Chapter II

REPARATION FOR INJURY

Commentary

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 indicated that "[t]he approach of customary international law to reparation is founded in *Factory at Chorzów*, which is reflected in the ILC Articles on State Responsibility".[1437] [170]

[A/71/80, para. 120]

[Permanent Court of Arbitration (under UNCITRAL Rules)

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",[1438] [150] which were relevant with regard to the parties' claims for relief.[1439] [151]

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

[1437] [170] See footnote [114] 24 above, para. 761.

[1438] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1439] [[151] *Ibid*., para. 9.9.]

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[1440] [485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[1441] [486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (*e.g.* injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[1442] [487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

[1440] [485] See paragraphs (4) to (14) of the commentary to article 31.

[1441] [486] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1442] [487] Thus, in the judgment in the *LaGrand* case (footnote [236] 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[1443] [488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[1444] [489] Satisfaction must "not be out of proportion to the injury".[1445] [490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[1446] [491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Law of the Sea

M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal referred to paragraph 1 of draft article 42 (Reparation), as adopted by the International Law Commission on first reading,[1447] [188] to determine the reparation which Saint Vincent and the Grenadines was entitled to obtain for damage suffered directly by it as well as for damage or other loss suffered by the Saiga oil tanker:

Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" (article 42, paragraph 1, of the draft articles of the International Law Commission on State responsibility). Reparation may take the form of monetary compensation for economically quantifiable

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[1443] [488] See article 35 (*b*) and commentary.

[1444] [489] See article 31 and commentary.

[1445] [490] See article 37, paragraph 3, and commentary.

[1446] [491] For example, the *Mélanie Lachenal* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

[1447] [188] This provision was amended and partially incorporated in article 34, as finally adopted by the International Law Commission in 2001. The text of paragraph 1 of draft article 42 (Reparation) adopted on first reading was as follows: "The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination". (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.[1448] 189

[A/62/62, para. 106]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1449] 190 in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 34, the tribunal considered it "broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction".[1450] 191

[A/62/62, para. 107]

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, in the context of an analysis of article 2 of the State responsibility articles, held that where there had been "substantial interference with an investor's rights, so as to amount to an expropriation … there may be scope for a non-compensatory remedy for the expropriation (*e.g.* injunctive, declaratory or restitutionary relief)".[1451] 51

[A/65/76, para. 34]

Caribbean Court of Justice

Trinidad Cement Limited and TCL Guyana Incorporated v. *The State of the Co-Operative Republic of Guyana*

In the *Trinidad Cement Limited and TCL Guyana Incorporated* v. *Guyana* case, the Caribbean Court of Justice referred to a passage in the commentary to the State responsibility articles confirming that "[i]n accordance with article 34, the function of damages is essentially compensatory".[1452] 52

[A/65/76, para. 35]

[1448] 189 See footnote [1096] 160 above, para. 171.

[1449] 190 See footnote [1100] 163 above.

[1450] 191 *Ibid.*, para. 399 and footnote 211.

[1451] 51 *Biwater Gauff* (footnote [5] 6 above), para. 466. See article 2 above.

[1452] 52 CCJ, Case No. [2009] CCJ 5 (OJ), Judgment, 20 August 2009, para. 38, reference to paragraph (5) of the introductory commentary to Part Two, Chapter III. See further Part Two, Chapter III.

INTERNATIONAL COURT OF JUSTICE

Case Concerning Pulp Mills on the River Uruguay (Argentina v. *Uruguay)*

In its 2010 judgment in the *Pulp Mills on the River Uruguay* case, the International Court of Justice, citing, *inter alia*, the State responsibility articles, recalled that

> customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.[1453] 53

[A/65/76, para. 36]

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 referred, with approval, to article 34 of the State responsibility articles.[1454] 165 It further expressed the view that "the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*".[1455] 166

[A/68/72, para. 116]

[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.[1456] 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 consid-

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[1453] 53 ICJ, Judgment, 20 April 2010, para. 273.

[1454] 165 See footnote [12] 10 above, para. 196.

[1455] 166 *Ibid*., para. 197.

[1456] [152 PCA, Case No. 2010–18, Award, 19 December 2014, paras. 287–291.]

ers that this logic leads to the application of the regular rate of interest under the contract, rather than the penalty rate".[1457] [153]

[A/71/80, para. 110]]

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[1458] [172] as relevant for the analysis regarding the award of reparation.

[A/71/80, para. 121]

Ioan Micula and others v. *Romania*

In *Ioan Micula and others* v. *Romania*, the arbitral tribunal referred to articles 34 and 36 in acknowledging that the obligation to make full reparation "[i]n most cases … involves the payment of compensation".[1459] [173] It further noted that "the commentary to the ILC Articles limits compensation to 'damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote'".[1460] [174]

[A/71/80, para. 122]

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

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, the arbitral tribunal cited article 34 as authority for the principle that reparation for injury "shall take the form of restitution, compensation and satisfaction, either singly or in combination".[1461] [175]

[A/71/80, para. 123]

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*

The African Court on Human and Peoples' Rights in *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe*

[1457] [153 *Ibid*., para. 299.]

[1458] [172] See footnote [320] 46 above, para. 560.

[1459] [173] See footnote [1188] 133 above, para. 917.

[1460] [174] *Ibid*., para. 1009 (quoting para. (5) of the commentary to article 34).

[1461] [175] See footnote [63] 16 above, para. 27, footnote 16 (quoting article 34).

Human and Peoples' Rights Movement v. *Burkina Faso*, cited the text of article 34 in support of the view that "reparation may take several forms".[1462] [176]

[A/71/80, para. 124]

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 referred to article 34 of the State responsibility articles as expanding on the principle contained in article 31.[1463] [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".[1464] [178]

[A/71/80, para. 125]

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

The arbitral tribunal in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia* noted that "Article 34 of the ILC Articles includes satisfaction as a form of reparation".[1465] [179]

[A/71/80, para. 126]

[Permanent Court of Arbitration (under UNCITRAL Rules)

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",[1466] [150] which were relevant with regard to the parties' claims for relief.[1467] [151]

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

[1462] [176] See footnote [1314] 155 above, para. 29.

[1463] [177] See footnote [114] 24 above, para. 684.

[1464] [178] *Ibid*., para. 686 (quoting para. (2) of the commentary to article 34).

[1465] [179] See footnote [65] 18 above, para. 554 and footnote 701.

[1466] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1467] [[151] *Ibid*., para. 9.9.]

International arbitral tribunal (under the ICSID Convention)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, after summarizing the parties' arguments regarding articles 28, 31, 34, 35 and 36 of the State responsibility articles,[1468] [189] the arbitral tribunal stated:

The adoption of the ILC Articles, which clearly articulate a State's obligation to provide full reparation in the event of a breach of an international obligation, and the practice of States in paying reparations in these circumstances, suggest that States accept this obligation. This is not to say that the general principle of international law that a State that has been found to have breached an international obligation must make full reparation for any damages caused by its breach has any impact on a State's right to expropriate a foreigner's property at international law. A State's right to do so exists at international law and, so long as the property is lawfully expropriated, there is an obligation to compensate the owner, but not to make full reparation. The State's obligation to make full reparation is related to its breach of international law. Respondent's concerns about the obligation to make full reparation leading to disproportionate compensation are dealt with in the limiting factors that the Parties agree are principles relating to damages in international law.[1469] [190]

[A/74/83, p. 33]

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].[1470] [191]

[A/74/83, p. 34]

[European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1471] [213]

[A/74/83, p. 37]]

[1468] [189] See footnote [355] 45 above, paras. 1077–1088.

[1469] [190] *Ibid.*, para. 1089.

[1470] [191] ICSID, Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, para. 1085.

[1471] [213 ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and footnote 6.]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[1472] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[1473] [43]

[A/77/74, p. 11]]

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 "[t]he forms of reparation recognized under customary international law as ways of satisfying a responsible State's obligation to make full reparation include … restitution in kind and compensation".[1474] [166] The Tribunal recalled in particular the texts of articles 34 and 35.[1475] [167]

[A/77/74, p. 29]

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 cited article 34, noting that full reparation "shall take the form of restitution, compensation and satisfaction, either singly or in combination".[1476] [168] Following an analysis of the provision, the tribunal determined that the appropriate restitution would include the withdrawal of a tax demand by the Respondent, thus releasing the investor from any obligation to pay it.[1477] [169]

[A/77/74, p. 30]

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 customary law, as codified in article 31, requires full reparation, and that "[a]dditional guidance is provided by Art. 34" on the forms that such full reparation for the injury caused may take.[1478] [170]

[A/77/74, p. 30]

[1472] [42] [Final Award, 26 March 2021, para. 72.]

[1473] [43] [*Ibid*., paras. 72 and 134–135.]

[1474] [166] See footnote [380] 31 above, paras. 1788–1789.

[1475] [167] *Ibid*., paras. 1789 and 1847.

[1476] [168] See footnote [1392] 142 above, para. 1872.

[1477] [169] *Ibid*., paras. 1874 and 1877.

[1478] [170] See footnote [1402] 152 above, paras. 623–625.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, *i.e.* the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible". The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[1479] [492] It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[1480] [493] Despite the difficulties restitution

[1479] [492] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 48.

[1480] [493] See, *e.g.*, *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7

may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[1481] [494] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, *e.g.* because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[1482] [495] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[1483] [496]

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[1484] [497] the restitution of ships[1485] [498] or other types of property,[1486] [499] including documents, works of art, share certificates, *etc.*[1487] [500] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment

(1920); *Walter Fletcher Smith*, *ibid*., vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

[1481] [494] See articles 43 and 45 and commentaries.

[1482] [495] *Walter Fletcher Smith* (footnote [1480] 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons" (see J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", BYBIL*, 1964*, vol. 40, p. 216, at p. 221).

[1483] [496] *Government of Kuwait* v. *American Independent Oil Company (Aminoil),* ILR, vol. 66, p. 519, at p. 533 (1982).

[1484] [497] Examples of material restitution involving persons include the *"Trent"* (1861) and *"Florida"* (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (footnote [80] 59 above), pp. 44–45.

[1485] [498] See, *e.g.*, the "*Giaffarieh*" incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, Società Italiana per l'Organizzazione Internazionale—Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, N. Y., Oceana, 1970), vol. II, pp. 901–902.

[1486] [499] For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid*., p. 240 (1950); and the *Hénon* case, *ibid*., p. 248 (1951).

[1487] [500] In the *Bužau-Nehoiași Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[1488] [501] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[1489] [502] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[1490] [503] In some cases, both material and juridical restitution may be involved.[1491] [504] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[1492] [505] The term "restitution" in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[1493] [506] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

[1488] [501] For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

[1489] [502] For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

[1490] [503] In the *Bryan-Chamorro Treaty* case (*Costa Rica* v. *Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action" (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also *ibid*., page 683.

[1491] [504] Thus, PCIJ held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*Appeal from a judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* (footnote [1417] 481 above)).

[1492] [505] In the *Legal Status of Eastern Greenland* case, PCIJ decided that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (footnote [138] 79 above), the Court decided that France "must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL*, 1976–1977*, vol. 48, p. 1, at pp. 5–8.

[1493] [506] See above, paragraph (8) of the commentary to article 30.

(8) Under article 35, subparagraph (*a*), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[1494] [507] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[1495] [508] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, subparagraph (*b*), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[1496] [509] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

[1494] [507] *Forests of Central Rhodopia* (footnote [1058] 382 above), p. 1432.

[1495] [508] For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, *ibid*., p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic ibid*., vol. 62, p. 141, at p. 200 (1977).

[1496] [509] See, *e.g.*, J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook … 1969*, vol. II, p. 149.

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,[1497] [192] the Panel of Commissioners of the United Nations Compensation Commission referred *inter alia* to article 35 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on pages 325–326] above.

[A/62/62, para. 108]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1498] [193] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 35, the tribunal observed that "[r]estitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation".[1499] [194]

[A/62/62, para. 109]

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, noted that article 35 finally adopted by the International Law Commission in 2001 provided that "restitution in kind is the preferred remedy for an internationally wrongful act".[1500] [195]

[A/62/62, para. 110]

European Court of Human Rights

Verein Gegen Tierfabriken Schweiz (VgT) v. *Switzerland*

In the *Verein Gegen Tierfabriken Schweiz (VgT)* v. *Switzerland (No. 2)* case, the European Court of Human Rights referred to article 35 of the State responsibility articles as reflecting "principles of international law". The Court alluded to the qualifications in the provision, *i.e.* that the obligation to make restitution was subject to such restitution not being "materially

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[1497] [192] "F3" claims before the UNCC are claims filed by the Government of Kuwait, excluding environmental claims.

[1498] [193] See footnote [1100] 163 above.

[1499] [194] *Ibid.*, para. 400 and footnote 212.

[1500] [195] ICSID, Case No. ARB/03/16, Award, 2 October 2006, paras. 494 and 495.

impossible" and not involving "a burden out of all proportion to the benefit derived from restitution instead of compensation", which it interpreted as meaning that "while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain".[1501] 54

[A/65/76, para. 37]

Guiso-Gallisay v. *Italy*

In the *Guiso-Gallisay* v. *Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 35 of the State responsibility articles (which it considered to be relevant international law) as reiterating the principle of *restitutio in integrum*.[1502] 55

[A/65/76, para. 38]

Arbitration Institute of the Stockholm Chamber of Commerce

Mohammad Ammar Al-Bahloul v. *The Republic of Tajikistan*

In *Mohammad Ammar Al-Bahloul* v. *The Republic of Tajikistan*, the arbitral tribunal, citing article 35, observed that "[t]he ILC Articles contemplate restitution as the principal remedy for internationally wrongful conduct", and recalled that "[t]he goal of restitution [was] to restore the investor to his position before the wrongful conduct" and that "[t]his remedy, however, should not be granted where its implementation is materially impossible … If such case, the ILC Articles would envisage a claim for damages as the available alternative".[1503] 167

[A/68/72, para. 117]

European Court of Human Rights

Laska and Lika v. *Albania*

In *Laska and Lika* v. *Albania*, the European Court of Human Rights considered article 35 as reflecting international law relevant to the case.[1504] 168 It observed that:

> in the instant case, a retrial or the reopening of the case, if requested by the applicant, represented in principle an appropriate way of redressing the violation … This also reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts …).[1505] 169

[A/68/72, para. 118]

[1501] 54 ECHR, Grand Chamber, *Verein Gegen Tierfabriken Schweiz (VgT)* v. *Switzerland (No. 2)*, Application No. 32772/02, Judgment, 30 June 2009, para. 86.

[1502] 55 ECHR, Grand Chamber, Application No. 58858/00, Judgment (Just satisfaction), 22 December 2009, para. 53.

[1503] 167 See footnote [1198] 144 above, para. 52.

[1504] 168 ECHR, Fourth Section, Application Nos. 12315/04 and 17605/04, Judgment, 20 July 2010, para. 35.

[1505] 169 *Ibid*., para. 75 (internal citation omitted).

International Court of Justice

Jurisdictional Immunities of the State (Germany v. *Italy)*

In the *Jurisdictional Immunities of the State (Germany* v. *Italy*) case, the International Court of Justice recalled that:

> [a]ccording to general international law on the responsibility of States for internationally wrongful acts … even if the [wrongful] act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.[1506] [170]

[A/68/72, para. 119]

[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.[1507] [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.[1508] [153]

[A/71/80, para. 110]]

[International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[1509] [172] as relevant for the analysis regarding the award of reparation.

[A/71/80, para. 121]]

[1506] [170] See footnote [788] 104 above, para. 137.

[1507] [[152] PCA, Case No. 2010–18, Award, 19 December 2014, paras. 287–291.]

[1508] [[153] *Ibid*., para. 299.]

[1509] [[172] See footnote [320] 46 above, para. 560.]

European Court of Human Rights

Savriddin Dzhurayev v. *Russia*

In *Savriddin Dzhurayev* v. *Russia*, the European Court of Human Rights referred to article 35 in finding that, in line with the relevant principles of international law, the primary aim of the individual measures to be taken in response to the judgment was to "put an end to the breach of the Convention and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".[1510] [181] It also referenced article 35 in support of the statement that "while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain".[1511] [182]

[A/71/80, para. 127]

Permanent Court of Arbitration (under UNCITRAL Rules)

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

The arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, found

> that the principles on the reparation for injury as expressed in the ILC Articles on State Responsibility are relevant in this regard. According to Article 35 of the ILC Articles, a State responsible for an illegal expropriation is in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place. This obligation of restitution applies as of the date when a decision is rendered. Only to the extent where it is not possible to make good the damage caused by restitution is the State under an obligation to compensate pursuant to Article 36 of the ILC Articles on State Responsibility.[1512] [183]

[A/71/80, para. 128]

European Court of Human Rights

Davydov v. *Russia*

In *Davydov* v. *Russia*, the European Court of Human Rights reiterated, with reference to article 35, that

> a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach … . This obligation reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation that existed before the wrongful act was committed, provided that restitution is not 'materially impossible' and 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'.[1513] [184]

[A/71/80, para. 129]

[1510] [181] ECHR, First Section, Application No. 71386/10, Judgment, 25 April 2013, para. 248.

[1511] [182] *Ibid*., para. 248.

[1512] [183] See footnote [19] 7 above, para. 1766.

[1513] [184] ECHR, First Section, Application No. 18967/07, Judgment (Merits and Just Satisfaction), 30 October 2014, para. 25 (quoting article 35).

Kudeshkina v. *Russia (No. 2)*

In *Kudeshkina* v. *Russia (No. 2)*, the European Court of Human Rights stated, with reference to article 35, that "[t]he States should organise their legal systems and judicial procedures so that this result [of *restitutio in integrum*] may be achieved".[1514] [185] The Court also relied on article 35 in reiterating that "while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain".[1515] [186]

[A/71/80, para. 130]

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 noted that the State responsibility articles "confirm restitution as the principal form of reparation in international law".[1516] [187] It acknowledged, quoting the commentary to article 35, that "restitution restores 'the situation that existed prior to the occurrence of the wrongful act'".[1517] [188] Referring to article 2, the tribunal explained that the "[b]reach of a peremptory norm could also justify restitution".[1518] [189] The tribunal also observed, with reference to the articles, that restitution "may take, in practice, a wide range of forms",[1519] [190] "encompassing any action that needs to be taken by the responsible State to restore the situation".[1520] [191]

[A/71/80, para. 131]

In relation to the limitations on restitution as provided for in subparagraphs (*a*) and (*b*), the arbitral tribunal noted that, in determining material impossibility as per article 35, subparagraph (*a*), "[t]he standard is high".[1521] [192] Pursuant to the commentary to article 35, "restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these".[1522] [193] Citing the second limitation in subparagraph (*b*), the tribunal found that "[i]t is not disproportionate to award title to lands unlawfully expropriated".[1523] [194]

[A/71/80, para. 132]

[1514] [185] ECHR, First Section, Application No. 28727/11, Decision, 17 February 2015, para. 55.

[1515] [186] *Ibid*., para. 55.

[1516] [187] See footnote [114] 24 above, para. 684.

[1517] [188] *Ibid*., para. 686 (quoting para. (2) of the commentary to article 35).

[1518] [189] See footnote [114] 24 above, para. 722.

[1519] [190] *Ibid*., para. 687.

[1520] [191] *Ibid*., para. 740.

[1521] [192] *Ibid*., para. 725.

[1522] [193] *Ibid*., para. 725 (quoting para. (8) of the commentary to article 35).

[1523] [194] *Ibid*., paras. 734–735 (quoting article 35(*b*)).

[Permanent Court of Arbitration (under UNCITRAL Rules)

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",[1524] [150] which were relevant with regard to the parties' claims for relief.[1525] [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.[1526] [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.[1527] [158]

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

[*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".[1528] [176]

[A/74/83, p. 31]]

European Court of Human Rights

Ryabkin and Volokitin v. *Russia*

In *Ryabkin and Volokitin* v. *Russia*, the European Court of Human Rights considered articles 35 and 36 of the State responsibility articles as relevant international law.[1529] [193]

[A/74/83, p. 34]

Guja v. *The Republic of Moldova (No. 2)*

The European Court of Human Rights in *Guja* v. *The Republic of Moldova (No. 2)* cited article 35, as relevant international law and observed, with reference to article 35, that

[1524] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1525] [151 *Ibid*., para. 9.9.]

[1526] [157 ICSID, Case No. ARB/13/7, Award, 12 January 2016, para. 222.]

[1527] [158 *Ibid*., paras. 223–224.]

[1528] [176 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 663.]

[1529] 193 ECHR, Third Section, Application Nos. 52166/08 and 8526/09, Judgment, 28 June 2016, para. 30.

"[t]he States should organise their legal systems and judicial procedures so that this result [of restitution] may be achieved".[1530] 194

[A/74/83, p. 34]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* stated that "[p]ursuant to Article 35 of the ILC Articles, restitution is the primary remedy for reparation of wrongful acts under international law".[1531] 195 However, the tribunal held that "juridical restitution should not be granted", stating that "Article 35(*b*) of the ILC Articles exempts responsible States from their primary obligation to make restitution when restitution is disproportionately burdensome compared to the benefit which would be gained".[1532] 196

[A/74/83, p. 34]

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

The arbitral tribunal in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *The Kingdom of Spain* considered the order of restitution sought by the claimants based on article 35 of the State responsibility articles "disproportional to its interference with the sovereignty of the State compared to monetary compensation".[1533] 197

[A/74/83, p. 35]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, referred to articles 35 and 36 of the State responsibility articles in support of its view that "the fair market value also reflects the compensation standard under customary international law".[1534] 206

[A/74/83, p. 36]]

[European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State

[1530] 194 ECHR, Second Section, Application No. 1085/10, Judgment, 15 March 2018, paras. 26 and 31.

[1531] 195 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 558.

[1532] 196 *Ibid*., para. 562.

[1533] 197 ICSID, Case No. ARB/13/31, Award, 15 June 2018, para. 636.

[1534] [206 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 627 and 711.]

responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1535] [213]

[A/74/83, p. 37]]

European Court of Human Rights

Ilgar Mammadov v. *Azerbaijan*

In *Ilgar Mammadov* v. *Azerbaijan*, the Grand Chamber of European Court of Human Rights cited article 35, which encompassed "the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, … provided that restitution is not 'materially impossible' and 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'".[1536] [172] The Court also cited articles 30 to 32 and 34 to 37.[1537] [173]

[A/77/74, p. 30]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *Glencore International A.G. and C.I. Prodeco S.A.* v. *Republic of Colombia* cited article 35, explaining that pursuant to that article, "restitution—as opposed to compensation—is the first of the forms of reparation available to a party injured by an internationally wrongful act".[1538] [174] The tribunal noted that "the two factors which exclude the possibility of restitution" pursuant to the articles were whether restitution was materially impossible and whether it imposed a disproportionate burden on the party in breach.[1539] [175] Referring to article 36, the tribunal noted that, "[i]n certain cases, to ensure full reparation restitution must be completed by compensation".[1540] [176]

[A/77/74, p. 30]

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

[1535] [213 ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and note 6.]

[1536] [172] ECHR, Grand Chamber, Application No. 15172/13, Judgment, 29 May 2019, para. 151.

[1537] [173] *Ibid*., paras. 84–88.

[1538] [174] See footnote [1375] 125 above, para. 1572.

[1539] [175] *Ibid*., para. 1576.

[1540] [176] *Ibid*., para. 1577.

[t]he forms of reparation recognized under customary international law as ways of satisfying a responsible State's obligation to make full reparation include … restitution in kind and compensation".[1541] [166] The Tribunal recalled in particular the texts of articles 34 and 35. [1542] [167]

… the Iran-United States Claims Tribunal cited article 35, recalling "that restitution is the primary form of reparation for injury caused by an internationally wrongful act".[1543] [177] The Tribunal therefore concluded that, in that case, "ordering the United States to arrange for the transfer of the Stradivarius constitutes the proper remedy, so as to put Iran in the situation [in which] it would have been had the breach by the United States not occurred.[1544] [178]

[A/77/74, pp. 29–30]

International arbitral tribunal (under the ICSID Convention)

(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 cited articles 35, 36 and 38, noting that "in investment law, full reparation may take the form of restitution or compensation", plus interest.[1545] [179]

[A/77/74, p. 31]

[1541] [[166] See footnote [380] 31 above, paras. 1788–1789.]

[1542] [[167] *Ibid.*, paras. 1789 and 1847.]

[1543] [177] *Ibid.*, para. 1789.

[1544] [178] *Ibid.*, para. 1849.

[1545] [179] See footnote [1029] 108 above, para. 396.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.[1546] [510] Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, *i.e.* the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[1547] [511] It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[1548] [512]

(3) The relationship with restitution is clarified by the final phrase of article 36 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[1549] [513] As the Umpire said in the *"Lusitania"* case:

> The fundamental concept of "damages" is … reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[1550] [514]

[1546] [510] See paragraphs (5) to (6) and (8) of the commentary to article 31.

[1547] [511] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 81, para. 152. See also the statement by the Permanent Court of International Justice in *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity" (p. 27).

[1548] [512] *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above); *Fisheries Jurisdiction* (footnote [1206] 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 142.

[1549] [513] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), pp. 47–48.

[1550] [514] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

Likewise, the role of compensation was articulated by PCIJ in the following terms:

> 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.[1551] 515

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[1552] 516 Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[1553] 517

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[1554] 518 The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

[1551] 515 *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)* (footnote [1096] 160 above). See also *Papamichalopoulos and Others* v. *Greece (article 50), Eur. Court H.R., Series A, No. 330–B*, para. 36 (1995); *Velásquez Rodríguez* (footnote [84] 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

[1552] 516 In the *Velásquez Rodriguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D. C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, "A reappraisal of punitive damages in international law", BYBIL, *1997*, vol. 68, pp. 247–266; and S. Wittich, "Awe of the gods and fear of the priests: punitive damages in the law of State responsibility", *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

[1553] 517 See paragraph (3) of the commentary to article 37.

[1554] 518 For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[1555] [519] the Iran-United States Claims Tribunal,[1556] [520] human rights courts and other bodies,[1557] [521] and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[1558] [522] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[1559] [523] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[1560] [524] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

[1555] [519] For example, the *M/V "Saiga"* case (footnote [1096] 160 above), paras. 170–177.

[1556] [520] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal's jurisprudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote [1017] 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, "Compensable claims before the Tribunal: expropriation claims", *The Iran-United States Claims Tribunal*: *Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid*., pp. 325–385.

[1557] [521] For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

[1558] [522] ICSID, tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, *e.g.*, *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

[1559] [523] See, *e.g.*, *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), and for the Court's order of discontinuance following the settlement, *ibid., Order* (footnote [779] 232 above); *Passage through the Great Belt (Finland* v. *Denmark)*, *Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996,* p. 9 (order of discontinuance following settlement).

[1560] [524] See Aldrich, *op. cit.* (footnote [1017] 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote [1241] 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote [1206] 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Milan, Giuffrè, 1990).

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *"Volage"*, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer *"Volage"*, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £ 50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, *etc.*".[1561] 525

(10) In the *M/V "Saiga" (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the *"Saiga"*, and its crew. ITLOS awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *"Saiga"*; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[1562] 526 Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[1563] 527

(11) In a number of cases payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[1564] 528 Similar payments have been negotiated where damage is caused to aircraft of a State, such as the "full and final settlement" agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[1565] 529

[1561] 525 *Corfu Channel, Assessment of Compensation* (footnote [1260] 473 above), p. 249.

[1562] 526 The *M/V "Saiga"* case (footnote [1096] 159 above), para. 176.

[1563] 527 *Ibid*., para. 177.

[1564] 528 See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid*., p. 562), and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

[1565] 529 *Aerial Incident of 3 July 1988* (footnote [1559] 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Cer-

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[1566] [530] or injury to its personnel.[1567] [531] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[1568] [532] In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.[1569] [533]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (*a*) the relevant international agreements … and (*b*) general principles of international law".[1570] [534] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[1571] [535] The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can$ 3 million (about 50 per cent of the amount claimed).[1572] [536]

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq's liability under international law "for any direct loss, damage—including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[1573] [537] The UNCC Governing Council decision 7

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tain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

[1566] [530] See, *e.g.*, the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, H. M. Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

[1567] [531] See, *e.g.*, Claim of Consul *Henry R. Myers (United States* v. *Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote [1007] 347 above), pp. 80–81.

[1568] [532] For examples, see Whiteman, *Damages in International Law* (footnote [1007] 347 above), p. 81.

[1569] [533] See, *e.g.*, the United States-China agreement providing for an *ex gratia* payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

[1570] [534] The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (footnote [1246] 459 above), pp. 899 and 905.

[1571] [535] *Ibid*., p. 907.

[1572] [536] Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite "Cosmos 954" (Moscow, 2 April 1981), United Nations, *Treaty Series,* vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

[1573] [537] Security Council resolution 687 (1991), para. 16 (footnote [1248] 461 above).

specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[1574] 538

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[1575] 539 However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, *etc.*—sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[1576] 540 The umpire considered that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated … "[1577] 541

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case,[1578] 542 the tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

[1574] 538 Decision 7 of 16 March 1992, Criteria for additional categories of claims, (S/AC.26/1991/7/Rev.1), para 35.

[1575] 539 See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote [817] 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

[1576] 540 See footnote [1550] 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote [505] 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid*., vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid*., p. 55 (1903).

[1577] 541 *"Lusitania"* (see footnote [1550] 514 above), p. 40.

[1578] 542 See footnote [1096] 159 above.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case:

> Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[1579] 543

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[1580] 544 Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[1581] 545

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, *etc.*) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[1582] 546 Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[1583] 547

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[1584] 548 property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating

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[1579] 543 *"Lusitania"* (see footnote [1550] 514 above), p. 35.

[1580] 544 For example, the *"Topaze"* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

[1581] 545 For example, the *William McNeil* case, *ibid.*, vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

[1582] 546 See the review by Shelton, *op. cit.* (footnote [1557] 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea", *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

[1583] 547 See, *e.g.*, the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote [84] 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote [1551] 515 above).

[1584] 548 See, *e.g.*, R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

bodies, the awards exhibit considerable variability.[1585] [549] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[1586] [550] The method used to assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.[1587] [551] Where the property interests in

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[1585] [549] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by the Permanent Court of International Justice in *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, *e.g.*, the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote [1495] 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote [1483] 496 above), p. 600, para. 138; and *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, *e.g.*, the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote [408] 67 above), p. 122, para. 110. See also *Starrett Housing, Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[1586] [550] See *American International Group, Inc.* v. *The Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares", Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing* (footnote [1585] 549 above), the tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat" (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation "will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known", World Bank, *Legal Framework for the Treatment of Foreign Investment* (Washington, D. C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation".

[1587] [551] Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, *e.g.*, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, H. M. Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Settlement of Mutual Historical

question are unique or unusual, for example, art works or other cultural property,[1588] [552] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[1589] [553]

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[1590] [554]

(24) An alternative valuation method for capital loss is the determination of net book value, *i.e.* the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[1591] [555] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases no provision is made for value over and above the market value of the individual assets. Techniques have been

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Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid.*) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[1588] [552] See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$ 100 000 (category "D" claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[1589] [553] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 8, p. 373 (1985).

[1590] [554] Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D. C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in "Propositions and conclusions on compensation for business losses: types of damages and their valuation" (S/AC.26/1992/9), para. 16.

[1591] [555] For an example of a business found not to be a going concern, see *Phelps Dodge Corp.* v. *The Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc.* v. *National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid.*, p. 180 (1986).

developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[1592] 556

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[1593] 557 The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[1594] 558 But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (*e.g.* discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[1595] 559 A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[1596] 560

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case[1597] 561 and *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company*.[1598] 562 Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured

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[1592] 556 The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (footnote [1585] 549 above), at pp. 256–257, paras. 220–223.

[1593] 557 See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of "E4" claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of "E2" claims, 9 December 1999 (S/AC.26/1999/22)).

[1594] 558 The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (footnote [1585] 549 above); *Starrett Housing Corporation* (footnote [1585] 549 above.); *Phillips Petroleum Company Iran* (footnote [408] 67 above); and *Ebrahimi (Shahin Shaine)* v. *Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

[1595] 559 See, *e.g.*, *Amoco* (footnote [1585] 549 above); *Starrett Housing Corporation* (footnote [1585] 549 above.); and *Phillips Petroleum Company Iran* (footnote [408] 67 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (footnote [1590] 554 above) states: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

[1596] 560 See, *e.g.*, *Ebrahimi* (footnote [1594] 558 above), p. 227, para. 159.

[1597] 561 *Navires* (footnote [769] 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote [1215] 561 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote [520] 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co.* case *(Great Britain* v. *Portugal)*, Lapradelle–Politis, *op. cit.* (*ibid.*), vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America* v. *Brazil)*, Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote [520] 139 above).

[1598] 562 ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[1599] [563] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*[1600] [564] and in some ICSID arbitrations.[1601] [565] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[1602] [566] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[1603] [567] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[1604] [568]

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property

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[1599] [563] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), pp. 47–48 and 53.

[1600] [564] *Libyan American Oil Company (LIAMCO)* (footnote [1495] 508 above), p. 140.

[1601] [565] See, *e.g.*, *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA* v. *the Government of the People's Republic of the Congo*, *ibid*., p. 306 (1979).

[1602] [566] According to the arbitrator in the *Shufeldt* case (footnote [146] 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote [1601] 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid*., para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

[1603] [567] In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (*i.e.* profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (footnote [1602] 566 above).

[1604] [568] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D. C., United States Government Printing Office, 1943), vol. III, p. 1837).

between the date of taking of title and adjudication;[1605] [569] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[1606] [570]

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[1607] [571] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[1608] [527] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,[1609] [573] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[1610] [574]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[1611] [575] In the case of contracts, it is the future income stream which

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[1605] [569] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above) and *Norwegian Shipowners' Claims* (footnote [146] 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[1606] [570] Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment; Resubmitted case* (footnote [1601] 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

[1607] [571] Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (footnote [234] 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

[1608] [572] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above).

[1609] [573] *Norwegian Shipowners' Claims* (footnote [146] 87 above).

[1610] [574] For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote [1593] 557 above), paras. 184–187.

[1611] [575] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, *e.g.*, *Robert H. May (United States* v. *Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote [1604] 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, *e.g.*, *Gould*

is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, *e.g.* where the contract is determinable at the instance of the State,[1612] [576] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[1613] [577] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[1614] [578] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[1615] [579] Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

Marketing, Inc. v. *Ministry of Defence of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote [1597] 561 above), and in *Shufeldt* (footnote [146] 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleums Ltd.* (footnote [1598] 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (footnote [1495] 508 above), p. 140; and *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment*; *Resubmitted case* (footnote [1601] 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

[1612] [576] As in *Sylvania Technical Systems, Inc.* (footnote [1611] 575 above).

[1613] [577] See footnote [1061] 385 above.

[1614] [578] See footnote [1558] 522 above.

[1615] [579] Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of "E2" claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Panel of Commissioners of the United Nations Compensation Commission

S/AC.26/1999/6

In its 1999 report concerning the second instalment of "E2" claims,[1616] [196] the Panel of Commissioners of the United Nations Compensation Commission found that its interpretation, based on Governing Council decision 9, according to which losses resulting from a decline in operations were compensable, was "confirmed by accepted principles of international law regarding State responsibility" as enshrined, for example, in draft article 44, paragraph 2, adopted by the International Law Commission on first reading:[1617] [197]

> 77. The preceding analysis based on decision 9 [of the Governing Council of the United Nations Compensation Commission] is confirmed by accepted principles of international law regarding State responsibility. The Draft articles on State Responsibility by the International Law Commission, for example, provide in relevant part that 'compensation covers any economically assessable damage sustained … , and, where appropriate, loss of profits'.[1618] [198]

[A/62/62, para. 111]

S/AC.26/2000/2

In its 2000 report concerning the fourth instalment of "E2" claims,[1619] [199] the UNCC Panel of Commissioners, after having found that "[t]he standard measure of compensation for each loss that is deemed to be direct should be sufficient to restore the claimant to the same financial position that it would have been in if the contract had been performed", referred in a footnote (without specifying any paragraph) to the commentary to draft article 44 adopted by the International Law Commission on first reading.[1620] [200]

[A/62/62, para. 112]

[1616] [196] "E2" claims before the United Nations Compensation Commission are claims of non-Kuwaiti corporations that do not fall into any of the other subcategories of "E" claims (*i.e.*, "E1" (oil sector claims), "E3" (claims of non-Kuwaiti corporations related to construction and engineering) and "E4" (claims of Kuwaiti corporations, excluding those relating to the oil sector)).

[1617] [197] This provision was amended and incorporated in article 36 as finally adopted in 2001. The text of draft article 44 adopted on first reading was as follows:

> Article 44
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> Compensation
>
> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
>
> 2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

[1618] [198] S/AC.26/1999/6, para. 77 (footnote omitted).

[1619] [199] See footnote [1616] 196 above.

[1620] [200] S/AC.26/2000/2, para. 157, footnote 61.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

S.D. Myers Inc. v. *Canada*

In its 2000 partial award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA under the UNCITRAL Rules to hear the *Myers* v. *Canada* case, in order to determine the methodology for the assessment of the compensation due in that case, noted that, "[t]here being no relevant provisions of the NAFTA other than those contained in article 1110", it needed to turn "for guidance" to international law.[1621] [201] After having quoted a passage of the judgement of the Permanent Court of International Justice on the merits in the *Factory at Chorzów* case on the question of reparation, the arbitral tribunal further observed that

> [t]he draft articles on State responsibility under consideration by the International Law Commission at the date of this award similarly propose that in international law, a wrong committed by one State against another gives rise to a right to compensation for the economic harm sustained.[1622] [202]

[A/62/62, para. 113]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1623] [203] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 36, it stated that "[c]ompensation is designed to cover any 'financially assessable damage including loss

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[1621] [201] NAFTA, Partial Award, 13 November 2000, para. 310 reproduced in *International Law Reports*, vol. 121, p. 127. The relevant parts of article 1110 of NAFTA read as follows:

> 1110(1). No Party may directly or indirectly nationalize or expropriate an investment of an investor or another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (*a*) For a public purpose;
>
> (*b*) On a non-discriminatory basis;
>
> (*c*) In accordance with due process of law and Article 1105(1); and
>
> (*d*) On payment of compensation in accordance with paragraphs 2 through 6.
>
> 1110(2). Compensation shall be equivalent to the firm market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

[1622] [202] *Ibid*., para. 312, reproduced in *International Law Reports*, vol. 121, p. 128. Although the arbitral tribunal did not mention it expressly, it was referring to draft article 44, as adopted by the International Law Commission on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65), which was amended and incorporated in article 36 finally adopted in 2001. For the text of draft article 44, see footnote [1617] 197 above.

[1623] [203] See footnote [1100] 163 above.

of profits insofar as it is established'" and that "compensation is only called for when the damage is not made good by restitution".[1624] 204

[A/62/62, para. 114]

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, noted that article 36 finally adopted by the International Law Commission in 2001 provided that "only where restitution cannot be achieved can equivalent compensation be awarded".[1625] 205

[A/62/62, para. 115]

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 36 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo Nagymaros Project (Hungary/Slovakia)*, '[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it' *(I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152–153; see also Article 36 of the ILC's Articles on State Responsibility).[1626] 11

[A/62/62/Add.1, para. 7]

International arbitral tribunal (under the ICSID Convention)

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

In its 2007 award, the arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* case applied article 36 of the State responsibility articles in its determination of the loss suffered by the investor.[1627] 56 It recalled the relevant paragraph of the commentary to article 36 indicating that the func-

[1624] 204 *Ibid.*, para. 401 and notes 214 and 215.

[1625] 205 ICSID, Case No. ARB/03/16, Award, 2 October 2006, paras. 494 and 495.

[1626] 11 ICJ, Judgment, *I.C.J. Reports 2007*, p. 43, para. 460.

[1627] 56 ICSID, Case No. ARB/02/1, Award, 25 July 2007, paras. 41–43.

tion of compensation is "to address the *actual losses incurred as a result* of the internationally wrongful act",[1628] [57] and held that

[a]ccordingly, the issue that the Tribunal has to address is that of the identification of the '*actual loss*' suffered by the investor '*as a result*' of Argentina's conduct. The question is one of '*causation*': what did the investor lose by reason of the unlawful acts?[1629] [58]

The tribunal also referred to the State responsibility articles in its consideration of a claim for loss of profits. It again recalled the relevant extracts of the commentary in holding that,

as a matter of principle, it is necessary to outline at this point the distinction between accrued losses and lost future profits. Whereas the former have commonly been awarded by tribunals, the latter have only been awarded when '*an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable*'. Or, in the words of the Draft articles, '*in so far as it is established*'. The question is one of '*certainty*'. '*Tribunals have been reluctant to provide compensation for claims with inherently speculative elements*'.[1630] [59]

[A/65/76, para. 39]

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentine Republic* case, in its 2007 award, referred to the requirement in article 36, paragraph 2, that compensation is meant to cover any "financially assessable damage including loss of profits insofar as it is established", as reflecting the "appropriate standard of reparation under international law" in the absence of restitution or agreed renegotiation of contracts or other measures of redress.[1631] [60]

[A/65/76, para. 40]

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* referred to article 36 of the State responsibility articles in support of the assertion that

compensation encompasses both the loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*). Any direct damage is to be compensated. In addition, the second paragraph of Article 36 recognizes that in certain cases compensation for loss of profits may be appropriate to reflect a rule applicable under customary international law.[1632] [61]

[1628] [57] *Ibid*., para. 43. Reference to paragraph (4) of the commentary to article 36, emphasis in award.

[1629] [58] *Ibid*., para. 45, emphasis in original.

[1630] [59] *Ibid*., para. 51 (footnotes omitted). References to article 36, paragraph 2, and to paragraph (27) of the commentary to article 36, emphasis in award.

[1631] [60] See footnote [1026] 25 above, para. 401.

[1632] [61] See footnote [3] 4 above, para. 281.

The tribunal continued:

> Any determination of damages under principles of international law requires a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, *i.e.*, damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage, measured in an amount of money.[1633] 62

[A/65/76, para. 41]

International arbitral tribunal (under the ICSID Convention)

Desert Line Projects LLC v. *The Republic of Yemen*

In its 2008 award, the arbitral tribunal constituted to hear the *Desert Line Projects LLC* v. *Yemen* case, in dealing with a claim for non-material ("moral") damages, cited the commentary to article 36 in support of its conclusion that

> [e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them … . [As] it was held in the *Lusitania* cases, non-material damages may be 'very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated'.[1634] 63

[A/65/76, para. 42]

European Court of Human Rights

Guiso-Gallisay v. *Italy*

In the *Guiso-Gallisay* v. *Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 36 of the State responsibility articles as reflecting relevant international law in the case.[1635] 64

[A/65/76, para. 43]

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

In its award in *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia*, the arbitral tribunal indicated that "[t]he *Chorzów Factory* standard is reflected today in the ILC's Articles on State Responsibility, and in particular in their compensation provision

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[1633] 62 *Ibid*., para. 282.

[1634] 63 ICSID, Case No. ARB/05/17, Award, 6 February 2008, para. 289, emphasis in original, citing the reference to the *Lusitania* case (footnote [1550] 514 above), in paragraph (16) of the commentary to article 36.

[1635] 64 See footnote [1502] 55 above, para. 54.

… ".[1636] [171] The tribunal then cited the commentary to article 36 in support of the proposition that "compensation is generally assessed on the basis of the [Fair Market Value] of the property rights lost".[1637] [172] The tribunal also relied on article 36 in providing guidance on the applicable standard of compensation for breach of a provision requiring fair and equitable treatment, in a context where the treaty in question was silent on the point.[1638] [173]

[A/68/72, para. 120]

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Mohammad Ammar Al-Bahloul v. *The Republic of Tajikistan*

In *Mohammad Ammar Al-Bahloul* v. *The Republic of Tajikistan*, the arbitral tribunal cited article 36 in support of the assertion that "[w]here damage is not made good by way of restitution, then the ILC Articles envisage monetary compensation for the damage shown to be caused by the misconduct".[1639] [174]

[A/68/72, para. 121]

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 relied upon article 36 of the State responsibility articles, and the commentary thereto, in its analysis of the claimants' claim for compensation.[1640] [175] Hence, it noted that:

> Article 36 contains two express requirements, (i) that the damage be 'financially assessable', *i.e.* capable of being evaluated in money, and that it be 'established', *i.e.* such that the remedy be commensurate with the injured party's proven loss and thus make it whole in accordance with the general principle expressed in *The Chorzów Factory* Case as regards compensation for an illegal act … .[1641] [176]

It further pointed to the commentary to paragraph (2) of article 36, as providing guidance when considering "the quality of evidential proof required of a claimant to establish a claim, directly or indirectly, based on lost future profits under international law",[1642] [177] and noted that the commentary emphasized "'certainty' to be established evidentially by a claimant in all cases".[1643] [178] However, the tribunal took the view that it was clear from other legal materials cited in the commentary that the "concept of certainty [was] both

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[1636] [171] See footnote [288] 36 above, para. 504.

[1637] [172] *Ibid*., para. 505.

[1638] [173] *Ibid*., para. 532.

[1639] [174] See footnote [1198] 144 above, paras. 52 and 65.

[1640] [175] See footnote [866] 116 above, paras. 13–80 to 13–83.

[1641] [176] *Ibid*., para. 13–81.

[1642] [177] *Ibid*., para. 13–82.

[1643] [178] *Ibid*., para. 13–83.

relative and reasonable in its application, to be adjusted to the circumstances of the particular case".[1644] [179] It subsequently indicated that it was,

addressing contingent future events and not actual past events; it [was] seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involve[d] the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. It [was] not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal [could] only evaluate the chances of such a future event happening. That is not therefore an exercise in certainty, as such; but it is, in the circumstances, an exercise in 'sufficient certainty', as indicated by the ILC's Commentary cited above.[1645] [180]

[A/68/72, paras. 122–123]

International arbitral tribunal (under the ICSID Convention)

Joseph C. Lemire v. *Ukraine*

In its award in *Joseph C. Lemire* v. *Ukraine*, the arbitral tribunal, referring to article 36, paragraph 2, as reflecting the accepted understanding of the purpose of compensation, indicated that it only provided,

a theoretical definition of a general standard; the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, 'but for' the State's breach.[1646] [181]

The tribunal also relied upon article 36 in support of its assertions that "[t]he duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act",[1647] [182] and that compensation for speculative claims is not typically awarded.[1648] [183]

[A/68/72, paras. 124–125]

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

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal, citing the commentary to article 36, indicated that "[t]he reference to '*loss of profits*' in Article 36(2) confirms that the value of the property should be determined with reference to a date subsequent to that of the internationally wrongful act, provided the damage is '*financially assessable*', therefore not speculative".[1649] [184]

[A/68/72, para. 126]

[1644] [179] *Ibid*.

[1645] [180] *Ibid*., para. 13–91.

[1646] [181] See footnote [1291] 156, para. 152.

[1647] [182] *Ibid*., para. 155.

[1648] [183] *Ibid*., paras. 245–246.

[1649] [184] See footnote [56] 16 above, para. 710.

Marion Unglaube and Reinhard Unglaube v. *Republic of Costa Rica*

In its award in *Marion Unglaube and Reinhard Unglaube* v. *Republic of Costa Rica*, the arbitral tribunal referred to the State responsibility articles, particularly articles 34 through 39, as constituting "subsequent international practice" reflecting "the compensation standard under customary international law".[1650] 185

[A/68/72, para. 127]

International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. *Democratic Republic of the Congo)*

In its judgment on compensation in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo*), the International Court of Justice cited, *inter alia*, the commentary to article 36 of the State responsibility articles in support of the proposition that "[w]hile an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative".[1651] 186

[A/68/72, para. 128]

International arbitral tribunal (under the ICSID Convention)

[*Mr Franck Charles Arif* v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[1652] 172 as relevant for the analysis regarding the award of reparation.

[A/71/80, para. 121]]

Ioan Micula and others v. *Romania*

[In *Ioan Micula and others* v. *Romania*, the arbitral tribunal referred to articles 34 and 36 in acknowledging that the obligation to make full reparation "[i]n most cases … involves the payment of compensation".[1653] 173 It further noted that "the commentary to the ILC Articles limits compensation to 'damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote'".[1654] 174

[A/71/80, para. 122]]

[1650] 185 ICSID, Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 306.

[1651] 186 ICJ, Judgment, 19 June 2012, para. 49.

[1652] [172 See footnote [320] 46 above, para. 560.]

[1653] [173 See footnote [1188] 133 above, para. 917.]

[1654] [174 *Ibid*., para. 1009 (quoting para. (5) of the commentary to article 34).]

The arbitral tribunal in *Ioan Micula and others* v. *Romania*, observed that article 36, paragraph 2, provides that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established".[1655] [196]

[A/71/80, para. 133]

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. *Kazakhstan*

In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, the arbitral tribunal agreed that, "as reflected in Article 36 and Article 39 … Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct".[1656] [197] The tribunal also noted that the respondent

> rightly referred to the comments in [the] Commentaries on the ILC Articles on State Responsibility and to respective comments in earlier awards that the investor must meet a high standard of proof to establish a claim for lost profits, especially due to the degree of economic, political and social exposure of long-term investment projects. To meet this standard, an investor must show that their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages.[1657] [198]

[A/71/80, para. 134]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

SAUR International S.A. v. *Republic of Argentina*

In *SAUR International S.A.* v. *Republic of Argentina*, the arbitral tribunal cited article 36, paragraph 2, when discussing "un principe international bien établi et que les deux parties reconnaissent: une fois les violations avérées, l'investisseur affecté doit obtenir une réparation intégrale qui soit équivalente au paiement d'une indemnisation incluant à la fois le dommage réel et le manque à gagner".[1658] [199]

[A/71/80, para. 135]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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",[1659] [147] including articles 31, 36 and 39. In assessing contributory fault, the tribunal, quoting the commentary to article 31, stated that

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[1655] [196] See footnote [1188] 133 above, para. 920 (quoting article 36 (emphasis omitted)).

[1656] [197] SCC, Case No. V (116/2010), Award, 19 December 2013, paras. 1330 and 1452.

[1657] [198] *Ibid*., para. 1688.

[1658] [199] ICSID, Case No. ARB/04/4, Award, 22 May 2014, para. 160, footnote 105 (footnote omitted).

[1659] [[147] See footnote [19] 7 above, para. 1593.]

[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.[1660] [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.[1661] [149]

[A/71/80, para. 106]]

In deciding on the existence of a breach of the Energy Charter Treaty, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* referred to the principle contained in article 36 and quoted from the commentary to the article, which states that "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. Compensation corresponds to the financially assessable damage suffered … it is not concerned to punish … nor does compensation have an expressive or exemplary character".[1662] [200] The tribunal indicated that while unanticipated events "decrease the value of the right to restitution (and accordingly the right to compensation in lieu of restitution), they do not affect an investor's entitlement to compensation of the damage 'not made good by restitution' within the meaning of Article 36(1) of the ILC Articles on State Responsibility".[1663] [201]

[A/71/80, para. 136]

International arbitral tribunal (under the ICSID Convention)

Tidewater Investments SRL and Tidewater Caribe C.A. v. *The Bolivarian Republic of Venezuela*

In *Tidewater Investments SRL and Tidewater Caribe C.A.* v. *The Bolivarian Republic of Venezuela*, the arbitral tribunal referenced the commentary to article 36 in support of "the standard of compensation to be applied in cases of lawful compensation, where the investment constituted a going concern at the time of the taking. The Guidelines prescribe 'the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred'".[1664] [202]

[A/71/80, para. 137]

[1660] [148 *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).]

[1661] [149 *Ibid*., para. 1775.]

[1662] [200] *Ibid*., para. 1590 (quoting para. (4) of the commentary to article 36).

[1663] [201] *Ibid*., para. 1768.

[1664] [202] ICSID, Case No. ARB/10/5, Award, 13 March 2015, para. 153, footnote 241.

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* referred to article 36 in support of the view that "the basic standard to be applied is that of full compensation (*restitutio in integrum*) for the loss incurred as a result of the internationally wrongful act", which represents "the accepted standard in customary international law".[1665] [203]

[A/71/80, para. 138]

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

The arbitral tribunal in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia* indicated with reference to article 36 that, "if restitution in kind is impossible or not practicable, the compensation awarded must wipe out all the consequences of the wrongful act", and that "compensation shall cover any financially assessable damage, including loss of profits insofar as it is established".[1666] [204] It also observed that it was required to "value the loss with reasonable certainty".[1667] [205]

[A/71/80, para. 139]

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

In *Hrvatska Elektroprivreda d.d.* v. *Republic of Slovenia*, the arbitral tribunal relied on article 36 as "reflecting the principle in *Chorzów Factory*" when stating that "it is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered".[1668] [206]

[A/71/80, para. 140]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela* stated that the State responsibility articles "are currently considered to be the most accurate reflection of customary international law" regarding the measurement and calculation of compensation.[1669] [207] Regarding the determination of fair market value, the arbitral tribunal noted that "[e]ach tribunal must, thus, attempt to give meaning both to the words of the treaty regarding the putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles, and the ruling of the PCIJ in the *Chorzów* case".[1670] [208]

[A/71/80, para. 141]

[1665] [203] See footnote [63] 16 above, para. 27.

[1666] [204] See footnote [65] 18 above, para. 328 (quoting article 36).

[1667] [205] *Ibid*., para. 384.

[1668] [206] See footnote [1322] 163 above, para. 238, footnote 19.

[1669] [207] See footnote [342] 68 above, para. 515.

[1670] [208] *Ibid*., para. 543 (footnotes omitted).

[Permanent Court of Arbitration (under UNCITRAL Rules)

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",[1671] [150] which were relevant with regard to the parties' claims for relief.[1672] [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.[1673] [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.[1674] [158]

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

[*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".[1675] [176]

[A/74/83, p. 31]]

[*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".[1676] [177]

[A/74/83, p. 31]]

[1671] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1672] [151 *Ibid*., para. 9.9.]

[1673] [157 ICSID, Case No. ARB/13/7, Award, 12 January 2016, para. 222.]

[1674] [158 *Ibid*., paras. 223–224.]

[1675] [176 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 663.]

[1676] [177 ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 1127–1129.]

[*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].[1677] [191]

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

[European Court of Human Rights

Ryabkin and Volokitin v. *Russia*

In *Ryabkin and Volokitin* v. *Russia*, the European Court of Human Rights considered articles 35 and 36 of the State responsibility articles as relevant international law.[1678] [193]

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

International Arbitral tribunal (under the ICSID Convention)

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal referred to article 36 of the State responsibility articles when stating that it is generally recognized that in matters of expropriation, the value of the expropriated good(s) has to assessed with reference to the fair market value.[1679] [199]

[A/74/83, p. 35]

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that the State responsibility articles "are currently considered to be the most accurate reflection of customary international law" regarding the assessment of compensation.[1680] [200] Regarding the determination of fair market value, the arbitral tribunal noted that "[e]ach tribunal must, thus, attempt to give meaning both to the words of the treaty regarding the putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles, and the ruling of the PCIJ in the *Chorzów* case".[1681] [201]

[A/74/83, p. 35]

[1677] [191 ICSID, Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, para. 1085.]

[1678] [193 ECHR, Third Section, Application Nos. 52166/08 and 8526/09, Judgment, 28 June 2016, para. 30.]

[1679] 199 ICSID, Case No. ARB/13/7, Award (French), 12 January 2016, paras. 224–225 and footnote 157.

[1680] 200 ICSID, Case No. ARB/11/26, Award, 29 January 2016, paras. 515–516.

[1681] 201 *Ibid*., para. 543.

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* cited article 36 and the corresponding commentary to note that "[a]ppraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished".[1682] [202] The tribunal also noted that "the ILC Articles recognize that in certain cases compensation for loss of profits may be appropriate".[1683] [203]

[A/74/83, p. 35]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Tidewater Investment SRL and Tidewater Caribe, C.A. v. *Bolivarian Republic of Venezuela*

In *Tidewater Investment SRL and Tidewater Caribe, C.A.* v. *Bolivarian Republic of Venezuela*, the *ad hoc* committee, in discussing the respondent's arguments for an excess of powers by the tribunal, noted that the tribunal had considered the "World Bank Guidelines [on the Treatment of Foreign Direct Investment]… together with case law, doctrine and the International Law Commission Draft on the Responsibility of States, as providing 'reasonable guidance' for the interpretation of Articles 5 and 8 of the BIT"[1684] [204] to find "a proper standard for the determination of the 'market value'".[1685] [205]

[A/74/83, p. 35]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, referred to articles 35 and 36 of the State responsibility articles in support of its view that "the fair market value also reflects the compensation standard under customary international law".[1686] [206]

[A/74/83, p. 36]

Burlington Resources Inc. v. *Republic of Ecuador*

The arbitral tribunal in *Burlington Resources Inc.* v. *Republic of Ecuador* concluded, citing article 36 of the State responsibility articles, that "Burlington has not proven, with

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[1682] [202] ICSID, Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 849–850.

[1683] [203] *Ibid*., para. 873.

[1684] [204] ICSID, Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 144.

[1685] [205] *Ibid*., para. 132.

[1686] [206] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 627 and 711.

the reasonable certainty that international law requires for a lost profits claim, that an extension capable of being 'taken' [by expropriation] would in fact have materialized from its [Burlington's] right to negotiate [a contractual extension]".[1687] 207

[A/74/83, p. 36]

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*, with reference to article 36 of the State responsibility articles, calculated "compensation reflecting the capital value of property taken as a result of an internationally wrongful on the basis of the 'fair market value' of the property lost", taking into account "the nature of the asset concerned".[1688] 208

[A/74/83, p. 36]

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, citing the text of article 36, paragraph 1, that the claimant "is entitled to full reparation of the loss that it has suffered from Respondent's breaches of the treaty".[1689] 209 It further observed that "moral damages are not covered by the principle set out in Article 36 of the ILC Articles".[1690] 210

[A/74/83, p. 36]

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

> [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.[1691] 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.[1692] 212

[A/74/83, p. 36]

[1687] 207 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 278.

[1688] 208 ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 872–73.

[1689] 209 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 564.

[1690] 210 *Ibid*., para. 565.

[1691] 211 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.96–10.97.

[1692] 212 *Ibid*., para. 10.138.

[*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".[1693] 236

[A/74/83, p. 39]]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[1694] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[1695] 43

[A/77/74, p. 11]]

[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* referred to articles 27, under which the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, and to article 36.[1696] 112 The tribunal therefore determined that under the applicable investment treaty, "whilst a State may adopt or enforce a measure pursuant to the stated objectives" in the treaty, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[1697] 113

[A/77/74, p. 22]]

[1693] [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 above), 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.]

[1694] [42 Final Award, 26 March 2021, para. 72.]

[1695] [43 *Ibid*., paras. 72 and 134–135.]

[1696] [112 See footnote [401] 51 above, para. 835.]

[1697] [113 *Ibid*., para. 830.]

[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 principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1698] [157] The tribunal also referred to articles 36[1699] [158] and 37.[1700] [159]

[A/77/74, p. 28]]

[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 noted that article 36, paragraph 2, provided that "compensation shall cover any financially assessable damages including loss of profits insofar as it is established".[1701] [181]

[A/77/74, p. 31]]

International arbitral tribunal (under the ICSID Convention)

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

The arbitral tribunal in *9REN Holding S.à.r.l.* v. *Kingdom of Spain* referred to article 36 in assessing the amount of recoverable legal costs of the proceeding, noting that the claims for legal costs had been made under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, "and not as compensation for an internationally wrongful act subject to the *Chorzów Factory* and other principles of international law".[1702] [182]

[A/77/74, p. 31]

Perenco Ecuador Limited v. *Ecuador*

In *Perenco Ecuador Limited* v. *Ecuador*, the arbitral tribunal found that, pursuant to article 36, "it should award compensation insofar as [the] damage is not made good by restitution".[1703] [183] Furthermore, the tribunal emphasized that "[t]he key point is that financial damage must not only be proximately caused by the unlawful act(s), but that it also be 'assessable', that is, capable of being assessed".[1704] [184]

[A/77/74, p. 31]

[1698] [157 PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.]

[1699] [158 *Ibid*., para. 740.]

[1700] [159 *Ibid*., para. 701.]

[1701] [181] ITLOS, *M/V "Norstar" (Panama* v. *Italy)* (footnote [72] 12 above), p. 116, para. 431.

[1702] [182] See footnote [1372] 122 above, para. 440.

[1703] [183] See footnote [1379] 129 above, para. 74.

[1704] [184] *Ibid*., paras. 321–322.

(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 cited articles 35, 36 and 38, noting that "in investment law, full reparation may take the form of restitution or compensation", plus interest.[1705] [179]

The arbitral tribunal noted that, pursuant to article 36, "it is generally accepted that compensation can be claimed for incidental expenses incurred as the result of an internationally wrongful act, insofar as they are financially assessable and reasonable".[1706] [185]

[A/77/74, p. 31]

Permanent Court of Arbitration (under UNCITRAL Rules)

OOO Manolium Processing v. *Republic of Belarus*

The arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* noted that article 36, paragraph 1, reflected the general principle that "injured claimants bear the burden of demonstrating that there is a sufficiently close relationship between the host State's irregular conduct and the compensation which is being claimed. The duty to compensate extends only to those damages which are legally regarded as the consequence of an unlawful act".[1707] [186]

[A/77/74, p. 31]

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* indicated that "[w]here restitution is not possible, pursuant to Article 36 (1) the ILC Draft Articles, a State's obligation is to pay compensation for the damage caused".[1708] [187]

[A/77/74, p. 32]

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 explained that damages, "under Article 36, include loss of profits insofar as they are established".[1709] [188] Furthermore, it stressed that article 36, paragraph 1, reflected the general principle that "injured claimants bear the burden of demonstrating … that the claimed quantum of damage was actually suffered, and … that such damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (*i.e.*, not 'too remote')".[1710] [189]

[A/77/74, p. 32]

[1705] [179 See footnote [1029] 108 above, para. 396.]

[1706] [185] *Ibid*., para. 427.

[1707] [186] See footnote [799] 86 above, para. 657.

[1708] [187] See footnote [401] 51 above, para. 894.

[1709] [188] See footnote [402] 52 above, para. 726.

[1710] [189] *Ibid*., paras. 728–729.

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal noted that "[s]ince restitution of Claimants to the *status quo* ante … is neither requested nor suggested by the Parties, nor is it materially possible, the only form of reparation in question in the present proceeding is compensation in the sense of Article 36 of the ILC Articles". The tribunal further cited the article, noting that "[p]ursuant to paragraph 1 of that provision, Respondent 'is under an obligation to compensate for the damage caused'; pursuant to paragraph 2 of the same provision, 'compensation shall cover any financially assessable damage including loss of profits insofar as it is established'".[1711] [190]

[A/77/74, p. 32]

[1711] [190] See footnote [193] 26 above, para. 441.

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State." Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[1712] [580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-

[1712] [580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

tion. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[1713] 581

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[1714] 582 violations of sovereignty or territorial integrity,[1715] 583 attacks on ships or aircraft,[1716] 584 ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[1717] 585 and violations of the premises of embassies or consulates or of the residences of members of the mission.[1718] 586

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[1719] 587 Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[1720] 588 a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the

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[1713] 581 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 272–273, para. 122.

[1714] 582 Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (footnote [1007] 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (footnote [1485] 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[1715] 583 As occurred in the *"Rainbow Warrior"* arbitration (footnote [40] 46 above).

[1716] 584 Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[1717] 585 See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[1718] 586 Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (footnote [1485] 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[1719] 587 In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (footnote [40] 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[1720] 588 For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

internationally wrongful act[1721] [589] or the award of symbolic damages for non-pecuniary injury.[1722] [590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[1723] [591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.
>
> This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[1724] [592]

This has been followed in many subsequent cases.[1725] [593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apolo-

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[1721] [589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1966), p. 257).

[1722] [590] See, *e.g.*, the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and *"Rainbow Warrior"* (footnote [40] 46 above).

[1723] [591] See paragraph (11) of the commentary to article 30.

[1724] [592] *Corfu Channel, Merits* (footnote [29] 35 above), p. 35, repeated in the operative part (p. 36).

[1725] [593] For example, *"Rainbow Warrior"* (footnote [40] 46 above), p. 273, para. 123.

gies were required in the *"I'm Alone"*,[1726] [594] *Kellett*[1727] [595] and *"Rainbow Warrior"*[1728] [596] cases, and were offered by the responsible State in the *Consular Relations*[1729] [597] and *LaGrand*[1730] [598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, *e.g.* where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[1731] [599]

(8) Excessive demands made under the guise of "satisfaction" in the past[1732] [600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[1733] [601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph *3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Quiborax S.A. et al. v. *Plurinational State of Bolivia*

In its decision on jurisdiction in *Quiborax S.A. et al.* v. *Plurinational State of Bolivia,* the arbitral tribunal decided that it was more appropriate to entertain in the final award on the merits the claimants' request for a declaratory judgment pursuant to article 37.[1734] [187]

[A/68/72, para. 129]

[1726] [594] See footnote [1722] 590 above.

[1727] [595] Moore, *Digest*, vol. V, p. 44 (1897).

[1728] [596] See footnote [40] 46 above.

[1729] [597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[1730] [598] See footnote [236] 119 above.

[1731] [599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[1732] [600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote [1714] 582 above), pp. 187–188.

[1733] [601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[1734] [187] ICSID, Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 308.

[International arbitral tribunal (under UNCITRAL Rules)

Valeri Belokon v. *Kyrgyz Republic*

In *Valeri Belokon* v. *Kyrgyz Republic*, the arbitral tribunal noted that, while it had "been directed to the ILC Articles on State Responsibility with regards to questions of attribution (Articles 4 and 8), no reference appears to have been made to this Tribunal's authority to grant Satisfaction (Article 37) or Assurances (Article 30) of the form requested".[1735] [137] It therefore held that its authority to grant the requested relief under international law had "not been sufficiently established" and so declined to grant it.[1736] [138]

[A/71/80, para. 99]]

International arbitral tribunal (under the ICSID Convention)

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, following a detailed examination of the remedy of satisfaction under international law, found that "the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair".[1737] [209] It further noted that "[t]he fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate".[1738] [210]

[A/71/80, para. 142]

[Permanent Court of Arbitration (under UNCITRAL Rules)

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",[1739] [150] which were relevant with regard to the parties' claims for relief.[1740] [151]

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

[1735] [137 Award, 24 October 2014, para. 275.]

[1736] [138 *Ibid*., para. 276.]

[1737] [209] See footnote [65] 18 above, para. 555 (see paras. 550–560 for the full discussion).

[1738] [210] *Ibid*., para. 560.

[1739] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1740] [151 *Ibid*., para. 9.9.]

European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1741] 213

[A/74/83, p. 37]

[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 principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1742] 157 The tribunal also referred to articles 36[1743] 158 and 37.[1744] 159

[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 referred to satisfaction as one of the three forms that full reparation could take, explaining that it "may consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality, as established in Article 37".[1745] 192 Moreover, the tribunal indicated that "[t]he only limitation (identified in Article 37 (3) of the ILC Articles) is that the satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State".[1746] 193

[A/77/74, p. 32]

[1741] 213 ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and footnote 6.

[1742] [157 PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.]

[1743] [158 *Ibid*., para. 740.]

[1744] [159 *Ibid*., para. 701.]

[1745] 192 See footnote [402] 52 above, para. 726.

[1746] 193 *Ibid*., para. 738.

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 referred to article 37 and the commentary thereto in analysing a request for reparations in the form of "the conduct of criminal investigations and prosecutions",[1747] [194] observing that the forms of satisfaction listed in article 37, paragraph 2, "are not exhaustive. In principle, satisfaction can include measures such as 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act'".[1748] [195]

[A/77/74, p. 32]

[1747] [194] ICJ, (footnote [1410] 160 above), para. 388.

[1748] [195] *Ibid*., para. 389.

Article 38. Interest

1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Commentary

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[1749] [602] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[1750] [603] In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due has been fixed and the obligation to pay has been established".[1751] [604]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[1752] [605] The experience of the Iran–United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran* v. *The United States of America (Case A–19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise . . . of the discretion accorded to them in deciding each particular case".[1753] [606] On the issue of principle the tribunal said:

[1749] [602] Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote [702] 182 above), pp. 252–253.

[1750] [603] See, *e.g.*, the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.)* v. *United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

[1751] [604] See footnote [28] 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[1752] [605] In the *M/V "Saiga"* case (footnote [1096] 160 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

[1753] [606] *The Islamic Republic of Iran* v. *The United States of America,* Iran–U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (footnote [1017] 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment"… . Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[1754] 607

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[1755] 608 It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[1756] 609

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[1757] 610

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[1758] 611

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the

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[1754] 607 *The Islamic Republic of Iran* v. *The United States of America* (*ibid.*), pp. 289–290.

[1755] 608 See C. N. Brower and J. D. Brueschke, *op. cit.* (footnote [1556] 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[1756] 609 See the detailed analysis of Chamber Three in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone,* Iran–U.S. C.T.R., vol. 11, p. 3, at pp. 26–31 (1986).

[1757] 610 Awards of interest, Decision, 18 December 1992, S/AC.26/1992/16.

[1758] 611 See, *e.g.*, the *Velásquez Rodríguez,* Compensatory Damages case (footnote [1552] 516 above), para. 57. See also *Papamichalopoulos* (footnote [1551] 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote [1557] 521 above), pp. 270–272.

principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[1759] [612] Some national court decisions have also dealt with issues of interest under international law,[1760] [613] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran–United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co.* v. *The Government of the Islamic Republic of Iran*, the tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable" … Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. [1761] [614]

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[1762] [615] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

> the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[1763] [616]

[1759] [612] See, *e.g.*, the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, H. M. Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote [1587] 551 above).

[1760] [613] See, *e.g.*, *McKesson Corporation* v. *The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F, Supp. 2d 13 (2000).

[1761] [614] Iran–U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law,* vol. III (footnote [1604] 568 above), p. 1997.

[1762] [615] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote [1017] 357 above), pp. 477–478.

[1763] [616] *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote [1483] 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[1764] 617 This view has also been supported by arbitral tribunals in some cases.[1765] 618 But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[1766] 619 date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[1767] 620 In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran–United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[1768] 621 On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally

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[1764] 617 F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

[1765] 618 See, *e.g.*, *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, Final Award, 17 February 2000, paras. 103–105.

[1766] 619 Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (footnote [1014] 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

[1767] 620 See, *e.g.*, J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid.*, pp. 38–40, with references).

[1768] 621 *The Islamic Republic of Iran* v. *The United States of America (Case No. A-19)* (footnote [1753] 606 above).

employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, *i.e.* compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

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,[1769] [206] the Panel of Commissioners was of the view that Governing Council decision 16 on "awards of interest" addressed any claim that in fact arose as a result of the delay of payment of compensation. It noted that the said decision provided that interest would be awarded "from the date the loss occurred until the date of payment". In a footnote, the panel further observed that this decision was "similar" to article 38, paragraph 2, as finally adopted by the International Law Commission in 2001, which it quoted.[1770] [207]

[A/62/62, para. 116]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1771] [208] in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to the principles embodied in articles 34, 35, 36 and 38, as finally adopted by the International Law Commission in 2001. With regard to article 38, it found that "[d]ecisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends".[1772] [209]

[A/62/62, para. 117]

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 38, and the commentary thereto, in support of the assertion that "the

[1769] [206] See footnote [1497] 192 above.

[1770] [207] S/AC.26/2003/15, para. 172, footnote 59.

[1771] [208] See footnote [1100] 163 above.

[1772] [209] *Ibid.*, para. 404 and footnote 220.

awarding of interest depends on the circumstances of each case and, in particular, whether an award of interest is necessary in order to ensure full reparation".[1773] 188

[A/68/72, para. 130]

SGS Société générale de Surveillance S.A. v. *The Republic of Paraguay*

The arbitral tribunal in *SGS Société Générale de Surveillance S.A.* v. The Republic of Paraguay cited article 38, paragraph 2, in support of its assertion that "[t]he virtually universal principle of international law and international arbitration practice in the case of a delayed payment of monetary obligations due is to apply interest as of the date payment became due".[1774] 189

[A/68/72, para. 131]

Marion Unglaube and Reinhard Unglaube v. *Republic of Costa Rica*

In *Marion Unglaube and Reinhard Unglaube* v. *Republic of Costa Rica*, the arbitral tribunal, citing article 38, paragraph 1, indicated that "[c]ustomary international law, as reflected in the ILC articles, broadly indicates that the interest rate should be set to achieve the result of full reparation".[1775] 190

[A/68/72, para. 132]

Mr Franck Charles Arif v. *Republic of Moldova*

In *Mr Franck Charles Arif* v. *Republic of Moldova*, the arbitral tribunal noted that:

Article 38 of the International Law Commission's Articles on State Responsibility confirms that interest will be payable 'when necessary in order to ensure full reparation'. It also confirms that the general view in international law is in favour of simple and not compound interest, although other commentators suggest the trend in investment arbitration is in favour of compound interest.[1776] 212

[A/71/80, para. 143]

Ioan Micula and others v. *Romania*

The arbitral tribunal in *Ioan Micula and others* v. *Romania* agreed that the "overwhelming trend among investment tribunals is to award compound rather than simple interest", which was not reflected in the commentary to article 38 relied on by the respondent.[1777] 213 The tribunal further noted that, according to the commentary to article 38, an award of interest is inappropriate where it would result in double recovery, but "interest

[1773] 188 See footnote [288] 36 above, paras. 659 and 660.

[1774] 189 ICSID, SGS Société générale de Surveillance S.A. v. The Republic of Paraguay, Case No. ARB/07/29, Award, 10 February 2012, para. 184.

[1775] 190 See footnote [1650] 185 above, para. 320.

[1776] 212 See footnote [320] 46 above, para. 617.

[1777] 213 See footnote [1188] 133 above, para. 1266.

may be due on the profits which would have been earned but which have been withheld from the original owner".[1778] 214

[A/71/80, para. 144]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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

The arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* referred to article 38 and the commentary thereto, as part of the legal framework relevant for the award of interest.[1779] 215 It went on to note that "the ILC Articles on State Responsibility [do not] provide specific rules regarding how interest should be determined".[1780] 216

[A/71/80, para. 145]

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*

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, the arbitral tribunal indicated, based on article 38, that "customary international law authorizes the payment of interest on the principal sum due from the time the amount should have been paid until the date when the payment obligation is actually fulfilled".[1781] 217

[A/71/80, para. 146]

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

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal relied on article 38 to explain that pre-award interest, as opposed to post-award interest, "is granted in order to ensure full reparation",[1782] 218 and to note that "it is relevant to take into account the returns the Claimants might have earned on these investments because, had they been immediately compensated for the wrongs they suffered, this is where the Claimants contend they would have invested their wealth".[1783] 219

[A/71/80, para. 147]

[1778] 214 *Ibid*., para. 1275 (quoting para. (11) of the commentary to article 38).

[1779] 215 See footnote [19] 7 above, paras. 1652–1653.

[1780] 216 *Ibid*., para. 1678.

[1781] 217 See footnote [63] 16 above, para. 27, footnote 19.

[1782] 218 See footnote [114] 24 above, para. 943.

[1783] 219 *Ibid*., para. 947.

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, according to the commentary to article 38,

> [w]here a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery,' because '[a] capital sum cannot be earning interest and notionally employed in earning profits at one and the same time.' However, … 'interest may be due on the profits which would have been earned but which have been withheld from the original owner.[1784] 220

The tribunal also noted that it was

> aware that the Commentary to ILC Article 38, which the Respondent also invokes, states that '[t]he general view of courts and tribunals has been against the award of compound interest.' Yet, a review of arbitral decisions shows that compound interest has been deemed to 'better reflect … contemporary financial practice' and to constitute 'the standard of international law in … expropriation cases.' The view that compound interest better achieves full reparation has been adopted in a large number of decisions and is shared by this Tribunal.[1785] 221

[A/71/80, para. 148]

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

In *Hrvatska Elektroprivreda d.d.* v. *Republic of Slovenia*, the arbitral tribunal relied on article 38 and the commentary thereto when stating that "[t]his principle of full reparation thus guides the Tribunal in making its finding on interest".[1786] 222

[A/71/80, para. 149]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, in determining the interest due upon the compensation awarded, the arbitral tribunal referred to article 38 and the commentary thereto.[1787] 223

[A/71/80, para. 150]

[1784] 220 See footnote [65] 18 above, para. 514 (quoting para. (11) of the commentary to article 38).

[1785] 221 *Ibid*., para. 524 (quoting para. (8) of the commentary to article 38, and the cases of *LG&E* v. *Argentina*, ICSID, Case No. ARB/02/1, Award, 25 July 2007, para. 103; *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, ICSID, Case No. ARB/99/6, Award, 12 April 2002, para. 174; *Occidental* v. *Ecuador II*, ICSID, Case No. ARB/06/11, Award, 5 October 2012, para. 840; *El Paso* v. *Argentina*, ICSID, Case No. ARB/03/15, Award, 31 October 2011, para. 745 (footnote [56] 16 above); *Vivendi* v. *Argentina II*, ICSID, Case No. ARB/97/3, Award, 20 August 2007, para. 9.2.6; and *Wena* v. *Egypt*, ICSID, Case No. ARB/98/4, Award, 8 December 2000, para. 129 (footnotes omitted)).

[1786] 222 See footnote [1322] 163 above, para. 539 (quoting para. (2) of the commentary to article 38).

[1787] 223 See footnote [342] 68 above, paras. 575–576.

[Permanent Court of Arbitration (under UNCITRAL Rules)

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",[1788] [150] which were relevant with regard to the parties' claims for relief.[1789] [151]

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

International arbitral tribunal (under the ICSID Convention)

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal quoted article 38 of the State responsibility articles and the commentary thereto[1790] [214] with regard to the actualization of the loss caused by an expropriation.[1791] [215] The tribunal stated: "While the rationale and rate of interest applied by investment tribunals has varied widely, a consensus appears to have evolved around the principle of the claimant's opportunity cost."[1792] [216]

[A/74/83, p. 37]

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 38 of the State responsibility articles as an "authoritative statement" that "[t]he substantive international legal obligation to pay interest on monies due is well established",[1793] [217] and relied on the corresponding commentary to discuss the award of simple or compound interest.[1794] [218]

[A/74/83, p. 37]

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* referred to article 38 and its commentary thereto, when

[1788] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1789] [151 *Ibid*., para. 9.9.]

[1790] [214] ICSID, Case No. ARB/11/26, Award, 29 January 2016, para. 575.

[1791] [215] *Ibid*., para. 576.

[1792] [216] *Ibid*., para. 577.

[1793] [217] ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 930.

[1794] [218] *Ibid*., para. 935 and footnote 1319.

"deem[ing] it appropriate to award interest for damages so as to ensure full reparation to Claimant".[1795] 219

[A/74/83, p. 37]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela* noted "[a]s to the standard under customary international law, Article 38 of the ILC Draft Articles provides that '[t]he interest rate and mode of calculation shall be set so as to achieve [the] result [of ensuring full reparation]'".[1796] 220

[A/74/83, p. 37]

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal awarded compound interest, thereby diverging from the commentary to article 38 to the State responsibility articles, because "compound interest achieves full reparation better than simple interest".[1797] 221

[A/74/83, p. 38]

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, citing article 38, "note[d] that the ILC Articles also address interest as a component of a State's obligation to make full reparation"[1798] 222 and "ha[d] no hesitation in accepting that the payment of interest forms part of the obligation to make full reparation for a breach of an international obligation".[1799] 223

[A/74/83, p. 38]

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* "noted that neither the BIT nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined".[1800] 224

[A/74/83, p. 38]

[1795] 219 PCA, Case No. 2012–16, Partial Final Award, 6 May 2016, paras. 511–513.

[1796] 220 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 872.

[1797] 221 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 540.

[1798] 222 See footnote [355] 45 above, para. 1120.

[1799] 223 *Ibid*., para. 1121.

[1800] 224 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 992, also referring to *Yukos Universal Ltd. (Isle of Man)* v. *Russia*, PCA, Case No. AA 227, Final Award, 18 July 2014, para. 1678.

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* stated that article 38 of the State responsibility articles confirmed the general premise that "[a]n award of interest compensates the claimant for the loss of the use of its money as a result of the respondent's wrong. Thus, limiting the reparation for the deprivation of the use of money to a period shorter than the actual time during which the deprivation lasted can only be an exception."[1801] [225] The tribunal awarded interest upon finding "no reason to depart from the general principles set forth in article 38 of the ILC Articles".[1802] [226]

[A/74/83, p. 38]

International Court of Justice

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. *Nicaragua)*

The International Court of Justice in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* referred to article 38 and the commentary thereto when it recalled that "in the practice of international courts and tribunals, prejudgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case."[1803] [227]

[A/74/83, p. 38]

International Chamber of Commerce

Olin Holdings Limited v. *State of Libya*

In *Olin Holdings Limited* v. *State of Libya*, the tribunal "refer[red] to Article 38.1 of the ILC Articles on State responsibility, formulating the basic rules of international law concerning the responsibility of States for their internationally wrongful acts".[1804] [228] The tribunal further noted the "[p]arties' positions in relation to the rate of interest, and considers that the five percent (5%) commercial rate of interest applicable in Cyprus would achieve the result of ensuring full compensation pursuant to the ILC Articles on State Responsibility for the following reasons:

> (1) The Tribunal acknowledges that neither the Cyprus-Libya BIT nor international law more generally prompts the Tribunal to award interest based on the commercial rate of interest applicable in Libya;
>
> (2) The Tribunal recognizes that Olin is a Cypriot company and the interest rate applicable in Cyprus represents Olin's cost of borrowing this same sum from Cypriot banks and that as

[1801] [225] ICSID, Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, paras. 1217–1218.

[1802] [226] *Ibid*., para. 1221.

[1803] [227] ICJ, Judgment, 2 February 2018, para. 151.

[1804] [228] ICC, Case No. 20355/MCP, Final Award, 25 May 2018, para. 531.

such, awarding interests at the commercial rate applicable in Cyprus would enable the Claimant to achieve the result of full reparation.[1805] 229

[A/74/83, p. 38]

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 cited article 38 of the State responsibility articles when stating that "guidance should be taken from the principle of *restitutio ad integrum* under international law as reflected in Art. 38 of the ILC Articles".[1806] 230

[A/74/83, p. 39]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[1807] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[1808] 43

[A/77/74, p. 11]]

[International arbitral tribunal (under the ICSID Convention)

(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 cited articles 35, 36 and 38, noting that "in investment law, full reparation may take the form of restitution or compensation", plus interest.[1809] 179

[A/77/74, p. 31]]

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 cited article 38 and noted that, in its commentary thereto, the Commission had observed

[1805] 229 *Ibid*., para. 532.

[1806] 230 ICSID, Case No. ARB/13/35, Award, 9 October 2018, para. 596.

[1807] [42 Final Award, 26 March 2021, para. 72.]

[1808] [43 *Ibid*., paras. 72 and 134–135.]

[1809] [179 See footnote [1029] 108 above, para. 396.]

that "[t]here is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable".[1810] 196

[A/77/74, p. 33]

International arbitral tribunal (under the ICSID Convention)

Tethyan Cooper Company Pty Limited v. *Islamic Republic of Pakistan*

In *Tethyan Cooper Company Pty Limited* v. *Islamic Republic of Pakistan*, the arbitral tribunal quoted article 38 "as reflective of the standard [of full reparation] under customary international law".[1811] 197

[A/77/74, p. 33]

Permanent Court of Arbitration (under UNCITRAL Rules)

Stans Energy Corp. and Kutisay Mining LLC v. *Kyrgyz Republic (II)*

The tribunal in *Stans Energy Corp. and Kutisay Mining LLC* v. *Kyrgyz Republic (II)* reasoned that "[t]he principle of full reparation … implies that Stans Energy is entitled to both pre-award interest applied from the valuation date … to the date of the Award, and to post-award interest on the full amount of damages awarded by the Tribunal", and that "[g]uidance can be taken from the principle of *restitutio ad integrum* under international law as reflected in Art. 38 of the ILC Articles".[1812] 198

[A/77/74, p. 33]

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* noted that "[p]re-award interest is consistent with the principle of full compensation and also generally accepted in investment arbitration and this principle is enshrined in Article 38 of the ILC Draft Articles".[1813] 199 It added that "post-award interest provides an incentive to pay as is recognized in the ILC Draft Articles, Commentary (12) of Article 38".[1814] 200

[A/77/74, p. 33]

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. *Kingdom of Spain*

The arbitral tribunal in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l.* v. *Kingdom of Spain* referred to article 38, noting that "[i]nter-

[1810] 196 ITLOS, *M/V "Norstar" (Panama* v. *Italy)* (footnote [72] 12 above), p. 122, paras. 457–458.

[1811] 197 ICSID, Case No. ARB/12/1, Award, 12 July 2019, para. 1780.

[1812] 198 PCA, Case No. 2015–32, Award, 20 August 2019, para. 849.

[1813] 199 ICISD, Case No. ARB/15/36 (footnote [1378] 128 above), para. 718.

[1814] 200 *Ibid*., para. 722.

ests (whether pre- or post-award) are a necessary consequence of the principle of full reparation. They are a compensation for the damage suffered by the loss of use of the principal sum during the period for which the payment thereof continued to be withheld".[1815] 201

[A/77/74, p. 33]

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

The arbitral tribunal in *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar* noted that, pursuant to article 38, full reparation may take the form of restitution or compensation, "to which is added the interest on the capital 'when necessary in order to ensure full reparation'".[1816] 202

[A/77/74, p. 34]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

The arbitral tribunal in *Strabag SE* v. *Libya* referred to article 38 when analysing the question as to whether interest over the compensation determined in the award should be simple or compound. The tribunal referred to the commentary to article 38, noting that "compound interest should be awarded only where there are 'special circumstances which justify some element of compounding as an aspect of full reparation'".[1817] 203

[A/77/74, p. 34]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

Duzgit Integrity Arbitration (Republic of Malta v. *Democratic Republic of Sao Tome and Principe)*

In the *Duzgit Integrity Arbitration (Republic of Malta* v. *Democratic Republic of Sao Tome and Principe)*, the arbitral tribunal noted that

> [i]nterest is well established as an element of full reparation where monetary damages are awarded and is recognized as such within the Articles on State Responsibility. Whether an award of interest is required in a particular case, however, and the appropriate rate and mode of calculation depend upon what is required to achieve full reparation.

Since there was no specific rule established in the State responsibility articles or the United Nations Convention on the Law of the Sea, "this determination falls within the Tribunal's discretion, subject to the overarching goal of achieving full reparation".[1818] 204

[1815] 201 ICSID, Case No. ARB/13/30, Award, 11 December 2019, paras. 65–66.

[1816] 202 See footnote [1029] 108 above, para. 396.

[1817] 203 See footnote [498] 59 above, para. 962.

[1818] 204 See footnote [883] 98 above, para. 204.

The arbitral tribunal proceeded to analyse whether interest was due in respect of damages under various heads of claim.[1819] 205

[A/77/74, p. 34]

Permanent Court of Arbitration (under UNCITRAL Rules)

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

The arbitral tribunal in *Cairn Energy PLC and Cairn UK Holdings Limited* v. *Republic of India* indicated that "interest is a component of full reparation", with reference to article 38, paragraph 1.[1820] 206 The tribunal added:

> [A]n award of interest must put the Claimants in the position [in which] they would have been had the breach not occurred. An award of interest aims to compensate a claimant for having been deprived of funds that it could have either invested, or used to pay off existing debts or avoid new ones. In today's economy, this means that the claimant had to forgo earning compound interest or was forced to pay it.[1821] 207

[A/77/74, p. 34]

International arbitral tribunal (under the ICSID Convention)

Abed El Jaouni and Imperial Holding SAL v. *Lebanese Republic*

The arbitral tribunal in *Abed El Jaouni and Imperial Holding SAL* v. *Lebanese Republic* referred to article 38, noting that

> interest is an integral component of full compensation under customary international law, as expressed in the ILC Articles. In this regard, the purpose of the award of interest is the same purpose as an award of damages for breach of an international obligation: to place the victim in the economic position it would have been [in] if the international wrong had not been committed.[1822] 208

[A/77/74, p. 34]

Permanent Court of Arbitration (under UNCITRAL Rules)

Olympic Entertainment Group AS v. *Ukraine*

In *Olympic Entertainment Group AS* v. *Ukraine*, the arbitral tribunal cited article 38 and found that the claimant was "entitled to receive pre-award and post-award interest on the compensation awarded to it as to ensure full reparation".[1823] 209 The tribunal also cited articles 31 and 36.[1824] 210

[A/77/74, p. 35]

[1819] 205 *Ibid*., paras. 205–216.

[1820] 206 See footnote [1392] 142 above, para. 1955.

[1821] 207 *Ibid*., para. 1956.

[1822] 208 ICSID, Case No. ARB/15/3, Award, 14 January 2021, para. 356.

[1823] 209 PCA, Case No. 2019–18, Award, 15 April 2021, para. 183.

[1824] 210 *Ibid*., paras. 140–141.

International arbitral tribunal (under the ICSID Convention)

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal cited article 38, explaining that "compensation under the principle of full reparation for internationally unlawful conduct has to bear interest from the Valuation Date until the date of payment. This is what follows from general international law concerning State responsibility".[1825] [211] In that case, the tribunal took the view that compound interest was necessary in the sense of article 38 "to ensure full reparation of an investor for breach of a treaty that aims at protecting his or her investment",[1826] [212] as was the payment of interest "on the costs of the proceedings from the date the award is rendered".[1827] [213]

[A/77/74, p. 35]

[1825] [211] See footnote [193] 26 above, para. 587.

[1826] [212] *Ibid*., para. 592.

[1827] [213] *Ibid*., para. 610.

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", *etc.*[1828] [622]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[1829] [623]

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[1830] [624] and in State practice.[1831] [625] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

[1828] [622] See C. von Bar, *op. cit.* (footnote [960] 315 above), pp. 544–569.

[1829] [623] *LaGrand, Judgment* (footnote [236] 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (*b*), and commentary.

[1830] [624] See, *e.g.*, B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote [1241] 454 above) and B. Bollecker-Stern, *op. cit.* (footnote [1241] 454 above), pp. 265–300.

[1831] [625] In the *Delagoa Bay Railway* case (footnote [1597] 561 above), the arbitrators noted that: "[a]11 the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant … a reduction in reparation". In *S.S. "Wimbledon"* (footnote [28] 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote [1206] 432 above), p. 23.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, *i.e.* which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[1832] [626] While the notion of a negligent action or omission is not qualified, *e.g.* by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[1833] [627] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 cited article 39 in its analysis of the concept of "contributory negligence", and referred to the treatment of the concept in paragraph (5) of the commentary to the article when drawing the conclusion that "[t]he common feature [was] a fault by the claimant which ha[d] caused or contributed to the injury which [was] the subject-matter of the claim; and such a fault [was] synonymous with a form of culpability and not any act or omission falling short of such culpability".[1834] [191]

[A/68/72, para. 133]

[1832] [626] This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

[1833] [627] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

[1834] [191] See footnote [866] 116 above, paras. 11.12 and 11.13.

International arbitral tribunal (under the ICSID Convention)

Joseph C. Lemire v. *Ukraine*

In *Joseph C. Lemire* v. *Ukraine*, the arbitral tribunal considered article 39 as providing "supplementary guidance" to judges and arbitrators attempting to define and give content to the specific elements required by article 36 of the State responsibility articles.[1835] 192

[A/68/72, para. 134]

International arbitral tribunal (under the ICSID Convention)

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

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal cited article 39 in support of its finding that "[t]here [was] no contribution by the Claimant to a loss it suffered due to its own conduct, in the absence of wilful or negligent action by the Claimant".[1836] 193

[A/68/72, para. 135]

International arbitral tribunal (under the ICSID Convention)

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 referred to articles 31 and 39 of the State responsibility articles in its analysis of the concept of "contributory negligence".[1837] 194 The tribunal relied upon article 39, and the commentary thereto, in its analysis of the extent to which the damages owed to the claimants for the wrongful act of the respondent were to be reduced as a consequence of the claimant's own wrongful conduct.[1838] 195

[A/68/72, para. 136]

International arbitral tribunal (under the ICSID Convention)

Ioan Micula and others v. *Romania*

In *Ioan Micula and others* v. *Romania*, the arbitral tribunal relied on article 39 and the accompanying commentary to support the proposition that "cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation"[1839] 224 and not a release of the responsible State from liability.

[A/71/80, para. 151]

[1835] 192 See footnote [1291] 156 above, para. 156.

[1836] 193 See footnote [56] 16 above, para. 684, and note 648 thereto.

[1837] 194 See footnote [309] 50 above, paras. 665–668.

[1838] 195 See *ibid.*, paras. 665–666 and 673.

[1839] 224 See footnote [1188] 133 above, para. 926, footnote 180.

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. *Kazakhstan*

In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, the arbitral tribunal agreed with the parties that "Article 39 [of the] ILC Articles requires that the Claimants' conduct be taken into account in determining compensation"[1840] [225] and that "the burden may shift to the state to prove that a factor attributable to the victim or a third party caused the damage alleged, unless the injury can be shown to be severable in causal terms from that attributed to the State".[1841] [226]

[A/71/80, para. 152]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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",[1842] [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.[1843] [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.[1844] [149]

[A/71/80, para. 106]]

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

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[1840] [225] See footnote [1656] 196 above, para. 1452. See also the reference to article 39 in the text accompanying footnote [1656] 196 above.

[1841] [226] *Ibid*., para. 1452.

[1842] [[147] See footnote [19] 7 above, para. 1593.]

[1843] [[148] *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).]

[1844] [[149] *Ibid*., para. 1775.]

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.[1845] 227

"Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary", the tribunal had to

determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the Cyprus-Russia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain.[1846] 228

[A/71/80, para. 153]

[*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",[1847] 150 which were relevant with regard to the parties' claims for relief.[1848] 151

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

Cooper Mesa Mining Corporation v. *The Republic of Ecuador*

In *Cooper Mesa Mining Corporation* v. *The Republic of Ecuador*, the arbitral tribunal noted that "[a]s to 'contributory fault', the Tribunal refers to Article 39 of the ILC Articles on State Responsibility, entitled 'Contribution to the Injury' as being declaratory of international law".[1849] 231 The tribunal

decide[d] that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands. Given that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles.[1850] 232

The tribunal further noted that "Article 39 requires a factual assessment as regards the Claimant's conduct …".[1851] 233

[A/74/83, p. 39]

[1845] 227 See footnote [19] 7 above, paras. 1592.

[1846] 228 *Ibid*., para. 1633.

[1847] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1848] [151 *Ibid*., para. 9.9.]

[1849] 231 PCA, Case No. 2012–2, Award, 15 March 2016, para. 6.91.

[1850] 232 *Ibid*., para. 6.97.

[1851] 233 *Ibid*., para. 6.98.

International arbitral tribunal (under the ICSID Convention)

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal, citing the text of article 39 and the commentary thereto, noted that "[i]t is undisputed that a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury",[1852] [234] but "reject[ed] Ecuador's argument that Burlington [had] contributed to its own losses".[1853] [235]

[A/74/83, p. 39]

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".[1854] [236]

[A/74/83, p. 39]

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* referring to article 39 of the State responsibility articles, concluded that "the damages awarded to CIOC [the Caratube International Oil Company LLP] in the amount of its sunk investment costs must not be reduced on the basis of contributory fault".[1855] [237]

[A/74/83, p. 40]

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

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".[1856] [238]

[A/74/83, p. 40]

[1852] [234] ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 572.

[1853] [235] *Ibid*., para. 585.

[1854] [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 above), 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.

[1855] [237] ICSID, Case No. ARB/13/13, Award, 27 September 2017, para. 1195.

[1856] [238] ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.124–10.125.

Perenco Ecuador Limited v. *Ecuador*

The arbitral tribunal in *Perenco Ecuador Limited* v. *Ecuador* referred to article 39 and the commentary thereto, and recalled that the latter noted that the focus of the article was on "situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', *etc.*". The tribunal went on to recall that, according to paragraph (5) of the commentary thereto, "article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, *i.e.* which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights".[1857] 214

The arbitral tribunal concluded that "[n]one of the alleged instances of contributory fault said to arise from Perenco's responses to Ecuador's contractual demands can be considered to amount to wilful or negligent conduct within the meaning of Article 39".[1858] 215 It cautioned that "it is wrong to equate a party's zealous protection of its legal rights and interests with wilful conduct or contributory negligence within the meaning of the ILC Articles",[1859] 216 referring to actions taken by the investor pursuant to provisional measures obtained in the arbitral proceeding.[1860] 217

[A/77/74, p. 35]

(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 cited article 39 and the commentary thereto, noting that in the determination of reparation in investment cases, account should be taken of "the victim's contribution to the damage".[1861] 218 The tribunal explained that "according to the jurisprudence, a party contributes to the damage that it incurs if it engages in wilful or negligent conduct that demonstrates a want of due diligence on the part of the injured party in respect of its property or its rights and there is a causal link between the conduct and the injury".[1862] 219

[A/77/74, p. 35]

STEAG GmbH v. *Kingdom of Spain*

In *STEAG GmbH* v. *Kingdom of Spain*, the arbitral tribunal observed that, pursuant to article 39, "the conduct of the party that claims to have suffered damage and, in particular, its contribution to the damage or injury, is a widely recognized element for analysing and quantifying the compensable injury".[1863] 220

[A/77/74, p. 36]

[1857] 214 See footnote [1379] 129 above, para. 344.

[1858] 215 *Ibid*., para. 352.

[1859] 216 *Ibid*., para. 359.

[1860] 217 *Ibid*., para. 360.

[1861] 218 See footnote [1029] 108 above, para. 396; see also paras. 460–461.

[1862] 219 *Ibid*., para. 461.

[1863] 220 See footnote [1390] 140 above, para. 760.

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal's majority failed "to see any indications for Claimants' contribution to injury pursuant to Article 39 of the ILC Articles, either in the form of contributory fault to Respondent's internationally wrongful conduct …, or as a violation of a duty to mitigate damages after the revocation has taken place".[1864] [221]

[A/77/74, p. 36]

[1864] [221] See footnote [193] 26 above, para. 444 (footnote 521).