



# Questions of compensation

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# Contents of this presentation

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- This is a Big Problem...
- ...with big unknowns...
- ...whose appropriate solution depends on factors yet to be determined.

=> Uncertainties make detailed preparation difficult.

# Compensation for Ukraine is a Generational Challenge

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- Probably the largest state-to-state conflict since WW2: nothing like it in our lifetimes.
- Civil wars in e.g. Syria, Congo, Yemen have caused enormous loss of life and human suffering but the economic consequences have been less significant. That doesn't excuse anybody, but...
- US wars of choice have unleashed internal conflict but the US has sought – not always successfully – to be an economic benefactor of post-war reconstruction => economic consequences for third party states have been limited.
- Reconstruction will not be quick: European countries took decades to repair the damage of WW2.
- The Ukraine of tomorrow will not be the Ukraine of 1992-2014, even if all of its sovereign territory is immediately returned to Kyiv's control once conflict ends.
- Historical precedent is unclear: e.g. Treaty of Versailles reparations have a poor reputation (deliberately not followed post-WW2), Marshall Plan *sui generis* (?), UNCC model worked well (eventually).
- Ukrainian government likely to require direct funding for years post-war on top of compensation.
- Potential conflicts between private interests and public policy issues.

# Known unknowns

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- The future: military outcome, eventual negotiated outcome, continuing unity of western coalition, Russian internal weakness etc.
- Legal basis for compensation: Russia a UN Security Council member that operates outside international law.
- Who will pay?
  - Russia unlikely to be a willing contributor, perhaps ever; claims may exceed its ability to pay even if willing.
  - Seizure of Russian assets: challenges of sovereign immunity, respect for private property under international and national laws.
  - Western contribution will be questioned by at least some in each country's political cycle, fatigue may set in.
- 'Hard' cases likely to be plentiful: imperfect proof of ownership, imperfect proof of causation, imperfect proof of asset value, 'laws of war' issues etc.
- Post-war inflation / supply-side difficulties may make replacement cost estimates unreliable.
- Compensation mechanism: 'top down' (payments from a central fund), or 'bottom up' (compensation for individual victims/losses). 'Marshall Plan' or 'US-Iran Claims Tribunal/UNCC'?

## 'Top-down' compensation may be imperfect at a 'micro' level

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- Draw on lessons from other 'mass' claims e.g. Deepwater Horizon?
- Triage likely to be important: decide which claims are 'in' and which are 'out', group claims by type, by size, by nature of claimant, decide on approaches to different groups.
- Priority of claims (individual, commercial, government?), domestic vs foreign claims.
- Speed vs accuracy:
  - justice delayed is justice denied; but
  - application of 'rules of thumb' to complex issues likely to result in over- or under-compensation in individual cases.
- Benefits: greater ability to control priority and direction of funds based on public policy.

## ‘Bottom-up’ appropriate compensation: *Factory at Chorzów*

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- *Factory at Chorzów* awards set out the ‘principles which should serve to determine the amounts of compensation due for an act contrary to international law’:
  - ‘...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’
  - ‘...restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear...’
- These principles of customary international law have (by and large) stood the test of time (over 90 years): in sum, either restore the asset as it was or pay compensation equivalent to its value.
- Modern valuation of cash-generating assets is based on present value of expected future cash flows. Compensation is a function of the difference between pre-war and post-war cash flows or market value but determining an appropriate ‘counterfactual’ may be difficult.
- Crimean cases have generally established liability for consequences of unlawful annexation and associated losses under Russia-Ukraine BIT.

## 'Bottom-up' process also likely to be imperfect

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- 'Restitution' implies restoration of the asset: remove unexploded munitions, repair damage, make asset as it was prior to conflict. BUT:
  - cost of restitution may well exceed cost of complete rebuild of a new plant => restitution would be over-compensation (and potentially irrational).
  - cost of a 'greenfield' nitrate factory may exceed the DCF/market value (pre- or post-war) of the one that was destroyed => monetary value of asset inadequate to permit reconstruction.
  - even if a new nitrate factory built 500km west, 'somebody' still needs to remove unexploded munitions.
- 'Bottom-up' process may not 'fit the macro facts' as to availability of funds, public policy concerns.

## Given uncertainties, how to prepare?

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- Gather and safeguard evidence: more detailed evidence likely needed for a 'bottom-up' process.
- Prepare to be flexible: depending on the procedural issues, different approaches may be needed.
- Seek advice where needed.