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.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[1235] 448

In this passage, which has been cited and applied on many occasions,[1236] 449 the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> 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.[1237] 450

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[1238] 451 In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

[1235] 448 *Case concerning the Factory at Chorzów,* Jurisdiction (footnote [28] 34 above).

[1236] 449 Cf. the ICJ reference to this decision in *LaGrand*, Judgment (footnote [236] 119 above), p. 485, para. 48.

[1237] 450 *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1238] 451 Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États"*, Collected Courses … 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "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"[1239] [452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, *i.e.* as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[1240] [453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.[1241] [454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[1242] [455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[1243] [456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a

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[1239] [452] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1240] [453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

[1241] [454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses … 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Simma and Spinedi, eds., *op. cit.* (footnote [689] 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote [195] 92 above), pp. 53–88.

[1242] [455] See especially article 36 and commentary.

[1243] [456] See paragraph (9) of the commentary to article 2.

specified act, *e.g.* to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[1244] 457

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[1245] 458

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (*e.g.* harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as

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[1244] 457 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 266–267, paras. 107 and 109.

[1245] 458 *Ibid.*, p. 267, para. 110.

a proximate cause",[1246] [459] or to damage which is "too indirect, remote, and uncertain to be appraised",[1247][460] or to "any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[1248] [461] Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[1249] [462] in others "foreseeability"[1250] [463] or "proximity".[1251] [464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[1252] [465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[1253][466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

[1246] [459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote [692] 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[1247] [460] See the *Trail Smelter* arbitration (footnote [817] 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote [146] 87 above).

[1248] [461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, *e.g.*, Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[1249] [462] As in Security Council resolution 687 (1991), para. 16.

[1250] [463] See, *e.g.*, the *"Naulilaa"* case (footnote [990] 337 above), p. 1031.

[1251] [464] For comparative reviews of issues of causation and remoteness, see, *e.g.*, H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit.* (footnote [815] 251 above), pp. 601–627, in particular pp. 609 *et seq.*; and B. S. Markesinis, *The German Law of Obligations: Volume II—The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[1252] [465] See, *e.g.*, the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[1253] [466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[1254] [467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[1255] [468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[1256] [469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[1257] [470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[1258] [471] except in cases of contributory fault.[1259] [472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid

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[1254] [467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (footnote [1248] 461 above), para. 54.

[1255] [468] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 80.

[1256] [469] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 29–32.

[1257] [470] *Corfu Channel, Merits* (footnote [29] 35 above), pp. 17–18 and 22–23.

[1258] [471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit.* (footnote [1251] 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (footnote [1033] 363 above), p. 229).

[1259] [472] See article 39 and commentary.

the mines.[1260] [473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[1261] [474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[1262] [475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[1263] [476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Panel of Commissioners of the United Nations Compensation Commission

S/AC.26/2003/15

In its 2003 report and recommendations concerning part three of the third instalment of "F3" claims,[1264] [182] the Panel of Commissioners of the United Nations Compensation Commission found that the loss resulting from the use or diversion of Kuwait's resources to fund the costs of putting right the loss and damage arising directly from Iraq's invasion and occupation of Kuwait (which it termed "direct financing losses") fell "squarely within the types

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[1260] [473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949,* p. 244, at p. 250.

[1261] [474] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 31–33.

[1262] [475] The *Zafiro* case (footnote [567] 154 above), pp. 164–165.

[1263] [476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[1264] [182] "F3" claims before the United Nations Compensation Commission are claims filed by the Government of Kuwait, excluding environmental claims.

of loss contemplated by articles 31 and 35 of the International Law Commission articles, and the principles established in the [*Factory at*] *Chorzów* case, and so are compensable".[1265] [183]

[A/62/62, para. 103]

S/AC.26/2005/10

In the 2005 report and recommendations concerning the fifth instalment of "F4" claims,[1266] [184] the Panel of Commissioners of the United Nations Compensation Commission noted that the claimants had asked for compensation for loss of use of natural resources damaged as a result of Iraq's invasion and occupation of Kuwait during the period between the occurrence of the damage and the full restoration of the resources. While Iraq had argued that there was no legal justification for compensating claimants for "interim loss" of natural resources that had no commercial value, the claimants invoked, *inter alia*, the principle whereby reparation must "wipe out all consequences of the illegal act", first articulated by the Permanent Court of International Justice in the *Factory at Chorzów* case and then "accepted by the International Law Commission".[1267] [185] The Panel concluded that a loss due to depletion of or damage to natural resources, including resources that may have a commercial value, was compensable if such loss was a direct result of Iraq's invasion and occupation of Kuwait. Although this finding was based on an interpretation of Security Council resolution 687 (1991) and United Nations Compensation Commission Governing Council decision 7, the panel noted that it was not "inconsistent with any principle or rule of general international law".[1268] [186]

[A/62/62, para. 104]

International arbitral tribunal (under the ICSID Convention)

ADC Affiliate Limited and ADC & ADMC Management Limited v. *Republic of Hungary*

In its 2006 award, the arbitral tribunal constituted to hear the *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary* case, in determining the "customary international law standard" for damages assessment applicable in the case, referred, together with case law and legal literature, to article 31, paragraph 1, finally adopted by the International Law Commission in 2001. The tribunal noted that the said provision, which it quoted, "expressly rel[ies] on and closely follow[s] *Chorzów Factory*". In addition, the tribunal recalled that the Commission's commentary on this article states that "The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory of Chorzów case".[1269] [187]

[A/62/62, para. 105]

[1265] [183] S/AC.26/2003/15, para. 220 (footnote omitted).

[1266] [184] "F4" claims before the United Nations Compensation Commission are claims for damage to the environment.

[1267] [185] S/AC.26/2005/10, para. 49.

[1268] [186] *Ibid.*, paras. 57 and 58.

[1269] [187] ICSID, Case No. ARB/03/16, Award, 2 October 2006, paras. 494 and 495.

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro)*

In its 2007 judgment in the *Genocide* case, the Court, having found that the Respondent had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, referred to article 31 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

> The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that 'reparation must, so 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' (*P.C.I.J. Series A, No. 17*, p. 47: see also Article 31 of the ILC's Articles on State Responsibility).[1270] 10

[A/62/62/Add.1, para. 6]

International arbitral tribunal (under the ICSID Convention)

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. *Argentine Republic*

The arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* case, having previously found Argentina to be in breach of its obligations under the 1991 bilateral investment treaty between the United States and Argentina,[1271] 38 proceeded to consider the applicable standard for reparation in its 2007 award. The tribunal stated that it agreed with the claimants that "the appropriate standard for reparation under international law is 'full' reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts".[1272] 39

[A/65/76, para. 28]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico* considered article 31 to reflect a rule applicable under customary international law.[1273] 40

[A/65/76, para. 29]

[1270] 10 [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 460.

[1271] 38 See footnote [1103] 166, and accompanying text, above.

[1272] 39 *Ibid*., award, 25 July 2007, para. 31.

[1273] 40 See footnote [3] 4 above, para. 275.

International arbitral tribunal (under the ICSID Convention)

Biwater Gauff (Tanzania) Ltd. v. *United Republic of Tanzania*

In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd.* v. *Tanzania* case cited the definition of the term "injury" in article 31, paragraph 2 ("… any damage, whether material or moral, caused by the internationally wrongful act of a State") in support of its assertion that "[c]ompensation for any violation of the [investment treaty between the United Kingdom and the United Republic of Tanzania], whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach … and the loss sustained".[1274] [41] The tribunal then proceeded to quote *in extenso* extracts from the commentary to article 31 describing the necessary link between the wrongful act and the injury in order for the obligation of reparation (here in the form of compensation) to arise,[1275] [42] and held that "in order to succeed in its claims for compensation, [the claimant] has to prove that the value of its investment was diminished or eliminated, and the actions [it] complains of were the *actual and proximate cause* of such dimunition in, or elimination of, value".[1276] [43] The tribunal also found occasion to refer to the definition of "injury" in paragraph 2 in support of its view that

> [i]t is … insufficient to assert that simply because there has been a 'taking', or unfair or inequitable conduct, there must necessarily have been an '*injury*' caused such as to ground a claim for compensation. Whether or not each wrongful act by the [respondent] 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages.[1277] [44]

[A/65/76, para. 30]

Duke Energy Electroquil Partners & Electroquil S.A. v. *Republic of Ecuador*

In its 2008 award, the tribunal in the *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Ecuador* case, referred to article 31 as having, in its view, "codified" the principle of "full" compensation, as earlier established by the Permanent Court of International Justice in the *Factory at Chorzów* case.[1278] [45] The tribunal saw "no reason not to apply this provision by analogy to investor-state arbitration".[1279] [46]

[A/65/76, para. 31]

[1274] [41] See footnote [5] 6 above, paras. 779 and 783.

[1275] [42] *Ibid*., para. 785, quoting extracts from paragraph (10) of the commentary to article 31.

[1276] [43] *Ibid*., para. 787, emphasis added.

[1277] [44] *Ibid*., para. 804 and footnote 369, (footnotes omitted) emphasis in the original.

[1278] [45] *Case concerning the Factory at Chorzów, Merits*, p. 21 (footnote [28] 34 above).

[1279] [46] ICSID, Case No. ARB/04/19, Award, 18 August 2008, para. 468.

ERITREA-ETHIOPIA CLAIMS COMMISSION

Ethiopia's Damages Claims, Final Award, 17 August 2009, and Eritrea's Damages Claims, Final Award, 17 August 2009

In its 2009 final awards on *Ethiopia's Damages Claims* and *Eritrea's Damages Claims*, the Eritrea-Ethiopia Claims Commission recalled that an earlier version of the State responsibility articles had included a qualification that "[i]n no case may a people be deprived of its own means of subsistence", which was also reflected in article 1, paragraph 2, of both Human Rights Covenants.[1280] [47] The Claims Commission further observed that the principle set out by the Permanent Court of International Justice in the *Chorzów Factory* case, that the purpose of compensation payable by a responsible State is "to seek to 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" was reflected in article 31 of the State responsibility articles.[1281] [48]

[A/65/76, para. 32]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia

In *Ioannis Kardassopoulos and Ron Fuchs* v. *the Republic of Georgia*, the arbitral tribunal cited article 31, and the commentary thereto, as authority for the proposition that "a State is under an obligation to make full reparation for the injury *caused by* an internationally wrongful act".[1282] [147]

[A/68/72, para. 103]

COURT OF JUSTICE OF THE EUROPEAN UNION

Axel Walz v. *Clickair SA*

In its judgment in *Axel Walz* v. *Clickair SA*, the Court of Justice of the European Union sought to determine the ordinary meaning to be given to the term "damage" by reference, *inter alia*, to article 31, paragraph 2, of the State responsibility articles,[1283] [148] which it considered as "codify[ing] the current state of general international law [and could] thus

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[1280] [47] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims*, Final Award, 17 August 2009, para. 19, and Eritrea-Ethiopia Claims Commission, *Eritrea's Damages Claims*, Final Award, 17 August 2009, para. 19, reference to the predecessor to article 31, namely draft article 42 [6 *bis*], at paragraph 3, as adopted by the Commission on first reading, at its forty-eighth session in 1996. The provision was deleted during the second reading, at the fifty-second session of the Commission in 2000. See *Yearbook of the International Law Commission, 2000*, vol. II, Part Two, paras. 79, 100 and 101. A reference to the qualification, as contained in article 1, paragraph 2, of the two Human Rights Covenants was, however, retained in the commentary to article 50, at paragraph (7). See further the discussion under article 56 below.

[1281] [48] *Ibid*., *Ethiopia's Damages Claims*, para. 24, and *Eritrea's Damages Claims*, para. 24, quoting *Case concerning the Factory at Chorzów*, (footnote [28] 34 above), p. 47.

[1282] [147] See footnote [288] 36 above, paras. 467 and 468 (emphasis in the original).

[1283] [148] CJEU, Third Chamber, *Axel Walz* v. *Clickair*, Case C-63/09, Judgment, 6 May 2010, para. 27.

be regarded as … expressing the ordinary meaning to be given to the concept of damage in international law".[1284] 149

[A/68/72, para. 104]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Gemplus S.A. et al. v. *The United Mexican States and Talsud S.A.* v. *The United Mexican States*

In its award, the arbitral tribunal in the *Gemplus S.A. et al.* v. *The United Mexican States* and *Talsud S.A.* v. *The United Mexican States* cases, in analysing the causal link between the breach of the treaty in question and the loss sustained by the claimant, indicated that "[a]s to causation generally, it [was] … useful to refer to" article 31 of the State responsibility articles, and in particular to the obligation to make full reparation for the injury "caused by the intentionally wrongful act of a State".[1285] 150 The tribunal proceeded to quote, *in extenso*, paragraph (10) of the commentary on article 31 on the question of the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise.[1286] 151

The tribunal subsequently indicated that, "[a]s to the general approach to the assessment of compensation", it was guided by both the decision of the Permanent Court of International Justice in the *Chorzów Factory* case, and by article 31 of the State responsibility articles which it considered to be "declaratory of international law".[1287] 152

[A/68/72, paras. 105–106]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber, in analysing the scope of liability under UNCLOS, confirmed that the "obligation for a State to provide for a full compensation or *restituto in integrum* [was] currently part of customary international law."[1288] 153 In support of its conclusion, the Chamber referred to the decision of the Permanent Court of International Justice in the *Chorzów Factory* case,[1289] 154 and indicated that: "[t]his obligation was further reiterated by the International Law Commission [in] article 31, paragraph 1, of the ILC Articles on State Responsibility … ".[1290] 155

[A/68/72, para. 107]

[1284] 149 *Ibid*., para. 28.

[1285] 150 See footnote [866] 116 above, para. 11.9.

[1286] 151 *Ibid*., para. 11.10.

[1287] 152 *Ibid*., para. 12–51.

[1288] 153 See footnote [12] 10 above, para. 194.

[1289] 154 *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1290] 155 See footnote [12] 10 above, para. 194.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Joseph C. Lemire v. *Ukraine*

The arbitral tribunal in *Joseph C. Lemire* v. *Ukraine* cited article 31 as authority for the proposition that "a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained".[1291] 156

[A/68/72, para. 108]

El Paso Energy International Company v. *The Argentine Republic*

The commentary to article 31 was cited by the arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* in support of the assertion that "the test of causation is whether there is a sufficient link between the damage and the treaty violation".[1292] 157

[A/68/72, para. 109]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Chevron Corporation & Texaco Petroleum Company v. *the Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation & Texaco Petroleum Company* v. *the Republic of Ecuador* referred to Part Two of the State responsibility articles as expressing the legal principle concerning claims for moral damages.[1293] 158

[A/68/72, para. 110]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Railroad Development Corporation v. *Republic of Guatemala*

The arbitral tribunal in *Railroad Development Corporation* v. *Republic of Guatemala* considered article 31, paragraph 1, to reflect the customary international law rule applicable in ascertaining the "minimum standard of treatment" to be applied in the case of breaches of the treaty in question.[1294] 159

[A/68/72, para. 111]

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. *The Republic of Ecuador*

In its award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, the arbitral tribunal, in an analysis of the

[1291] 156 ICSID, Case No. ARB/06/18, Award, 28 March 2011, para. 147.

[1292] 157 See footnote [56] 16 above, para. 682, note 644.

[1293] 158 See footnote [304] 45 above, para. [9.6].

[1294] 159 See footnote [789] 105 above, para. 260.

concept of "contributory negligence", referred to articles 31 and 39 of the State responsibility articles, and took note of paragraph (13) of the commentary to article 31.[1295] [160]

In its subsequent consideration of the claimant's claims for consequential damages, the tribunal held that "[t]he availability of consequential loss in international law is uncontroversial", and referred to the principle of "full reparation" expressed in the *Chorzów Factory* case.[1296] [161] The tribunal indicated further that "[t]his principle is now also embodied in Article 31 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts … ".[1297] [162]

[A/68/72, paras. 112–113]

[International Tribunal for the Law of the Sea

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission

In *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea found that articles 1, 2 and 31, paragraph 1 "are the rules of general international law relevant to the second question", namely to what extent the flag State shall be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag.[1298] [15]

[A/71/80, para. 16]]

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

In *Mr Franck Charles Arif* v. *Republic of Moldova*, the arbitral tribunal cited article 31 as reflecting the "general obligation of a State guilty of an internationally wrongful act to make reparation".[1299] [140]

[A/71/80, para. 100]

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal constituted to hear *The Rompetrol Group N.V.* v. *Romania* case discussed article 31 as follows:

> While the Tribunal cannot fault the Claimant's submission that, under the draft Articles, breach of an international obligation has wider consequences than the duty to pay damages, it notes (subject to what will appear later) that, in its final form, the Claimant's claim is primarily a claim for damages. The crux therefore lies in draft Article 31, and specifically the ILC's commentary to that article (read together with its commentary to draft Article 2). In both places, the ILC states clearly that there is no general rule requiring damage as a constituent element of an international wrong giving rise to State

[1295] [160] See footnote [309] 50 above, paras. 665–668.

[1296] [161] *Ibid*., para. 792.

[1297] [162] *Ibid*., para. 793.

[1298] [[15] ITLOS, Advisory Opinion, 2 April 2015, para. 144.]

[1299] [140] See footnote [320] 46 above, para. 559.

responsibility. The ILC goes on to say that whether damage is or is not actually required depends on the nature of the primary obligation that has been breached. Moreover the ILC goes on to make explicit that its formulation of the rule in terms of an automatic obligation borne by the wrongful State is designed to side-step the problems that would otherwise be caused by the possible existence of more than one State 'specially affected by the breach,' the latter being a phrase repeatedly used in the draft Articles, along with the expression 'injured State,' to express the idea of a State which has suffered damage in some direct sense sufficient to entitle it to 'invoke the responsibility of' the wrongful State. … Transposing the above from the State-to-State to the investment treaty context leads, in the Tribunal's opinion, to the following conclusions. The starting point, as the ILC points out, is the nature of the particular international obligation (the 'primary obligation') breach of which is being invoked.[1300] 141

[A/71/80, para. 101]

The tribunal further cited article 31 to support the statement that "[i]n general international law … the award of moral damages is certainly accepted".[1301] 142

[A/71/80, para. 102]

International arbitral tribunal (under the ICSID Convention)

Ioan Micula and others v. *Romania*

The arbitral tribunal in *Ioan Micula and others* v. *Romania* cited article 31 and the commentary thereto, as emphasizing the principle that there is a "need for a causal link between the internationally wrongful act and the injury for which compensation is due".[1302] 143 In relation to the directness of the causal link, the tribunal further "note[d] that under the ILC Articles not every event subsequent to the wrongful act and antecedent to the occurrence of the injury will necessarily break the chain of causation and qualify as an intervening cause".[1303] 144

[A/71/80, para. 103]

International Tribunal for the Law of the Sea

The M/V "Virginia G" Case (Panama/Guinea-Bissau)

The International Tribunal for the Law of the Sea in *The M/V "Virginia G" Case (Panama/Guinea-Bissau)* observed that article 31, paragraph 1 provided that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[1304] 145

[A/71/80, para. 104]

[1300] 141 See footnote [17] 5 above, paras. 189–190, also referring to Part III of the State responsibility articles (footnotes omitted).

[1301] 142 *Ibid*., para. 289.

[1302] 143 See footnote [1188] 133 above, para. 923.

[1303] 144 *Ibid*., para. 925, referring to comments 12 and 13 to article 31.

[1304] 145 See footnote [58] 11 above, para. 429 (quoting article 31).

Permanent Court of Arbitration (under UNCITRAL Rules)

Enkev Beheer B.V. v. *Republic of Poland*

In *Enkev Beheer B.V.* v. *Republic of Poland*, the arbitral tribunal "derived no decisive assistance from Article 31 of the International Law Commission's Articles on State Responsibility and its Commentary", because "[c]ompensation for unlawful expropriation may entail more than compensation for lawful expropriation".[1305] 146

[A/71/80, para. 105]

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal noted that it will "assess damages in the light of the foregoing accepted principles of international law",[1306] 147 including articles 31, 36 and 39. In assessing contributory fault, the tribunal, quoting the commentary to article 31, stated that

> [i]t is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.[1307] 148

In relation to the quantification of damage in cases of multiple causes for the same damage, the tribunal also cited the commentary to article 31, emphasizing that

> as the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage. Rather, it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate.[1308] 149

[A/71/80, para. 106]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Gold Reserve Inc. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela* noted that the principles found in the State responsibility articles, and particularly in article 31 "to make full reparation for injury caused through violating an international obligation an international obligation",[1309] 150 reflect customary international law.

[A/71/80, para. 107]

[1305] 146 PCA, Case No. 2013–01, First Partial Award, 29 April 2014, para. 363.

[1306] 147 See footnote [19] 7 above, para. 1593.

[1307] 148 *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).

[1308] 149 *Ibid*., para. 1775.

[1309] 150 See footnote [61] 14 above, para. 679.

International arbitral tribunal (under the ICSID Convention)

Flughafen Zurich A.G. and Gestión Ingenería IDC S.A. v. *Bolivarian Republic of Venezuela*

In *Flughafen Zurich A.G. and Gestión Ingenería IDC S.A.* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited, *inter alia*, the State responsibility articles in support of the proposition that it "[e]s un principio firme del Derecho internacional consuetudinario que la víctima de un acto ilícito perpetrado por un Estado tiene derecho a recibir una reparación íntegra, como si el acto ilícito no hubiera ocurrido".[1310] 151

[A/71/80, para. 108]

Permanent Court of Arbitration (under UNCITRAL Rules)

British Caribbean Bank Limited v. *The Government of Belize*

The arbitral tribunal, in *British Caribbean Bank Limited* v. *The Government of Belize*, considered that "[i]n the absence of an applicable provision within the Treaty itself, establishing the standard of compensation as a matter of *lex specialis*, the applicable standard of compensation is that existing in customary international law, as set out by the Permanent Court of International Justice in the *Factory at Chorzów*" and articles 31, 34 and 35 of the Articles of State Responsibility, as cited by the tribunal.[1311] 152

[A/71/80, para. 109]

The arbitral tribunal also noted that "the approach it has taken in the application of the *Chorzów Factory* standard and the ILC Articles on State Responsibility to provide the Claimant with full reparation calls for the Tribunal to place the Claimant in the circumstances in which it would have found itself, but for the unlawful act. The Tribunal considers that this logic leads to the application of the regular rate of interest under the contract, rather than the penalty rate".[1312] 153

[A/71/80, para. 110]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. *The Argentine Republic*

The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, noted that, as per article 31, a State is responsible for the full reparation for any damage caused by its internationally wrongful act and there must be a causal link between the internationally wrongful act and the injury for which reparation is claimed. "If such a link exists, then Argentina is required to make 'full reparation' for the injury it has caused".[1313] 154

[A/71/80, para. 111]

[1310] 151 ICSID, Case No. ARB/10/19, Award 18 November, 2014, para. 746.

[1311] 152 PCA Case No. 2010–18, Award, 19 December 2014, paras. 287–291.

[1312] 153 *Ibid*., para. 299.

[1313] 154 See footnote [63] 16 above, para. 26 (quoting article 31).

African Court on Human and Peoples' Rights

Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. *Burkina Faso*

In *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement* v. *Burkina Faso*, the African Court on Human and Peoples' Rights referred to article 31, paragraph 1 of the State responsibility articles,[1314] [155] noting that "in accordance with international law, for reparation to accrue, there must be a causal link between the wrongful act that has been established and the alleged prejudice".[1315] [156] The Court explained that "Article 31(2) of the Draft Articles on Responsibility of States mentioned above indeed refers to a 'prejudice … resulting from an internationally wrongful act'".[1316] [157] The Court cited article 31, paragraph 2 in support of the statement that "according to international law, both material and moral damages have to be repaired".[1317] [158]

[A/71/80, para. 112]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal, referring to article 31, paragraph 1, observed that "the ILC Articles confirm restitution as the principal form of reparation in international law".[1318] [159] The tribunal further cited article 31 and the accompanying commentary in noting that "[a] State's obligation to provide reparation for an 'injury' may include moral damage, as well as material damage". Such "moral damages include 'such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life' … . Nevertheless, moral damages will be awarded only in exceptional circumstances".[1319] [160]

[A/71/80, para. 113]

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. *Plurinational State of Bolivia*

In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, the arbitral tribunal noted that compensation for unlawful expropriation is "governed by the full reparation principle as articulated by the PCIJ in the *Chorzów* case and later expressed in the ILC Articles",[1320] [161] and cited the text of article 31 in support of

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[1314] [155] ACHPR, Application No. 013/2011, Judgment on Reparations, 5 June 2015, para. 21.

[1315] [156] *Ibid*., para. 24.

[1316] [157] *Ibid*.

[1317] [158] *Ibid*., para. 26.

[1318] [159] See footnote [114] 24 above, para. 684. See also the reference to article 31 in the text accompanying footnote [1324] 177 below.

[1319] [160] *Ibid*., para. 908 (quoting para. (5) of the commentary to article 31).

[1320] [161] See footnote [65] 18 above, para. 326.

the principle that a "responsible state must repair the damage caused by its internationally wrongful act".[1321] 162

[A/71/80, para. 114]

Hrvatska Elektroprivreda d.d. v. *Republic of Slovenia*

The arbitral tribunal in *Hrvatska Elektroprivreda d.d.* v. *Republic of Slovenia* indicated that, "[t]aken together, Article 31(1) and the *Chorzów Factory* decision require that [the Claimant] be placed in the same situation 'which would, in all probability, have existed'" had the internationally unlawful act not been committed "while also providing 'damages for loss sustained'".[1322] 163 The tribunal found that "consistent with the above principles, the preferred approach to calculate the X factor is the replacement cost approach. The focus compelled by Article 31 and the *Chorzów Factory* decision is on the loss suffered to the harmed party".[1323] 164

[A/71/80, para. 115]

[*Bernhard von Pezold and others* v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal referred to article 34 of the State responsibility articles as expanding on the principle contained in article 31.[1324] 177 Based on the commentary to article 34, the tribunal explained that reparation must achieve "re-establishment of the situation which existed before the breach" and explained that "restitution is only one form of reparation. If restitution alone fails to adequately restore a claimant to the situation it was in prior to the wrong, then other forms of reparation may also be awarded".[1325] 178

[A/71/80, para. 125]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In assessing the contributory fault of the claimants, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* referred to article 39 and the commentary thereto, in conjunction with article 31, to "decide, on the basis of the totality of the evidence before it, whether there is a sufficient causal link between any wilful or negligent act or omission of the Claimants (or of Yukos, which they controlled) and the loss Claimants ultimately suffered at the hands of the Russian Federation through the destruction of Yukos".[1326] 227 …

[A/71/80, para. 153]]

[1321] 162 *Ibid*., para. 327.

[1322] 163 ICSID, Case No. ARB/05/24, Award, 17 December 2015, para. 363 (quoting the *Case concerning the Factory at Chorzów, Merits*, (footnote [28] 34 above), Series A, No. 17, p. 47.

[1323] 164 *Ibid*., para. 364.

[1324] [177 See footnote [114] 24 above, para. 684.]

[1325] [178 *Ibid*., para. 686 (quoting para. (2) of the commentary to article 34).]

[1326] [227 See footnote [19] 7 above, paras. 1592. See also the reference to article 39 in text accompanying footnote [1306] 147 above.]

[*Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1327] [150] which were relevant with regard to the parties' claims for relief.[1328] [151]

[A/74/83, p. 28]]

International Arbitral tribunal (under the ICSID Convention)

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal stated that article 31 of the State responsibility articles codified the customary international law standard of integral reparation in cases in which a State violates its international obligations.[1329] [157] Interpreting articles 35 and 36 of the State responsibility articles, the tribunal noted that the responsible States may only provide compensation to the extent that restitution is not possible.[1330] [158]

[A/74/83, p. 29]

[European Court of Human Rights

Case of Georgia v. *Russia (I)*

In *Case of Georgia* v. *Russia (I)*, the European Court of Human Rights stated

> [t]hat the just-satisfaction rule [under the European Convention on Human Rights] is directly derived from the principles of public international law relating to State liability … Those principles include both the obligation on the State responsible for the internationally wrongful act 'to cease that act, if it is continuing' and the obligation to 'make full reparation for the injury caused by the internationally wrongful act', as laid down in Articles 30 and 31 respectively of the Articles on Responsibility of States for Internationally Wrongful Acts.[1331] [155]

[A/74/83, p. 29]]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela* referred to article 31 when discussing the applicable standard of compensation,[1332] [159] and observed that "compensation for violation of a treaty will only

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[1327] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1328] [151 *Ibid*., para. 9.9.]

[1329] 157 ICSID, Case No. ARB/13/7, Award, 12 January 2016, para. 222.

[1330] 158 *Ibid*., paras. 223–224.

[1331] [155 ECHR, Grand Chamber, Application No. 13255/07, Judgment, 31 January 2019, para. 54.]

[1332] 159 ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 849.

be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant".[1333] [160]

[A/74/83, p. 29]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Vestey Group Limited Ltd. v. *Bolivarian Republic of Venezuela*

In *Vestey Group Limited Ltd.* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 31 when finding that Venezuela had committed an internationally wrongful act that "gives rise to an obligation to make full reparation for the injury caused by the illicit act".[1334] [161] The tribunal also noted that "while the ILC Articles govern a State['s] responsibility *vis-à-vis* another State and not a private person, it is generally accepted that the key provisions of the ILC, such as Article 31(1) can be transposed in the context of the investor-State disputes".[1335] [162]

[A/74/83, p. 29]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Murphy Exploration and Production Company International v. *The Republic of Ecuador*

The arbitral tribunal in *Murphy Exploration and Production Company International* v. *The Republic of Ecuador*, referring to article 31 of the State responsibility articles, explained that the "principle of full reparation applies to breaches of investment treaties unrelated to expropriations. This is reflected in the practice of investment tribunals."[1336] [163] The tribunal further noted that "[t]he applicable international law standard of full reparation, as reflected in the *Chorzów Factory* judgment and Article 31 of the ILC Articles on State Responsibility, does not determine the valuation methodology".[1337] [164] Therefore, "[t]ribunals enjoy a large margin of appreciation in order to determine how an amount of money may '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'".[1338] [165]

[A/74/83, p. 30]

Flemingo DutyFree Shop Private Limited v. *The Republic of Poland*

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal observed that the Poland-India BIT

itself does not set forth the standard of compensation for these breaches. Under customary international law, as codified in Article 31(1) of the ILC Articles, Claimant is entitled to full reparation in an amount

[1333] [160] *Ibid*., para. 860 and footnote 1247.

[1334] [161] ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 326 and footnote 306.

[1335] [162] *Ibid*., para. 326.

[1336] [163] PCA, Case No. 2012–16, Partial Final Award, 6 May 2016, para. 425.

[1337] [164] *Ibid*., para. 481.

[1338] [165] *Ibid*.

sufficient to wipe out all of the injury it has incurred due to Respondent's wrongful acts. Full reparation encompasses both actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*).[1339] 166

[A/74/83, p. 30]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Rusoro Mining Limited v. *The Bolivarian Republic of Venezuela*

In *Rusoro Mining Limited* v. *The Bolivarian Republic of Venezuela*, the arbitral tribunal indicated that "absent any specific Treaty language, damages must be calculated in accordance with the rules of international law", including, in particular, article 31 of the State responsibility articles.[1340] 167

[A/74/83, p. 30]

International arbitral tribunal (under the ICSID Convention)

Victor Pey Casado and President Allende Foundation v. *Republic of Chile*

The arbitration tribunal in *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile* observed, that

> [i]t is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights … . But equally it follows directly from the principles of State responsibility in international law reflected in Article 31 of the ILC Articles.[1341] 168

The tribunal further noted that "the distinction between injury (and the associated question of causation) and the assessment of the compensation due for that injury […] is fundamental to the operation of Article 31 of the ILC Articles".[1342] 169

[A/74/83, p. 30]

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal stated that "the appropriate standard of compensation is thus the customary international law standard of full reparation set out in Article 31 of the ILC Articles, applied by analogy".[1343] 170 Relying on the commentary to article 31, the tribunal further noted that "[t]he only unlawful act identified in the Decision on Liability was the expropriation of Burlington's investment through Ecuador's permanent physical takeover of the Blocks. As a result, the Tribunal's task is circumscribed to awarding damages 'arising from and ascribable to' that takeover."[1344] 171 On the question of whether "using information post-dating the expropria-

[1339] 166 PCA, Award, IIC 883 (2016), 12 August 2016, para. 865 (original emphasis).

[1340] 167 ICSID (Additional Facility), Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 640.

[1341] 168 ICSID, Case No. ARB/98/2, Award, 13 September 2016, para. 205.

[1342] 169 *Ibid*., para. 215 (see also para. 204).

[1343] 170 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 177.

[1344] 171 *Ibid*., para. 212.

tion would somehow conflict with the requirement of causation", the tribunal determined, further citing the commentary to article 31, that "the fact that some of the information used to quantify lost profits on the date of the award may not have been foreseeable on the date of the expropriation does not break the chain of causation. What matters is that the injury suffered must have been caused by the wrongful act".[1345] 172

[A/74/83, p. 30]

Cervin Investissements S.A. and Rhone Investissements S.A. v. *Republic of Costa Rica*

In *Cervin Investissements S.A. and Rhone Investissements S.A.* v. *Republic of Costa Rica*, the arbitral tribunal observed that article 31 of the State responsibility articles codified the principle of full reparation.[1346] 173

[A/74/83, p. 31]

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. *Kingdom of Spain*

The arbitration tribunal in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l.* v. *Kingdom of Spain*

regards Article 31 [of the State responsibility articles] as accurately reflecting the international law rules that are to be applied here. International law requires that Respondent make full reparation for the injury caused by failing to comply with its obligation to accord fair and equitable treatment under ECT article 10(1), so as to remove the consequences of the wrongful act.[1347] 174

[A/74/83, p. 31]

Valores Mundiales, S.L. and Consorcio Andino S.L. v. *Bolivarian Republic of Venezuela*

In *Valores Mundiales, S.L. and Consorcio Andino S.L.* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that the International Commission, in article 31 of the State responsibility articles, had codified the principle of full reparation.[1348] 175

[A/74/83, p. 31]

Karkey Karadeniz Elektrik Uretim A.S. v. *Islamic Republic of Pakistan*

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan* concluded, in the view of articles 31, 35 and 36 of the State responsibility articles, that "Karkey is entitled to an award of damages that will erase the consequences of Pakistan's wrongful acts and re-establish the situation that would have existed but for such wrongful acts".[1349] 176

[A/74/83, p. 31]

[1345] 172 *Ibid*., para. 333.

[1346] 173 ICSID, Case No. ARB/13/2, Final Award (Spanish), 7 March 2017, para. 700.

[1347] 174 ICSID, Case No. ARB/13/36, Final Award, 4 May 2017, para. 424.

[1348] 175 ICSID, Case No. ARB/13/11, Award (Spanish), 25 July 2017, para. 693.

[1349] 176 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 663.

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal stated that "[u]nder Article 31 of the ILC Articles the State responsible for an internationally wrongful act must make 'full reparation for the injury caused' by such act;" and noted that for damage to be recoverable under the terms of article 36 of the State responsibility articles, "the damage must have been caused by the State's internationally wrongful act complained of by the investor, Article 31 of the ILC Articles".[1350] [177]

[A/74/83, p. 31]

Masdar Solar & Wind Cooperatief U.A. v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* concluded that the "Claimant is entitled to full reparation of the damage caused by Respondent's breach of the ECT FET [fair and equitable treatment] standard. This is the standard prescribed by the *Chorzów Factory* principle and Article 31(1) of the ILC Articles, which the Tribunal considers fully applicable here".[1351] [178] The arbitral tribunal also observed that "[t]he status of the principles set out in the ILC Articles as customary international law is also undisputed between the Parties".[1352] [179]

[A/74/83, p. 32]

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. *Kingdom of Spain*

The arbitral tribunal in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *Kingdom of Spain* considered article 31 of the State responsibility articles

> as reflecting the international law rules that are to be applied here and therefore, the Claimants under international law are entitled to full reparation for damages caused by the breach by the Respondent of its obligation to accord FET [fair and equitable treatment] under ECT [Energy Charter Treaty] Article 10(1), so as to remove the consequences of the wrongful act.[1353] [180]

[A/74/83, p. 32]

International Criminal Court

Prosecutor v. *Germain Katanga*

In *Prosecutor* v. *Germain Katanga*, the Trial Chamber cited the commentary to article 31 of the State responsibility articles when finding that "if the person who committed the initial act could not have reasonably foreseen the event in question, the initial act cannot be con-

[1350] [177] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 1127–1129.

[1351] [178] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 552.

[1352] [179] *Ibid*., para. 551.

[1353] [180] ICSID, Case No. ARB/13/31, Award, 15 June 2018, para. 664.

sidered to be the proximate cause of the harm suffered by the victim and, consequently, the person who committed the initial act cannot be held liable for the harm in question".[1354] 181

[A/74/83, p. 32]

Arbitration Institute of the Stockholm Chamber of Commerce

Novenergia II—Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. *The Kingdom of Spain*

In *Novenergia II—Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR* v. *The Kingdom of Spain*, the arbitral tribunal, relying, *inter alia*, on article 31 of the State responsibility articles, held that

[t]he principle of full reparation under customary international law therefore dictates that the aggrieved investor shall through monetary compensation be placed in the same situation it would have been but for the breaches of the state's international law obligations. The compensation includes the loss already sustained as well as loss of profits.[1355] 182

[A/74/83, p. 32]

International Chamber of Commerce

Olin Holdings Limited v. *State of Libya*

In *Olin Holdings Limited* v. *State of Libya*, the tribunal "reviewed the ILC Articles on State Responsibility which require a State '*to make a full reparation for the injury caused by the internationally wrongful act*', covering '*any financially assessable damage including loss of profits insofar as it is established*.'".[1356] 183

[A/74/83, p. 32]

International arbitral tribunal (under the ICSID Convention)

UP and CD Holding Internationale v. *Hungary*

In *UP and CD Holding Internationale* v. *Hungary*, the arbitral tribunal noted that

the customary international law principle of full reparation was defined in the oft-cited PCIJ Chorzow Factory case, and this principle has since been reflected in Art. 31 of the ILC Articles. Under this standard, compensation must wipe out the consequences of the illegal act. Thus, the customary international law principle of full reparation includes reparation for consequential damages.[1357] 184

[A/74/83, p. 33]

[1354] 181 International Criminal Court, Trial Chamber II, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04–01/07, 19 July 2018, para. 17 and footnote 36.

[1355] 182 SCC, Case No. 2015/063, Final Arbitral Award, 15 February 2018, para. 808.

[1356] 183 ICC, Case No. 20355/MCP, Final Award, 25 May 2018, para. 473.

[1357] 184 ICSID, Case No. ARB/13/35, Award, 9 October 2018, para. 512.

Arbitration Institute of the Stockholm Chamber of Commerce

Foresight Luxembourg Solar 1 S.À.R.L. et al. v. *The Kingdom of Spain*

In *Foresight Luxembourg Solar 1 S.À.R.L. et al.* v. *The Kingdom of Spain*, the arbitral tribunal quoted article 31 of the State responsibility articles when "look[ing] to customary international law for the applicable standard of compensation".[1358] [185] The tribunal "further consider[ed] that the principle of full reparation is generally accepted in international investment law".[1359] [186]

[A/74/83, p. 33]

[International arbitral tribunal (under the ICSID Convention)

Caratube International Oil Company LLP and Devincci Salah Hourani v. *Republic of Kazakhstan*

The arbitral tribunal in *Caratube International Oil Company LLP and Devincci Salah Hourani* v. *Republic of Kazakhstan* concluded, after referring to articles 31, 34 and 36 of the State responsibility articles, that

> the damages actually incurred by CIOC [Caratube International Oil Company LLP] as a result of the Respondent's unlawful expropriation of the Contract (as determined by a majority of the Tribunal) are appropriately assessed using a subjective and concrete valuation approach providing full reparation for the damages actually incurred by CIOC, without FMV [fair market value].[1360] [191]

[A/74/83, p. 34]]

Marco Gavazzi and Stefano Gavazzi v. *Romania*

The arbitral tribunal in *Marco Gavazzi and Stefano Gavazzi* v. *Romania*, agreeing with the discussion of articles 31, 36 and 39 of the State responsibility articles in previous arbitral cases, "determine[d] that the Respondent caused the losses suffered by the Claimants as assessed in this Award, without any reduction for 'contributory negligence' or other fault, as alleged by the Respondent".[1361] [236]

[A/74/83, p. 39]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal stated that

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[1358] [185] SCC, Case No. V (2015/150), Final Award, 14 November 2018, paras. 432 and 435.

[1359] [186] *Ibid*., para. 436.

[1360] [[191] ICSID, Case No. ARB/13/13, Award, 27 September 2017, para. 1085.]

[1361] [[236] ICSID, Case No. ARB/12/25, Award, 18 April 2017, para. 280, referring to *CME Czech Republic B.V.* v. *Czech Republic*, Partial Award (13 September 2001), para. 583; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd* v. *Republic of Kazakhstan* (footnote [1656] 196 below), paras. 1330–1332; and *Gemplus, S.A., SLP, S.A., Gemplus Industrial, S.A. de C.V. and Talsud S.A.* v. *United Mexican States* ICSID Cases Nos. ARB(AF)/04/03 & ARB(AF)/04, Award, 16 June 2009, para. 11.12.]

[i]t follows that any compensation to be awarded by this Tribunal is to be decided by applying principles of customary international law, namely 'full reparation' to wipe out, as far as possible, the consequences of the Respondent's international wrongs under the general principle long established in the PCIJ's judgment in *Chor[z]ów Factory* (1928), as also confirmed by Articles 31 and 36 of the ILC Articles on State Responsibility.[1362] 211

The tribunal

decide[d] to use Three-Month LIBOR + 2.0% compounded quarterly as the appropriate rate for pre-award interest [and] considered that rate to reflect a reasonable rate of interest applicable to the Project as an investment by the Claimant, in concordance with the principles in *Chorzów Factory* (1928) and Article 36 of the ILC Articles on State Responsibility.[1363] 212

[A/74/83, p. 36]

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal found that

[t]he Claimant cannot claim compensation from the Respondent to the extent that the Claimant has failed unreasonably to mitigate its loss in accordance with international law. In the Tribunal's view, the legal test is based upon a reasonable and not an absolute standard, as confirmed by Comment (11) to Article 31 of the ILC Articles and Article 39 of the ILC Articles.[1364] 238

[A/74/83, p. 40]]

Permanent Court of Arbitration (under UNCITRAL Rules)

William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. *Government of Canada*

In *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc.* v. *Government of Canada*, the arbitral tribunal referred to the commentary to article 31, noting that "[u]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided".[1365] 115

The arbitral tribunal noted that "the duty to mitigate is a restriction on compensatory damages", whose rationale "is to encourage efficiency and to minimize the consequences of unlawful conduct (such as a breach of a treaty)".[1366] 116 The tribunal specified that the "duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of a treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty".[1367] 117 The tribunal explained that the "first limb of the mitigation principle concerns the unreasonable failure by the claimant to act subsequent to a breach of treaty, where it could have reduced the damages arising (including by incurring certain additional expenses)", while the second

[1362] [211 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.96–10.97.]

[1363] [212 *Ibid*., para. 10.138.]

[1364] [238 *Ibid*., paras. 10.124–10.125.]

[1365] 115 PCA, Case No. 2009–04, Award on Damages, 10 January 2019, para. 196.

[1366] 116 *Ibid*., para. 204.

[1367] 117 *Ibid*.

limb, "conversely, concerns the unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim".[1368] [118]

[A/77/74, p. 22]

International Tribunal for the Law of the Sea

M/V "Norstar" (Panama v. *Italy)*

In *M/V "Norstar" (Panama* v. *Italy)*, the International Tribunal for the Law of the Sea recalled that article 31 "is part of customary international law",[1369] [119] and emphasized "the requirement of a causal link between the wrongful act committed and damage suffered".[1370] [120]

[A/77/74, p. 23]

Permanent Court of Arbitration (under UNCITRAL Rules)

Serafín García Armas and Karina García Gruber v. *Bolivarian Republic of Venezuela*

In *Serafín García Armas and Karina García Gruber* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 31, noting that "customary international law also recognizes the right of the Claimants to full reparation for the damage suffered as a consequence of the acts of the Defendant".[1371] [121]

[A/77/74, p. 23]

International arbitral tribunal (under the ICSID Convention)

9REN Holding S.à.r.l. v. *Kingdom of Spain*

In *9REN Holding S.à.r.l.* v. *Kingdom of Spain*, the arbitral tribunal noted that in absence of pertinent "explicit guidance to quantum" in the Energy Charter Treaty, "resort is had to the customary international law principle of full compensation", referring to article 31.[1372] [122]

[A/77/74, p. 23]

SolEs Badajoz GmbH v. *Kingdom of Spain*

In *SolEs Badajoz GmbH* v. *Kingdom of Spain*, the arbitral tribunal considered that the compensation owed by the State to the investor was "governed by the customary international law of State responsibility", referring to the *Case concerning the Factory at Chorzów*

[1368] [118] *Ibid*., para. 205.

[1369] [119] ITLOS, see footnote [72] 12 above, p. 95, para. 318, citing *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 62, para. 194.

[1370] [120] *Ibid*., pp. 97–98, para. 333, citing *M/V "Virginia G" (Panama/Guinea Bissau)* (footnote [58] 11 above), pp. 118–120, paras. 435, 439 and 442.

[1371] [121] PCA, Case No. 2013–03, Final Award, 26 April 2019, para. 476.

[1372] [122] ICSID, Case No. ARB/15/15, Award, 31 May 2019, para. 373.

and article 31.[1373] [123] The tribunal emphasized that "the injury for which reparation is due includes damage 'caused by' the State's internationally wrongful act", and, quoting the commentary to article 31, noted that the "notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31".[1374] [124]

[A/77/74, p. 23]

Glencore International A.G. and C.I. Prodeco S.A. v. *Republic of Colombia*

In *Glencore International A.G. and C.I. Prodeco S.A.* v. *Republic of Colombia*, the arbitral tribunal stated that the principle of full reparation was adopted in the *Case concerning the Factory at Chorzów* and "subsequently codified" in the articles.[1375] [125] The tribunal concluded that "[c]ustomary international law rules on reparation for breaches of international law are set out in the ILC Articles", citing in particular article 31.[1376] [126]

[A/77/74, p. 24]

Inter-American Court of Human Rights

Álvarez Ramos v. *Venezuela*

In *Álvarez Ramos* v. *Venezuela*, the Inter-American Court of Human Rights cited the State responsibility articles and the American Convention on Human Rights, indicating "that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary law on State responsibility".[1377] [127]

[A/77/74, p. 24]

International arbitral tribunal (under the ICSID Convention)

OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. *Kingdom of Spain*

The arbitral tribunal in *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Kingdom of Spain* observed that while the applicable investment protection treaty did not "specify the consequences of a breach …, customary international law applies". The tribunal recalled that "the relevant principles of customary international law are derived from the … judgment [of the Permanent Court of International Justice] in the *Chorzów Factory Case* and are recorded in Articles 31–38 of the ILC Draft Articles".[1378] [128]

[A/77/74, p. 24]

[1373] [123] ICSID, Case No. ARB/15/38, Award, 31 July 2019, para. 476, citing Permanent Court of International Justice, *Case concerning the Factory at Chorzów, Merits, Judgment No. 13* (footnote [28] 34 above)*, Series A, No. 17*, p. 1, at p. 47.

[1374] [124] ICSID, Case No. ARB/15/38, *ibid*., para. 477.

[1375] [125] ICSID, Case No. ARB/16/6, Award, 27 August 2019, para. 1567.

[1376] [126] *Ibid*., paras. 1569–1570.

[1377] [127] IACHR, Series C, No. 380, Judgment (Preliminary Objection, Merits, Reparations and Costs), 30 August 2019, para. 192.

[1378] [128] ICSID, Case No. ARB/15/36, Award, 6 September 2019, para. 609.

Perenco Ecuador Limited v. *Ecuador*

While assessing the amount of compensation owed by the State to the investor, the arbitral tribunal in *Perenco Ecuador Limited* v. *Ecuador* found that no compensation was owed during the period prior to the promulgation of a decree that had violated the standard of protection contained in the relevant investment treaty, recalling that according to the commentary to article 31, "it is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made".[1379] [129]

[A/77/74, p. 24]

Inter-American Court of Human Rights

Cesti Hurtado v. *Peru*

In an order in *Cesti Hurtado* v. *Peru*, the Inter-American Court of Human Rights cited articles 1 and 31, recalling that "whenever a State is found responsible for an internationally wrongful act that has caused damage, an obligation arises for that State to make full reparation for the damage".[1380] [130]

[A/77/74, p. 24]

International arbitral tribunal (under the ICSID Convention)

RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. *Kingdom of Spain*

The arbitral tribunal in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U.* v. *Kingdom of Spain* referred to article 31 and the commentary thereto, noting the "basic proposition 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'".[1381] [131]

[A/77/74, p. 25]

Ad hoc committee (under the ICSID Convention)

Víctor Pey Casado and Foundation President Allende v. *Republic of Chile*

The *ad hoc* committee in the annulment proceeding *Víctor Pey Casado and Foundation President Allende* v. *Republic of Chile* rejected an argument that the nature of the violation as a single act or continuous conduct could affect the analysis pertaining to adequate compensation. Instead, it noted that "[i]t does not make any difference whether a wrongful act is a single act or 'a course of conduct', as explicitly provided for in Articles 14 and 15 of the Articles on State Responsibility. A course of conduct cannot remove the wrongfulness of

[1379] [129] ICSID, Case No. ARB/08/6, Award, 27 September 2019, para. 127.

[1380] [130] IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 14 October 2019, para. 30.

[1381] [131] ICSID, Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, paras. 685 (see also paras. 733 and 741), citing *Case concerning the Factory at Chorzów*, Merits (footnote [28] 34 above), p. 47.

one or many acts, and it cannot remove the obligation of the wrongdoer to make full reparation for injury, as provided for in Article 31 of the Articles on State Responsibility".[1382] 132

[A/77/74, p. 25]

IRAN-UNITED STATES CLAIMS TRIBUNAL

Award No. 604-A15 (II:A)/A26 (IV)/B43-FT

In a partial award rendered in 2020, the Iran-United States Claims Tribunal noted that "[u]nder customary international law, as reflected in Article 31 (1) of the ILC Articles, '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'".[1383] 133 Referring to the commentary to article 31, the Tribunal indicated that "[u]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided".[1384] 134

[A/77/74, p. 25]

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

In (*DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal referred to article 31, paragraph 2, recalling that "injury 'includes any damage, whether material or moral, caused by the internationally wrongful act of a State'".[1385] 135

[A/77/74, p. 25]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)

The "Enrica Lexie" Incident (Italy v. *India)*

The arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in *The "Enrica Lexie" Incident (Italy* v. *India)* recalled that

> under customary international law as codified in the ILC Draft Articles on State Responsibility, '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act', which may include 'any damage, whether material or moral, caused by the internationally wrongful act'. Specifically, full reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination.[1386] 136

[A/77/74, p. 25]

[1382] 132 See footnote [860] 132 above, para. 681.

[1383] 133 See footnote [380] 31 above, para. 1787.

[1384] 134 *Ibid*., para. 1796.

[1385] 135 See footnote [1029] 108 above, para. 396.

[1386] 136 See footnote [384] 34 above, para. 1082.

Permanent Court of Arbitration (under UNCITRAL Rules)

Deutsche Telekom AG v. *Republic of India*

In *Deutsche Telekom AG* v. *Republic of India*, the arbitral tribunal opined that it "must seek to implement the full reparation principle under customary international law as set out in *Chorzów* and restated in the ILC Articles, a point which is undisputed".[1387] [137] Furthermore, the tribunal recalled that:

> [I]n accordance with Article 31 of the ILC Articles, the determination of damages under international law implies a three-step process:
>
> i. establishing a breach;
>
> ii. ascertaining that the injury was caused by that breach (causation); and
>
> iii. determining the amount of compensation due for the injury caused (valuation or quantification of damages).[1388] [138]

[A/77/74, p. 26]

Inter-American Court of Human Rights

Galindo Cárdenas et al. v. *Peru*

In a provisional measures order in the case of *Galindo Cárdenas et al.* v. *Peru*, the Inter-American Court of Human Rights cited articles 1 and 31, noting that "under international law, whenever a State is found responsible for an internationally wrongful act that has caused damage, an obligation arises for that State to make full reparation for the damage".[1389] [139]

[A/77/74, p. 26]

International arbitral tribunal (under the ICSID Convention)

STEAG GmbH v. *Kingdom of Spain*

The arbitral tribunal in *STEAG GmbH* v. *Kingdom of Spain* found that in the absence of a specific rule on compensation in the applicable investment treaty, the general rule of article 31 was applicable,[1390] [140] pursuant to which "the internationally wrongful conduct of the State must be the actual and proximate cause of the damage".[1391] [141]

[A/77/74, p. 26]

[1387] [137] PCA, Case No. 2014–10, Final Award, 27 May 2020, para. 287.

[1388] [138] *Ibid*., para. 119.

[1389] [139] IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 3 September 2020, para. 17.

[1390] [140] ICSID, Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020, para. 745.

[1391] [141] *Ibid*., para. 748.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Cairn Energy PLC and Cairn UK Holdings Limited v. *Republic of India*

In *Cairn Energy PLC and Cairn UK Holdings Limited* v. *Republic of India*, the arbitral tribunal, citing article 31 and the commentary thereto, noted that India was "only under an obligation to repair 'the injury caused by the internationally wrongful act', which includes 'any damage, whether material or moral, caused by the internationally wrongful act'", and that "it is only 'the injury resulting from or ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act', that must be repaired".[1392] 142

[A/77/74, p. 26]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Silver Ridge Power B.V. v. *Italian Republic*

The arbitral tribunal in *Silver Ridge Power B.V.* v. *Italian Republic* considered that under article 31, paragraph 1,

> which represents customary international law, the State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Hence, there can be no doubt that, under general international law, the existence of a causal link between the alleged infringement of obligations under international law and the damage ensuing from it is an indispensable prerequisite for a compensation claim.[1393] 143

The tribunal also cited articles 1 and 2.[1394] 144

[A/77/74, p. 26]

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Ronald Enrique Castedo Allerding v. *Bolivia*

In *Ronald Enrique Castedo Allerding* v. *Bolivia*, the Inter-American Commission on Human Rights, citing article 31, mentioned that it is a "cardinal principle of public international law … that when a State violates any of its international obligations, it incurs international responsibility, which immediately places upon it the obligation to make full reparation for the damage caused by its incompliance".[1395] 145 Thus, reparation "is a secondary obligation that arises for a State as a consequence of its violation of a primary obligation under international law".[1396] 146

[A/77/74, p. 27]

[1392] 142 PCA, Case No. 2016–07, Final Award, 21 December 2020, para. 1862.

[1393] 143 ICSID, Case No. ARB/15/37, Award, 26 February 2021, para. 513.

[1394] 144 *Ibid*., para. 512.

[1395] 145 Inter-American Commission of Human Rights, Petition No. 1178–13, Admissibility Report No. 117/21, 13 June 2021, para. 40.

[1396] 146 *Ibid*.

Permanent Court of Arbitration (under UNCITRAL Rules)

OOO Manolium Processing v. *Republic of Belarus*

Citing articles 31 and 36, the arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* indicated that the provision of the treaty concerned in that case

stating that adequate compensation shall be calculated as the fair market value is in line with the principle of full reparation of the injury caused, firmly established in jurisprudence since the seminal *Chorzów Factory* decision of the Permanent Court of International Justice and subsequently codified in the ILC Articles.[1397] 147

[A/77/74, p. 27]

Ad hoc committee (under the ICSID Convention)

Infrastructure Services Luxembourg S.à.r.l. and Energía Termosolar B.V. v. *Kingdom of Spain*

The *ad hoc* committee in the annulment proceeding *Infrastructure Services Luxembourg S.à.r.l. and Energía Termosolar B.V.* v. *Kingdom of Spain* cited the text of article 31, indicating that international law "provides 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'".[1398] 148

[A/77/74, p. 27]

International arbitral tribunal (under the ICSID Convention)

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* noted that, pursuant to article 31, "Colombia is only required to make full reparation for damage 'caused by' the wrongful act".[1399] 149 However, the investor "must adduce 'persuasive evidence' that its loss was proximately caused by Colombia's actions".[1400] 150 The tribunal accepted, in terms of ascertaining the quantum of loss, "that the appropriate standard is full reparation for the loss suffered as a result of the breach, as provided for in the ILC Draft Articles".[1401] 151

[A/77/74, p. 27]

[1397] 147 See footnote [799] 86 above, para. 618.

[1398] 148 ICSID, Case No. ARB/13/31, Decision on Annulment, 30 July 2021, para. 251, citing *Case concerning the Factory at Chorzów, Merits,* (footnote [28] 34 above), p. 47.

[1399] 149 See footnote [401] 51 above, para. 839.

[1400] 150 *Ibid*., para. 839.

[1401] 151 *Ibid*., para. 894.

International arbitral tribunal (under the ICSID Additional Facility Rules)

Lion Mexico Consolidated L.P. v. *United Mexican States*

The arbitral tribunal in *Lion Mexico Consolidated L.P.* v. *United Mexican States* indicated that "[t]he customary international law principle of full reparation has been embodied in Art. 31(1)".[1402] 152

[A/77/74, p. 28]

International arbitral tribunal (under the ICSID Convention)

Pawlowski AG and Project Sever s.r.o. v. *Czech Republic*

In *Pawlowski AG and Project Sever s.r.o.* v. *Czech Republic*, the arbitral tribunal cited article 31, which, as a "second consequence" of internationally wrongful acts, "requires that the delinquent State make 'full reparation' for the 'injury caused'".[1403] 153

[A/77/74, p. 28]

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. *Argentine Republic*

The arbitral tribunal in *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic* stated that the duty to provide full reparation was part of "customary international law … and is enshrined in Article 31 (1) of the ILC Articles".[1404] 154 The tribunal emphasized that "there must be a proximate causal link between the violation of international law and the injury caused to Claimants" and that "only 'the injury caused by the internationally wrongful act' has to be fully repaired. By contrast, hypothetical, speculative as well as undetermined and remote damage cannot be compensated".[1405] 155

Additionally, the arbitral tribunal found that the duty to provide full compensation "also encompasses consequential damages that Claimants would not have incurred 'but for' Respondent's unlawful conduct", including "consequential damage that occurred after the internationally wrongful act occurred".[1406] 156

[A/77/74, p. 28]

Permanent Court of Arbitration (under UNCITRAL Rules)

Bank Melli Iran and Bank Saderat Iran v. *Kingdom of Bahrain*

The arbitral tribunal in *Bank Melli Iran and Bank Saderat Iran* v. *Kingdom of Bahrain* cited the text of article 31 and recalled that "it is a basic principle of international law that States incur responsibility for their internationally wrongful acts. The corollary to this

[1402] 152 ICSID, Case No. ARB(AF)/15/2, Award, 20 September 2021, para. 623.

[1403] 153 See footnote [402] 52 above, para. 725.

[1404] 154 See footnote [193] 26 above, para. 441.

[1405] 155 *Ibid*., para. 442.

[1406] 156 *Ibid*., para. 575.

principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1407] [157] The tribunal also referred to articles 36[1408] [158] and 37.[1409] [159]

[A/77/74, p. 28]

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. *Uganda)*

In its judgment on reparations in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)*, the International Court of Justice noted that article 31 "reflects customary international law".[1410] [160] In its analysis of expert evidence on the loss of lives during the conflict, the Court stated that "[s]ome of the lives lost during the conflict (the number of which cannot be determined) may be regarded as having a cause that is too remote from the internationally wrongful acts of Uganda to be a basis for a claim of reparation against it", and concluded that "the mortality surveys presented as evidence cannot contribute to the determination of the number of lives lost that are attributable to Uganda".[1411] [161]

[A/77/74, p. 28]

[…] the International Court of Justice referred to the commentary to articles 31 and 47, noting that

in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered … . In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors.[1412] [233]

[A/77/74, p. 38]]

[1407] [157] PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.

[1408] [158] *Ibid*., para. 740.

[1409] [159] *Ibid*., para. 701.

[1410] [160] ICJ, Judgment (Reparations), 9 February 2022, para. 70.

[1411] [161] *Ibid*., para. 148.

[1412] [[233] *Ibid*., para. 98.]