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.