocated to the award simple interest at the successive prevailing prime bank lending rates in the United States for the period of non-payment of the award.[412]

4.1.2 Eritrea Ethiopia Claims Commission

The EECC was established pursuant to Article 5 of the Agreement between Eritrea and Ethiopia, done at Algiers on 12 December 2000 ("Eritrea-Ethiopia Algiers Agreement").[413] The EECC had the mandate to:

> decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.[414]

The EECC, which consisted of five arbitrators,[415] was seated in The Hague.[416] The PCA served as registry. The EECC adopted its own rules of procedure,[417] which were based upon the 1992 PCA Optional Rules for Arbitrating Disputes Between Two States.[418] The

[412] Ibid., para. 294.
[413] Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia 2138 UNTS 94, 40 ILM 260, 12 December 2000.
[414] Eritrea-Ethiopia Algiers Agreement, Article 5(1). The same agreement established the Eritrea Ethiopia Boundary Commission with a mandate to "delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law" through arbitration. See Eritrea-Ethiopia Algiers Agreement, Article 4(2).
[415] Ibid., Article 5(2).
[416] Ibid., Article 5(5).
[417] Eritrea-Ethiopia Claims Commission, Rules of Procedure of 1 October 2001, In: Tofan and van der Wolf, *Eritrea-Ethiopia Claims Commission: Permanent Court of Arbitration 2009*, pp. 25-38.
[418] Eritrea-Ethiopia Algiers Agreement, Article 5(7), referring to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, effective 20 October 1992.

Eritrea-Ethiopia Algiers Agreement expressly provided that the EECC should apply "relevant rules of international law" and it should not have "the power to make decisions *ex aequo et bono*."[419] The EECC's precedent is of considerable value with regard to the analysis and calculation of damages for a violation of the *jus ad bellum*.[420]

The disputing parties filed their claims by 12 December 2001, addressing various matters including military operations, treatment of prisoners of war, treatment of civilians and their property, diplomatic immunities and the economic impact of certain actions during the conflict.[421]

In consultation with the disputing parties in beginning of 2001, the EECC decided first to renders its award on the merits of the claims and, if liability was established and the parties, or either of them, wished to do so, the EECC would hold further proceedings regarding the amount of damages. Accordingly, the EECC held four rounds of hearings on the merits of both parties' claims between November 2002 and April 2005, and between 1 July

[419] Eritrea-Ethiopia Algiers Agreement, Article 5(13).
[420] On the topic, see Murphy, 'The Eritrean-Ethiopian War (1998-2000)'.
[421] See *Eritrea Ethiopia Claims Commission (Prisoners of War - Eritrea's Claim 17)*, Partial Award, PCA, 1 July 2003; *Eritrea Ethiopia Claims Commission (Prisoners of War - Ethiopia's Claim 4)*, Partial Award, PCA, 1 July 2003; *Eritrea Ethiopia Claims Commission (Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22)*, Partial Award, PCA, 28 April 2004; *Eritrea Ethiopia Claims Commission (Central Front - Ethiopia's Claim 2)*, Partial Award, PCA, 28 April 2004; *Eritrea Ethiopia Claims Commission (Civilians Claims - Eritrea's Claims 15, 16, 23 & 27–32)*, Partial Award, PCA, 17 December 2004; *Eritrea Ethiopia Claims Commission (Civilians Claims - Ethiopia's Claim 5)*, Partial Award, PCA, 17 December 2004; *Eritrea Ethiopia Claims Commission (Diplomatic Claim - Eritrea's Claim 20)*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26)*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Diplomatic Claim - Ethiopia's Claim 8)*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Loss of Property in Ethiopia Owned by Non-Residents - Eritrea's Claim 24)*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Jus Ad Bellum - Ethiopia's Claims 1–8)*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Economic Loss Throughout Ethiopia - Ethiopia's Claim 7)*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Western and Eastern Fronts Ethiopia's Claims 1 & 3*, Partial Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Pensions - Eritrea's Claims 15, 19 & 23)*, Final Award, PCA, 19 December 2005; *Eritrea Ethiopia Claims Commission (Ports - Ethiopia's Claim 6)*, Final Award, PCA, 19 December 2005.

2003 and 19 December 2005.[422] Furthermore, the EECC rendered a total of fifteen Partial and Final Awards on liability between 1 July 2003 and 19 December 2005.[423]

Following the conclusion of the merits phase, the EECC consulted with the disputing parties during the summer of 2005 about whether they wished to proceed to the damages phase. The EECC noted that "these consultations highlighted a fundamental challenge." According to it, "[a] damages phase involving precise assessment of the extent of injuries allegedly suffered by large numbers of persons, entities and government bodies would require years of additional difficult, burdensome and expensive proceedings." Despite that, the disputing parties indicated that they wished to proceed to the damages phase.[424]

In an order dated 13 April 2006, the EECC directed the disputing parties to proceed with a simplified "fast-track" damages phase, which involved "a limited number of filings of legal pleadings and evidence, and a tight schedule of hearings."[425]

The EECC identified that there were certain preliminary legal issues that could be decided prior to the filing of briefs on any category of the damages claimed, such as the scope of damages for breach of the *jus ad bellum.* However, the EECC concluded that the additional time to address and decide those preliminary issues would "unduly extend" the time to complete the EECC's work on the damages phase. Thus, the EECC decided that all such issues would be addressed as part of the first group of claimed damages,[426] according to the following division: (i) first group consisting of damages related to war front claims, building

[422] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 6; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 6.
[423] See fn. 421.
[424] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, paras. 8-9; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, paras. 8-9.
[425] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 10; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 10.
[426] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 11; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 11.

claims, cultural property claims, prisoner of war claims, displaced person claims, rape, and the preliminary issues the disputing parties might raise, including the scope of damages for breach of the *jus ad bellum* ("Group 1 Claims"); and (ii) second group consisting of damages related to deprivation of nationality, wrongful expulsion claims, unlawful detention claims, claims of property losses by persons, including the claims with respect to the civilians or home front claims ("Group 2 Claims").[427]

The EECC directed the disputing parties to file their briefs and supporting evidence on Group 1 Claims by 15 November 2006 and their reply briefs and evidence by 15 February 2007. The EECC's order provided that the disputing parties were entitled to file any additional documents and evidence, together with a brief explanation of the relevance of the material, which should not exceed 10 pages. Following the hearing on Group 1 Claims, scheduled for April 2007, the EECC would establish the schedule for Group 2 Claims.[428]

The EECC created a working group of three members. As stated in the awards rendered on 17 August 2009, they "met informally with the Parties' representatives on July 29, 2006 regarding procedural questions". Following that meeting, the EECC issued an order by which it directed the disputing parties not to address the following three matters before the April 2007 hearing: (i) effect of third party donations and payments; (ii) technical financial questions; and (iii) attorney's fees.[429] The issues would be discussed at the conclusion of the Group 1 Claims.[430]

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[427] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, paras. 47-436; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, paras. 47-479.
[428] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 11; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 11.
[429] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 12; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 12.
[430] The disputing parties later agreed not to request payment of attorneys' fees or costs against each other. See *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 45; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 45.

The hearing on Group 1 Claims occurred from 16 to 27 April 2007. On 28 April 2007, the EECC and the counsel for the disputing parties addressed the preparation of their Group 2 Claims.[431] On 16 May 2007, the EECC set the schedule for the Group 2 Claims, culminating in a hearing that was held from 19 to 27 May 2008.[432]

The EECC noted that the "fast-track" damages phase, which encompassed the establishment of two groups, would "put great pressure on the Parties and their counsel." The EECC also recognized that the faster approach would impact on the precision of the disputing parties' preparation and presentation of their claims, and their assessment of those claims. However, the EECC took into account that the "fast-track" proceedings "were appropriate in the circumstances, given the Parties' situations and the [EECC]'s obligation to complete its task within a reasonably short period, as indicated in the [Eritrea Ethiopia Algiers Agreement]."[433]

Both Eritrea and Ethiopia filed their claims for damages as interstate claims.[434] Ethiopia calculated its Group 1 Claims to equal nearly USD 7.4 billion and its Group 2 Claims to equal approximately USD 6.9 billion. Eritrea's claims, on the other hand, approached USD 6 billion.[435]

The EECC was mindful of the disputing parties' difficult economic situation at that time. It noted that the amounts claimed would have a significant impact on their finances. According to the EECC, the "[a]wards of compensation of the magnitude sought by each

[431] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 13; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 13.
[432] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 15; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 15.
[433] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 16; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 16.
[434] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 25; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 25.
[435] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 18; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 18.

Party would impose crippling burdens upon the economies and populations of the other." [436] Accordingly, the EECC concluded that, under international law, "[t]he difficult economic conditions found in the affected areas of Eritrea and Ethiopia must be taken into account in assessing compensation there."[437]

The EECC addressed the disputing parties' difficulties to provide and address evidence and recognized "the enormous practical problems faced by both Parties in quantifying the extent of damage". The EECC concluded that, if it applied the "clear and convincing" standard of proof, as it applied during the merits phase, the EECC could hinder the exercise of its mandate. Thus, for purposes of quantification, the EECC concluded that less rigorous proof was required.[438] The EECC also noted that quantification of damages often involves estimation, or even guesswork, "within the range of possibilities indicated by the evidence".[439] For the EECC, the determination of compensation in large interstate claims has to take into account multiple factors, which are often not subject to precise quantification.[440] In order to address Ethiopia's and Eritrea's claims, the EECC:

> has weighed the nature, seriousness and extent of particular unlawful acts. It has examined whether such acts were intentional, and whether there may have been any relevant mitigating or extenuating circumstances. It has sought to determine, insofar as possible, the numbers of persons who were victims of particular violations, and the implications of these victims' injuries for their future lives.[441]

[436] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 21; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 21.
[437] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 26; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 26.
[438] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 36; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 36.
[439] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 37; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 37.
[440] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 40; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 40.
[441] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 40; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 40.

On 17 August 2009, the EECC issued its final award with respect to Eritrea's damages claims and, on the same date, another award in relation to Ethiopia's damages claims.[442] The EECC awarded Eritrea, in respect of its own claims, nearly USD 161 million. The amount awarded in respect of claims presented on behalf of individual claimants by Eritrea was USD 2,065,865. The EECC awarded Ethiopia a total of nearly USD 174 million for all damages claimed.[443]

4.2 INTERNATIONAL COURTS

Since the case *Corfu Channel*, the ICJ has only awarded compensation again in *Diallo*.[444] Notwithstanding the claims for compensation put before it in other cases, the ICJ has rejected compensation claims based on jurisdictional impediments to assess the alleged damages[445] or on the grounds that the claiming party was not entitled to the relief sought.[446]

[442] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*.
[443] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims), dispositif,* para. 21; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims), dispositif,* para. E.
[444] *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo*, Judgment on compensation, General List No 103, ICGJ 435 (ICJ 2012), 19 June 2012.
[445] In *Certain Property,* the claimant asked for compensation and requested that the amount should be assessed and determined by the ICJ in a separate phase of the proceedings. However, the ICJ did not proceed with the issue because it found that it did not possess jurisdiction to hear the claimant's application. *Certain Property, Liechtenstein v Germany*, Judgment, Preliminary Objections, [2005] ICJ Rep 6, ICGJ 18 (ICJ 2005), 10 February 2005, paras. 11 and 54 [paragraph numbers added by OUP].
[446] In the case *Elettronica Sicula SpA (ELSI)*, the claimant requested an ICJ Chamber to award compensation for losses incurred by two of its nationals in the total amount of US$12,679,000, plus interest. The claim for reparation was, however, rejected by the Chamber. See *Elettronica Sicula SpA (ELSI), United States v Italy*, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15, (1989) 28 ILM 1109, ICGJ 95 (ICJ 1989), 20 July 1989, paras. 10 and 137 [paragraph numbers added by OUP]. In *Barcelona Traction,* the claimant requested the payment of compensation in the person of its nationals, shareholders in Barcelona Traction, as the result of alleged acts contrary to international law, which led to the spoliation of the Barcelona Traction group. The main head of damage amount to U.S. $78,000,000, which represented the value of the shares on the day the Barcelona Traction group was despoiled. The claimant's case was rejected by the ICJ. *Barcelona Traction, Light and Power Company Limited (New Application, 1962)*, Judgment, Merits, paras. 25 and 103 [paragraph numbers added by OUP]. In the case *Pulp Mills,* the claimant asked the respondent to pay compensation for the damages caused as a result of its breach of the Statute of the River Uruguay in case restitution was not possible. See Statute of the River Uruguay 1295 UNTS 331, UN Reg No I-21425. The claimant requested that, in the event of compensation, the ICJ should determine the amount at a subsequent stage of the proceedings. The claimant described that it had suffered injuries in various economic sectors, notably tourism and agriculture. However, the ICJ found that the respondent had not breached its substantive obligations under the Statute of the River

Also, the ICJ has in occasions concluded that compensation may not be the proper remedy for certain breaches of international law.[447] Often, the ICJ has found that the party claiming compensation had failed to provide evidence of damage.[448] Also, parties have abandoned their claim for damages during the proceedings[449] or requested the termination of the proceedings following a declaratory judgment holding the respondent liable for damages.[450] Moreover, the ICJ has often invited the disputing parties to have meaningful negotiations to reach an

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Uruguay and therefore the ICJ did not uphold the claim for compensation. See *Case Concerning Pulp Mills on the River Uruguay, Argentina v Uruguay*, Judgment on the merits, ICGJ 425 (ICJ 2010), 20 April 2010, paras. 24, 275-276.

[447] In the *Bosnian Genocide Case*, the claimant requested a declaration that the respondent should pay full compensation for the damages and losses caused as a result of the respondent's breaches of its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. See Convention on the Prevention and Punishment of the Crime of Genocide (United Nations) 78 UNTS 277, UN Reg No I-1021. The claimant asked the ICJ to determine the amount in a subsequent phase of the proceedings in this case. The ICJ found that the respondent breached its obligation to prevent genocide at Srebrenica. Accordingly, damages were caused to the claimant State and its nationals as a result of the respondent's failure to prevent genocide. However, the ICJ noted that it could not "regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica". Therefore, the ICJ concluded that "financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide". See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, Merits, ICJ GL No 91, ICGJ 70 (ICJ 2007), 26 February 2007, paras. 65-66 and 462 [paragraph numbers added by OUP].

[448] See for example the case *Navigational and Related Rights*, in which the claimant Costa Rica requested the payment of compensation for damages incurred as a result of Nicaragua's restriction to the claimant's navigational rights in the river San Juan, which borders both States. The claimant requested that the amount should be determined in a subsequent phase of the proceedings. In one paragraph, the ICJ rejected the claim for compensation noting that "Costa Rica has not submitted any evidence capable of demonstrating that it has suffered a financially assessable injury." *Dispute Regarding Navigational and Related Rights, Costa Rica v Nicaragua*, Judgment on the merits, ICGJ 421 (ICJ 2009), 13 July 2009, paras. 13, 147 and 149.

[449] In *Fisheries*, the claimant United Kingdom asked for compensation in respect of British fishing vessels that were wrongfully arrested by the respondent Norway. The claim was abandoned as the disputing parties agreed to leave the question to subsequent settlement if it should arise. *Fisheries, United Kingdom v Norway*, Merits, Judgment, paras. 6-7 and 23 [paragraph numbers added by OUP].

[450] In *Military and Paramilitary Activities in and Against Nicaragua*, the ICJ held that the United States was liable and thus should make reparation to Nicaragua for all injury caused by breaches of obligations under customary international law. See *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Judgment, Merits, ICJ GL No 70, [1986] ICJ Rep 14, ICGJ 112 (ICJ 1986), 27 June 1986, para. 292 [paragraph numbers added by OUP]. Nicaragua requested the ICJ to calculate the damages in a subsequent phase of the proceedings. The ICJ upheld the request so Nicaragua can "demonstrate and prove exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law." In addition, the ICJ noted that, since the United States has chosen not to appear or participate in the merits phase of the proceedings, it would be able to appear again during the quantum phase and present its arguments on the question of reparation if it so wishes. See *Military and Paramilitary Activities in and Against Nicaragua*, paras. 283-284. However, following the judgment on the merits, Nicaragua requested the removal of the case from the ICJ list of pending cases. See *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Order, Removal From the List, (1991) ICJ Rep 47; ICGJ 110 (ICJ 1991), 26 September 1991.

agreement on the financial claims and counter-claims.[451] As of October 2016, the ICJ was addressing claims for compensation in *Armed Activities on the Territory of the Congo*.[452]

Since 1996, the ITLOS has to date rendered two judgments in which it has awarded compensation.[453] The ECtHR, in the context of interstate disputes under Article 41 of the ECHR, has also awarded just satisfaction, *i.e.* monetary damages,[454] in the case *Cyprus v. Turkey.* In another case, the *Georgia v. Russia* case, the ECtHR held that the claimant State was entitled to just satisfaction for the injuries suffered by its nationals caused by the government of the respondent State. However, the ECtHR has not yet rendered its judgment on quantum in *Georgia v. Russia* and the matter was pending by October 2016.

4.2.1 International court of general jurisdiction: the ICJ

The *Diallo* case concerns a dispute initiated by Guinea on 28 December 1998 against the Democratic Republic of Congo ("DRC"). The claimant State has argued that Mr. Ahmadou Sadio Diallo, a Guinean businessman who was a resident in the DRC for more than 30 years, was unjustly imprisoned by the authorities of DRC and was despoiled of his

[451] That was the case in *Gabčikovo-Nagymaros*, which concerns a dispute jointly initiated by Hungary and Slovakia pursuant to an agreement signed by both States dated 2 July 1993. Each disputing party claimed that the opposite side breached the Treaty concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks, signed between Hungary and Czechoslovakia. See Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks 1109 UNTS 211, UN Reg No I-17134. As a consequence of the breach, both parties claimed that they were entitled to compensation to be paid by the opposite side. In addition, both disputing parties asked the court to assess the damages they claimed in a subsequent phase of the proceedings. In its judgment of 25 September 1997, the ICJ found that both disputing parties committed international wrongful acts and caused damage to each other. Thus, the ICJ avoided the question of compensation and noted that the issue could be resolved by the disputing parties "in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims". The dispute continues to be listed by the ICJ as pending case as of October 2016. See *Gabčikovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, paras. 13-14 and 152-153 [paragraph numbers added by OUP].

[452] *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19 December 2005.

[453] Caminos, 'The Creation of Specialised Courts: The Case of the International Tribunal for the Law of the Sea'.

[454] See Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (CUP, 2015).

investments, business, properties and bank accounts, and then expelled.[455] By its order of 25 November 1999, the ICJ fixed the time-limits for the disputing parties' written submissions,[456] which were later extended.[457]

On 3 October 2002, the DRC raised preliminary objections regarding the admissibility of the claimant State's application. The proceedings on the merits were then suspended.[458] Following the exchange of written submissions on the preliminary objections, the ICJ held a public sitting from 27 November to 1 December 2006.[459] On 24 May 2007, the ICJ rendered its judgment and rejected the DRC's preliminary objections.[460]

Furthermore, the ICJ fixed the time-limit for the filing of the written submissions on the merits.[461] A public hearing on the merits was held on 19, 26, 28 and 29 April 2010.[462]

In the application submitted by Guinea, the claimant State quantified the damages allegedly caused by the DRC and claimed compensation in the amount of: (i) US$31,334,685,888.45 and Z14,207,082,872.7, in respect of losses incurred by Mr. Diallo; and (ii) US$4,700,202,883.26 and Z2,131,062,430.9, which is 15 per cent of the principal award, to be paid to the State of Guinea. In addition, the claimant State asked the allocation of "bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full".[463]

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[455] *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo*, Judgment, Preliminary Objections, ICJ GL No 103, ICGJ 52 (ICJ 2007), 24 May 2007, para. 1 [paragraph numbers added by OUP].
[456] *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo*, Order of 25 November 1999, ICJ Reports 1999, p. 1042.
[457] See *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo*, Order of 8 September 2000. ICJ Reports 2000, p. 146; and Order of 7 November 2002, ICJ Reports 2002, p. 607.
[458] *Diallo*, Judgment, Preliminary Objections, para. 5 [paragraph numbers added by OUP].
[459] Ibid., paras. 5 and 7.
[460] Ibid.
[461] See *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo,* Order of 27 June 2007, ICJ Reports 2007, p. 9.
[462] *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo* Judgment, ICGJ 428 (ICJ 2010), 30 November 2010, para. 10 [paragraph numbers added by OUP].
[463] Ibid., para. 12.

During the course of the proceedings, Guinea put forward its claim for compensation in more generic terms. It claimed that DRC was "bound to make full reparation" and that "such reparation [should] take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the [DRC]".[464] With regard to the calculation of the damages, Guinea stated in its Reply memorial that the amount due should be assessed in a subsequent phase of the proceedings in case the two disputing parties were unable to agree on the amount thereof within a period of six months from the delivery of the judgment on the merits.[465] At the oral proceedings in the case, Guinea reiterated its claim that the calculation of the damages should occur in a subsequent phase of the proceedings in the event the disputing were unable to agree on the amount during the envisaged period of time.[466]

In its judgment of 30 November 2010, the ICJ unanimously held that: (i) the DRC was under obligation to make appropriate reparation, in the form of compensation, to Guinea for certain injurious consequences resulted from the violations of international obligations; and (ii) failing agreement between the disputing parties on this matter within six months from the date of the judgment on the merits, the question of compensation due to Guinea should be settled by the ICJ, and reserved for this purpose the subsequent procedure in the case.[467]

The ICJ noted Guinea's request to submit an assessment of the amount of compensation due to it "in a subsequent phase of the proceedings".[468] The ICJ agreed that the disputing parties in *Diallo* should engage in negotiation in order to agree on the amount of compensation.[469] The ICJ also noted that the application was filed by Guinea in December 1998 and thus "the sound administration of justice requires that those proceedings soon be

[464] Ibid., para. 13.
[465] Id.
[466] Ibid., para. 14.
[467] Ibid., para. 165.
[468] Ibid., para. 162.
[469] Ibid., para. 163.

brought to a final conclusion". Accordingly, the ICJ held that: (i) the period for negotiating an agreement on the amount of compensation should be limited to six months from the delivery of its judgment; and (ii) the disputing parties should file a single exchange of written pleadings, since it was already versed of the facts of the case.[470]

Judge Cançado Trindade appended a separate opinion to the ICJ's judgment of 30 Judgment 2011.[471] He criticized the time of almost 12 years – from the end of December 1998 (date of Guinea's application) to the end of November 2010 (date of the judgment on the merits) – the ICJ took to decide the issues of merits in the *Diallo* case. Judge Cançado Trindade understood that the reasons for the long delay were not all attributable to the ICJ itself, "except for its apparent outlook of such procedure inadequately resembling rather that of an arbitral tribunal".[472] Judge Cançado Trindade referred to the fact that the ICJ extended time-limits upon the request of the disputing parties. In arbitration, the proceedings are flexible and are often determined by the arbitral tribunal on the basis of the parties' requests and needs. In his opinion, the ICJ should not decide procedural aspects of the case as an arbitral tribunal, in particular when the dispute concerns reparation for human rights breaches.[473] Judge Cançado noted that the ICJ "is the master […] of its own procedure" and thus "unreasonable prolongation of time-limits for the performance of procedural acts is to be curtailed and avoided."[474] On that basis, Judge Cançado Trindade also disapproved the ICJ's decision to postpone the determination of reparation for another period of up to six months.[475]

[470] Ibid., para. 164.
[471] *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo,* Judgment, ICGJ 428 (ICJ 2010), 30 November 2010, Separate Opinion of Judge Cançado Trindade, ICJ Reports 2010, pp. 729-811.
[472] Ibid., para. 202.
[473] *Diallo*, Judgment (Merits), Separate Opinion of Judge Cançado Trindade, para. 202.
[474] Id.
[475] Ibid., para. 203.

The time-limit of six months fixed by the ICJ expired on 30 May 2011 without an agreement being reached between the disputing parties on the question of compensation. The President of the ICJ held a meeting with the representatives of the disputing parties on 14 September 2011 in order to ascertain their views on the time-limits to be fixed for the filing of the pleadings envisaged.[476]

By its order dated 20 September 2011, almost 10 months of the judgment on the merits, the ICJ fixed the time-limits for the filing of the disputing parties' submissions on the calculation of compensation.[477] Judge Cançado Trindade appended a declaration to the ICJ's order.[478] He, once more, criticized the ICJ's decision to postpone the calculation of the compensation to be paid by the DRC and claimed that the ICJ should have already decided on the reparation in its judgment on the merits. Judge Cançado Trindade noted the "prolonged length of time that the handling of [the] case by the [ICJ] has taken". He argued that the ICJ should have avoided further delays.[479] In Judge Cançado Trindade's opinion, the ICJ, "[…] could, and should, have proceeded *ex officio*, *sponte sua*, to the determination of the reparations due to [Mr. Diallo]."[480]

Guinea and DRC filed their written submissions on compensation within the time-limits of 6 December 2011 and 21 February 2012, respectively.[481] In its written submission on compensation, Guinea has claimed the payment of the following sums: (i) USD 250,000 for mental and moral damage, including injury to Mr. Diallo's reputation; (ii) USD 6,430,148 for loss of earnings during Mr. Diallo's detention and following his expulsion; (iii) USD 550,000

[476] *Diallo*, Judgment on compensation, para. 8.
[477] *Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo,* Order of 20 September 2011, ICJ Reports 2011, p. 635.
[478] Ibid., Declaration of Judge Cançado Trindade, ICJ Reports 2011, pp. 637-639.
[479] Ibid., para. 3.
[480] Ibid., para. 4.
[481] *Diallo*, Judgment on Compensation, para. 9.

for other material damages; (iv) USD 4,360,000 for loss of potential earnings; and (v) USD 500,000 for unrecoverable costs incurred by the State of Guinea.[482] The DRC, on the other hand, claimed that the only amount due was USD 30,000 for Mr. Diallo's wrongful detentions and expulsion.[483]

In its judgment on compensation of 19 June 2012, the ICJ determined the DRC to pay damages to Guinea corresponding to: (i) USD 85,000 for non-material injury suffered by Mr. Diallo;[484] and (ii) USD 10,000 for material injury incurred by the individual.[485] The compensation awarded was expressed in USD because it was the currency to which both parties referred in their written pleadings on compensation.[486]

The ICJ awarded the amount due on the basis of equitable considerations and by observing the practice of other international courts.[487] When addressing compensation for non-material injury, the ICJ made reference to the Mixed Claims Commission in the *Lusitania cases*[488] and the IACtHR jurisprudence in the case *Gutiérrez-Soler*[489] in order to determine the scope of the term "non-pecuniary injury".[490] The ICJ stated that "non-material injury can be established even without specific evidence"[491] and concluded that the fact Mr. Diallo suffered "significant psychological suffering and loss of reputation" was an "inevitable

[482] Ibid., para. 10.
[483] Ibid., para. 11.
[484] Ibid., para. 25.
[485] Ibid., para. 55.
[486] Id.
[487] For an analysis on the equitable considerations approach adopted by the ICJ to assess the injuries in the *Diallo* case, see Geir Ulfstein, 'Awarding Compensation in a Fragmented Legal System: The Diallo Case', *Journal of International Dispute Settlement*, 2013.
[488] "mental suffering, injury to [a claimant's] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation" See *Lusitania cases, United States/Germany*, Opinion, United Nations, RIAA, Vol. VII, 1 November 1923, p. 40.
[489] *Gutiérrez-Soler v. Colombia*. Judgment of 12 September 2005 (Merits, Reparations and Costs), IACtHR Series C, No. 132, para. 82: "[n]on pecuniary damage may include distress, suffering, tampering with the victim's core values, and changes of a non pecuniary nature in the person's everyday life"
[490] *Diallo*, Judgment on compensation, para. 18.
[491] Ibid., para. 21.

consequence" of the unlawful actions of the DRC.[492] The ICJ fixed an amount of USD 85,000 as compensation for non-material injury suffered by Mr. Diallo.[493] The ICJ did not provide any reasoning on how such amount was reached. No expert was used. The ICJ cited the *Lusitania cases*[494], together with the Human Rights Committee (*A. v. Australia*)[495] and the African Commission on Human and Peoples' Recommendations (*Kenneth Good*)[496] to conclude that there is no standard compensation sum to be applied, and therefore the ICJ had discretion to determine the amount due.[497] In addition, the ICJ cited decisions from the IACtHR (*Cantoral Benavides*)[498] and ECtHR (*Al-Jedda*)[499] to state that equitable consideration is a guiding principle to determine the compensation for non-pecuniary damages.[500]

The ICJ noted that Guinea did not provide evidence to prove the material damages in the amount of USD 550,000.[501] Nevertheless, the ICJ awarded an amount of compensation based in equitable considerations, following case law of the ECtHR (*Lupsa*)[502] and IACtHR (*Chaparro Álvarez*).[503] Accordingly, the ICJ awarded the sum of USD 10,000 for the personal

[492] Id.
[493] Ibid., para 61.
[494] As provided in the Opinion in the *Lusitania Cases, n*on-material injuries "are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages". *Lusitania Cases*, p. 40.
[495] *A. v. Australia*, Human Rights Committee, communication No. 560/1993, United Nations doc. CCPR/C/59/D/560/1993, 3 April 1997, para. 11.
[496] *Kenneth Good v. Republic of Botswana*, Judgment of 26 May 2010, communication No. 313/05, 28th Activity Report, p. 110, para. 244.
[497] *Diallo*, Judgment on Compensation, para. 24.
[498] "in reasonable exercise of its judicial authority and on the basis of equity". See *Cantoral Benavides v. Peru*, Judgment of 3 December 2001 (Reparations and Costs), IACtHR Series C, No. 88, para. 53.
[499] "[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred". *Al-Jedda v. The United Kingdom*, Judgment of 7 July 2011, ECtHR Reports 2011, Application No. 27021/08, para. 114.
[500] *Diallo*, Judgment on Compensation, para. 24.
[501] Ibid., para. 31.
[502] *Lupsa v. Romania*, Judgment of 8 June 2006, ECtHR Reports 2006-VII. (2006), Application No. 10337/04, paras. 70-72.
[503] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C, No. 170, paras. 240 and 242.

property losses of Mr. Diallo based on the approach followed by both the ECtHR and the IACtHR in the cited cases.[504]

Regarding the claim for the alleged loss of remuneration, the ICJ once again observed the practice of other international courts. It observed that the international jurisprudence considers that a claim for income lost resulted from an unlawful detention is under the scope of a claim for compensation.[505] The ICJ cited[506] the ECtHR (*Teixeira de Castro*)[507], the IACtHR (*Suárez-Rosero*)[508], and the UNCC.[509] The ICJ also cited the ECtHR (*Elci*)[510] and the IACtHR (*Villagrán-Morales*)[511] to state that "if the amount of the lost income cannot be calculated precisely, estimation may be appropriate".[512]

In the case, Guinea asserted that Mr. Diallo had a total remuneration of USD 25,000 that he was prevented to receive because of the unlawful detention and further expulsion by the DRC. Once again, the ICJ found that Guinea did not provide evidence of the existence of such remuneration.[513] Therefore, the ICJ rejected the claim for compensation for the loss of professional remuneration.[514] In the decision, the ICJ stated that an award for compensation for losses of future earnings are, by its nature uncertain, but such claim cannot be based solely

[504] *Diallo*, Judgment on Compensation, para. 36.
[505] Ibid., para. 40.
[506] Id.
[507] *Teixeira de Castro v. Portugal*, Judgment of 9 June 1998, ECtHR Reports 1998-IV, Application No. 44/1997/828/1034, paras. 46-49.
[508] *Suárez-Rosero v. Ecuador*, Judgment of 20 January 1999 (Reparations and Costs), IACtHR Series C, No. 44, para. 60.
[509] United Nations Compensation Commission Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the Fourteenth Instalment of "E3" Claims*, United Nations doc. S/AC.26/2000/19, 29 September 2000, para. 126.
[510] *Elci and Others v. Turkey*, Judgment of 13 November 2003, ECtHR, Application Nos. 23145/93 and 25091/94, para. 721.
[511] *Case of the "Street Children", Villagrán-Morales et al. v. Guatemala*, Judgment of 26 May 2001 (Reparations and Costs), IACtHR Series C, No. 77, para. 79.
[512] *Diallo*, Judgment on compensation, para. 40.
[513] Ibid., paras. 41-44.
[514] Ibid., para. 49.

in speculations. In this sense, the ICJ cited the ECtHR (*Khamidov*),[515] IACtHR (*Chaparro Álvarez*)[516] and the ARSIWA.[517]

Judge Cançado Trindade provided a separate opinion to the ICJ's judgment on compensation. He recalled *inter alia* the importance of an award of reparation rendered within a reasonable time and reminded that "justice delayed is justice denied".[518]

4.2.2 International courts of specific jurisdiction: ITLOS and ECtHR

The ITLOS awarded compensation in the cases *M/V Saiga (No. 2)* and *M/V Virginia G.* The ECtHR has addressed interstate disputes since its creation. The ECtHR awarded just satisfaction, *i.e.* reparation in the form of a pecuniary obligation, in the context of an interstate dispute brought before it in the case *Cyprus v. Turkey*.[519]

4.2.2.1 ITLOS in M/V Saiga (No. 2)

In the case *M/V Saiga (No. 2)*, Saint Vincent and the Grenadines filed on 22 December 1997 a notification instituting arbitral proceedings against Guinea in accordance

[515] *Khamidov v. Russia*, Judgment of 15 November 2007 (Merits and Just Satisfaction), ECtHR, Application No. 72118/01, para. 197.
[516] *Chaparro Álvarez,* paras. 235-6.
[517] ARSIWA Commentary, pp. 104-5.
[518] *Diallo*, Judgment on compnsation, Separate Opinion of Judge Cançado Trindade, para. 80.
[519] The interstate applications at the ECtHR are the following: *Greece v. United-Kingdom (I),* Application no. 176/56, 7 May 1956; *Greece v. United-Kingdom (II)*, Application no. 299/57, 17 July 1957; *Austria v. Italy*, Application no. 788/60, 11 July 1960; *Denmark, Norway, Sweden and the Netherlands v. Greece (I)*, Applications no. 3321/67 to 3323/67 and 3344/67, 27 September 1967 and 25 March 1968; *Denmark, Norway, Sweden and the Netherlands v. Greece (II)*, Application no. 4448/70, 10 April 1970; *Ireland v. United-Kingdom (I)*, Application no. 5310/71, 16 December 1971; *Ireland v. United-Kingdom (II)*, Application no. 5451/72, 6 March 1972; *Cyprus v. Turkey (I)*, Application no. 6780/74, 10 September 1974; *Cyprus v. Turkey (II)*, Application no. 6950/75, 21 March 1975; *Cyprus v. Turkey (III)*, Application no. 8007/77, 6 September 1977; *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, Applications no. 9940/82 to 9944/82, 1 July 1982; *Cyprus v. Turkey (IV)*, Application no. 25781/94, 22 November 1994; *Denmark v. Turkey*, Application no. 34382/97, 7 January 1997; *Georgia v. Russian Federation (I)*, Application no. 13255/07, 26 March 2007; *Georgia v. Russian Federation (II)*, Application no. 38263/08, 12 August 2008; *Georgia v. Russian Federation (III)*, Application no. 61186/09, 3 December 2009; *Ukraine v. Russian Federation,* Application no. 20958/14, 13 March 2014; *Ukraine v. Russian Federation (II)*, Application no. 43800/14, 13 June 2014; *Ukraine v. Russian Federation (III)*, Application no. 49537/14, 9 July 2014; and *Ukraine v. Russian Federation (IV)*, Application no. 42410/15, 26 August 2015.

with Annex VII to the UNCLOS.[520] The dispute concerned the arrest and detention of the vessel "M/V Saiga".[521] By an agreement dated 20 February 1998, both disputing parties agreed to transfer the arbitration dispute to the ITLOS.[522] This was the second dispute brought to and decided by the ITLOS. The first dispute was initiated on 13 November 1997, involved the same parties, and concerned the prompt release of the M/V Saiga and its crew.[523]

The agreement dated 20 February 1998 provided that the ITLOS should address claims for damages and costs during "a single phase dealing with all aspects of the merits (including damages and costs)". The agreement also provided time-limits for the filing of pleadings in the case.[524]

From 8 to 20 March 1999, the ITLOS held 18 public sittings.[525] At the end of the sittings, Saint Vincent and the Grenadines claimed compensation with interest for damages incurred as a result of the unlawful detention of the vessel by Guinea.[526] The heads of damage included: (i) material damage in respect of natural and juridical persons; (ii) damage to the vessel M/V Saiga; (iii) financial losses of the shipowners, the operators of the M/V Saiga, the owners of the cargo, the master, the members of the crew, and other persons on board the vessel; (iv) loss of liberty and personal injuries, including pain and suffering. Saint Vincent and the Grenadines requested the allocation of interest on the amount due as compensation for material damages.[527]

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[520] *M/V Saiga (No. 2)* (St. Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS, para. 1, referring to Annex VII to the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994.
[521] *M/V Saiga (No. 2)*, para. 1.
[522] Ibid., para.4.
[523] See *M/V Saiga (St. Vincent and the Grenadines v. Guinea)*, Judgment of 4 December 1997, ITLOS.
[524] *M/V Saiga (No. 2)*, para. 4.
[525] Ibid., para. 21.
[526] Ibid., para. 30.
[527] Ibid., para. 168.

In its judgment of 1 July 1999, the ITLOS concluded that the claimant was entitled to compensation for the damages it had incurred, pursuant to Article 111, paragraph 8, and Article 304 of the UNCLOS, the rule of international law laid down in the case *Factory at Chorzów*, and Article 42, paragraph 1, of the ARSIWA.[528] Thus, the ITLOS held that the claimant was entitled to reparation for damage suffered by the M/V Saiga, including all persons involved or interest in its operation. Such damages encompassed "injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit".[529]

In assessing the damages, the ITLOS provided a brief reasoning. It stated that it had reviewed "substantial documentation" provided by the disputing parties and had scrutinized "invoices and other documents submitted". The ITLOS awarded a total of USD 2,123,357, with interest, in compensation for damages claimed by the Saint Vincent and the Grenadines.[530] The total amount broke down in heads of damages that included: (i) damages to the vessel, including costs of repairs; (ii) loss with respect to the charter hire; (iii) costs related to the detention of the vessel; (iv) value of the tons of gas oil discharged from the vessel; (v) detention of the members of the crew and other persons on board the vessel;[531] (vi) medical expenses incurred by certain individuals of the crew; and (vi) injury, pain, suffering, disability and psychological damage incurred by a member of the crew.[532]

Finally, the ITLOS rejected the claimant's compensation claim for the loss of registration revenue resulting from the illegal arrest of the vessel, and for the "expenses resulting from the time lost by its officials in dealing with the arrest and detention of the ship

[528] Ibid., paras.169-171, referring to Article 111, paragraph 8, and Article 304 of the UNCLOS; and *Factory at Chorzów*, Judgment, Merits, p. 47.
[529] *M/V Saiga (No. 2)*, para. 172.
[530] Ibid., paras. 174-175.
[531] See breakdown provided in the Annex to the ITLOS Judgment of 1 July 1999 in *M/V Saiga (No. 2)*.
[532] *M/V Saiga (No. 2)*, para. 175.

and its crew." The ITLOS concluded that the claimant did not provide evidence that the arrest of the vessel caused a decrease in registration activity. With respect to the expenses resulting from the time lost by State officials, the ITLOS held that they were borne by the claimant State in the exercise of its normal functions and thus should not be compensated.[533]

4.2.2.2 ITLOS in M/V Virginia G

The case *M/V Virginia G* concerned a dispute between the Panama and Guinea-Bissau relating to the vessel "M/V Virginia G", an oil tanker flying the flag of Panama which was arrested by the authorities of Guinea-Bissau on 21 August 2009. Panama claimed *inter alia* that Guinea-Bissau unlawfully arrested the vessel and confiscated the cargo of gas oil from on board the M/V Virginia G. Guinea-Bissau, by acting in that manner, allegedly caused material damages to the various individuals with direct or indirect interest on the vessel and moral injury to the ones on board the M/V Virginia G.[534]

By letter dated 3 June 2011, Panama notified the Guinea-Bissau of the institution of arbitral proceedings under Annex VII to the UNCLOS. In the letter, Panama stated "that there is the possibility of submitting this dispute to ITLOS, or a special chamber within ITLOS, as a way of resolving the dispute contentiously, yet in a less costly manner".[535] By letter dated 29 June 2011, Guinea-Bissau agreed to transfer the dispute to ITLOS. Thus, both States entered into an agreement to submit the dispute concerning the M/V Virginia G to ITLOS. The case was entered in the ITLOS' list of cases on 4 July 2011.[536]

In *M/V Virginia G*, both parties to the dispute agreed that the proceedings before the ITLOS "shall comprise a single phase dealing with all aspects of the merits (including

[533] Ibid., para. 177.
[534] *M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS.
[535] Ibid., para. 2.
[536] Ibid., paras. 5-6.

damages and costs)".[537] In addition, both parties agreed that the ITLOS "would address all claims for damages and costs and would be 'entitled to make an award on the legal and other costs incurred by the successful party'".[538]

Following two rounds of written submissions, which included the submission of counter-claim by Guinea-Bissau,[539] the ITLOS held 8 public sittings from 2 to 6 September 2013.[540]

Panama sought compensation in the amount of: (i) EUR 4,221,222.54 for damages incurred by the owners of the vessel and by other operators and entities with an interest in the vessels' operation, including as a consequence of the unlawful confiscation of the cargo of gas oil from on board the M/V Virginia G; (ii) EUR 65,000.00 for damages suffered by the crew of the vessel, including moral damages; and (iii) EUR 150,000.00 for interest in respect of the claims for material damages.[541]

The ITLOS noted that Panama "submitted substantial written material to the [ITLOS] in support of its claims for reparation", which included two reports provided by marine engineer and surveyor-consultant.[542] Guinea rejected all the claims for damages.[543]

The ITLOS submitted a letter to the disputing parties, dated 6 September 2013, containing a list of questions.[544] In that letter, the ITLOS requested the production of evidence

[537] Ibid., para. 100.
[538] Ibid., para. 412.
[539] Ibid., paras. 18-25.
[540] Ibid., para. 34.
[541] Ibid., para. 414.
[542] Ibid., paras. 416-417.
[543] Ibid., para. 419.
[544] Ibid., para. 46.

concerning the amount of compensation requested by Panama. The applicant State provided an explanation to its calculation approach.[545]

In its judgment of 14 April 2014, the ITLOS found that Panama was entitled to reparation for damages it incurred and for damage "suffered by the vessel, including all persons and entities involved or interested in its operation, as a result of the confiscation of the vessel and its cargo."[546] Accordingly, the ITLOS awarded compensation in the amount of: (i) USD 388,506.00, with interest compounded annually, for the value of gas oil confiscated; and (ii) EUR 146,080.80, with interest compounded annually, for costs of repairs to the vessel.[547] The ITLOS did not provide details on the reason why it had awarded damages in different currencies, *i.e.* USD and EUR.

In order to calculate the amount of damages for the value of gas oil confiscated, the ITLOS first established the precise quantity that was on board of the vessel that was removed after having examined "the evidence and documentation provided by Panama". Later, the ITLOS took into account a price per tonne of gas oil noted in an invoice submitted by Panama. Accordingly, the ITLOS multiplied the price per tonne for the total quantity of gas oil confiscated.[548]

With respect to the assessment of the repairs to the vessel, the ITLOS noted that not all of the damages claimed satisfied the requirement of casual link with the confiscation of the

[545] The ITLOS posed the following question on the calculation of compensation: "[c]ould the parties submit documents (including copies of invoices) in support of the amount of compensation claimed?" See Id. In reply, Panama stated the following: "An increment of 10% was applied to the calculated costs, damage and losses. This percentage was added as a lost business-related consideration to reflect the future business lost as a result of the negatively affected reputation of the vessel and her owner as a result of the published falsehoods, and the arrest and detention." See Ibid., para. 418. Guinea-Bissau, on the other hand, claimed that Panama's calculation was "incomprehensible" and lacked evidence. See Ibid., para. 420. The ITLOS rejected Panama's claim for an additional 10% of the compensation because the alleged damage was "too indirect and remote to be financially assessable". See Ibid., para. 440.
[546] Ibid., para. 434.
[547] Ibid., para. 446.
[548] Ibid., para. 441.

vessel. To calculate the damages for the repairs, the ITLOS conducted "a careful scrutiny of the invoices provided by Panama" and concluded that the amount of EUR 146,080.80 as damage was adequate.[549]

The ITLOS did not uphold Panama's claim for compensation for loss, damages and costs suffered by the crew of the vessel, including moral damages. For the ITLOS, Panama did not satisfy the requirement of a causal nexus between the confiscation of the M/V Virginia G and the claims made.[550] In addition, the ITLOS rejected Panama's claim of compensation for loss of profits. According to ITLOS, Panama also failed to show the direct nexus between the confiscation of the vessel and the loss of profit.[551]

4.2.2.3 ECtHR in Cyprus v. Turkey

The ECtHR has to date awarded just satisfaction under Article 41 of the ECHR in only one dispute, *i.e. Cyprus v. Turkey*.[552] The case concerned the situation in the northern part of Cyprus since the military operations carried out by Turkey in 1974, and the on-going division of the territory of Cyprus since then.

The case on the merits was referred to the ECtHR by Cyprus on 30 August 1999.[553] During the course of the proceedings on the merits, the disputing parties agreed that, in case the ECtHR were to find a violation, a separate procedure would be required for dealing with

[549] Ibid., para. 442.
[550] Ibid., para. 446.
[551] Ibid., paras. 436-438.
[552] Article 41 of the ECHR (just satisfaction) reads as follows: "[i]f the [ECtHR] finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the [ECtHR] shall, if necessary, afford just satisfaction to the injured party." See Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953.
[553] *Case of Cyprus v. Turkey*, Judgment of 10 May 2001, ECtHR, Grand Chamber, Application no. 25781/94, para. 1

claims under Article 41 of the ECHR.[554] Thus, the ECtHR instructed the disputing parties on 29 November 1999 that the applicant State was not required to submit any claim for just satisfaction under Article 41 of the ECHR at that stage of the proceedings.[555]

In the judgment on the merits delivered on 10 May 2001, the ECtHR's Grand Chamber rendered a judgment in which it found that Turkey had violated the ECHR as a result of Turkey's military operations in northern Cyprus between July and August 1974 and the continuing division of the Cypriot territory.[556] The ECtHR's Grand Chamber also held that "the issue of the possible application of Article 41 of the [ECHR] [was] not ready for decision and [adjourned] consideration thereof."[557]

On 11 March 2010, more than 8 years later after the judgment on the merits, the applicant State submitted to the ECtHR its claims for just satisfaction concerning missing persons in respect of whom the ECtHR had found a violation by Turkey of the ECHR. The applicant State reserved any claim for just satisfaction concerning the remaining violations and the disputing parties provided their observations.[558]

By a letter dated 21 March 2012, the ECtHR invited the applicant State to reply to questions, and to submit a final version of its just-satisfaction claim. On 18 June 2012, Cyprus amended its initial just-satisfaction claim concerning missing persons, and filed new Article 41 claim in respect of other human rights violations incurred by Greek-Cypriots residents of the Karpas peninsula. Turkey submitted its observation on 26 October 2012.[559]

[554] *Case of Cyprus v. Turkey (Just satisfaction),* para. 2.
[555] Ibid., para. 3.
[556] *Case of Cyprus v. Turkey (Merits).*
[557] Ibid., *dispositif* (VIII).
[558] *Case of Cyprus v. Turkey (Just satisfaction),* para. 6.
[559] Ibid., para. 9.

With respect to the claims concerning missing persons, Cyprus sought just satisfaction for 1,456 persons who were in a list of missing persons. The amounts would be distributed to the families of the missing ones. Initially, the applicant State requested the payment of EUR 12,000 per missing person. However, during the course of the proceedings, Cyprus abandoned its claim and requested the ECtHR to award just satisfaction "at a standard rate in accordance with equitable principles".[560]

With regard to the claims concerning the residents of the Karpas peninsula, Cyprus requested just-satisfaction of no less than GBP 50,000 per Greek Cypriot resident of the Karpas peninsula during the period between July 1974 and the date of the judgment on the merits in 2001. The precise number of such residents would be agreed between the parties in a subsequent phase of the proceedings.[561]

The respondent State did not provide an estimation of the amount of just satisfaction it deemed applicable.[562]

As noted by the ECtHR, the "general logic" behind the just satisfaction rule under Article 41 is derived from "the principles of public international law relating to State liability".[563] In order to reach an amount, the ECtHR referred to the general statement made in the case of *Varnava and Others*.[564] The ECtHR noted that there was no doubt "about the

[560] Ibid., para. 49.
[561] Ibid., para. 52.
[562] Ibid., paras. 50, 53-55.
[563] *Case of Cyprus v. Turkey (Just satisfaction)*, para. 40, noting the Report presented by the committee of experts to the Committee of Ministers of the Council of Europe on 16 March 1950 (Doc. CM/WP 1(50)15).
[564] Ibid., para. 56, referring to the ECtHR's Grand Chamber statement in *Varnava and Other*, which provides the following: "[t]he Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity ... and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right ... In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to

protracted feelings of helplessness, distress and anxiety of the Karpas residents".[565] Accordingly, the ECtHR, "making its assessment on an equitable basis", considered "reasonable" to award the applicant State aggregate sums of: (i) EUR 30,000,000 "for non-pecuniary damage suffered by the surviving relatives of the missing persons"; and (ii) EUR 60,000,000 "for non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula". The just-satisfaction award would be increased by the amount corresponding to any tax that may be chargeable on these amounts. The ECtHR stated that the amounts were to be distributed to the victims of the violations.[566] The ECtHR did not address or discussed the number of potential victims or beneficiaries. Finally, it allocated to the amounts awarded default interest based on the marginal lending rate of the European Central Bank, with an addition of three percentage points.[567]

4.3 OVERVIEW ON PENDING DISPUTES ADDRESSING DAMAGES

In addition to the case *Gabčikovo-Nagymaros*,[568] the adjudicators in other pending interstate cases have awarded compensation in their decision on the merits and deferred the assessment of the damages to a subsequent phase.

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have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned." See *Case of Varnava and Others v. Turkey*, Judgment of 18 September 2009, ECtHR, Grand Chamber, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, para. 224.

[565] *Case of Cyprus v. Turkey (Just satisfaction)*, para. 57.

[566] Ibid., para. 58.

[567] Ibid., para. 60.

[568] See fn. 451.

Two pending interstate arbitrations under the auspices of the PCA have held the respondent liable for damages. However, by October 2016, the tribunals in both cases have not yet calculated the damages and rendered an award on quantum. The two cases, which are currently pending, are: (i) the *The Arctic Sunrise Arbitration*, between the Netherlands and Russia, which commenced on 10 April 2013; and (ii) and *The Duzgit Integrity Arbitration*, between Malta and São Tomé e Príncipe, which commenced on 22 October 2013.[569]

The Arctic Sunrise Arbitration and *The Duzgit Integrity Arbitration* were initiated under Annex VII of the UNCLOS. In each arbitration, the claimant State claimed damages for losses incurred by vessels flying their respective flags and individuals on board of the respective vessels as a result of the unlawful detention and seizure of property carried out by the authorities of the respective respondent State.[570] Both tribunals have rendered an award on the merits holding the claimant State entitled to damages and have postponed the assessment of damages phase to a subsequent stage of the proceedings.[571]

The arbitrators in both cases have not provided reasoning to the determination to postpone the damages assessment phase.[572] In *The Duzgit Integrity Arbitration*, the disputing parties had opposite views about the issue of postponing the quantum phase; the respondent was in favour of a separate quantum phase and the claimant was against.[573] The tribunal did not address the specific procedural divergence and held that the claimant was "entitled to proceed in a further phase of the proceedings to claim damages".[574] *The Arctic Sunrise*

[569] See *The Arctic Sunrise Arbitration, Netherlands v Russia,* Award on the Merits, PCA Case Nº 2014-02, 14 August 2015. Case view available at: https://pcacases.com/web/view/21, accessed on 15 October 2016; and *The Duzgit Integrity Arbitration, Malta v São Tomé and Príncipe,* Award, PCA Case Nº 2014-07, 5 September 2016. Case view available at: https://pcacases.com/web/view/53, accessed on 15 October 2016.
[570] Id.
[571] *The Arctic Sunrise Arbitration,* para. 401(L); and *The Duzgit Integrity Arbitration,* para. 333.
[572] It is noteworthy to mention that in *The Arctic Sunrise Arbitration* the respondent has not participated in the proceedings at any stage. See *The Arctic Sunrise Arbitration,* para. 7
[573] *The Duzgit Integrity Arbitration,* paras. 24-25.
[574] Ibid., para. 333.

Arbitration case was particular, as the respondent State failed to participate in the proceedings.[575] It is not clear, however, whether the tribunal took into account this factor to postpone the analysis of the damages claimed.

The ICJ case *Armed Activities on the Territory of the Congo* is another interstate dispute in which damages are being assessed to date. It concerns claims and counter-claims ut forward by the DRC and Uganda. The proceedings commenced on 23 June 1999, pursuant to an application filed by the DRC.[576] The claimant State requested the ICJ to determine the cessation of armed aggression carried by Ugandan troops on Congolese territory. It also sought reparation for acts of intentional destruction and looting, and the restitution of national property and resources appropriated for the benefit of Uganda.[577] The respondent, on the other hand, put forward a counter-claim arguing that DRC also carried out attacks against Ugandan nationals and property. Thus, the respondent State requested the ICJ to hold DRC liable for damages under international law and claimed reparation.[578] Both disputing parties requested the ICJ to reserve the issue of reparation for a subsequent stage of the proceedings.[579]

In its judgment of 19 December 2005, the ICJ upheld both claims for reparation.[580] The ICJ also decided that the assessment of the damages claimed would be carried out in a subsequent phase of the proceedings, failing agreement between the disputing parties. The World Court considered appropriate DRC's suggestion to give the disputing parties the opportunity to directly negotiate the nature, form and amount of the reparation due. In case the parties were unable to agree, then one of them could request the continuation of the

[575] *The Arctic Sunrise Arbitration*, para. 7.
[576] *Armed Activities on the Territory of the Congo*, Judgment, Merits, para. 1.
[577] Ibid., paras. 24-25.
[578] Id.
[579] Ibid., para. 25.
[580] Ibid., paras. 259-261 and 344-345.

damage assessment phase.[581] No time-limit for the period of negotiation was provided by the judgment.

By a letter dated 12 May 2015, almost ten years after the date of the judgment on the merits, the DRC communicated the ICJ that the negotiations with Uganda was deemed to have failed. Thus, DRC requested the continuation of the damages assessment phase. In its Order dated 1 July 2015, the ICJ fixed time-limits for the filings of written submissions on reparations due by each State,[582] which were later extended in two occasions.[583] Judge Cançado Trindade has criticised the ICJ for its inertia in settling the dispute. He has noted that a period of almost a decade had been lapsed since the ICJ's judgment on the merits. He has also pointed to the fact that the case concerns grave breaches to the right of individuals and thus the proceedings should be conducted in a speedy manner.[584] As of October 2016, the proceedings remained pending.

The ECtHR is currently assessing another just satisfaction claim in the case *Georgia v. Russia*, which was initiated on 26 March 2007.[585] Georgia argued that the government of the respondent State carried out a coordinated policy of arresting, detaining and expelling

[581] Ibid., paras. 260-261 and 345.
[582] *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 1 July 2015.
[583] *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 10 December 2015; *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 11 April 2016.
[584] *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 1 July 2015, Declaration of Judge Cançado Trindade; *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 11 April 2016, Declaration of Judge Cançado Trindade. Judge Cançado Trindade understands that: "[r]eparations, in cases involving grave breaches of the International Law of Human Rights and of International Humanitarian Law, cannot simply be left over for 'negotiations' without time-limits between the States concerned, as contending parties. Reparations in such cases are to be resolved by the Court itself, within a reasonable time, bearing in mind not State susceptibilities, but rather the suffering of human beings, — the surviving victims, and their close relatives, — prolonged in time, and the need to alleviate it. The aforementioned breaches and prompt compliance with the duty of reparation for damages, are not be separated in time: they form an indissoluble whole." See *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 1 July 2015, Declaration of Judge Cançado Trindade, para. 7; *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Order, 11 April 2016, Declaration of Judge Cançado Trindade, para. 19.
[585] *Case of Georgia v. Russia (I)*, Judgment (Merits) of 3 July 2014, ECtHR, Grand Chamber, Application no. 13255/07, para. 1.

Georgian nationals from the territory of Russia during the autumn of 2006. Thus, the claimant State requested the ECtHR to hold the respondent liable for the alleged wrongful acts and award just satisfaction for all the pecuniary and non-pecuniary damage suffered or incurred by the Georgian nationals in concern.[586]

In its judgment of 3 July 2014, the ECtHR found that the respondent breached its obligations under the ECHR and held that the claimant was entitled to claim just satisfaction. However, the ECtHR stated that "the question of the application of Article 41 of the [ECHR] [was] not ready for examination".[587] Therefore, the ECtHR invited the disputing parties to file written submissions with their observations on the matter of just satisfaction "and, in particular, to notify the [ECtHR] of any agreement that they may reach".[588] As of October 2016, the case remained listed as pending.

4.4 CONCLUSION

The possibility of separating the merits and quantum proceedings is not expressly foreseen in the statutes and rules of the contemporary international courts. Consequently, the disputing parties often have liberty to agree ahead on whether or not the adjudicators should separate the proceedings.

In the context of the ICJ, notwithstanding the silence of its Statute and Rules on the procedural issue,[589] the separation between the merits and quantum phases is the established

[586] Ibid., para. 79.
[587] Ibid., para. 240.
[588] Ibid., *dispositif*, para. 17.
[589] Article 79.2 of the ICJ Rules address the separation of the proceedings in relation to preliminary objections. That article provides that the "[ICJ] may decide that any questions of jurisdiction and admissibility shall be determined separately".

practice and may be determined on the basis of the inherent powers of the ICJ to decide its own procedure.[590]

International adjudicators have chosen to postpone the analysis of the quantum phase – and thus separating the merits and quantum phases – in cases in which the respondent has failed to fully participate in the proceedings, *i.e.* the arbitration *Arctic Sunrise* and ICJ case *Military Activities in Nicaragua*.[591]

In *Corfu Channel* and *Diallo*, the only two cases in which the ICJ has awarded monetary payment to date, the principal judicial organ of the UN rendered its judgment on the merits and postponed the analysis of the calculation of the damages to a later stage.[592] The ICJ adopted the same approach in the pending case *Armed Activities on the Territory of the Congo*.[593] Again, the ICJ postponed the analysis of the reparation to be awarded to a subsequent phase of the proceedings.[594]

International courts and tribunals often determine the separation of the merits and quantum phases following a request by one or both parties. In *Diallo* and *Armed Activities on the Territory of the Congo*, the disputing parties requested and agreed that the analysis of the damages should be postponed. In the contrary, the cases *M/V Saiga 2* and *M/V Virginia G*

[590] As stated by Elihu Lauterpacht, "the [ICJ] is the master of its own procedure". See Elihu Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice', in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, ed. Vaughan Lowe and Malgosia Fitzmaurice (CUP, 1996), 465–86, p. 475. In the same direction, Biehler pointed that the rules of procedure are established by international courts themselves and they do not derive directly from the consent of States. Thus, they are the bodies with authority to carry their functions: "[t]he provisions contained in the rules of procedures […] represent a source of law which is only indirectly derived from the consent of states and rather reflects the international courts' authority to carry out their functions properly." See Gernot Biehler, *Procedures in International Law* (Springer, 2008), p. 41.

[591] See fn. 450. As explained by the ICJ in *Military Activities in Nicaragua,* a quantum phase would give an opportunity to the respondent State to appear again and present its case on calculation of damages. *Military and Paramilitary Activities in and Against Nicaragua*, para. 284 [paragraph numbers added by OUP].

[592] See *Corfu Channel*, Judgment, Merits, I.C.J. Reports 1949, p. 36; and *Diallo*, Judgment (Merits), ICJ Reports 2010, p. 693.

[593] *Armed Activities on the Territory of the Congo,* p. 168.

[594] Ibid., p. 282.

were concluded in a single phase of the proceedings because the disputing parties agreed in advance that the ITLOS should decide all the issues, including damages, in a single phase.[595]

Adjudicators have never denied a party's request to postpone the analysis of the quantum proceedings in contemporary interstate dispute settlement. Among the cases reviewed, only the tribunal in *The Duzgit Integrity Arbitration* has addressed a request to postpone the analysis of the quantum issue under the objection of the opposing party. The tribunal in *The Duzgit Integrity Arbitration* granted the request to postpone the quantum phase but did not provide any reasoning.[596] The parties and the tribunal could and should have addressed the impact of separation of merits and quantum phases on procedural efficiency.

In case both parties agree to postpone the analysis of the quantum issues, it is arguable whether the adjudicators should interfere on the parties' procedural choice. Arbitration tribunals would be more inclined to accept and apply the parties' choice because the parties have wide liberty to decide the procedural aspects of the dispute. Similarly, international courts tend to follow the parties' procedural choices in case of agreement.

The current interstate practice seems to suggest that the analysis of quantum issues shall be postponed whenever possible or when requested by either party. However, it is not clear whether the parties and the adjudicators have been paying reasonable consideration to the impacts of the separation between merits and quantum phases on procedural efficiency.

[595] *The M/V "Saiga" (No 2),* para. 47; and *M/V "Virginia G",* para. 100.
[596] See fns. 573-574.

5. EFFICIENCY ANALYSIS OF QUANTUM BIFURCATION IN INVESTOR-STATE ARBITRATION AND ITS APPLICATION TO INTERSTATE DISPUTES

Investor-State arbitration tribunals have addressed the impact of the separation between the merits and the quantum phases, or also referred as "quantum bifurcation", on procedural efficiency. Tribunals and scholars have addressed the merits and demerits of quantum bifurcation and how it may increase or undermine procedural efficiency.

The practice of tribunals and scholarly writings on quantum bifurcation in investor-State arbitration can give guidance to parties and adjudicators in interstate dispute settlement on the issue of separation of the merits and quantum proceedings, including in relation to its impact on procedural efficiency. However, efficiency considerations applicable to investor-State arbitration are not always and entirely applicable to interstate disputes. The latter category of disputes is surrounded by political and diplomatic sensitivities that may impact on the conduction of the proceedings and procedural choices. Therefore, a debate on procedural efficiency in interstate dispute settlement shall take into account its own inherent particularities.

5.1 QUANTUM BIFURCATION IN INVESTOR-STATE ARBITRATION

In international arbitration, the term "bifurcation" means the process of splitting the proceedings in distinct phases, "each contemplating *ad hoc* pleadings, possibly hearings, and ending with a decision on a discrete matter".[597] Bifurcation has also has been defined as "the process in which discrete issues are determined by the tribunal by way of a partial final

[597] Massimo V. Benedettelli, 'To Bifurcate or Not To Bifurcate? That Is the (Ambiguous) Question', *Arbitration International* 29, no. 3 (2013): 493–506, p. 493.

award".[598] It usually refers to either the separation between the jurisdiction phase and the merits phase,[599] or, less commonly, between the merits phase and the quantum phase.[600]

The arbitral tribunal, by bifurcating the proceedings, would focus on discrete matters instead of addressing all issues altogether and rendering a single award on jurisdiction, merits and quantum.[601] Tribunals may also "trifurcate" the proceedings. In such cases, trifurcation "refers to the division of the jurisdiction, merits, and quantum phases of an arbitration."[602] As in bifurcation, each phase would contemplate its own round of pleadings, potentially hearings, and end with a partial award or judgment on discrete matter.[603]

Another possibility is to apply "reverse bifurcation". In this hypothesis, the proceedings would be split as in bifurcation. However, the tribunal would "reverse" the order of the issues to be addressed. For example, in a reverse bifurcation between the merits and quantum phases, the tribunal would first address the issues related to the calculation of compensation and then it would proceed to the analysis of liability. A party would suggest

[598] Lucy Greenwood, 'Does Bifurcation Really Promote Efficiency?', *Journal of International Arbitration* 28, no. 2 (2011): 105–11, p. 105.
[599] See for example: *Toto Costruzioni Generali S.P.A. v. Lebanon*, ICSID ARB/07/12, Decision on Jurisdiction, 11 September 2009; and Award, 7 June 2012; *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, Decision on the Respondent's request for bifurcation, ICSID ARB/11/28, 2 November 2012; *Philip Morris Asia Limited v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, UNCITRAL Rules of 2010, PCA Case No. 2012-12, 17 December 2015.
[600] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; and Award, 25 July 2007. The latter award contemplated issues of calculation of damages.
[601] For an example in which the Tribunal addressed all the matters in a single award, see *Patrick Mitchell v. Congo*, Award, ICSID ARB/99/7, 26 January 2004.
[602] Baiju S. Vasani, 'Bi-Trifurcation of Investment Disputes', in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (OUP, 2010), 121–27, p. 121.
[603] See for example, the ICSID case *LG&E v. Argentina*, in which the tribunal rendered three decisions, each one encompassing different phases of the arbitration: *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004; Decision on Liability, 3 October 2006; and Award, 25 July 2007.

such an approach in a case in which the lack of proof of damages may be dispositive and concern less assessment than does the merits.[604]

In international arbitration, the use of bifurcation is not novel.[605] As noted by a commentator, the issue has been discussed at length by legal scholarship.[606] The majority of the debate has focused on the merits and demerits of the separation between the jurisdiction and the merits phase,[607] as the issue of an award on jurisdiction "is a common practice, not an exception", especially in the context of arbitrations under ICSID and UNCITRAL rules.[608] The few references to bifurcation in arbitration rules are limited to the hypothesis of separation between jurisdiction and merits phases.[609] The rules of the International Centre for

[604] As explained by two commentators: "reverse bifurcation can alert the arbitral panel to the tenuous nature of a claimant's allegations when later addressing liability. Such reverse bifurcation can also assist the parties in trying to shape settlement negotiations based upon the outcome of a hearing on damages, particularly since the panel will likely be left with only two choices after addressing liability: a determination that the respondent is not liable for any amount or that the respondent is liable for the damage amount found in the first phase of the process." See Thomas J. Tallerico and J. Adam Behrendt, 'The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings' 20, no. 3 (2003): 295–305 pp. 297-298.

[605] Alan Redfern, Martin Hunter, and Murray Smith, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 1991).

[606] Benedettelli, 'To Bifurcate or Not To Bifurcate? That Is the (Ambiguous) Question', p. 494, referring to Greenwood, 'Does Bifurcation Really Promote Efficiency?'; N. Ulmer, The Cost Conundrum, 26 Arb. Int'l 221, at 234 f. (2010); Vasani, 'Bi-Trifurcation of Investment Disputes'; T.H.Webster, Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues, 25 Arb. Int'l 469 (2009); T. Giovannini, Comments on Judith Jill's Report on Applications for the Early Disposition of Arbitral Proceedings, in A.J. Van den Berg (ed.), 50 Years of the New York Convention, ICCA Congress Series, The Hague-Boston-London, 2009, 526; JJ. Coe Jr., Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness — Some Thoughts Concerning Arbitral Process Design, 2 Pepperdine Dispute Resolution L.J.53 (2002); A. Rau, Contracting Out of the Arbitration Act, 8 Am. Rev. Int'l Arb. 225, at 251 (1997); G.B. Born, International Commercial Arbitration, Alphen aan den Rijn, 2009, 1815 f; C. Schreuer (ed.), The ICSID Convention: A Commentary, Cambridge, 2009 (II ed.), 545 ff; N. Blackaby, C. Partasides, A. Redfern, M. Hunter, Redfern and Hunter on International Arbitration, Oxford, 2009, 374 pp., 522 pp.; E. Gaillard, J. Savage, Fouchard Gaillard Goldman on International Commercial Arbitration, The Hague-Boston-London, 1999, 741 ff; M.N. Kinnear, A. K. Bjorklund, J.F.G. Hannaford, Investment Disputes under NAFTA: An Annotated Guide to Chapter 11, The Hague-Boston-London, 2006, 1135-8 pp.; Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), 281 pp.; M. McIllwrath, J. Savage, International Arbitration and Mediation: A Practical Guide, The Hague-Boston-London, 2010, 275 pp.

[607] With respect to the arguments raised in favour and against bifurcation in the context of preliminary matters, see Andrea Carlevaris, 'Preliminary Matters: Objections, Bi-Furcation, Request for Provisional Measures', in *Litigating International Investment Disputes: A Practitioner's Guide*, ed. Chiara Giorgetti (Brill, 2014), 173–205, pp. 183-185.

[608] Vojtěch Trapl, 'Thinking Big. Bifurcation of Arbitration Proceedings - To Bifurcate or Not to Bifurcate', *Czech Yearbook of International Law* 4 (2013): 267–77, p. 271.

[609] See for example Daly, Goriatcheva, and Meighen, *A Guide to the PCA Arbitration Rules*, addressing the bifurcation between the jurisdiction and merits phase in the 2010 UNCITRAL Rules, at Ibid., pp. 67, para. 5.06; pp. 85-88, paras. 5.63-5.75. Article 41(2) of the ICSID Convention provides that a tribunal may decide on

Dispute Resolution ("ICDR") are an exception, as they expressly mention the possibility of bifurcating the proceedings into merits and quantum phases.[610]

Although arbitration rules are usually silent on the issue of bifurcation in general, the same rules provide the tribunal a high level of discretion to conduct the proceedings.[611] As noted by Born, the discretion "to determine the arbitral procedure, in the absence of agreement by the parties on such matters, is [a] foundation of the international arbitral process."[612] Accordingly, the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings recommends that, "[s]ubject to any agreement of the parties, the arbitral tribunal has the flexibility and discretion to determine the sequence of the arbitral proceedings and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration."[613] In case of ICSID arbitrations, the bifurcation between the merits and quantum phases are determined on the grounds of Article 44 of the ICSID Convention.[614] However, as noted by the ICSID tribunal in *Suez v. Argentina*, the bifurcation between the merits and the

jurisdiction matter at a preliminary stage as follows: "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute." See also Trapl, 'Thinking Big. Bifurcation of Arbitration Proceedings - To Bifurcate or Not to Bifurcate', p. 272.

[610] See Article 20(3) of the ICDR Rules, which reads as follows: "The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case." See ICDR's *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)*, Rules Amended and Effective, 1 June 2014.

[611] See for example Article 17(1) of the 2010 UNCITRAL Rules; Article 19 of the ICSID Convention Arbitration Rules; Article 22(2) of the ICC Rules of 2012; Articles 19(1) and 38 of the SCC 2010 Arbitration Rules; Article 14, paragraphs 4(ii) and 5, of the 2014 LCIA Rules.

[612] Gary B. Born, *International Arbitration: Law and Practice* (Kluwer, 2012), pp. 148-149.

[613] 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17), para. 69, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e-pre-release.pdf Accessed on: 7 Sept. 2016.

[614] Article 44 of the ICSID Convention reads as follows: "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

quantum phase in ICSID disputes is not common.[615] Similarly, the tribunal in *Waguih Elie George Siag and Clorinda Vecchi* also noted that separating the merits and quantum phases is not in the "the usual practice of ICSID Tribunals".[616]

5.2 EFFICIENCY ANALYSIS OF QUANTUM BIFURCATION IN INTERNATIONAL ARBITRATION

A party may seek bifurcation when the determination of an issue might eliminate the need to arbitrate the rest of the dispute.[617] As noted by a commentator, the arguments on whether or not to bifurcate thus involve questions of efficiency as the general objective is to avoid additional costs and delays.[618]

The 2016 UNCITRAL Notes on Organizing Arbitral Proceedings acknowledge that bifurcation may have an impact on the adjudicative process and recommend the arbitral tribunal to "consider carefully whether such a staged process is likely to save time and costs of the overall proceedings or to have the opposite effect."[619] In other words, the 2016 UNCITRAL Notes invite the arbitral tribunals to consider the overall impact of the separation between the merits and quantum phase on procedural efficiency. Accordingly, arbitration

[615] The tribunal noted the following: "The Tribunal is aware that a bifurcation of the merits phase of an ICSID case into determination of liability and a determination of damages is not common. On the other hand, the ICSID Rules do not preclude such an approach. Indeed, Article 44 of the ICSID Convention […] specifically states: 'If any question of procedure which is not covered by this Section or the Arbitration Rules or any rules agreed upon by the parties, the Tribunal shall decide the question.' The Tribunal relies on Article 44 in deciding on bifurcating the merits phase of this case […]." See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/17, 30 July 2010, para. 245.
[616] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/15, 1 June 2009, para. 116, reproducing the tribunal's Procedural Order No. 3.
[617] Tallerico and Behrendt, 'The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings', p. 296.
[618] Benedettelli, 'To Bifurcate or Not To Bifurcate? That Is the (Ambiguous) Question', p. 494.
[619] 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, para. 70.

tribunals have determined bifurcation on the basis of efficiency considerations, including judicial economy.[620]

In the arbitration *Bilcon*, initiated under Chapter 11 of NAFTA and conducted under the UNCITRAL Arbitration Rules of 1976, the procedural efficiency issue was a central point of discussion in relation to the question of whether or not to bifurcate the merits and quantum phases. The *Bilcon* tribunal ordered at an early stage the bifurcation "between the merits (liability) phase and, if any liability is found to exist, a damages (quantum) phase."[621] Following the issuance of the award on jurisdiction and liability on 17 March 2015, in which the majority found that the respondent breached its obligations under Articles 1102 and 1105 of NAFTA,[622] the claimants requested on 29 May 2015 a hearing to be scheduled in order to discuss the timeline for the quantum phase.[623]

On 18 June 2015, the respondent in *Bilcon* filed a motion "requesting the Tribunal do consider the scope of the issues to be addressed in the damages phase as a preliminary matter".[624] The respondent has requested the preliminary analysis of certain issues within the quantum phase of the proceeding. The respondent demonstrated its concern over the magnitude of the claim and the amount of evidence to be addressed. The request was based on the argument that the preliminary analysis of the issues would improve procedural efficiency by reducing the cost and the complexity that would be expended by the disputing parties to produce and analyse the relevant evidence. The claimants challenged the respondent's requests, characterizing the respondent's motion as an attempt to "sub-bifurcate the quantum

[620] See for example *Suez and ors v Argentina*, Decision on Liability, ICSID Case No ARB/03/19, para. 272. See also Jeremy K. Sharpe, 'Representing a Respondent State in Investment Arbitration', in *Litigating International Investment Disputes: A Practitioner's Guide*, ed. Chiara Giorgetti (Brill, 2014), p. 68.
[621] *Bilcon of Delaware Inc. et al. v. The Government of Canada*, Arbitration under Chapter Eleven of NAFTA, PCA (UNCITRAL), Procedural Order No. 3, 3 June 2009, para. 1.2.
[622] Ibid., Award on Jurisdiction and Liability, 17 March 2015.
[623] Ibid., Procedural Order No. 20, 5 January 2016.
[624] Ibid., para. 8.

phase".[625] The claimants averred that the limitation would result in a "needless duplication of the proceedings",[626] and thus would introduce inefficiencies.

The *Bilcon* tribunal denied the respondent's motion on the grounds that an undivided quantum phase would be "procedurally the soundest one". The tribunal did not provide a deep analysis on how an undivided quantum phase would be the most efficient. However, the tribunal simply noted that the burden of proving the damages rested with the claimants. Moreover, it held that it would consider the parties' submissions as to cost consequences arising in relation to unsuccessful claims as a way to mitigate expenses the respondent would have to incur as a result of the single quantum phase.[627]

The ICSID tribunal in *Tulip v. Turkey*, when asked to decide on the request to bifurcate the jurisdiction and merits phases, exercised its discretion to decide on the matter and addressed efficiency consideration. The ICSID tribunal analysed the following three considerations:

> (i) whether it is desirable to bifurcate for reasons of procedural economy; and (ii) whether the preliminary objection is intimately linked to the merits; and (iii) whether a determination of the preliminary objection is capable of resulting either in the dismissal of the entire case or reducing significantly its scope and complexity.[628]

The three considerations above are associated with the adjudicators' concern with the overall efficiency of the proceedings. The tribunal in *Tulip v. Turkey* expressly addressed the question of whether the motion for bifurcation would be justifiable for reasons of procedural economy and whether the preliminary objection raised could result in the dismissal of the entire case, thus with a power to impact on the time and costs to be eventually incurred.

[625] Ibid., para. 23.
[626] Ibid., para. 11.
[627] Ibid., para. 39.
[628] *Tulip Real Estate Investment*, para. 30

The question of whether bifurcation promotes efficiency is not obvious, as suggested by two commentators.[629] They have noted that the issues of calculation of damages usually concern matters and evidence completely unrelated to the liability dispute. Thus, it would be natural in those cases to determine the bifurcation of the proceedings because it would allow the disputing parties to avoid the expense and time need to argue and address matters which may turn out to be irrelevant as a result of a decision on the merits.[630] Hence, respondents would seek bifurcation because he or she may be able to defeat the claim at an early stage and avoid an additional phase, such as the quantum phase.[631]

Recent awards rendered by investor-State arbitration tribunals have shown that the quantum related issues are becoming very detailed and complex, requiring an increasing amount of effort from the parties, tribunal, and arbitral institution.[632] If a tribunal decides to bifurcate, there would be an assumption that bifurcation would allow the disputing parties and the tribunal to focus on each of the relevant issues separately and thus more efficiently.[633] In case the tribunal decides not to bifurcate, the disputing parties and the tribunal would have to address the issues of merits and, at the same time, provide a calculation of the potential compensation to be awarded. In this case, the disputing parties and the tribunal would have to consider the different hypothetical scenarios that could arise depending on the approach to be

[629] Tallerico and Behrendt, 'The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings', p. 297.
[630] Id.
[631] CPR International Committee on Arbitration, 'CPR Protocol on Determination of Damages in International Arbitration' (International Institute for Conflict Prevention and Resolution, 2010), http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/CPR%20Protocol%20on%20Determination%20of%20Damages%20in%20Arbitration%20fnl.pdf, p. 4.
[632] A study published by the PwC in 2015 on quantum awards rendered by investor-State arbitral tribunals has concluded that: "[a]t a very basic level, Tribunals dedicate more pages now than ever before to explaining the basis for their quantification of damages. That finding is in the context of longer arbitration awards generally, but our observation from reading the awards is that the increased page count reflects Tribunals explaining their approach to damages in more depth, and addressing more complex valuation issues, than was historically the case." PricewaterhouseCoopers, '2015 – International Arbitration Damages Research: Closing the Gap between Claimants and Respondents', 2015, https://www.pwc.com/sg/en/publications/assets/international-arbitation-damages-research-2015.pdf, p. 5.
[633] Tallerico and Behrendt, 'The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings', p. 295.

adopted by the adjudicators concerning the merits. The biggest risk of this approach is that, in case the tribunal decides that the injured party is not at all entitled to compensation for damages, all previous discussion on its calculation would have been a waste of resources. The question would thus involve a *prima facie* analysis of the arguments put forward by the parties and their relevance.

However, the determination of bifurcation by itself can significantly impose obstacles to the efficiency of the proceedings by adding new rounds of written submissions and potentially a new hearing. Moreover, bifurcated proceedings may force the parties to address and argue the same facts.[634]

Aware that bifurcation can extend the time of the proceedings, respondents may seek bifurcation with the intention "to delay and obstruct the arbitration, rather than to make it more efficient".[635] Following the same line, an empirical study has disputed the assumption that bifurcation always promotes efficiency and thus suggested that bifurcation may actually undermine efficiency. In order to determine whether bifurcation promotes efficiency, the commentator Greenwood, author of the empirical study, compared the time each tribunal took to decide an ICSID case in which the tribunal determined the bifurcation with other ICSID cases in which bifurcation was not determined. The commentator recognized that the approach adopted has many methodological defects because a case may take longer time than others for various reasons, and not only because the case was bifurcated.[636] Nevertheless, the commentator concluded that "the empirical evidence, however imperfect, can be illustrative".[637]

[634] Greenwood, 'Does Bifurcation Really Promote Efficiency?', p. 110.
[635] Ibid., p. 108.
[636] Id.
[637] Id.

In total, the commentator reviewed 174 concluded ICSID cases. The scholar found that 45 proceedings were bifurcated and 129 were not. The 45 proceedings included cases that were split between a jurisdiction and a merits phase (43 cases) and cases that had hived off issues as preliminary matters (2 cases). The study did not provide the number of cases that had a separated quantum phase. In average, the 45 proceedings that were bifurcated took 3.62 years to conclude. With regard to the 129 cases that had not been bifurcated, she excluded 61 cases because these proceedings did not reach a final award. The commentator found that the remaining 68 non-bifurcated cases took, on average, 3.04 years to reach a final award.[638]

The same empirical study also analysed 19 ICSID Additional Facility cases and provided that 10 proceedings were bifurcated, 8 of which were divided between jurisdiction and merits phases and the remaining 2 were split between liability and quantum phases. The commentator found that the 10 bifurcated proceedings took an average of 3.39 years to reach a final award. On the other hand, the 9 non-bifurcated cases took an average of 2.96 years to reach a final award.[639]

The study concluded that "the limited empirical data does not support the view that bifurcating proceedings limits the duration of the dispute".[640] Consistent with its findings, the study noted that claimants tend to oppose bifurcation.[641] In addition to increasing the time and costs of the proceedings, bifurcation may also create parallel proceedings.[642] The

[638] Id.
[639] Id.
[640] Id.
[641] CPR International Committee on Arbitration, 'CPR Protocol on Determination of Damages in International Arbitration', p. 4. In cases, however, a claimant may agree with the respondent that the determination of quantum shall be made in a subsequent phase of the proceedings. See *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award, UNCITRAL 1976, SSC No. 049/2002, 13 September 2001, para. 618.
[642] In a bifurcated proceeding, the partial award is subject to set aside proceedings before national courts while the arbitration is pending. According to the commentator, the difficulty arising out of the issue is "[t]he most problematic part of bifurcation". Greenwood, 'Does Bifurcation Really Promote Efficiency?', p. 110. A party that initiates a set aside proceedings might have to focus its attention in two fronts, *i.e.* the international

commentator noted, however, that in some cases "bifurcation appears to promote settlement, but not in all cases".[643]

The author of that empirical study emphasized that each case on its own merits needs to be examined before any order of bifurcation.[644] The commentator also alerted that the empirical data on bifurcation used in the study was very limited. According to the author, the reason of the limited data is related to the fact that international commercial arbitration institutions do not maintain statistics on bifurcation.[645] Thus, the study only collected data made available by ICSID.[646]

Commentators have discussed techniques and approaches that would assist the tribunals to address the question of whether or not to bifurcate the proceedings. Tallerico and

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arbitration and the proceedings before national courts. Both the arbitral tribunal and the national court might not agree to suspend its proceedings and thus they would run in parallel. In addition, a decision that sets aside a partial award may affect the arbitral proceedings conducted thereafter. As explained by the commentator "if the liability phase determined the manner in which damages will be calculated (rather than the actual calculation of those damages) then the quantum phase may be jeopardized while the partial award determining the manner of the calculation is challenged." See Ibid., p. 110. The issue affected the NAFTA case *SD Myers v. Canada*, conducted under the 1976 UNCITRAL Rules. See *SD Myers v. Canada*, Award (Second Partial Award). The tribunal in *SD Myers* bifurcated the merits and the quantum phase. As provided in the tribunal's procedural order no. 1: "the proceedings the Tribunal will determine (in a partial award) liability issues and issues as to the principles on which damages rtf any) should be awarded, leaving the calculation of the quantification of such damages, if any, to a second stage." See *SD Myers v. Canada*, Procedural Order No. 1, 28 May 1999, para. 1. After the tribunal rendered a partial award on liability, the respondent applied to set aside the partial award and requested a stay of the next phase of the arbitration proceedings. The tribunal refused the application of stay and proceeded with the quantum phase. Ultimately, respondent sought to set aside also the award on damages and costs, which was consolidated with the application to set aside the partial award on merits before the competent national court. See Ibid., pp. 110-111, referring to 21 I.L.M. 976 (1982), discussed at paras. 6.42, 6.51, and 6.52. The issue of parallel proceedings does not possess a risk on interstate dispute settlement because decisions from such bodies are final and immune from national courts.

[643] Id. The commentator noted that, out of the 45 proceedings that were bifurcated, 9 were settled: *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2; *Kaise Beauxite Co. v. Jamaica*, ICSID Case No. ARB/74/3; *Mobil Oil Corp. et al. v. New Zealand*, ICSID Case No. ARB/87/2; *Lanco International, Inc. v. Argentina*, ICSID Case No. ARB/97/6; *Salini Construttori S.p.A. & Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13; *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3; *Impreglio S.p.A v. Pakistan*, ICSID Case No. ARB/03/3; and *Camuzzi Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/7. Greenwood also stated that one case was concluded in an award by consent: *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6. See Ibid., p. 107, fns. 8 and 9. However, the study does not provide the data of how many cases that were not bifurcated were settled.

[644] Greenwood, 'Does Bifurcation Really Promote Efficiency?' pp. 105-111.

[645] Ibid., pp. 106-107.

[646] Ibid., p. 107.

Behrendt have provided a list of considerations in order to decide whether or not to determine any kind of bifurcation in the context of international commercial arbitration. The list is as follows:

> (i) the amount and type of evidence needed to support each issue;
> (ii) whether the evidence necessary for a later phase of the hearing will overlap or will be mutually exclusive;
> (iii) whether the evidence necessary for a later phase of the hearing will be prejudicial or inflammatory;
> (iv) whether evidence necessary for a later phase of a hearing is sensitive or if there is a strategic reason to withhold certain key evidence until a later phase;
> (v) whether resources will be conserved by bifurcation or would increase costs with multiple phases;
> (vi) whether a second phase of the arbitration will be voluminous;
> (vii) the effect that bifurcation may have on discovery (if allowed);
> (viii) whether bifurcation will somehow result in prejudice or unfair advantage;
> (ix) whether bifurcation will result in greater convenience to witnesses, the parties or the tribunal;
> (x) whether bifurcation will act to expedite the proceedings and help to conserve resources.[647]

Tallerico and Behrendt's list of considerations concerns a *prima facie* estimation of the required evidence and the impact on the procedural efficiency of the case.

Benedettelli has defended that the question of whether or not to bifurcate requires a flexible and balanced approach. According to the commentator, arbitration rules provide the arbitrators discretion to conduct the proceedings in different manners, which is consistent with the flexibility requirement. Furthermore, the tribunal has to adopt an approach that identifies and balances all the effects bifurcation may result. The commentator has explained the issue as follows:

> This means that the arbitral tribunal will have first to determine: (i) which is the *disputed matter* on which a separate decision is sought; (ii) the *form* in which the early decision will have to be given under the applicable laws or arbitration rules and (iii) the different *interests* affected by making recourse to this procedural device. On the basis of all these elements, the arbitral

[647] Tallerico and Behrendt, 'The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings', p. 298.

> tribunal will have to assess the possible effects of bifurcation in the specific case which is pending before it.[648]

The analysis, according to the commentator, involves the consideration of whether the bifurcated phase "would reduce or increase the time and costs of the proceedings", which may depend on "the number and type of legal or factual issues to be addressed, the amount of documentary or witness evidence required, the need for hearings and memorials".[649] For Benedettelli, the tribunal should make a *prima facie* analysis of the substance of the claim, including "the seriousness/frivolousness of the parties' respective arguments on the issue to be determined earlier".[650] Hence, the commentator pays less regard to the type and amount of evidence to be presented but prioritizes the substance of the issue to be decided and the impact of bifurcation on the procedural efficiency.

Another point to be considered is the amount of the dispute. As argued by a commentator, the arbitration agreement shall tailor the proceedings according to the amounts in discussion.[651] Thus, the disputing parties, and also the tribunal, would consider the question of whether or not to bifurcate in relation to the amount claimed. A small claim would justify fast-track proceedings to be decided by a single award.

International arbitration practice has shown that tribunals and parties shall be aware of and address the potential consequences of quantum bifurcation on procedural efficiency. As Greenwood's empirical study has illustrated, it seems that the assumption that bifurcation will always improve efficiency is not applicable. The tribunal and the parties are expected to revisit many of the evidence, and also re-argue particular issues in the quantum phase. Furthermore, it is expected that, the more opportunity the counsel are given to present their

[648] Benedettelli, 'To Bifurcate or Not To Bifurcate? That Is the (Ambiguous) Question', p. 506.
[649] Id.
[650] Id.
[651] Veijo Heiskanen, 'Key to Efficiency in International Arbitration', *ICSID Review* 30, no. 3 (2015): 481–85.

case, the more they will use their time. Consequently, one can conclude that the time to present a case in a bifurcated proceeding will always be higher than the time to present a case in a non-bifurcated proceeding.

The bifurcation question deserves a close analysis by the parties and the tribunal on a case by case basis as the issue can both improve and also undermine the efficient conduct of the proceedings. For instance, adjudicators shall assess whether the claim for bifurcation is a strategy to slow the process. Similarly, the adjudicators shall make a *prima facie* analysis of the *fumus boni iuris* surrounding the claim for remedy. In case the tribunal decides that the *fumus boni iuris* is not present, it could consider bifurcating the proceedings in order to avoid a matter that may be potentially rejected. Furthermore, a tribunal shall consider whether the analysis of the evidence to be presented to support the quantification of damages requires an additional attention from the parties and the adjudicators, hence justifying a quantum phase. The tribunal may also consider the legal complexity of the remedy claim and assess whether the arguments in that regard will require a careful review. Finally, the tribunal shall consider, together with the parties, the applicable standard of proof to establish damage. A lower standard of proof may dismiss the need for additional rounds of document production.

Henceforth, the potential matters to be assessed may involve: (i) the substance of the claims for bifurcation, including their relevance; (ii) whether there is a *fumus boni iuris* supporting the claim behind the request for bifurcation; (iii) the type and amount of evidence to be produced, presented and argued; (iv) the complexity of the claim for remedies and the need for additional rounds of written submissions and hearing to address the parties' arguments in detail; and (v) the applicable standard of proof.

In international arbitration, commentators have supported the claim that the tribunals need to address quantum issues as early as possible. The International Institute for Conflict

Prevention & Resolution issued, by its International Committee on Arbitration, a protocol on determination of damages in international arbitration ("CPR Protocol").[652] The committee identified and proposed steps that arbitrations may consider adopting in order to deal with complex, time-consuming and expensive damage claims. The CPR Protocol recommended that tribunals should work on the early identification of damages issues as early as the initial scheduling conference among the tribunals, counsel, and eventually the parties.[653] As described in the CPR Protocol, the conference is an appropriate occasion for a preliminary examination of damages issues and, if practicable, a preliminary study of damages calculation.[654] Accordingly, the CPR Protocol provided that an early conference could also help the tribunal in assessing: the disclosure of information on damages; the strength of the evidence presented by claimant; the extent the evidence is linked with the evidence of damage; and the theories presented by the parties for their position on damages.[655] The CPR Protocol provided that the "arbitrators' objective in this discussion should be to obtain at least a fundamental understanding of the factual and theoretical bases for the damage claims and the opposition to them."[656]

The CPR Protocol also made reference to the early participation of experts in the proceedings, in order to, together with the tribunal and the parties, identify the kind of presentation of damages might be useful.[657]

Finally, the CPR Protocol suggested that tribunals should address quantum issues in the initial procedural order. The CPR Protocol provided that tribunals should work directly

[652] CPR International Committee on Arbitration, 'CPR Protocol on Determination of Damages in International Arbitration'.
[653] Ibid., p. 3.
[654] Id.
[655] Id.
[656] Id.
[657] A practitioner supports the view that experts should be able to assist early, so they can assist counsel in identifying the documents needed and thus avoiding unnecessary costs. See King & Spalding, *Quantum Quarterly: the damages newsletter*, An Interview with Wayne R. Wilson, Jr., Issue 05, 2Q, 2013, p. 2.

with counsel, parties, and their experts, at the initial phase of the proceedings, with the objective of refining and narrowing the damages issues. This approach, according to the CPR Protocol, would enable "an understanding of the theories on which the parties will be seeking (or resisting) damages"[658] and would be used by the tribunal to inform to the parties useful presentation on damages.[659]

The exercise suggested by the CPR Protocol would enable the tribunal and the parties to better determine the scope of the damages claim and thus give substance to the question of whether or not to bifurcate. However, this approach, as suggested in the CPR Protocol, is significant in cases of complex damages claims which usually involve complex accounting analysis and economic models which have been outside the practice of interstate disputes.

The bifurcation issue cannot be determined with a high-level of certainty at an early stage and thus it involves the consideration of different variables (evidence, amount in dispute) and their potential impact. The variables, however, may change if the proceedings involve private parties or solely sovereign States.

5.3 THE PARTICULARITIES OF INTERSTATE ADJUDICATION

Every international jurisdiction has its own particularities.[660] Furthermore, when addressing the efficiency of proceedings in the context of interstate disputes, there are specificities that international courts and tribunals have to take into account, including

[658] CPR International Committee on Arbitration, 'CPR Protocol on Determination of Damages in International Arbitration', p. 3.
[659] Id.
[660] José E. Alvarez, 'Beware: Boundary Crossings — A Critical Appraisal of Public Law Approaches to International Investment Law', *World Inv. & Trade* 17 (2016): pp. 171-.

political sensitive issues which surround international disputes.[661] These issues influence the disputing parties' strategy towards the dispute, their priorities and therefore their procedural choices. Thus, the particularities of interstate adjudication may have an impact on the procedural efficiency of international dispute settlement mechanisms.

Commentators have referred to the particularities of interstate adjudication, including the matter of political sensitiveness surrounding those disputes during debates around the procedural efficiency of international courts and tribunals. Brownlie addressed the performance of the ICJ and responded to claims that its work capacity should be greatly improved.[662] Brownlie's comments, although centred on the ICJ's practice, raise issues that are applicable to interstate disputes in general. The commentator's arguments demonstrate

[661] With respect to political sensitivity of interstate disputes, see Natalie Klein, ed., *Litigating International Law Disputes : Weighing the Balance* (CUP, 2014); Markus Böckenförde, 'The Abyei Award: Fitting a Diplomatic Square Peg Into a Legal Round Hole', *Leiden Journal of International Law* 23, no. 3 (2010): 555–69; S. Jayakumar, Tommy Thong Bee Koh, and Robert C. Beckman, eds., *The South China Sea Disputes and Law of the Sea* (Cheltenham, 2014); Giorgio Gaja and Jenny Grote Stoutenburg, eds., *Enhancing the Rule of Law through the International Court of Justice* (Brill Nijhoff, 2014); Institute of International Public Law and International Relations of Thessaloniki, *Pacific Settlement of Disputes (Diplomatic, Judicial, Political, Etc.)* (Thessaloniki, 1991); Frederick Samuel Northedge and Michael Denis Donelan, *International Disputes: The Political Aspects* (London: Europa Publications for the David Davies Memorial Institute of International Studies, 1971).

[662] During the mid-1990s, a study group established by the British Institute of International and Comparative Law addressed the ICJ's difficulties with handling the increasing number of pending cases. The study pointed that the "core issue" was whether the ICJ would be able to cope with the increasing pressure of work that States were bringing to it. Therefore, the study was concerned with the ICJ's efficiency to conduct its proceedings and its work-rate capacity. It pointed to potential issues to the ICJ's capacity, such as: (i) the length, number and timetable of written and oral pleadings; (ii) the frequency and length of sittings; (iii) the procedure for elaborating a judgment; (iv) the fact that the ICJ relies on the parties to provide all necessary evidence, with few exceptions. Finally, the report of the Study Group provided recommendations. Among the procedural recommendations, the Study Group suggested that, *inter alia*: (i) the ICJ plan its schedule of oral hearings as far in advance as reasonably possible; (ii) prepare a note on the issues raised in advance of the oral hearings phase; (iii) increase the number of deliberations; (iv) encourage the judges to abbreviate their notes. It seems that the Study Group understood that the internal organisation of the ICJ plays a great role in the efficient conduction of proceedings. The study and its recommendations were heavily criticised by two ICJ judges at that time, namely the then President Judge Mohammed Bedjaoui and Judge Oda. Both of them attacked some of the assumptions and conclusions reached by the Study Group. For example, both judges disapproved the Study Group's conclusion that the advanced age of ICJ judges could negatively affect the work of the ICJ or that the time spent by the Members of the Court during deliberation was insufficient. See Bowett et al., 'The International Court of Justice: Efficiency of Procedures and Working Methods'.

that interstate disputes, namely those before the ICJ, have particularities that do not exist in disputes before municipal courts.[663]

Brownlie reminded that "States attach great importance to the settlement procedures *as such*".[664] Although he recognized that it is difficult to provide proof of such expectations, he pointed to certain factors "which must raise a strong inference that such expectations exist".[665] The factors are the following:

> First, the nature of many international disputes is wholly distinct from municipal law cases. The political resonance of international disputes is inevitably greater. The *peaceful* settlement of disputes is, after all, a substitute for self-help and the use of force. Secondly, the governments litigating in front of the [ICJ] have to demonstrate to the home political constituency that the forum is entirely suitable for the task in hand. Thirdly, the governments litigating must be allowed to demonstrate to their colleagues at home that everything possible was done to present the case to the highest professional standards.[666]

The subjects of interstate disputes are sovereign States. As pointed by Brownlie, the political resonance of international disputes[667] are greater than in municipal law cases and therefore a tribunal shall make sure that States have the best opportunity to present their case as States have to report to their political constituency.

Another commentator, Kolb, also made a distinction between interstate adjudication and municipal or domestic adjudication and noted that the distinction is relevant when addressing the application of the principle of procedural economy in international dispute settlement. Kolb argued that "[municipal] tribunals are placed in a position of superior

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[663] Ian Brownlie, 'The Performance of the Court: Making the Right Assumptions', in *The International Court of Justice: Process, Practice and Procedure*, by Bowett et al. (BIICL, 1997), 105–8.The author's intention was to comment on a report of a study group established by the British Institute of International and Comparative Law on the ICJ's efficiency of procedure and working methods. See Bowett et al., 'The International Court of Justice: Efficiency of Procedures and Working Methods'.
[664] Brownlie, 'The Performance of the Court: Making the Right Assumptions', p. 106. (emphasis in the original).
[665] Id.
[666] Id.
[667] About the complexity of international adjudication due to political considerations, see Merrils, *International Dispute Settlement*, pp. 311-315.

authority with respect to the parties". However, in international law, "the parties to the proceedings are mainly States". Accordingly, "[States] are jealous of their sovereignty and invested with great power". Furthermore, "the judge has to be more deferential in their regard". For Kolb, it is important that international adjudicators do not interfere "too heavily" on the States' choices to debate on aspects of the dispute.[668]

National governments pay significant importance to international disputes.[669] Consequently, States intend to show that everything possible was done to address the case to the highest professional standards. The concern of litigant States with "the highest professional standards" due to the high political sensitiveness of the cases is supported by the fact that the number of counsel appearing before the ICJ between 1999-2012 has been limited to a very few group of lawyers, which are deemed to be the most qualified counsel on international disputes.[670] Two commentators have concluded that one of the factors litigant States always seem to choose the same group of counsel is because those lawyers are regarded as the "best" in the field and therefore they are the appropriate choice to address political sensitive cases.[671]

Not only States would seek to hire the best counsel, but they would also expect that their case is presented in an exhaustive manner.[672] In one hand, the nature of the case requires

[668] Kolb, 'General Principles of Procedural Law', 2012, p. 893.
[669] Brownlie, 'The Performance of the Court: Making the Right Assumptions', p. 106.
[670] See Shashank P. Kumar and Cecily Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999–2012', *European Journal of International Law*, 2014, 893–917.
[671] According to the commentators, "[m]ost disputes that come before the [ICJ] are politically sensitive, both domestically and regionally, and are of considerable importance to the national governments involved. [footnote omitted] Governments may therefore insist upon being represented by the 'best' counsel, whom they may identify as those who have prior experience appearing before the Court." See Ibid., p. 912. See also Alain Pellet, 'The Role of the International Lawyer in International Litigation', in *The International Lawyer as Practitioner*, ed. Chanaka Wickremasinghe (BIICL, 2000), p. 147; Robert Jennings, 'The Work of the International Bar', in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah et al. (Kluwer Law International, 2003), p. 444.
[672] See Brownlie, 'The Performance of the Court: Making the Right Assumptions', p. 106.

that the scale of the pleadings be extensive,[673] which reflect "the importance and the sensitivity of the business in hand."[674] On the other hand, the procedure in interstate dispute settlement is more formalistic and ceremonial-tainted.[675] Thus, States would not give privilege to an expedite procedure. Accordingly, the international adjudicators have to give the impression that States have sufficient time to present their case.[676] Those aspects influence the organization of the proceedings. For example, the organization of a hearing in the context of interstate disputes brings more challenges than the organization of a hearing involving private parties. As interstate disputes usually attract significant media attention,[677] such hearings require preparation for the general public, press releases, a spacious venue, security for agents, diplomats and other authorities, and structure for the media and international press. The disputing parties and respective counsel are subject to significant pressure. There is thus an incentive for a more cautious proceeding and more passionate attitude from each side.

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673 Id. According to Brownlie, "[t]his is particularly true of cases involving title to territory or issues of delimitation." Id.

674 Ibid., p. 107.

675 Kolb, 'General Principles of Procedural Law', 2012, p. 893.

676 Id.

677 See for example the media coverage of the award rendered by an arbitral tribunal in the PCA case *Philippines v China*: The Guardian, *Beijing rejects tribunal's ruling in South China Sea case*, 12 July 2016, available at https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china, accessed on 19 November 2016; Le Figaro, *La Cour permanente d'arbitrage désavoue Pékin en mer de Chine*, 12 July 2016, available at http://www.lefigaro.fr/international/2016/07/12/01003-20160712ARTFIG00225-la-cour-permanente-d-arbitrage-desavoue-pekin-en-mer-de-chine.php, accessed on 19 November 2016; El País, *La Haya deja a China sin base legal para su expansionismo maritime*, 13 July 2016, available at http://internacional.elpais.com/internacional/2016/07/11/actualidad/1468258154_789338.html, accessed on 19 November 2016; The Diplomat, *The South China Sea Ruling: Who Really Won?*, 16 July 2016, available at http://thediplomat.com/2016/07/the-south-china-sea-ruling-who-really-won/, accessed on 19 November 2016; The Japan Times, *Tribunal rejects Beijing's claims to South China Sea; Japan braces for reaction,* 12 July 2016, available at http://www.japantimes.co.jp/news/2016/07/12/asia-pacific/tribunal-rules-chinese-claims-south-china-sea, accessed on 19 November 2016; BBC, *South China Sea: Philippines and Beijing award Court ruling*, 12 July 2016, available at http://www.bbc.com/news/world-asia-36767252, accessed on 19 November 2016; Euronews, *China declara que não vai aceitar decisão do Tribunal de Haia em disputa com Filipinas*, 4 June 2016, available at http://pt.euronews.com/2016/06/04/china-declara-que-nao-vai-aceitar-decisao-do-tribunal-de-haia-em-disputa-com, accessed on 19 November 2016; The Washington Post, *Beijing's claims to South China Sea rejected by international tribunal*, 12 July 2016, available at https://www.washingtonpost.com/world/beijing-remains-angry-defiant-and-defensive-as-key-south-china-sea-tribunal-ruling-looms/2016/07/12/11100f48-4771-11e6-8dac-0c6e4accc5b1_story.html, accessed on 19 November 2016.

In the same direction, Brownlie reminded that the ICJ, like other international courts and arbitration tribunals – with the exception of the WTO dispute settlement –, does not have an appeal mechanism and therefore its decisions are final.[678] He added that, because of the finality of its judgment, "it is desirable that […] the parties are given ample opportunities to present evidence and argument […]".[679] Also, because of the finality of the decisions rendered by international courts and tribunals, the adjudicators are expected to motivate their judgments and awards in "a closer and somewhat more prolix fashion".[680]

Also, Jennings has argued that the number of adjudicators addressing an international dispute may impact on the overall conduction of the proceedings.[681] In the same direction, Schwebel has stated that "the judicial and arbitral process is characterized by judges and arbitrators voting to form a majority rather than voting to express what each of them may see as the optimum judgment".[682] Consequently, the bigger the number of adjudicators, bigger will be the effort to accommodate the different views in one single judgment or arbitral award. In addition to that, Brownlie also recalled that the different background of the ICJ Judges and the collegiate character of the process of deliberation may also be a factor that consumes time. Judges with different backgrounds and from different legal cultures is a reality not only at the ICJ, but also in ITLOS, WTO panels and Appellate Body, and international arbitration. The adjudicators of these bodies are likewise susceptible to address issues and engage into discussions due to their different backgrounds and legal cultures. However, Brownlie contended that the lengthy decision-making process "is a modest price to

[678] Brownlie, 'The Performance of the Court: Making the Right Assumptions', p. 107.
[679] Id.
[680] Kolb, 'General Principles of Procedural Law', 2012, p. 893.
[681] Robert Jennings, 'The Differences Between Conducting a Case in the ICJ and in an Ad Hoc Arbitration Tribunal - An Inside View', in *Liber Amicorum Judge Shigeru Oda* (Kluwer, 2002), 893–909.
[682] Stephen M. Schwebel, 'May the Majority Vote of an International Arbitral Tribunal Be Impeached?', in *Arbitration Insights*, 2007, p. 211.

for the general high quality of the [ICJ]'s Judgments".[683] Accordingly, governments might feel compelled to: (i) hire the "best", most reputable, and possibly the most pricy legal counsel;[684] (ii) address exhaustively and repeatedly their arguments, both written and orally;[685] and (iii) present an excessive amount of evidence.[686] Similarly, judges would be expected to address the arguments put forward by the States and deliberate in a more careful manner as compared to national courts. These particularities of interstate adjudication, which in general serve as obstacles to the celerity of the proceedings, shall be taken into account when addressing the efficiency of international courts and tribunals.

While commentators seem to agree that interstate adjudication shall attend the particularities attached to it, such as political sensitiveness of the disputes, Kolb has stated that such obstacles to the celerity of the procedure "do not mean that the judge should not keep in highest esteem the principle of procedural economy".[687] The particularities of interstate proceedings shall not undermine or underestimate concerns with procedural efficiency, which is essential to guarantee the effectiveness of the settlement of the dispute.

5.4 CONCLUSION

The determination of quantum bifurcation is not the rule in international arbitration. In the context of ICSID disputes, the separation of the quantification phase is the exception.[688]

[683] Brownlie, 'The Performance of the Court: Making the Right Assumptions', p. 107.
[684] See Kumar and Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999–2012'.
[685] For a detailed review, see Stefan Talmon, 'A Primer on ICJ Procedure: A Commentary on Article 43 ICJ Statute', *Bonn Research Papers on Public International Law No 2/2012*, http://ssrn.com/abstract=1969900.
[686] Brownlie, 'The Performance of the Court: Making the Right Assumptions', p. 106.
[687] Kolb, 'General Principles of Procedural Law', 2012, p. 893.
[688] *Suez and ors v The Argentine Republic*, Decision on Liability, para. 245; and *Waguih*, Award, para. 116, reproducing the tribunal's Procedural Order No. 3.

Such procedural option is exercised more often in arbitration disputes governed by UNCITRAL Arbitration Rules.[689]

The overall goal of the bifurcation between merits and quantum phases are to promote procedural efficiency. Accordingly, arguments on the merits and demerits of quantum bifurcation are often surrounded by efficiency considerations. A party requesting bifurcation may argue that the separation between the merits and quantum phase will allow the tribunal and the disputing parties to focus on specific issues, address evidence more carefully, and avoid discussing matters that may be rejected at an earlier stage. A party disputing bifurcation may also argue that the postponement of the analysis of quantum will in fact increase time and costs.

An adjudicative body possess the power to "ensure and safeguard the efficiency, credibility and integrity of the adjudicative function and the adjudicative character of the organ".[690] According to the International Law Association's Committee on International Commercial Arbitration, "arbitrators are widely understood to have some inherent degree of control over the efficient conduct of procedure."[691] Accordingly, arbitration tribunals have carefully addressed the matter of whether or not to bifurcate and relied on efficiency considerations.[692]

Whether the separation of merits and quantum phase will promote efficiency is an issue that has been debated by international arbitration scholars and practitioners.[693] An empirical study has disputed the general assumption that bifurcation will always promote

[689] See *SD Myers v. Canada;* and *Bilcon v. Canada.*
[690] *ConocoPhillips*, p. 56.
[691] Mark W. Friedman; Filip De Ly; Luca G. Radicati di Brozolo. *International Law Association's Committee on International Commercial Arbitration Report for the Biennial Conference in Washington D.C.*
[692] See fn. 623.
[693] See fn. 606.

efficiency in international arbitration.[694] In fact, a commentator has reminded that respondents may request bifurcation in order to delay and obstruct the proceedings.[695]

International arbitration commentators have concluded that decision of whether or not to bifurcate shall entail a careful analysis on a case by case basis. Such an analysis would review to which extent the requested bifurcation would promote the efficiency of the proceedings, including aspects of the merits of the claim and the evidence to be presented. In addition, tribunals would consider the impact on the different interests affected by bifurcation[696] and the amounts in dispute.[697]

The analysis of whether or not to bifurcate can and should also be applied to interstate disputes. However, the nature of international arbitration involving private parties differs from interstate disputes. The latter adjudication category is surrounded by political and diplomatic sensitivities which may impact on the procedural efficiency of interstate proceedings. Governments would give more significance to ceremonial-tainted proceedings. They would expect to be heard extensively and exhaustively and the sovereign entities should feel that all the opportunity to present their case was given. Such aspect, according to commentators, is obvious in disputes before the ICJ. Hence, with respect to the issue of whether or not to bifurcate, international courts and tribunals addressing interstate disputes may feel compelled to determine the bifurcation of the proceedings in order to allow the parties to address the evidence in detail and provide additional arguments.

[694] See Greenwood, 'Does Bifurcation Really Promote Efficiency?'.
[695] Ibid., p. 108.
[696] Benedettelli, 'To Bifurcate or Not To Bifurcate? That Is the (Ambiguous) Question', p. 506.
[697] Heiskanen, 'Key to Efficiency in International Arbitration'.

6. CONCLUSION

Procedural efficiency refers to the rationalization of dispute settlement proceedings in terms of time and costs.[698] It is part of the often cited principle of sound administration of justice, which also encompasses the principals of judicial and procedural economy. Although efficiency considerations shall not hinder the principle of fairness, procedural efficiency is a principal of international adjudication that seeks to safeguard the right of a party to obtain a prompt and effective resolution of the dispute. The well-known *dictum* "justice delayed is justice denied" translates the importance of procedural efficiency and its overall impact.

Courts and tribunals are universally expected to be efficient. The fair resolution of a dispute and the delivery of an effective remedy are directly related to the time taken by an adjudicative body to render its decision and the costs incurred in relation to the adjudicate process.

Concerns with procedural efficiency are more evident in proceedings in which a party seeks reparation in the form of monetary payment. Since one of the objectives of the claimant party in these cases is to obtain a monetary award, the assumption is that lengthy and costly proceedings may undermine the pecuniary relief sought. In extremely lengthy cases, the compensation to be awarded may be lower than the costs incurred with the legal proceedings. In order to avoid such circumstance, parties and adjudicators shall make procedural choices on the basis of efficiency to adapt the proceedings to the reality of each case, especially when a compensation for damages is sought.

Contemporary international courts and tribunals have adopted different procedural approaches in interstate disputes involving the assessment of damages and calculation of

[698] See fn. 192.

compensation. Often, these mechanisms have separated the analysis of the merits and the quantum into two distinct phases of the proceedings. In this case, the court or tribunal would first hear the parties arguments on the merits and render a judgment or award on liability and, in case a claim for compensation is upheld, the adjudicators would later re-open the proceedings in order to hear the parties' arguments on the assessment of damages and render a another decision on the amount, or quantum, to be awarded. Other international courts and tribunals have not separated the merits and the quantum phases and thus addressed all the claims during a single phase of the proceedings. Example of cases in which bifurcation of quantum was not determined include historic arbitrations under the PCA, the PCIJ in the case *S.S. Wimbledon*, two interstate arbitrations before the IUSCT, and, more recently, the ITLOS in the cases *M/V Saiga (No. 2)* and *M/V Virginia G*.

The parties and the adjudicators should be mindful of the impact quantum bifurcation may cause on procedural efficiency. Bifurcation can greatly increase the time the case will be decided and the litigation costs incurred by the parties. For example, the quantum phase in *Diallo* has lasted nearly 17 months. In the ECtHR case *Cyprus v. Turkey*, the time between the application to initiate the quantum phase and the judgment on just satisfaction reached nearly 4 years. In the case *Armed Activities on the Territory of the Congo*, more than 16 years have passed since the ICJ judgment on the merits of the case.[699] In the *Arctic Sunrise*

[699] In this case, the case was suspended upon the request of the disputing parties so they could negotiate on the quantum of compensations. However, the ICJ did not give a time-limit for the parties to settle the amount, as it did in *Diallo*. As noted by Judge Cançado Trindade in *Armed Activities on the Territory of the Congo*, States "cannot simply be left over for 'negotiations' without time-limits". See *Armed Activities on the Territory of the Congo*, Order, 1 July 2015, Declaration of Judge Cançado Trindade, para. 7; *Armed Activities on the Territory of the Congo*, Order, 11 April 2016, Declaration of Judge Cançado Trindade, para. 19. In addition, he claimed that reparations, especially in cases involving grave breaches of the International Law of Human Rights and of International Humanitarian Law, shall be resolved within a reasonable time. See *Armed Activities on the Territory of the Congo*, Order, 1 July 2015, Declaration of Judge Cançado Trindade, para. 7; *Armed Activities on the Territory of the Congo*, Order, 11 April 2016, Declaration of Judge Cançado Trindade, para. 19.

arbitration, one year has passed since the award on the merits, which instead took nearly 2 years to be rendered since the date of the commencement of the proceeding.[700]

In addition to the injury for which a remedy is sought, the costs incurred by the parties with the adjudicative process tend to increase with time. As described by commentator Sands, expedite proceedings can save costs considerably.[701] A proceeding that lasts many years demands the continuing attention of the concerned counsel who will feel compelled to read and review the same documents of the disputes with the time in order to keep his or her memory fresh on all the issues in discussion until a final decision is rendered. Also, certain counsel may chance with time. Presumably, an expedite procedure would not require counsel to review the same documents repeatedly.

Costs may dramatically increase in case of bifurcated proceedings because it usually requires at least one new round of written submissions and, eventually, another hearing and document production phase. In addition, parties may put forward multiple and conflicting claims during quantum phase, and also consider to sub-bifurcate the quantum phase, as the respondent did in *Bilcon v. Canada*. The more submissions the parties provide, the more their claims can change, which may affect the adjudicators' ability to address the issues efficiently. This was the case for example in the case *Factory at Chorzów*.[702]

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[700] See fn. 569.

[701] Philippe Sands, 'Remarks of Professor Philippe Sands QC on the Occasion of a Celebration of the Centenary of the PCA' (Permanent Court of Arbitration, The Hague, 18 October 2007), https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Reflections-on-the-Current-Relevance-of-the-PCA-Presentation-by-Professor-Philippe-Sands-QC.pdf, p. 4.

[702] In its judgment in the case *Factory at Chorzów*, the PCIJ noted the following: "[i]t is therefore solely with the points of divergence as set out above that the Court has to deal in the judgment which it is about to deliver. It is true that the Parties have, both in the written and oral proceedings, formulated yet other claims. In so far, however, as these claims do not constitute developments of the original submissions, or alternatives to them, the Court cannot regard them otherwise than—to use the expression of the Agent of the German Government—as 'subsidiary arguments' or as mere suggestions as to the procedure to be adopted ; this is certainly the case as regards the numerous requests with a view to the consultation of experts or the hearing of witnesses. There is no occasion for the Court to pass upon all these requests ; it may therefore confine itself to taking them into account, in so far as may be necessary during the discussion of the arguments advanced by the Parties in support of their

The choice to separate the proceedings into two phases is often the result the parties' request. In interstate adjudication, the separation of the merits and quantum phases would give time to the disputing parties to enter into negotiation and discuss the quantum following the decision on the merits. The ARSIWA Commentary has provided that usually parties negotiate with each other about the compensation on damages caused to diplomatic premises, public property, aircraft of a State, ships, and in certain cases, death and injury suffered by the crew.[703] In investor-State arbitration, a commentator has found evidence that bifurcation seems to promote settlement.[704] The incentive to settle would arise as soon as the position of the adjudicators on the merits and the heads of damages are known. However, courts and tribunals should not assume that the suspension of the proceedings to enable the parties to negotiate is the most efficient choice. Direct negotiations can be carried out by the disputing parties directly and in parallel to the proceedings. The suspension of the proceedings is not a must. In addition, in case the parties are unable to settle on the quantum, a considerable amount of time and cost could be lost and the dispute, which the court or tribunal was asked to settle, would remain on-going. The case *Armed Activities on the Territory of the Congo* illustrates the issue with precision.

Although international courts and tribunals have adopted different approaches with respect to the issue of whether or not to bifurcate the merits and quantum phases, international adjudicators have not provided detailed reasons to support each approach taken.[705] Interstate dispute settlement mechanisms seem to overlook the issue.

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submissions, for the purposes of stating the reasons of the judgment." See *Factory At Chorzów*, Judgment, Merits, para. 38 [paragraph numbers added by OUP].

[703] ARSIWA Commentary, pp. 100-101.

[704] See fn. 643.

[705] In the arbitration *The Duzgit Integrity*, the parties adopted opposing views concerning the issue of whether or not to bifurcate the merits and quantum phases. The tribunal determined the bifurcation of the proceedings and did not provide reasons to its choice.

The practice of investor-State arbitration tribunals can provide guidance on the question of whether or not to bifurcate the merits and the quantum phases. These tribunals have addressed the advantages and disadvantages of the procedural choice, and decided the question on the basis of its impact on the efficiency of the proceedings.

Arbitration commentators have challenged the assumption that bifurcation will always promote procedural efficiency and have argued that bifurcation may, in fact, often serve the opposite purpose. The investor-State arbitration practice and commentators have shown that the issue of whether or not to bifurcate shall be analysed on a case-by-case basis, taking into account *inter alia* the *fumus boni iuris* of the compensation claim and the evidence to be assessed. Furthermore, the adjudicators shall make a preliminary assessment of the overall impact of bifurcation on the efficiency of the proceedings. The same approach could be applied to interstate dispute settlement mechanisms, like the ICJ and the ECtHR. Both international courts have consistently bifurcated the merits and quantum phases, although their rules of procedure do not require such approach. This pattern in favour of quantum bifurcation should be reviewed and give space to a more careful analysis of the impact of bifurcation on the efficiency of the proceedings in each case.

The analysis of whether or not to bifurcate should, whenever appropriate, be a matter of discussion among the parties and the tribunal at an early stage of the proceedings,[706] or even before the commencement of the proceedings, as it was done by the parties in *M/V Saiga (No. 2)* and *M/V Virginia G.*[707]

In case the parties are unable to agree on whether or not to bifurcate the merits and the quantum phases at an early stage, the court or tribunal should be in a position to render a

[706] See fn. 631.
[707] See fns. 524 and 537.

decision on the procedural issue. The adjudicators may invite the disputing parties to submit their views on the matter and arguments on whether an order to bifurcate would promote procedural efficiency. Such approach has been applied in investor-State arbitration[708] and could also be applied to interstate disputes. Furthermore, the court or tribunal would render its decision taking into account efficiency considerations.[709]

The quantum bifurcation may be determined by the court or tribunal when the evidence concerning the assessment of damages is considered complex or requires an expert analysis, as it was the case in *Factory at Chórzow*, *Corfu Channel*, and *Arctic Sunrise.* International adjudicators have also determined bifurcation in cases in which the respondent State decided not to present its case. Examples include *Military Activities in Nicaragua* and *Artic Sunrise*.[710] Thus, the quantum bifurcation could serve as an additional opportunity for the respondent party to participate in the proceedings and present its case.

One factor that may have an impact on the choice of whether or not to bifurcate is the standard of proof required to determine the existence of and quantify the damage. Evidence to support a claim for compensation has been a continuing issue in interstate dispute settlement. The disputing parties before the PCIJ and ICJ have had issues to make evidence of the damages they have claimed. For example, the PCIJ refused to award compensation in the case *Mavrommatis Jerusalem Concessions* due to the claimant's failure to provide evidence of the damages suffered by Mr Mavrommatis, a national of the claimant State, who incurred losses as a result of the unlawful annulment of certain concessions granted to him by the City of

[708] See fn. 623.
[709] As it was shown in the Section 2 above, the statutes and rules of international dispute settlement mechanisms make express references to procedural efficiency as a principle surrounding the adjudicative process. Also, international adjudicators have relied on efficiency considerations to address and decide procedural matters on a recurrent basis.
[710] In *Corfu Channel*, the ICJ determined quantum bifurcation and the respondent failed to participate in the quantum proceedings. However, quantum bifurcation was determined by before the respondent formally notified the ICJ that it would no longer take part in the proceedings.

Jerusalem.[711] In the more recent *Diallo* case, the ICJ refused to award compensation in the amount of U$ 550,000 for Mr Diallo's personal property losses, noting that no evidence was presented by the claimant to prove the extent of such losses.[712] Instead, the ICJ found that Mr Diallo's personal property losses amounted to U$ 10,000.[713] One may assume that one of the reasons why States have been having difficulties to present evidence supporting their compensation claims is that international proceedings may take long time to be prepared and argued. Thus, much of the evidence can be lost before they are submitted to the dispute settlement proceeding. In the context of fact-finding and investigations by international courts and tribunals, Judge Cançado Trindade has noted that "[t]he more time passes, the more difficult fact-finding and investigations in loco become."[714]

Also, international courts may impose evidentiary requirements that are costly to meet. In *Corfu Channel*, certain documents presented by the disputing parties were refused because they did not fulfil certain requirements of the Rules of the Court, *i.e.* the documents presented were not in an original and complete form.[715] In its judgement on the merits in the same case, the ICJ postponed the issue of calculation of damages because, *inter alia*, the claimant had provided insufficient evidence with regard to the quantum to be compensated.[716]

International courts and tribunals are aware of the issues concerning evidence to support damages claim. For that reasons, the adjudicators have applied more flexible

[711] *Mavrommatis Jerusalem Concessions, Greece v United Kingdom*, Judgment, (1925) PCIJ Series A no 5, ICGJ 239 (PCIJ 1925), 26 March 1925, paras. 114 and 137 [paragraph numbers added by OUP].
[712] *Diallo*, Judgment on compensation, para. 31.
[713] Ibid., para. 55.
[714] See *Armed Activities on the Territory of the Congo*, Order, 11 April 2016, Declaration of Judge Cançado Trindade, para. 13. On "in loco" and site visits, see Michael A. Becker and Cecily Rose, 'Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication', *Journal of International Dispute Settlement*, 2016, doi:10.1093/jnlids/idw005.
[715] *Corfu Channel*, Judgment, Merits, para. 10 [paragraph numbers added by OUP], referring to International Court of Justice Rules of Court, Part III Proceedings in Contentious Cases, Section C Proceedings before the Court, Subsection 1 Institution of Proceedings, Articles 48 and 43(1).
[716] *Corfu Channel*, Judgment, Merits, para. 68 [paragraph numbers added by OUP].

principles to assess and calculate the damages, such as equitable considerations as in the *Diallo* case and the *ex aequo et bono* principle.[717] Even in cases international adjudicators were expressly asked not to apply the *ex aequo et bono* principle, as was in the case of the EECC, the precise assessment of the damages claimed turned out to be burdensome and expensive, thus requiring a more flexible approach.[718] Similar issues have been faced by mass claims[719] mechanisms, which have applied flexible standards concerning evidence.[720] The need to apply standards that are more flexible may be related to the fact that international courts and tribunals do not have the structure and resources to conduct a thoroughly analysis of damages claims in interstate disputes as they are often complex and extensive.

The parties may wish to discuss the evidentiary standards to be applied in the dispute and the level of damages assessment precision. Also, parties may wish to expressly give the adjudicators the liberty and discretion to award an amount they deem just. Or, adjudicators could be instructed to fix an amount within a certain minimum and maximum range, as was the practice in certain historic arbitrations.[721] Granting discretion to the adjudicators would render bifurcation unnecessary, circumvent the need for extensive proceedings, and would minimize the time and costs connected to the adjudicative process.

[717] Kotzur, 'Ex Aequo et Bono', para. 7.
[718] *Eritrea Ethiopia Claims Commission (Eritrea's Damages Claims)*, para. 8; and *Eritrea Ethiopia Claims Commission (Ethiopia's Damages Claims)*, para. 8.
[719] With regard to an example of mass claim in the context of ICSID arbitration, see: Anna De Luca, 'Collective Actions in ICSID Arbitration: The Argentine Bonds Case', *The Italian Yearbook of International Law* XXI (2011): 211–39.
[720] See for example, the case of the UNCC: Ali and Walter, 'Principles of Valuation Taken from the UNCC Perspective'; Christopher Gibson, 'Using Computers to Evaluate Claims at the United Nations Compensation Commission', *Arbitration International* 13 (1997): pp. 167–92.
[721] Whiteman mentions the case *Sergent Malamine*, a dispute between France and the Great Britain referred to arbitration where the convention that ruled the procedure provided that: [i]n regard to the amount of the indemnity for the loss of the 'Sergent Melamine' to be paid by the British Government: this amount shall neither be less than 5,000 *l*, nor more than 8,000 *l."* See Whiteman, *Damages in International Law*, pp. 3-4.

Moreover, insufficient evidence provided by the parties should not be a reason *per se* to postpone the analysis of the quantum issues, as the ICJ did in *Corfu Channel.*[722] The adjudicators shall ask the parties to produce evidence if they are deemed insufficient. The ITLOS adopted this approach in the case *M/V Virginia G.*[723]

When deciding procedural aspects of the case on the basis of efficiency considerations, international courts and tribunals should take into account the particularities of interstate adjudication. The court or tribunal should remind that States are generally entitled to present their case in an extensive, exhaustive and ceremonial-tainted manner so they can attend the political significance of an international dispute and the expectations of their constituents. However, the adjudicators should always balance those concerns with its goal to provide an effective remedy, to organize and conduct the proceedings in an efficient manner,[724] and deliver justice. For example, the adjudicators in interstate disputes shall bear in mind that, in cases of diplomatic protection, States seeking compensation on behalf of individuals do not have the same incentives to conduct the proceedings in a timely manner as the individuals themselves would have.

A more complex issue concerns the cases in which the parties have agreed to bifurcate the proceedings and the amount of time passed has reached an unreasonable sum of many years. A current example is the ICJ case *Armed Activities on the Territory of the Congo*. One could argue that the ICJ was bound to the parties' choice to suspend and bifurcate the proceedings, which seems to have been the approach adopted by the majority. Others, like Judge Cançado Trindade, have argued that the amount of time has undermined the ICJ's ability to provide just reparation, especially because the case concerned reparations to

[722] See fn. 335.
[723] See fn. 545.
[724] See fn. 687.

individuals.[725] As pointed out by the same judge, adjudicators, including the ICJ, are the masters of their own proceedings and can adapt the procedure in order to best deliver justice. In the *Gabčikovo-Nagymaros Project* case, in which the disputing parties also claimed damages and requested quantum bifurcation,[726] the ICJ adopted a different procedural approach; it invited the parties to abandon their respective compensation claims and settle the case because it was in the best interest of the resolution of the dispute.[727] The ICJ could adopt such precedent to deviate from the parties' choice and render a decision on quantum on the basis of the evidence already presented under the same reasoning. The ICJ would be mindful of equitable considerations, as applied in the *Diallo* case. However, in *Armed Activities on the Territory of the Congo*, there is not much to be done to repair the long-time already passed and the costs incurred by the parties.

The conclusion is that the separation between merits and quantum phases should be carefully addressed by the parties and international courts and tribunals. It should not be assumed that quantum bifurcation is the most efficient approach, as there is evidence suggesting the opposite. Parties and adjudicators should be aware of the impact of bifurcation on procedural efficiency and make their decision accordingly and, whenever the case permits, at an early stage of the proceedings.

[725] *Armed Activities on the Territory of the Congo*, Order of 1 July 2015, Declaration of Judge Cançado Trindade.
[726] *Gabčikovo-Nagymaros Project*, Judgment, Merits, paras. 13-14 [paragraph numbers added by OUP].
[727] Ibid., paras. 152-153.

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7.3 STATUTES AND PROCEDURAL RULES

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7.4 RESOLUTIONS AND DOCUMENTS OF INTERNATIONAL ORGANIZATIONS

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