Article 39. Contribution to the injury

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

Commentary

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

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

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

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

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

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

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

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

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

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

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

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

In its award, the arbitral tribunal in the *Gemplus S.A. et al.* v. *The United Mexican States* and *Talsud S.A.* v. *The United Mexican States* cases cited article 39 in its analysis of the concept of "contributory negligence", and referred to the treatment of the concept in paragraph (5) of the commentary to the article when drawing the conclusion that "[t]he common feature [was] a fault by the claimant which ha[d] caused or contributed to the injury which [was] the subject-matter of the claim; and such a fault [was] synonymous with a form of culpability and not any act or omission falling short of such culpability".[1834] [191]

[A/68/72, para. 133]

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

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

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

International arbitral tribunal (under the ICSID Convention)

Joseph C. Lemire v. *Ukraine*

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

[A/68/72, para. 134]

International arbitral tribunal (under the ICSID Convention)

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

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

[A/68/72, para. 135]

International arbitral tribunal (under the ICSID Convention)

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

In its award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, the arbitral tribunal referred to articles 31 and 39 of the State responsibility articles in its analysis of the concept of "contributory negligence".[1837] 194 The tribunal relied upon article 39, and the commentary thereto, in its analysis of the extent to which the damages owed to the claimants for the wrongful act of the respondent were to be reduced as a consequence of the claimant's own wrongful conduct.[1838] 195

[A/68/72, para. 136]

International arbitral tribunal (under the ICSID Convention)

Ioan Micula and others v. *Romania*

In *Ioan Micula and others* v. *Romania*, the arbitral tribunal relied on article 39 and the accompanying commentary to support the proposition that "cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation"[1839] 224 and not a release of the responsible State from liability.

[A/71/80, para. 151]

[1835] 192 See footnote [1291] 156 above, para. 156.

[1836] 193 See footnote [56] 16 above, para. 684, and note 648 thereto.

[1837] 194 See footnote [309] 50 above, paras. 665–668.

[1838] 195 See *ibid.*, paras. 665–666 and 673.

[1839] 224 See footnote [1188] 133 above, para. 926, footnote 180.

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

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

In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, the arbitral tribunal agreed with the parties that "Article 39 [of the] ILC Articles requires that the Claimants' conduct be taken into account in determining compensation"[1840] [225] and that "the burden may shift to the state to prove that a factor attributable to the victim or a third party caused the damage alleged, unless the injury can be shown to be severable in causal terms from that attributed to the State".[1841] [226]

[A/71/80, para. 152]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

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

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal noted that it will "assess damages in the light of the foregoing accepted principles of international law",[1842] [147] including articles 31, 36 and 39. In assessing contributory fault, the tribunal, quoting the commentary to article 31, stated that

> [i]t is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.[1843] [148]

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

> as the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage. Rather, it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate.[1844] [149]

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

In assessing the contributory fault of the claimants, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* referred to article 39 and the commentary thereto, in conjunction with article 31, to

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[1840] [225] See footnote [1656] 196 above, para. 1452. See also the reference to article 39 in the text accompanying footnote [1656] 196 above.

[1841] [226] *Ibid*., para. 1452.

[1842] [[147] See footnote [19] 7 above, para. 1593.]

[1843] [[148] *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).]

[1844] [[149] *Ibid*., para. 1775.]

decide, on the basis of the totality of the evidence before it, whether there is a sufficient causal link between any wilful or negligent act or omission of the Claimants (or of Yukos, which they controlled) and the loss Claimants ultimately suffered at the hands of the Russian Federation through the destruction of Yukos.[1845] 227

"Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary", the tribunal had to

determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the Cyprus-Russia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain.[1846] 228

[A/71/80, para. 153]

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

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1847] 150 which were relevant with regard to the parties' claims for relief.[1848] 151

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

Cooper Mesa Mining Corporation v. *The Republic of Ecuador*

In *Cooper Mesa Mining Corporation* v. *The Republic of Ecuador*, the arbitral tribunal noted that "[a]s to 'contributory fault', the Tribunal refers to Article 39 of the ILC Articles on State Responsibility, entitled 'Contribution to the Injury' as being declaratory of international law".[1849] 231 The tribunal

decide[d] that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands. Given that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles.[1850] 232

The tribunal further noted that "Article 39 requires a factual assessment as regards the Claimant's conduct …".[1851] 233

[A/74/83, p. 39]

[1845] 227 See footnote [19] 7 above, paras. 1592.

[1846] 228 *Ibid*., para. 1633.

[1847] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1848] [151 *Ibid*., para. 9.9.]

[1849] 231 PCA, Case No. 2012–2, Award, 15 March 2016, para. 6.91.

[1850] 232 *Ibid*., para. 6.97.

[1851] 233 *Ibid*., para. 6.98.

International arbitral tribunal (under the ICSID Convention)

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal, citing the text of article 39 and the commentary thereto, noted that "[i]t is undisputed that a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury",[1852] [234] but "reject[ed] Ecuador's argument that Burlington [had] contributed to its own losses".[1853] [235]

[A/74/83, p. 39]

Marco Gavazzi and Stefano Gavazzi v. *Romania*

The arbitral tribunal in *Marco Gavazzi and Stefano Gavazzi* v. *Romania*, agreeing with the discussion of articles 31, 36 and 39 of the State responsibility articles in previous arbitral cases, "determine[d] that the Respondent caused the losses suffered by the Claimants as assessed in this Award, without any reduction for 'contributory negligence' or other fault, as alleged by the Respondent".[1854] [236]

[A/74/83, p. 39]

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

The arbitral tribunal in *Caratube International Oil Company LLP and Devincci Salah Hourani* v. *Republic of Kazakhstan* referring to article 39 of the State responsibility articles, concluded that "the damages awarded to CIOC [the Caratube International Oil Company LLP] in the amount of its sunk investment costs must not be reduced on the basis of contributory fault".[1855] [237]

[A/74/83, p. 40]

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

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal found that "[t]he Claimant cannot claim compensation from the Respondent to the extent that the Claimant has failed unreasonably to mitigate its loss in accordance with international law. In the Tribunal's view, the legal test is based upon a reasonable and not an absolute standard, as confirmed by Comment (11) to Article 31 of the ILC Articles and Article 39 of the ILC Articles".[1856] [238]

[A/74/83, p. 40]

[1852] [234] ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 572.

[1853] [235] *Ibid*., para. 585.

[1854] [236] ICSID, Case No. ARB/12/25, Award, 18 April 2017, para. 280, referring to *CME Czech Republic B.V.* v. *Czech Republic*, Partial Award (13 September 2001), para. 583; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd* v. *Republic of Kazakhstan* (footnote [1656] 196 above), paras. 1330–1332; and *Gemplus, S.A., SLP, S.A., Gemplus Industrial, S.A. de C.V. and Talsud S.A.* v. *United Mexican States* (ICSID, Cases Nos. ARB(AF)/04/03 & ARB(AF)/04/), Award, 16 June 2009, para. 11.12.

[1855] [237] ICSID, Case No. ARB/13/13, Award, 27 September 2017, para. 1195.

[1856] [238] ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.124–10.125.

Perenco Ecuador Limited v. *Ecuador*

The arbitral tribunal in *Perenco Ecuador Limited* v. *Ecuador* referred to article 39 and the commentary thereto, and recalled that the latter noted that the focus of the article was on "situations which in national law systems are referred to as 'contributory negligence', 'comparative fault', 'faute de la victime', *etc.*". The tribunal went on to recall that, according to paragraph (5) of the commentary thereto, "article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, *i.e.* which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights".[1857] 214

The arbitral tribunal concluded that "[n]one of the alleged instances of contributory fault said to arise from Perenco's responses to Ecuador's contractual demands can be considered to amount to wilful or negligent conduct within the meaning of Article 39".[1858] 215 It cautioned that "it is wrong to equate a party's zealous protection of its legal rights and interests with wilful conduct or contributory negligence within the meaning of the ILC Articles",[1859] 216 referring to actions taken by the investor pursuant to provisional measures obtained in the arbitral proceeding.[1860] 217

[A/77/74, p. 35]

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

In *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal cited article 39 and the commentary thereto, noting that in the determination of reparation in investment cases, account should be taken of "the victim's contribution to the damage".[1861] 218 The tribunal explained that "according to the jurisprudence, a party contributes to the damage that it incurs if it engages in wilful or negligent conduct that demonstrates a want of due diligence on the part of the injured party in respect of its property or its rights and there is a causal link between the conduct and the injury".[1862] 219

[A/77/74, p. 35]

STEAG GmbH v. *Kingdom of Spain*

In *STEAG GmbH* v. *Kingdom of Spain*, the arbitral tribunal observed that, pursuant to article 39, "the conduct of the party that claims to have suffered damage and, in particular, its contribution to the damage or injury, is a widely recognized element for analysing and quantifying the compensable injury".[1863] 220

[A/77/74, p. 36]

[1857] 214 See footnote [1379] 129 above, para. 344.

[1858] 215 *Ibid*., para. 352.

[1859] 216 *Ibid*., para. 359.

[1860] 217 *Ibid*., para. 360.

[1861] 218 See footnote [1029] 108 above, para. 396; see also paras. 460–461.

[1862] 219 *Ibid*., para. 461.

[1863] 220 See footnote [1390] 140 above, para. 760.

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

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal's majority failed "to see any indications for Claimants' contribution to injury pursuant to Article 39 of the ILC Articles, either in the form of contributory fault to Respondent's internationally wrongful conduct …, or as a violation of a duty to mitigate damages after the revocation has taken place".[1864] [221]

[A/77/74, p. 36]

[1864] [221] See footnote [193] 26 above, para. 444 (footnote 521).