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.