

## CHAPTER II

## REPARATION FOR INJURY

*Commentary*

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

### Article 34. Forms of reparation

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

#### Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of “injury” and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,<sup>[692]</sup> 485 article 34 need do no more than refer to “[f]ull reparation for the injury caused”.

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.<sup>[693]</sup> 486 In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.<sup>[694]</sup> 487

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

<sup>[692]</sup> 485 See paragraphs (4) to (14) of the commentary to article 31.

<sup>[693]</sup> 486 *Factory at Chorzów, Merits* (see footnote [10] 34 above), p. 47.

<sup>[694]</sup> 487 Thus, in the judgment in the *LaGrand* case (see footnote [117] 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction “by taking account of the violation of the rights set forth in the Convention” (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.<sup>[695] 488</sup> Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.<sup>[696] 489</sup> Satisfaction must “not be out of proportion to the injury”.<sup>[697] 490</sup> Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.<sup>[698] 491</sup> To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

In its 1999 judgment in the *M/V “SAIGA” (No. 2)* case, the Tribunal referred to paragraph 1 of draft article 42 (Reparation), as adopted by the International Law Commission on first reading,<sup>[699] 188</sup> to determine the reparation which Saint Vincent and the Grenadines was entitled to obtain for damage suffered directly by it as well as for damage or other loss suffered by the Saiga oil tanker:

<sup>[695]</sup> 488 See article 35 (b) and commentary.

<sup>[696]</sup> 489 See article 31 and commentary.

<sup>[697]</sup> 490 See article 37, paragraph 3, and commentary.

<sup>[698]</sup> 491 For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

<sup>[699]</sup> 188 This provision was amended and partially incorporated in article 34, as finally adopted by the International Law Commission in 2001. The text of paragraph 1 of draft article 42 (Reparation) adopted on first reading was as follows: “The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination”. (*Yearbook . . . 1996*, vol. II (Part Two), para. 65.)

Reparation may be in the form of “restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination” (article 42, paragraph 1, of the draft articles of the International Law Commission on State responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.<sup>[700] 189</sup>

[A/62/62, para. 106]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*CMS Gas Transmission Company v. Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company v. Argentina* case,<sup>[701] 190</sup> in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 34, the tribunal considered it “broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction”.<sup>[702] 191</sup>

[A/62/62, para. 107]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

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

In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case, in the context of an analysis of article 2 of the State responsibility articles, held that where there had been “substantial interference with an investor’s rights, so as to amount to an expropriation . . . there may be scope for a non-compensatory remedy for the expropriation (e.g. injunctive, declaratory or restitutionary relief)”.<sup>[703] 51</sup>

[A/65/76, para. 34]

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<sup>[700] 189</sup> The *M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, judgment, 1 July 1999, para. 171.

<sup>[701] 190</sup> See [footnote] [566] 162 above.

<sup>[702] 191</sup> ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 399 and [footnote] 211.

<sup>[703] 51</sup> *Biwater Gauff*, cited in [footnote] [5] 6 above, para. 466. See article 2 above.

## CARIBBEAN COURT OF JUSTICE

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

In the *Trinidad Cement Limited and TCL Guyana Incorporated v. Guyana* case, the Caribbean Court of Justice referred to a passage in the commentary to the State responsibility articles confirming that “[i]n accordance with article 34, the function of damages is essentially compensatory”.<sup>[704] 52</sup>

[A/65/76, para. 35]

## INTERNATIONAL COURT OF JUSTICE

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

In its 2010 judgment in the *Pulp Mills on the River Uruguay* case, the International Court of Justice, citing, *inter alia*, the State responsibility articles, recalled that “customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.”<sup>[705] 53</sup>

[A/65/76, para. 36]

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<sup>[704] 52</sup> Caribbean Court of Justice, *Trinidad Cement Limited and TCL Guyana Incorporated v. The State of the Co-Operative Republic of Guyana*, Case No. [2009] CCJ 5 (OJ), Judgment, 20 August 2009, para. 38, reference to paragraph (5) of the introductory commentary to Part Two, Chapter III. See further Part Two, Chapter III.

<sup>[705] 53</sup> International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, para. 273.

### Article 35. Restitution

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

**(a) is not materially impossible;**

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

#### Commentary

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

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

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów* case when it said that the responsible State was under “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible”. The Court went on to add that “[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution”.<sup>[706] 492</sup> It can be seen in operation in the cases where tribunals have considered compensation only

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<sup>[706]</sup> 492 *Factory at Chorzów, Merits* (see footnote [10] 34 above), p. 48.

after concluding that, for one reason or another, restitution could not be effected.<sup>[707] 493</sup> Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.<sup>[708] 494</sup> But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in “the best interests of the parties, and of the public”.<sup>[709] 495</sup> In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.<sup>[710] 496</sup>

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,<sup>[711] 497</sup> the restitution of ships<sup>[712] 498</sup> or other

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<sup>[707] 493</sup> See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote [20] 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith, ibid.*, vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont, ibid.*, vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

<sup>[708] 494</sup> See articles 43 and 45 and commentaries.

<sup>[709] 495</sup> *Walter Fletcher Smith* (see footnote [707] 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for “important State reasons” (see J. G. Wetter and S. M. Schwebel, “Some little known cases on concessions”, *BYBIL*, 1964, vol. 40, p. 216, at p. 221).

<sup>[710] 496</sup> *Government of Kuwait v. American Independent Oil Company (Aminoil)*, ILR, vol. 66, p. 519, at p. 533 (1982).

<sup>[711] 497</sup> Examples of material restitution involving persons include the “*Trent*” (1861) and “*Florida*” (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote [39] 59 above), pp. 44–45.

<sup>[712] 498</sup> See, e.g., the “*Giaffarieh*” incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, *Società Italiana per l’Organizzazione Internazionale—Consiglio Nazionale delle Ricerche, La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, N. Y., Oceana, 1970), vol. II, pp. 901–902.

types of property,<sup>[713]</sup> 499 including documents, works of art, share certificates, etc.<sup>[714]</sup> 500 The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,<sup>[715]</sup> 501 the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner<sup>[716]</sup> 502 or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.<sup>[717]</sup> 503 In some cases, both material and juridical restitution may be involved.<sup>[718]</sup> 504 In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.<sup>[719]</sup> 505 The term “restitution” in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing

<sup>[713]</sup> 499 For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid.*, p. 240 (1950); and the *Hénon* case, *ibid.*, p. 248 (1951).

<sup>[714]</sup> 500 In the *Bužau-Nehoiși Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

<sup>[715]</sup> 501 For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

<sup>[716]</sup> 502 For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

<sup>[717]</sup> 503 In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that “the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action” (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and *AJIL*, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

<sup>[718]</sup> 504 Thus, PCIJ held that Czechoslovakia was “bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question” (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote [686] 481 above)).

<sup>[719]</sup> 505 In the *Legal Status of Eastern Greenland* case, PCIJ decided that “the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid” (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote [67] 79 above), the Court decided that France “must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties” (p. 172). See also F. A. Mann, “The consequences of an international wrong in international and municipal law”, *BYBIL, 1976–1977*, vol. 48, p. 1, at pp. 5–8.



character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.<sup>[720] 506</sup> Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

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

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

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.<sup>[721] 507</sup> The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.<sup>[722] 508</sup> The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

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

(11) A second exception, dealt with in article 35, subparagraph (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the

<sup>[720] 506</sup> See above, paragraph (8) of the commentary to article 30.

<sup>[721] 507</sup> *Forests of Central Rhodopia* (see footnote [525] 382 above), p. 1432.

<sup>[722] 508</sup> For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, *ibid.*, p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* *ibid.*, vol. 62, p. 141, at p. 200 (1977).

responsible State. Specifically, restitution may not be required if it would “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”. This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,<sup>[723] 509</sup> although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### PANEL OF COMMISSIONERS OF THE UNITED NATIONS COMPENSATION COMMISSION

*S/AC.26/2003/15*

In its 2003 report and recommendations concerning part three of the third instalment of “F3” claims,<sup>[724] 192</sup> the Panel of Commissioners of the United Nations Compensation Commission referred inter alia to article 35 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 212] above.

[A/62/62, para. 108]

### INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*CMS Gas Transmission Company v. Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company v. Argentina* case,<sup>[725] 193</sup> in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to articles 34, 35, 36 and 38 finally adopted by the International Law Commission in 2001. With regard to article 35, the tribunal observed that “[r]estitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation”.<sup>[726] 194</sup>

[A/62/62, para. 109]

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<sup>[723]</sup> 509 See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook . . . 1969*, vol. II, p. 149.

<sup>[724]</sup> 192 “F3” claims before the UNCC are claims filed by the Government of Kuwait, excluding environmental claims.

<sup>[725]</sup> 193 See [footnote] [566] 162 above.

<sup>[726]</sup> 194 ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 400 and [footnote] 212.

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

In its 2006 award, the arbitral tribunal constituted to hear the *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary* case, in determining the “customary international law standard” for damages assessment applicable in the case, noted that article 35 finally adopted by the International Law Commission in 2001 provided that “restitution in kind is the preferred remedy for an internationally wrongful act”.<sup>[727] 195</sup>

[A/62/62, para. 110]

EUROPEAN COURT OF HUMAN RIGHTS

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

In the *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* case, the European Court of Justice referred to article 35 of the State responsibility articles as reflecting “principles of international law”. The Court alluded to the qualifications in the provision, i.e. that the obligation to make restitution was subject to such restitution not being “materially impossible” and not involving “a burden out of all proportion to the benefit derived from restitution instead of compensation”, which it interpreted as meaning that “while restitution is the rule, there may be circumstances in which the State responsible is exempted—fully or in part—from this obligation, provided that it can show that such circumstances obtain”.<sup>[728] 54</sup>

[A/65/76, para. 37]

*Guiso-Gallisay v. Italy*

In the *Guiso-Gallisay v. Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 35 of the State responsibility articles (which it considered to be relevant international law) as reiterating the principle of *restitutio in integrum*.<sup>[729] 55</sup>

[A/65/76, para. 38]

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<sup>[727] 195</sup> ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Case No. ARB/03/16, award, 2 October 2006, paras. 494 and 495.

<sup>[728] 54</sup> European Court of Human Rights, Grand Chamber, *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, Case No. 32772/02, Judgment, 30 June 2009, para. 86.

<sup>[729] 55</sup> European Court of Human Rights, Grand Chamber, *Guiso-Gallisay v. Italy*, Case No. 58858/00, Judgment (Just satisfaction), 22 December 2009, para. 53.

### 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.<sup>[730]</sup> <sup>510</sup> 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.”<sup>[731]</sup> <sup>511</sup> 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.<sup>[732]</sup> <sup>512</sup>

(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.<sup>[733]</sup> <sup>513</sup> 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.<sup>[734]</sup> <sup>514</sup>

<sup>[730]</sup> <sup>510</sup> See paragraphs (5) to (6) and (8) of the commentary to article 31.

<sup>[731]</sup> <sup>511</sup> *Gabčíkovo-Nagymaros Project* (see footnote [13] above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów, Merits* (footnote [10] 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).

<sup>[732]</sup> <sup>512</sup> *Factory at Chorzów, Jurisdiction* (see footnote [10] 34 above); *Fisheries Jurisdiction* (see footnote [615] 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote [12] 36 above), p. 142.

<sup>[733]</sup> <sup>513</sup> *Factory at Chorzów, Merits* (see footnote [10] 34 above), pp. 47–48.

<sup>[734]</sup> <sup>514</sup> UNRIIAA, 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.<sup>[735] 515</sup>

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.<sup>[736] 516</sup> 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.<sup>[737] 517</sup>

(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.<sup>[738] 518</sup> 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

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<sup>[735] 515</sup> *Factory at Chorzów, Merits* (see footnote [10] 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)*, Judgment, ITLOS Reports 1999, p. 65, para. 170 (1999). See also *Papamichalopoulos and Others v. Greece (article 50)*, Eur. Court H.R., Series A, No. 330-B, para. 36 (1995); *Velásquez Rodríguez* (footnote [43] 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

<sup>[736] 516</sup> In the *Velásquez Rodríguez*, 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*, I.L.R., 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.

<sup>[737] 517</sup> See paragraph (3) of the commentary to article 37.

<sup>[738] 518</sup> 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.

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.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,<sup>[739] 519</sup> the Iran-United States Claims Tribunal,<sup>[740] 520</sup> human rights courts and other bodies,<sup>[741] 521</sup> and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.<sup>[742] 522</sup> 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.<sup>[743] 523</sup> 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.<sup>[744] 524</sup> 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

<sup>[739] 519</sup> For example, the *M/V "Saiga"* case (see footnote [735] 515 above), paras. 170–177.

<sup>[740] 520</sup> 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 [489] 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. McGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid.*, pp. 325–385.

<sup>[741] 521</sup> 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.

<sup>[742] 522</sup> 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).

<sup>[743] 523</sup> See, e.g., *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [329] 230 above), and for the Court's order of discontinuance following the settlement, *ibid.*, *Order* (footnote [331] 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).

<sup>[744] 524</sup> See Aldrich, *op. cit.* (footnote [489] 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote [641] 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote [615] 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).



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.

(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.”.<sup>[745] 525</sup>

(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.<sup>[746] 526</sup> 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.<sup>[747] 527</sup>

(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.<sup>[748] 528</sup> 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

<sup>[745] 525</sup> *Corfu Channel, Assessment of Compensation* (see footnote [660] 473 above), p. 249.

<sup>[746] 526</sup> The *M/V “Saiga”* case (see footnote [735] 515 above), para. 176.

<sup>[747] 527</sup> *Ibid.*, para. 177.

<sup>[748] 528</sup> 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).

dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.<sup>[749] 529</sup>

(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<sup>[750] 530</sup> or injury to its personnel.<sup>[751] 531</sup> Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.<sup>[752] 532</sup> In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.<sup>[753] 533</sup>

(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".<sup>[754] 534</sup> 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".<sup>[755] 535</sup> 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).<sup>[756] 536</sup>

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<sup>[749] 529</sup> *Aerial Incident of 3 July 1988* (see footnote [743] 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain 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).

<sup>[750] 530</sup> 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).

<sup>[751] 531</sup> 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 [479] 347 above), pp. 80–81.

<sup>[752] 532</sup> For examples, see Whiteman, *Damages in International Law* (footnote [479] 347 above), p. 81.

<sup>[753] 533</sup> 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.

<sup>[754] 534</sup> The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote [646] 459 above), pp. 899 and 905.

<sup>[755] 535</sup> *Ibid.*, p. 907.

<sup>[756] 536</sup> 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.



(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".<sup>[757] 537</sup> The UNCC Governing Council decision 7 specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".<sup>[758] 538</sup>

(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.<sup>[759] 539</sup> 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.<sup>[760] 540</sup> 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 . . ."<sup>[761] 541</sup>

<sup>[757] 537</sup> Security Council resolution 687 (1991), para. 16 (see footnote [648] 461 above).

<sup>[758] 538</sup> Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

<sup>[759] 539</sup> See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote [357] 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.

<sup>[760] 540</sup> See footnote [734] 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote [193] 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).

<sup>[761] 541</sup> "*Lusitania*" (see footnote [734] 514 above), p. 40.

(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,<sup>[762] 542</sup> 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.

(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.<sup>[763] 543</sup>

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.<sup>[764] 544</sup> Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.<sup>[765] 545</sup>

(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.<sup>[766] 546</sup> Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.<sup>[767] 547</sup>

<sup>[762] 542</sup> See footnote [735] 515 above.

<sup>[763] 543</sup> "*Lusitania*" (see footnote [734] 514 above), p. 35.

<sup>[764] 544</sup> 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).

<sup>[765] 545</sup> For example, the *William McNeil* case, *ibid.*, vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

<sup>[766] 546</sup> See the review by Shelton, *op. cit.* (footnote [741] 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.

<sup>[767] 547</sup> See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote [43] 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote [735] 515 above).

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,<sup>[768] 548</sup> 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 bodies, the awards exhibit considerable variability.<sup>[769] 549</sup> 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.<sup>[770] 550</sup> 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

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<sup>[768] 548</sup> 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* (Ardley, N.Y., Transnational, 1999).

<sup>[769] 549</sup> 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 PCIJ in *Factory at Chorzów, Merits* (footnote [10] 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 [722] 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote [710] 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 [239] 164 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.

<sup>[770] 550</sup> 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* (see footnote [769] 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”.

difficulties associated with long outstanding claims.<sup>[771] 551</sup> Where the property interests in question are unique or unusual, for example, art works or other cultural property,<sup>[772] 552</sup> 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.<sup>[773] 553</sup>

(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.<sup>[774] 554</sup>

(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

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<sup>[771] 551</sup> 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 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.

<sup>[772] 552</sup> 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.

<sup>[773] 553</sup> 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).

<sup>[774] 554</sup> 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.

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,<sup>[775] 555</sup> 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 developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.<sup>[776] 556</sup>

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.<sup>[777] 557</sup> 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.<sup>[778] 558</sup> 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.<sup>[779] 559</sup> 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.<sup>[780] 560</sup>

(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

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<sup>[775] 555</sup> 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).

<sup>[776] 556</sup> The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote [769] 549 above), at pp. 256–257, paras. 220–223.

<sup>[777] 557</sup> 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)).

<sup>[778] 558</sup> The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote [769] 549 above); *Starrett Housing Corporation* (*ibid.*); *Phillips Petroleum Company Iran* (see footnote [239] 164 above); and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 30, p. 170 (1994).

<sup>[779] 559</sup> See, e.g., *Amoco* (footnote [769] 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote [239] 164 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 (see footnote [774] 554 above) state: “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).

<sup>[780] 560</sup> See, e.g., *Ebrahimi* (footnote [778] 558 above), p. 227, para. 159.

in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case<sup>[781] 561</sup> and *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*.<sup>[782] 562</sup> Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured 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.<sup>[783] 563</sup> Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*<sup>[784] 564</sup> and in some ICSID arbitrations.<sup>[785] 565</sup> 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.<sup>[786] 566</sup> 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.<sup>[787] 567</sup> This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.<sup>[788] 568</sup>

<sup>[781] 561</sup> *Navires* (see footnote [321] 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 [624] 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote [199] 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 [199] 139 above).

<sup>[782] 562</sup> ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

<sup>[783] 563</sup> *Factory at Chorzów, Merits* (see footnote [10] 34 above), pp. 47–48 and 53.

<sup>[784] 564</sup> *Libyan American Oil Company (LIAMCO)* (see footnote [722] 508 above), p. 140.

<sup>[785] 565</sup> 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).

<sup>[786] 566</sup> According to the arbitrator in the *Shufeldt* case (see footnote [75] 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 [785] 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).

<sup>[787] 567</sup> 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 (see footnote [786] 566 above).

<sup>[788] 568</sup> 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).



(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 between the date of taking of title and adjudication;<sup>[789] 569</sup> and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.<sup>[790] 570</sup>

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.<sup>[791] 571</sup> 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,<sup>[792] 527</sup> 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,<sup>[793] 573</sup> 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.<sup>[794] 574</sup>

(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 some-

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<sup>[789] 569</sup> 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 *Factory at Chorzów, Merits* (see footnote [10] 34 above) and *Norwegian Shipowners' Claims* (footnote [75] 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

<sup>[790] 570</sup> 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* (see footnote [785] 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).

<sup>[791] 571</sup> 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 (see footnote [115] 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.

<sup>[792] 572</sup> *Factory at Chorzów, Merits* (see footnote [10] 34 above).

<sup>[793] 573</sup> *Norwegian Shipowners' Claims* (see footnote [75] 87 above).

<sup>[794] 574</sup> 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 [777] 557 above), paras. 184–187.

times been awarded.<sup>[795] 575</sup> In the case of contracts, it is the future income stream which 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,<sup>[796] 576</sup> 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<sup>[797] 577</sup> a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,<sup>[798] 578</sup> 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.<sup>[799] 579</sup> Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

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<sup>[795] 575</sup> 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 [788] 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 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 [781] 561 above), and in *Shufeldt* (see footnote [75] 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleum Ltd.* (see footnote [782] 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote [722] 508 above), p. 140; and *Amco Asia Corporation and Others v. The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote [785] 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

<sup>[796] 576</sup> As in *Sylvania Technical Systems, Inc.* (see the footnote above).

<sup>[797] 577</sup> See footnote [528] 385 above.

<sup>[798] 578</sup> See footnote [742] 522 above.

<sup>[799] 579</sup> 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,<sup>[800]</sup> 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:<sup>[801]</sup> 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’.<sup>[802]</sup> 198

[A/62/62, para. 111]

S/AC.26/2000/2

In its 2000 report concerning the fourth instalment of “E2” claims,<sup>[803]</sup> 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.<sup>[804]</sup> 200

[A/62/62, para. 112]

<sup>[800]</sup> 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)).

<sup>[801]</sup> 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

## 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.)

<sup>[802]</sup> 198 S/AC.26/1999/6, para. 77 (footnote omitted).

<sup>[803]</sup> 199 See [footnote] [800] 196 above.

<sup>[804]</sup> 200 S/AC.26/2000/2, para. 157, [footnote] 61.

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA AND THE 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.<sup>[805] 201</sup> 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.<sup>[806] 202</sup>

[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,<sup>[807] 203</sup> 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

<sup>[805] 201</sup> NAFTA, *S.D. Myers Inc. v. Canada*, 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.

<sup>[806] 202</sup> *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] 197 above.

<sup>[807] 203</sup> See [footnote] [566] 162 above.

of profits insofar as it is established” and that “compensation is only called for when the damage is not made good by restitution”.<sup>[808] 204</sup>

[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”.<sup>[809] 205</sup>

[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).<sup>[810] 11</sup>

[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

<sup>[808] 204</sup> ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 401 and notes 214 and 215.

<sup>[809] 205</sup> ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Case No. ARB/03/16, award, 2 October 2006, paras. 494 and 495.

<sup>[810] 11</sup> [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)*, Judgment, *I.C.J. Reports 2007*, p. 43], para. 460.

State responsibility articles in its determination of the loss suffered by the investor.<sup>[811]</sup> 56 It recalled the relevant paragraph of the commentary to article 36 indicating that the function of compensation is “to address the *actual losses incurred as a result* of the internationally wrongful act”,<sup>[812]</sup> 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?<sup>[813]</sup> 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*’.<sup>[814]</sup> 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.<sup>[815]</sup> 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

<sup>[811]</sup> 56 ICSID, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, Case No. ARB/02/1, award, 25 July 2007, paras. 41–43.

<sup>[812]</sup> 57 *Ibid.*, para. 43. Reference to paragraph (4) of the commentary to article 36, emphasis in award.

<sup>[813]</sup> 58 *Ibid.*, para. 45, emphasis in original.

<sup>[814]</sup> 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.

<sup>[815]</sup> 60 *Sempra Energy International*, cited in [footnote] [498] 25 above, para. 401.

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.<sup>[816] 61</sup>

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.<sup>[817] 62</sup>

[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.’”<sup>[818] 63</sup>

[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.<sup>[819] 64</sup>

[A/65/76, para. 43]

<sup>[816]</sup> 61 *Archer Daniels Midland Company*, cited in [footnote] [3] 4 above, para.281.

<sup>[817]</sup> 62 *Ibid.*, para. 282.

<sup>[818]</sup> 63 ICSID, *Desert Line Projects LLC v. The Republic of Yemen*, Case No. ARB/05/17, award, 6 February 2008, para. 289, emphasis in original, citing the reference to the *Lusitania* case, *United Nations Reports of International Arbitral Awards*, vol. VII, p. 32 (1923), in paragraph (16) of the commentary to article 36.

<sup>[819]</sup> 64 *Guiso-Gallisay v. Italy*, cited in [footnote] [729] 55 above, para. 54.

### Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

#### Commentary

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

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

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

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”,<sup>[820] 580</sup> is well established in international law. The point was made, for example, by the tribunal in the “*Rainbow Warrior*” arbitration:

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to

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<sup>[820] 580</sup> See C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

the State, especially as opposed to the case of damage to persons involving international responsibilities.<sup>[821] 581</sup>

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,<sup>[822] 582</sup> violations of sovereignty or territorial integrity,<sup>[823] 583</sup> attacks on ships or aircraft,<sup>[824] 584</sup> ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons<sup>[825] 585</sup> and violations of the premises of embassies or consulates or of the residences of members of the mission.<sup>[826] 586</sup>

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.<sup>[827] 587</sup> Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,<sup>[828] 588</sup> a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose

<sup>[821] 581</sup> “Rainbow Warrior” (see footnote [22] 46 above), pp. 272–273, para. 122.

<sup>[822] 582</sup> Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote [479] 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote [712] 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

<sup>[823] 583</sup> As occurred in the “Rainbow Warrior” arbitration (see footnote [22] 46 above).

<sup>[824] 584</sup> Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid.*, vol. 84 (1980), pp. 1078–1079).

<sup>[825] 585</sup> See F. Przetacznik, “La responsabilité internationale de l’État à raison des préjudices de caractère moral et politique causés à un autre État”, RGDIP, vol. 78 (1974), p. 919, at p. 951.

<sup>[826] 586</sup> Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (see footnote [712] 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid.*, vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid.*, vol. 70 (1966), pp. 165–166).

<sup>[827] 587</sup> In the “Rainbow Warrior” arbitration the tribunal, while rejecting New Zealand’s claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation “to assist [the parties] in putting an end to the present unhappy affair”. Specifically, it recommended that France contribute US\$ 2 million to a fund to be established “to promote close and friendly relations between the citizens of the two countries” (see footnote [22] 46 above), p. 274, paras. 126–127. See also L. Migliorino, “Sur la déclaration d’illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l’affaire du Rainbow Warrior”, RGDIP, vol. 96 (1992), p. 61.

<sup>[828] 588</sup> For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.



conduct caused the internationally wrongful act<sup>[829] 589</sup> or the award of symbolic damages for non-pecuniary injury.<sup>[830] 590</sup> Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.<sup>[831] 591</sup> Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

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

[T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.<sup>[832] 592</sup>

This has been followed in many subsequent cases.<sup>[833] 593</sup> However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

<sup>[829] 589</sup> Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1966), p. 257).

<sup>[830] 590</sup> See, e.g., the cases “*I’m Alone*”, UNRIIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and “*Rainbow Warrior*” (footnote [22] 46 above).

<sup>[831] 591</sup> See paragraph (11) of the commentary to article 30.

<sup>[832] 592</sup> *Corfu Channel, Merits* (see footnote [11] 35 above), p. 35, repeated in the operative part (p. 36).

<sup>[833] 593</sup> For example, “*Rainbow Warrior*” (see footnote [22] 46 above), p. 273, para. 123.



(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the “*I’m Alone*”,<sup>[834] 594</sup> *Kellett*<sup>[835] 595</sup> and “*Rainbow Warrior*”<sup>[836] 596</sup> cases, and were offered by the responsible State in the *Consular Relations*<sup>[837] 597</sup> and *LaGrand*<sup>[838] 598</sup> cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that “an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties”.<sup>[839] 599</sup>

(8) Excessive demands made under the guise of “satisfaction” in the past<sup>[840] 600</sup> suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.<sup>[841] 601</sup> In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term “humiliating” is imprecise, but there are certainly historical examples of demands of this kind.

<sup>[834] 594</sup> See footnote [830] 590 above.

<sup>[835] 595</sup> Moore, *Digest*, vol. V, p. 44 (1897).

<sup>[836] 596</sup> See footnote [28] 46 above.

<sup>[837] 597</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States’ apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

<sup>[838] 598</sup> See footnote [117] 119 above.

<sup>[839] 599</sup> *LaGrand, Merits (ibid.)*, para. 123.

<sup>[840] 600</sup> For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote [822] 582 above), pp. 187–188.

<sup>[841] 601</sup> The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

### Article 38. Interest

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

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

#### Commentary

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

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.<sup>[842] 602</sup> Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.<sup>[843] 603</sup> In the S.S. “*Wimbledon*”, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable “from the moment when the amount of the sum due has been fixed and the obligation to pay has been established”.<sup>[844] 604</sup>

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.<sup>[845] 605</sup> The experience of the Iran–United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran v. The United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related “to the exercise . . . of the discretion accorded to them in deciding each particular case”.<sup>[846] 606</sup> On the issue of principle the tribunal said:

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<sup>[842] 602</sup> Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote [276] 182 above), pp. 252–253.

<sup>[843] 603</sup> See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.) v. United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States–Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

<sup>[844] 604</sup> See footnote [10] 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to “the present financial situation of the world and . . . the conditions prevailing for public loans”.

<sup>[845] 605</sup> In the *M/V “Saiga”* case (see footnote [735] 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

<sup>[846] 606</sup> *The Islamic Republic of Iran v. The United States of America*, Iran–U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote [489] 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims “on the basis of respect for law”. In doing so, it has regularly treated interest, where sought, as forming an integral part of the “claim” which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as “compensation for damages suffered due to delay in payment”. . . . Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal’s authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.<sup>[847] 607</sup>

The tribunal has awarded interest at a different and slightly lower rate in respect of inter-governmental claims.<sup>[848] 608</sup> It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.<sup>[849] 609</sup>

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

1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
3. Interest will be paid after the principal amount of awards.<sup>[850] 610</sup>

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

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.<sup>[851] 611</sup>

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<sup>[847] 607</sup> *The Islamic Republic of Iran v. The United States of America* (see footnote [846] 606 above), pp. 289–290.

<sup>[848] 608</sup> See C. N. Brower and J. D. Brueschke, *op. cit.* (footnote [740] 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

<sup>[849] 609</sup> See the detailed analysis of Chamber Three in *McCullough and Company, Inc. v. Ministry of Post, Telegraph and Telephone, Iran–U.S. C.T.R.*, vol. 11, p. 3, at pp. 26–31 (1986).

<sup>[850] 610</sup> Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

<sup>[851] 611</sup> See, e.g., the *Velásquez Rodríguez*, *Compensatory Damages* case (footnote [736] 516 above), para. 57. See also *Papamichalopoulos* (footnote [735] 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote [741] 521 above), pp. 270–272.

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.<sup>[852] 612</sup> Some national court decisions have also dealt with issues of interest under international law,<sup>[853] 613</sup> although more often questions of interest are dealt with as part of the law of the forum.

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

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

any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, “[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable” . . . Even though the term “all sums” could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.<sup>[854] 614</sup>

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit “wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal”.<sup>[855] 615</sup> The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other . . . is unanimous . . . in disallowing

<sup>[852] 612</sup> See, e.g., the Foreign Compensation (People’s Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, H. M. Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote [771] 551 above).

<sup>[853] 613</sup> See, e.g., *McKesson Corporation v. The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F. Supp. 2d 13 (2000).

<sup>[854] 614</sup> Iran–U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote [788] 568 above), p. 1997.

<sup>[855] 615</sup> *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote [489] 357 above), pp. 477–478.

compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.<sup>[856] 616</sup>

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

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that “compound interest reasonably incurred by the injured party should be recoverable as an item of damage”.<sup>[857] 617</sup> This view has also been supported by arbitral tribunals in some cases.<sup>[858] 618</sup> But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,<sup>[859] 619</sup> date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.<sup>[860] 620</sup> In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran–United States Claims Tribunal’s observation that such matters, if the parties cannot resolve them, must be left “to the exercise . . . of the discretion accorded to [individual tribunals] in deciding each particular case”.<sup>[861] 621</sup> On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should

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<sup>[856] 616</sup> *British Claims in the Spanish Zone of Morocco* (see footnote [20] 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote [710] 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

<sup>[857] 617</sup> F. A. Mann, “Compound interest as an item of damage in international law”, *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

<sup>[858] 618</sup> See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

<sup>[859] 619</sup> Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote [486] 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

<sup>[860] 620</sup> See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to “foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited” (*ibid.*, pp. 38–40, with references).

<sup>[861] 621</sup> *The Islamic Republic of Iran v. The United States of America* (Case No. A-19) (see footnote [846] 606 above).

have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

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

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### PANEL OF COMMISSIONERS OF THE UNITED NATIONS COMPENSATION COMMISSION

*S/AC.26/2003/15*

In its 2003 report and recommendations concerning part three of the third instalment of “F3” claims,<sup>[862] 206</sup> the Panel of Commissioners was of the view that Governing Council decision 16 on “awards of interest” addressed any claim that in fact arose as a result of the delay of payment of compensation. It noted that the said decision provided that interest would be awarded “from the date the loss occurred until the date of payment”. In a footnote, the panel further observed that this decision was “similar” to article 38, paragraph 2, as finally adopted by the International Law Commission in 2001, which it quoted.<sup>[863] 207</sup>

[A/62/62, para. 116]

### INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*CMS Gas Transmission Company v. Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company v. Argentina* case,<sup>[864] 208</sup> in determining the compensation due by Argentina for its breaches of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, made reference to the principles embodied in articles 34, 35, 36 and 38, as finally adopted by the International Law Commission in 2001. With regard to article 38, it found that “[d]ecisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends”.<sup>[865] 209</sup>

[A/62/62, para. 117]

<sup>[862]</sup> 206 See [footnote] [724] 192 above.

<sup>[863]</sup> 207 *S/AC.26/2003/15*, para. 172, [footnote] 59.

<sup>[864]</sup> 208 See [footnote] [566] 162 above.

<sup>[865]</sup> 209 ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Case No. ARB/01/8, award, 12 May 2005, para. 404 and [footnote] 220.

*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.<sup>[866] 622</sup>

(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”.<sup>[867] 623</sup>

(4) The relevance of the injured State’s contribution to the damage in determining the appropriate reparation is widely recognized in the literature<sup>[868] 624</sup> and in State practice.<sup>[869] 625</sup> 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

<sup>[866] 622</sup> See C. von Bar, *op. cit.* (footnote [439] 315 above), pp. 544–569.

<sup>[867] 623</sup> *LaGrand, Judgment* (see footnote [117] 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.

<sup>[868] 624</sup> See, e.g., B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages” (footnote [641] 454 above) and B. Bollecker-Stern, *op. cit.* (footnote [641] 454 above), pp. 265–300.

<sup>[869] 625</sup> In the *Delagoa Bay Railway* case (see footnote [781] 561 above), the arbitrators noted that: “[a]ll 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*” (see footnote [10] 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 [615] 432 above), p. 23.



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.

(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.<sup>[870] 626</sup> 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.<sup>[871] 627</sup> 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.

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<sup>[870] 626</sup> This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

<sup>[871] 627</sup> 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.