Distr.
LIMITED

A/CN.4/L.484/Add.5
15 July 1993

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-fifth session
3 May - 23 July 1993

# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION

## CHAPTER IV

## STATE RESPONSIBILITY

Addendum

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GE.93-61636 (E)

Article 8

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.

Commentary

(1) Compensation is the main and central remedy resorted to following an internationally wrongful act. As stated by the PCIJ in the Chorzow Factory case, "it is a principle of international law that the reparation of a wrong may consist of an indemnity ... this is even the most usual form of reparation". 1/ Compensation is of course not the only mode of reparation consisting in the payment of a sum of money: nominal damages or damages reflecting the gravity of the infringement, both dealt with in article 10 on satisfaction are also of a pecuniary nature but they perform an afflictive function which is alien to compensation, even considering that a measure of retribution is present in any form of reparation.

(2) The distinction between payment of moneys by way of compensation and payment of moneys for afflictive purposes is generally recognized and frequently emphasized in the relevant literature. 2/ Explicit indications in the same sense are also to be found in jurisprudence. In the Lusitania case, for example, the umpire expressed himself clearly when he stated:

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1/ P.C.I.J., Series A, No. 17, judgement of 13 September 1928, p. 47.

2/ See for instance C. Eagleton, The Responsibility of States in International Law (New York, 1928):

> "The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment ... It has usually been said that the damages assessed should be for the purpose only of paying the loss suffered, and that they are thus compensatory rather than punitive in character ... (p. 189) (emphasis added).

Along the same lines see E. Jimenez de Arechaga, "International responsibility", Manual of Public International Law, M. Sorensen, ed. (London, Macmillan, 1968).

> "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. The superimposing of a penalty in addition to full compensation and naming its damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought ... (emphasis added)"

Another instance is the case concerning the Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war, 3/ in which the arbitral tribunal unambiguously separated the compensatory and punitive consequences of the German conduct. 4/

(3) In formulating the rules governing compensation, the Commission has taken cognizance of the natural tendency of arbitral tribunals and commissions to

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3/ United Nations, Reports of International Arbitral Awards, vol. II, pp. 1035 et seq.

4/ Decision of 30 June 1930 (Portugal v. Germany) (Ibid., vol. II, pp. 1035 et seq.). The tribunal stated:

> "In addition to reparation for actual damage caused by the acts committed by Germany during the period of neutrality, Portugal claims an indemnity of 2,000 million gold marks because of 'all the offences against its sovereignty and for the violation of international law'. It makes this claim on the grounds that the indemnity under this heading 'will demonstrate the gravity of the acts in terms of international law and the rights of peoples' and 'it will help ... to show that such acts cannot continue to be performed with impunity'. Apart from the sanction of disapproval by conscience and by international public opinion, they would be matched by material sanctions ..."
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> "It is therefore very clear that it is not in reality an indemnity, or reparation for material or even moral damage, but rather sanctions, a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation. Yet it is obvious that, by assigning an arbitrator the task of determining the amount of the claims for the acts committed during the period of neutrality, the High Contracting Parties did not intend to vest him with powers of repression. Not only is paragraph 4, under which he is held competent, contained in Part X of the Treaty, entitled 'Economic clauses', whereas it is Part VII that deals with 'Sanctions', but it would be contrary to the clearly expressed intentions of the Allied Powers to say that they contemplated imposing pecuniary penalties on Germany for the acts it committed, since article 232, paragraph 1, expressly recognizes that even simple reparation of the actual losses it had caused would exceed its financial capacity. The sanction claimed by Portugal therefore lies outside the competence of the arbitrators and the context of the Treaty." (Ibid., pp. 1076-1077).

have recourse to rules of private law, particularly of Roman law. 5/ It has at the same time recognized with the majority of the doctrine, 6/ that it was impossible, in view of the number and variety of concrete cases to find or even conceive very detailed rules applying mechanically or indiscriminately to any cases or groups of cases. It has therefore concluded that the rules on compensation were bound to be relatively general and flexible, even though they could be formulated so as to set forth the rights of the injured State and the corresponding obligations of the wrongdoing State.

(4) Paragraph 1 provides that the injured State is "entitled" to obtain from the wrongdoing State compensation for the damage "caused" by that act, "if and to the extent that the damage is not made good by restitution in kind". The concept of entitlement, the requirement of a causal link and the relationship between compensation and restitution in kind will now be dealt with in the above order.

(5) Like all the articles on reparation, article 8 is couched in terms of an entitlement of the injured State and makes the discharge of the duty of compensation conditional upon a corresponding claim on the part of the injured State.

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5/ The influence of rules of private law is acknowledged by many writers including K. Nagy, "The problem of reparation in international law", Questions of International Law: Hungarian Perspectives, H. Bokor-Szego, ed. (Budapest, Akademia: Kiadó, 1986), vol. 3, pp. 178-179; C. Cepelka, Les conséquences juridiques du délit en droit international contemporain (Prague, Karlova University, 1965); Reitzer, pp. 161-162 and Anzilotti, Corso di diritto internazionale, 4th ed. (Padua, CEDAM, 1955), vol. I; French trans. by G. Gidel of 3rd Italian ed., Cours de droit international (Paris, 1929), p. 524. The last two writers however disagree on the status of the principles of municipal law as applied in the relevant international jurisprudence. Anzilotti takes the view that in resorting to the rules of private law, international tribunals do not apply national law as such; they apply international legal principles modelled on municipal principles or rules. Reitzer, on the other hand, considers that the rules of private law do not form part of general international law.

6/ Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", Collected Courses ..., 1984-II (The Hague, Nijhoff, 1985), vol. 185, p. 101. See also J.H.W. Verzijl, International Law in Historical Perspective (Leyden, Sijthoff, 1973), part VI, pp. 746-747; Eagleton (op. cit. (footnote 2 above)), p. 191; Reitzer, op. cit. (footnote 5 above); and C.D. Gray, Judicial Remedies in International Law (Oxford, Clarendon Press, 1987), pp. 33-34.

(6) The requirement of a causal link between the wrongful act and the damage calls for more extensive comments. While the requirement itself is universally taken for granted, the distinction between the consequences that may be considered to have been caused by a wrongful act, and hence indemnifiable, from the ones not to be considered as such and therefore not indemnifiable has attracted considerable attention in doctrine and in practice. For some time in the past, this question has been discussed in terms of a distinction between "direct" and "indirect" damage. This approach, however, has given rise to doubts because of the ambiguity and the scant utility of such a distinction. 7/ In international jurisprudence, 8/ the expression "indirect damage" has been used to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and losses that would justify their qualification as "indirect" 9/. Also worthy of mention in this context are two statements of the United States-German Mixed Claims Commission. The first, which is to be found in the decision taken by the Commission in the South Porto Rico Company 10/ case describes the term "indirect" used with regard to damage as "inapt, inaccurate and ambiguous" and the distinction between "direct" and "indirect" damage as "frequently illusory and fanciful". The second is taken from administrative decision No. II 11/ of the Commission, dated 1 November 1923, and reads:

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7/ See J. Personnaz, La réparation du préjudice en droit international public (Paris, 1939), p. 135; Eagleton, op. cit. (footnote 2 above), pp. 199-202; Morelli, op. cit., p. 365; Bollecker-Stern, Le préjudice dans la théorie de la responsabilité internationale (Paris, Pedone, 1973), pp. 204-211; Gray, op. cit. (footnote 6 above), p. 22.

8/ The Alabama case is cited by Hauriou ("Les dommages indirects dans les arbitrages internationaux", Revue générale de droit international public, vol. 31 (1924), p. 209) as the most striking application of the rule excluding "indirect" damage.

9/ See in that sense Anzilotti, op. cit. (footnote 5 above), p. 431; Hauriou, op. cit. (footnote 8 above) and Reitzer, op. cit. (footnote 5 above), p. 180.

10/ This was one of the War-Risk Insurance Premium Claims cases; decision of 1 November 1923 of the Mixed Claims Commission (United Nations, Reports of International Arbitral Awards, vol. VII, pp. 62-63).

11/ Ibid., p. 29.

> "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connexion between Germany's act and the loss complained of ..."

(7) Rather than the directness of the damage, the criterium is thus indicated as the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect 12/ and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage it caused. Although the conditions of normality and predictability nearly always coexist (in the sense that the causing of the damage could also have been predicted if it were within the norm), 13/ they receive varying degrees of emphasis in practice. Predictability prevails in judicial practice. One clear example is the decision in the Portuguese Colonies case (Naulilaa incident). 14/ The injuries caused to Portugal by the revolt of the indigenous population in its colonies were attributed to Germany because it was alleged that the revolt had been triggered by the German invasion. The responsible State was therefore held liable for all the damage which it could have predicted, even though the link between the unlawful act and the actual damage was not really a "direct" one. On the contrary, damages were not awarded for injuries that could not have been foreseen:

> ... it would not be equitable for the victim to bear the burden of damage which the author of the initial unlawful act foresaw and perhaps even wanted, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should not necessarily rule out, for fear of leading to an inadmissible extension of liability, the damage that is connected

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12/ In this sense, Personnaz, op. cit. (footnote 7 above), p. 136; Eagleton, op. cit. (footnote 2 above), pp. 202-203.

13/ See for example G. Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", Recueil des cours ... 1929-III (Paris, 1930), vol. 28, p. 251; Reitzer, op. cit. (footnote 5 above), p. 183.

14/ Decision of 31 July 1928 (Portugal v. Germany) (United Nations; Reports of International Arbitral Awards, vol. II, pp. 1011 et seq.).

> to the initial act only by an unforeseen chain of exceptional circumstances which occurred only because of a combination of causes alien to the author's will and not foreseeable on his part ... 15/

(8) The Commission does not consider it correct to exclude predictability from the requisites for determining causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of a reasonable man in the position of the wrongdoer is an important indication for judging the "normality" or "naturalness" which seems to be an undeniable prerequisite for identifying the causality link. Administrative decision No. II of the United States-German Mixed Claims Commission, mentioned above, once again provides a valuable example of the way in which the test of normality is applied in identifying the causality link:

> ... It matters not how many links there may be in the chain of causation concerning Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act ... 16/

(9) The criterion for presuming causality when the conditions of normality and predictability are met requires further explanation. Both in doctrine and in judicial practice, one notes a tendency to identify the criterion in question with the principle of proxima causa as used in private law. Brownlie, referring to the Dix case, 17/ says that:

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15/ Ibid., p. 1031.

16/ The Commission added:

> "Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" (Ibid., vol. VII, p. 30).

17/ Decision handed down in 1903 by the United States-Venezuelan Mixed Claims Commission (United Nations, Reports of International Awards, vol. IX, pp. 119 et seq., at p. 121).

> "There is some evidence that international tribunals draw a similar distinction, and thus hold governments responsible 'only for the proximate and natural consequences of their acts', denying 'compensation for remote consequences, in the absence of evidence of deliberate intention to injure'." 18/

Following the disintegration of the Cosmos 954 Soviet satellite with nuclear power source on board over its territory in 1978, Canada stated in its claim:

> "In calculating the compensation claimed, Canada has applied 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." 19/

(10) It seems therefore that an injudicious use of the adjective "proximate" (with reference to "cause") in order to indicate the type of relation which should exist between an unlawful act and indemnifiable injury is not without a certain degree of ambiguity. That adjective would seem utterly to exclude the indemnifiability of damage which, while linked to an unlawful act, is not close to it in time or in the causal chain.

(11) The Commission is thus inclined to think that the causal link criterion should operate as follows:

(i) Damages must be fully paid in respect of injuries that have been caused immediately and exclusively by the wrongful act; 20/

(ii) Damages must be fully paid in respect of injuries for which the wrongful act is the exclusive cause, even though they may be linked to that act not by an immediate relationship but by a series of events each exclusively linked with each other by a cause-and-effect relationship.

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18/ Brownlie, System of the Law of Nations: State responsibility, part I (Oxford, Clarendon Press, 1983), p. 224.

19/ International Legal Materials, vol. XVIII (1979), p. 907, paragraph 23 of the claim.

20/ J. Combacau, "La responsabilité internationale", in H. Thierry and others, Droit international public, 4th ed. (Paris, Montchrestien, 1984), speaks in such a case of a "causalité au premier degré: celle qui unit sans aucun intermédiaire le fait générateur au dommage" (p. 711).

Causation is thus to be presumed not only in the presence of a relationship of "proximate causation". It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted.

(12) Consideration must be given to cases in which injuries are not caused exclusively by an unlawful act but have been produced also by concomitant causes among which the wrongful act plays a decisive but not exclusive role. One possibility, already dealt with in the context of article 6 bis, is that the damage may be partly due to the negligence or to a deliberate act or omission of the injured State. Other hypotheses concern the concurrent wrongdoing of several States 21/ and the intervention of an independent cause external to the wrongdoing State resulting in an aggravation of the harm that would have otherwise resulted from the wrongful act.

(13) Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. 22/ In such cases, as in the case dealt with in paragraph 2 of article 6 bis, to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined

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21/ The ICJ decision in the Nauru case might be analysed in this context.

22/ One example is the Yuille, Shortridge and Co. case (Decision of 21 October 1861 (Great Britain v. Portugal) (Lapradelle-Politis, Vol. II, pp. 78 et seq.)). The case concerned an English wine-exporting company with registered office in Portugal, which was wrongly found liable by the Portuguese courts after an irregular procedure. The main injury for which the company sought reparation was represented by the costs it had sustained in the course of the hearing. "Accessory injuries" were the fall in sales, since the company's activities had been partly paralysed. As summed up by Hauriou (op. cit. (footnote 8 above)), p. 216,

> "... the question was precisely to determine whether the hearing was the sole cause of the fall in sales or whether other causes were involved. It was obvious that extraneous circumstances had contributed to the decline in the company's profits. The arbitrators noted, for example, a crisis in wine production from 1839 to 1842, as well as losses from the bad conditions under which some wine consignments had been made. Consequently, the damage qualified as 'indirect', namely the decline in the company's profits, is the result of different causes. Some relate to the denial of justice suffered by the company, but others are totally extraneous."

on the basis of the criteria of normality and predictability. 23/ In view of the diversity of possible situations, the Commission has not attempted to find any rigid criteria applicable to all cases or to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State. It would, in its view, be absurd to think in terms of laying down in a universally applicable formula the various hypotheses of causal relationship and to try to provide a dividing line between damage for which compensation is due from damage for which compensation is not due. The application of the principles and criteria discussed above can only be made on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators will have to play a decisive role in judging the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors. 24/

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23/ See in this connection, Salvioli, op. cit. (footnote 13 above), p. 203; Personnaz, op. cit. (footnote 7 above), p. 143; Gray, op. cit. (footnote 6 above), p. 23.

24/ As observed by Reitzer,

> "... Causality is the chain of an infinite number of causes and effects: the injury sustained is due to a multitude of factors and phenomena. An international judge must say which of them have produced the injury, in the normal course of things, and which, indeed, are extraneous. He must, more particularly, decide whether, according to the criterion of normality, the injury is or is not attributable to the act in question. This calls for a choice, a selection, an assessment, of the facts which, in themselves, are all of equal value. In this work of selection, an arbitrator is compelled to do things according to his own lights. It is he who breaks the chain of causality, so as to include one category of acts and events and to exclude another, guided by his wisdom and his perspicacity alone. Whenever the arbitrator finds nothing useful in the precedents, his freedom of judgment takes over." (op. cit. (footnote 5 above), pp. 185 et seq).
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> Also relevant are the remarks made by Personnaz according to whom:
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> "The existence of relationships [of causality] is a question of fact and must be established by the judge; it cannot be locked in formulas, for it is a case-by-case matter." (op. cit. (footnote 7 above), p. 129.)
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> The same writer states further on:

(14) The concluding clause of paragraph 1 "if and to the extent that the damage which the injured State has suffered is not made good by restitution in kind" clarifies the relationship between restitution in kind and compensation as forms of reparation. Restitution in kind, despite its "primacy" as a matter of equity and legal principle, is very frequently inadequate to ensure a complete reparation: it may be partially or entirely ruled out either on the basis of subparagraphs (a) to (d) of article 7 or because the injured State prefers to have reparation provided in the form of compensation; it may also be insufficient to ensure full reparation. The role of compensation is to fill in any gaps, large, small or minimal which may be left in full reparation by the noted frequent inadequacy of restitution in kind.

(15) Since both articles 7 and 8 are couched in terms of an entitlement of the injured State, the Commission considers it unnecessary, in the case of a bilateral situation, to expressly provide for the injured State's freedom to choose between restitution in kind and compensation. At the same time, the Commission is aware that, where there is a plurality of injured States, difficulties may arise if the injured States opt for different forms of remedy. This question is part of a cluster of issues which are likely to come up whenever there are two or more injured States which may be equally or differently injured. It has implications in the context of both substantive and instrumental consequences of internationally wrongful acts and the Commission intends to revert to it in due course.

(16) Paragraph 2 of article 8 deals with the scope of compensation. Consisting as it does in the payment of a sum of money substituting for or integrating restitution in kind, compensation is the appropriate remedy for "economically assessable damage" i.e. damage which is susceptible of being evaluated in economic terms. As such, it is often described as covering all the "material" injury suffered by the injured State. Correct in a sense, this description calls for important qualifications. It is true that compensation does not ordinarily cover the moral (non-material) damage to the injured State, this function being normally performed by another form of reparation, namely satisfaction as dealt with in article 10. It is not true however that

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"It is a question that cannot be resolved by principles, but solely in the light of the facts of the particular case, and in examining them the judge will, if there are no restrictions in the compromise, have full powers of appraisal." (ibid., p. 135).

compensation does not cover moral damage to the persons of nationals or agents of the injured State. The ambiguity is due to the fact that moral damage to the injured State and moral damage to the injured State's nationals or agents receive different treatment from the point of view of international law.

(17) The most frequent among internationally wrongful acts are those which inflict damage upon natural or juridical persons connected with the State, either as mere nationals or as agents. This damage, which internationally affects the State directly even though the injury is sustained by nationals or agents in their private capacity, is not always an exclusively material one. On the contrary, it is frequently also, or even exclusively, moral damage - and a moral damage which, no less than material damage, is susceptible of a valid claim for compensation.

(18) One of the leading cases in that sense is the Lusitania case, decided by the United States-German Mixed Claims Commission in 1923. 25/ The case dealt with the consequences of the sinking of the British liner by a German submarine. In regard to the measure of the damages to be applied to each one of the claims originating from the American losses in the event, the umpire stated that both the civil and the common law recognized injury caused by "invasion of private right" and provided remedies for it. The umpire was of the opinion that every injury should be measured by pecuniary standards and referred to Grotius' statement that "money is the common measure of valuable things". 26/ Dealing in particular with the death of a person, he held that the preoccupation of the tribunal should be to 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". 27/

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25/ Decision of 1 November 1923 (United Nations, Reports of International Arbitral Awards, vol. VII, pp. 32 et seq.).

26/ Ibid., p. 35.

27/ Ibid. (emphasis added).

Apart from the umpire's considerations regarding the damages under points (a) and (b), which are relevant with regard to the broader concept of "personal injury", it is of interest to note what he stated with regard to the injuries described under point (c). According to him, international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation. Such injuries, the umpire stated:

> "are 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" ... 28/

These kinds of damages, the umpire added, were not "penalty".

(19) The Lusitania case should not be considered as an exception. Although such cases have not occurred very frequently, international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties. 29/ Practice therefore shows that moral

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28/ Ibid., p. 40.

29/ Examples are the Chevreau case (Decision of 9 June 1931 (France v. United Kingdom) (United Nations, Reports of International Arbitral Awards, vol. II, p. 1113 et seq.; English translation in American Journal of International Law, vol. 27 (1933), pp. 153 et seq.); the Gage case (Decision handed down in 1903 by the United States-Venezuela Mixed Claims Commission (United Nations, Reports of International Arbitral Awards, vol. X, pp. 226 et seq.; and the Di Caro case (Decision handed down in 1903 by the Italian-Venezuelan Mixed Claims Commission (ibid., vol. IX, pp. 597-598). In the latter instance, which concerned the killing of an Italian shopkeeper in Venezuela, the Italian-Venezuelan Mixed Claims Commission took account not only of the financial deprivation suffered by the widow of the deceased, but also of the shock suffered by her and of the deprivation of affection, devotion and companionship that her husband could have provided her with (ibid., p. 598).

Another clear example of pecuniary compensation of moral damage suffered by a private party is the Heirs of Jean Maninat case. (Decision of 31 July 1905 of the Franco-Venezuelan Mixed Claims Commission (ibid., pp. 55 et seq.). Rejecting the claim for compensation of the material-economic damage, which he deemed to be insufficiently proved, the umpire awarded to the sister of Jean Maninat (victim of an aggression) a sum of money by way of pecuniary compensation for the death of her brother. Mention should also be made of the Grimm case decided by the Iran-United States Claims Tribunal, but only to that part of the tribunal's decision in which moral damages seemed to be referred to and in principle to be considered as a possible object of pecuniary compensation (Decision of 18 February 1983 (International Law Reports, vol. 71, pp. 650 et seq., at p. 653).

(or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated as an integral part of the principal damage suffered by the injured State. The Commission however refrained from expressly providing in article 8 for compensation of the moral damage to nationals of the injured State since the relationship between that State and its nationals is a primary rule which has no place in the present context.

(20) In the light of the above, the phrase "economically assessable damage" covers both:

(i) damage caused to the State's territory in general, to its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft, spacecraft, etc. (so-called "direct" damage to the State); 30/ and

(ii) damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage to the State). 31/

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30/ Examples of "direct" damage to the State are found in such cases as the Corfu Channel case (Merits), I.C.J. Reports, 1949, p. 4, and the case concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports, 1980, p. 3. In the literature, see in particular Brownlie, op. cit., (footnote 18 above), pp. 236-240.

31/ That the damage suffered by the State through its nationals (and, it should be added, through its agents in their private capacity) is a "direct" damage to the State itself - notwithstanding its frequent qualification as "indirect" damage - is explained in masterly fashion by Reuter:

> "... the modern State socializes all private assets by taxation, as it socializes part of private expenditures by taking over health costs or part of the risks attached to human existence. In an even more general way, the State now actually picks up all the elements of economic life. All property and all income, all debts and all expenditures, even of a private character, are set down in a system of national accounts and its teachings are one of the tools of the economic policy of all governments and thus under its sway.
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> "Nowadays, therefore, it can no longer be said that the damage sustained by private individuals is attributed to the State by a purely formal mechanism; economically that is so: it is the Nation, represented by the State, that bears the burden, at least to some extent, of the loss first suffered by a private individual." (P. Reuter, "Le dommage comme condition de la responsabilité internationale", Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muella (Madrid, Tecnos, 1979), vol. II, pp. 841-842.

(21) The latter class of damage embraces both the "patrimonial" loss sustained by private persons, physical or juridical, and the "moral" damage suffered by such parties. It also includes, a fortiori, the "personal" damage - other than "moral" damage - caused to the said private parties by the wrongful act. This refers, in particular, to such injuries as unjustified detention or any other restriction of freedom, torture or other physical damage to the person, death, etc.

(22) Injuries of the latter kind, in so far as they are susceptible of economic assessment, are treated by international jurisprudence and State practice according to the same rules and principles as those applicable to the pecuniary compensation of material damage to the State. It is actually easy to find a clear tendency to extend to the said class of "personal" injuries the treatment afforded to strictly "patrimonial" damages. A typical example is that of the death of a private national of the State concerned. In awarding pecuniary compensation, jurisprudence seems to refer in such a case to the economic loss sustained, as a consequence of the death, by the persons who were somehow entitled to consider the existence of the deceased as a "source" of goods or services susceptible of economic evaluation. One should recall in this respect the first two points made by the umpire in the Lusitania case. According to the umpire, the damage to be compensated in case of death should be calculated on the amount: "(a) which the decedent, had he not been killed, would probably have contributed to the claimant" and on "(b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision." 32/ This approach to reparation was clearly followed by the ICJ in the Corfu Channel case (United Kingdom v. Albania). 33/ The Court upheld the United Kingdom's claims in respect of the casualties and injuries sustained by the crew and awarded a sum covering "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical

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32/ Private parties include, as well as the State's nationals, agents of the State in so far as they are privately affected by the internationally wrongful act.

33/ Judgment of 15 December 1949 (Assessment of the amount of compensation), I.C.J. Reports 1949, p. 244.

treatment, etc." 34/ The Corfu Channel case shows that pecuniary compensation is awarded not only in cases of death but also in cases of physical or psychological injury. Among the numerous similar cases, one which is generally considered to be a classic example of this approach to "personal" damage is the William McNeil case, 35/ where the personal injury had consisted in a serious and long-lasting nervous breakdown caused to that British national as a result of the cruel and psychologically traumatic treatment to which he had been subjected by Mexican authorities whilst in prison. The British-Mexican Claims Commission pointed out that:

> "... It is easy to understand that this treatment caused the serious derangement of his nervous system, which has been stated by all the witnesses. It is equally obvious that considerable time must have elapsed before this breakdown was overcome to a sufficient extent to enable him to resume work, and there can be no doubt that the patient must have incurred heavy expenses in order to conquer his physical depression." 36/

Having noted that after his recovery McNeil had practised a rather lucrative profession, the Commission took the view that "the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained". 37/ This type of reasoning has been used at times by courts in cases in which personal injury consisted in unlawful detention. Particularly in cases in which detention was extended for a long period of time, the courts have been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim. One example is the Topaze case, decided by the British-Venezuelan Mixed Claims Commission. In view of the personality and the profession of the private victims, the Mixed Commission decided in that case to award a sum of $100 a day to each

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34/ Ibid., p. 249.

35/ Decision of 19 May 1931 of the British-Mexican Claims Commission (United Nations, Reports of International Arbitral Awards, vol. V, pp. 164 et seq.).

36/ Ibid., p.168.

37/ Ibid.

injured party for the whole period of their detention. 38/ The same method was followed in the Faulkner case by the Mexico-United States General Claims Commission, except that this time the daily rate was estimated at $150 in order to take account of inflation. 39/

(24) Paragraph 2 of article 8 provides that compensation "may include interest". This formulation makes it clear that there is no automatic entitlement to the payment of interest and no presumption in favour of the injured State. The Commission however recognizes that the concept of full reparation will normally require the awarding of interest 40/ which seems to be the most frequently used method for compensating the type of loss stemming from the temporary non-availability of capital. In the words of one writer:

> "... interest, an expression of the value of the utilization of money is nothing more than a means open to the judge for a priori determination of the injury sustained by a creditor from the non-availability of the principle for a given period". 41/

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38/ Ibid., vol. IX, p. 387 et seq., at p. 389.

39/ Decision of 2 November 1926 (ibid., vol. IV, pp. 67 et seq., at p. 71).

40/ Doctrinal views on this point are divided. Some writers (including Anzilotti, "Sugli effetti dell'inadempienza di obligazioni internazionali aventi per oggetto una somma di danero", Rivista di diritto internazionale (Rome), vol. VII (1913), p. 61; K. Strupp, "Das völkerrechtliche Delikt", Handbuch des Völkerrechts, F. Stier-Somlo ed. (Stuttgart, 1920), vol. III, 1st part, a, p. 212; P. Guggenheim, Traité de droit international public (Geneva, Georg, 1954), vol. II, p. 73; and Morelli, Nozioni di diritto internazionale, 7th ed. (Padua, CEDAM, 1967), p. 358) deny that the payment of interest is the subject of an international obligation. The opposite view is held by others (among whom Lapradelle, commentary of the Dundonald case (Lapradelle-Politis, vol. III, pp. 456 et seq.); Salvioli, op. cit. (footnote 13 above), pp. 278-279; Rousseau, Droit international public, vol. V, Les rapports conflictuels (Paris, Sirey, 1983), p. 13; Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", Zeitschrift für Völkerrecht (Breslau), vol. 10, supplement No. 2 (1917), pp. 128-129; Personnaz, op. cit. (footnote 7 above), p. 186; Graefrath, op. cit. (footnote 6 above), p. 98; and Nagy, op. cit. (footnote 5 above), pp. 182-183.

41/ J.L. Subilia, L'allocation d'intérêts dans la jurisprudence internationale (thesis, University of Lausanne), (Lausanne, imprimerie Vaudoise, 1972), p. 142.

(25) International practice seems to be in support of awarding interest in addition to the principal amount of compensation. The only case in which interest has been denied as a matter of principle (and not because of the circumstances of the case) seems to have been the Montijo case. 42/ By way of examples of the prevailing jurisprudence, reference may be made to the Illinois Central Railroad Co. case, 43/ to the Lucas case 44/ and to Administrative Decision No. III of the United States-German Mixed Claims Commission dated 11 December 1923. 45/

(26) In line with its general position that the awarding of interest, although normally justified, depends on the circumstances of each case, the Commission considers that the determination of dies a quo and dies ad quem in the calculation of interest, the choice of the interest rate and the allocation of compound interest are questions to be solved on a case-by-case basis. It is comforted in its position by the diversity of the solutions advocated in the literature or adopted in judicial practice on all these issues. It will be for the judge or other third party involved in the settlement of the dispute to determine in each case whether interest should be paid, bearing in mind the overriding principle of "full reparation" of the damage laid down in article 6 bis.

(27) The same remarks apply to compensation for loss of profits even though the concluding part of paragraph 2 of the present article, by qualifying the reference to loss of profits by the phrase "where appropriate", recognizes that compensation for lucrum cessans is less widely accepted in the literature and in practice there is reparation for damnum emergens.

(28) The main problems arising with regard to lucrum cessans are those connected with the role of causation and with the correct determination of the extent of profits to be compensated, particularly in the case of wrongful acts

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42/ Decision of 26 July 1875 (United States of America v. Colombia) (Moore, Digest, vol. II, pp. 1421 et seq.).

43/ Decision of 6 December 1926 (United Nations, Reports of International Arbitral Awards, vol. IV, pp. 134 et seq.).

44/ Decision of 11 July 1957 (International Law Reports, vol. 30 (1966), pp. 220 et seq.).

45/ United Nations, Reports of International Arbitral Awards, vol. VII, pp. 66-68.

affecting property rights or "going concerns" of an industrial or commercial nature.

(29) As regards the first point, the prevailing doctrine, opposing notably the dictum of the arbitral tribunal in the Alabama case, 46/ whereby "prospective earnings cannot properly be made the subject of compensation inasmuch as they depend in their nature upon future and uncertain contingencies", 47/ contends that for the purpose of indemnification, it is not necessary for the judge to acquire the certainty that the damage depends on a given wrongful act; it is sufficient - also and especially for lucrum cessans - to be able to presume that, in the ordinary and normal course of events, the identified loss would not have occurred if the unlawful act had not been committed. 48/

(30) The majority of court decisions also seems to move in favour of the indemnifiability in principle of lucrum cessans. The decision in the Cape Horn Pigeon case 49/ is a classic example. The case related to the seizure of an American whaler by a Russian cruiser. Russia accepted its responsibility, and the only thing the arbitrator had to do was establish the amount of compensation. He decided that the compensation should be sufficient to cover not only the real damage already occasioned but also the profits which the injured party had been deprived of because of the seizure.

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46/ Decision of 14 September 1872 (United States of America v. Great Britain) (Moore, Digest, vol. I, pp. 653 et seq.).

47/ Ibid., p. 658.

48/ In this sense, see Salvioli, op. cit. (footnote 13 above), pp. 256-257; Bollecker-Stern, op. cit. (footnote 7 above), p. 199; Reitzer, op. cit. (footnote 5 above), pp. 188-189; Eagleton, op. cit. (footnote 2 above), pp. 197-203; Jimenez de Arechaga, op. cit. (footnote 2 above), pp. 569-570.

49/ Decision of 29 November 1902 (United States of America v. Russia) (United Nations, Reports of International Arbitral Awards, vol. IX, pp. 63 et seq.). Similar conclusions were reached in the Delagoa Bay Railway case (Martens, Nouveau Recueil, 2nd series, vol. XXX, pp. 329 et seq.), the William Lee case (Decision handed down on 27 November 1867 by the Lima Mixed Commission (Moore, Digest, vol. IV, pp. 3405-3407) and the Yuille Shortridge and Co. case (see footnote 22 above).

Diametrically opposed conclusions were however reached in the Canada 50/ and Lacaze 51/ cases. Lucrum cessans also played a role in the Chorzow Factory case (Merits). The PCIJ decided 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. 52/

(31) As for the correct determination of the extent of profits to be compensated, two distinct methods have emerged which are widely used to determine lucrum cessans: the so-called "in abstracto" and "in concreto" systems. The in abstracto method, which is more commonly used, consists in attributing interest on the amounts due by way of compensation of the principal damage. 53/ Paradigms other than interest which may be used in the case of business activities are the amount of the profits earned by the same physical or juridical person in the period preceding the unlawful act, or the amount of the profits earned during the same period by similar business concerns. The so-called in concreto system is used when the estimate is

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50/ Decision of 11 July 1870 (United States of America v. Brazil) (Moore, Digest, vol. II, pp. 1733 et seq).

51/ Ibid., p. 1746.

52/ P.C.I.J., Series A, No. 17, pp. 47-48. The Court made the following observations on this point:

> "... Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts ... should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded." (p. 53)(emphasis added).

53/ A typical example is the Fabiani case (Decision of 30 December 1896 (France v. Venezuela) (Martens, Nouveau Recueil, 2nd series, vol. XXVII, pp. 663 et seq.)), in which the arbitrator awarded a lump sum for lucrum cessans which was approximately twice the amount that would have been awarded by way of compound interest.

"based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question". 54/

(32) The determination of lucrum cessans involves naturally the most problematic choices in cases where the reparation is due for the unlawful taking of foreign property consisting of the totality or a part of a going commercial or industrial concern. A proper analysis of the relevant practice should also take into account in a measure that part of international jurisprudence which has dealt with the lawful expropriation of going concerns. The necessity for the adjudicating bodies to pronounce themselves on the claim of unlawfulness advanced by the dispossessed owner has led them in fact to develop interesting considerations on the principles governing compensation - and notably compensation for lost profits - in case of unlawful taking.

(33) The precedent most frequently recalled is the PCIJ's judgment in the Chorzow Factory case (Merits), in which the necessity of determining the consequences of the unlawful taking by Poland of the assets of German companies moved precisely from an unambiguous and sharp distinction between lawful and unlawful expropriation. 55/ It was after formulating that distinction (and assuming the case before it to be one of unlawful expropriation) that the PCIJ set forth that famous principle of full compensation according to which the injured party was entitled to be re-established in the same situation which would, in all probability, have existed if the wrongful taking had not taken place. In brief, the Court applied a principle of full restitution in the literal and broad sense of restitutio in integrum, as distinguished from the technical and narrow sense in which the expression is sometimes used to indicate naturalis restitutio. According to the Court, full compensation could be achieved by different means. Whenever possible, one should apply naturalis restitutio or restitutio in integrum stricto sensu. Whenever and to the extent that such a remedy did not ensure full compensation (namely restitutio in integrum in the broad

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54/ Gray, op. cit. (footnote 6 above) p. 26. One example is the Cheek case (Decision of 21 March 1898 (United States of America v. Siam) (Moore, Digest, vol. V, p. 5068)), in which the arbitrator awarded damages explicitly in order to place the estate of the injured party as far as possible in the same position as it would have been in without the unlawful act, which involved complicated calculations and valuations "to arrive at a probable figure for lost profits".

55/ P.C.I.J., Series A, No. 17, pp. 46-67.

literal sense), one should resort to pecuniary compensation in such a measure as to cover any loss not covered thereby, up to the amount necessary for such full compensation.

(34) It is on the same principle that the Permanent Court of Arbitration decided the Lighthouses case. 56/ Considering the activity which was the object of the contract and the impossibility of assessing the value of the concession (at the time of expropriation) on the basis of the "residual amortization value of the buildings", the tribunal found the injured party to be entitled to compensation equivalent to the profits the company would have earned from the concession for the rest of the duration of the contract. This interpretation of the principle of full compensation seems to have depended, however, on the particular circumstances of the case. It depended notably, it seems, on the fact that the contract article contemplating the possibility of the "taking over" of the concession indicated that the indemnifiable damage should consist, in such eventuality, in "all compensation which may be determined by the parties or by arbitration in case of failure to agree". 57/ Within such a contractual context, any question with regard to compensation was bound to be settled by the discretionary power of the arbitral tribunal rather than on the basis of any objective legal principle. All that can be drawn from this case, therefore, is that the tribunal awarded an amount of compensation calculated on the basis of the capitalization of future profits, such sum representing the "value of the concession in 1928" (namely, the value which the Greek Government was contractually bound to pay for it if it exercised its agreed right of redemption).

(35) The same principle of full compensation was the basis of the decision handed down in 1963 in the Sapphire International Petroleums Ltd. v. National Iranian Oil Company (NIOC) case, 58/ in which the injured party obtained compensation for both the loss corresponding to the expenses incurred for the performance of the contract and the net lost profits. As regards the assessment of such lost profits, the arbitrator noted, however, that that was

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56/ Decision of 24/27 July 1956 (France v. Greece) (United Nations, Reports of International Arbitral Awards, vol. XII, pp. 155 et seq.).

57/ Ibid., pp. 299-350.

58/ Decision of 12 April 1977 (International Law Reports, vol. 35 (1967), pp. 136 et seq.).

"a question of fact to be evaluated by the arbitrator"; and after considering "all the circumstances", including "all the risks inherent in an operation in a desolate region" and "the troubles - such as wars, disturbances, economic crises or slumps in prices - which could affect the operations during the several decades during which the agreement was to last", 59/ the arbitrator awarded compensation for loss of profits amounting to a sum corresponding to two fifths of the amount claimed by the company. In this case, while lucrum cessans was decidedly included in the compensation, the arbitrator did not indicate any preference of principle for one or the other of the possible methods of evaluation.

(36) Although the LIAMCO v. Government of Libya case 60/ concerned a lawful expropriation, with regard to which the arbitrator rejected the claim to naturalis restitutio, some considerations were made concerning "cases of wrongful taking of property". The arbitrator had no difficulty in admitting with the claimant that an internationally wrongful violation of a concession agreement "entitles Claimant in lieu of specific performance to full damages including damnum emergens and lucrum cessans. 61/ Again, however, nothing was specified with regard to the method by which lucrum cessans should, in such cases, be assessed. Something more seems to emerge from AMINOIL v. Kuwait. 62/ Again, the expropriation was considered to be a lawful one. It was stated later, however, in connection with the issue of compensation for loss of profits, that the method of the Discounted Cash Flow (DCF), 63/ which was unsuitable for the calculation of lost profits compensation in a case of lawful take-over, might be adequate in a case of unlawful expropriation - this in view of the fact that the application of such a method would ensure, in a case of a wrongful taking affecting decisively the assets involved, a compensation globally apt to restore the situation that would have existed if the wrongful act had not been committed. A confirmation comes from

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59/ Ibid., pp. 187 and 189.

60/ Decision of 12 April 1977 (ibid. vol. 62 (1982), pp. 141 et seq.).

61/ Ibid., pp. 202-203.

62/ Decision of 24 March 1982 (International Legal Materials, vol. XXI (1982), pp. 976 et seq.).

63/ Ibid., pp. 1034-1035.

AMCO Asia Corporation v. Indonesia 64/ a case of unlawful taking. After recalling the principle of full compensation as being inclusive of damnum emergens and lucrum cessans - the latter not to exceed the "direct and foreseeable prejudice" - the tribunal evaluated the lost profits on the basis of DCF, rendering thus more explicit what had been stated only incidentally in the AMINOIL case: namely, that DCF should be considered one of the most appropriate methods of evaluation of a going concern unlawfully taken. 65/ (37) The latter conclusion does not find confirmation, however, in the Amoco International Finance Corporation v. Iran case, partly decided by an award of 14 July 1987 by the Iran-United States Claims Tribunal, 66/ part of which is devoted precisely to the effects of lawfulness or unlawfulness on the standard of compensation. 67/ In evaluating the parties' contentions, the tribunal confirmed the distinction between lawful and unlawful expropriations, "since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking". 68/ The study of that case might suggest that the tribunal saw a certain discrepancy between the evaluation of lucrum cessans in the case of unlawful taking (such evaluation to be confined in any case to the profits lost up to the time of settlement), on the one hand, and the lost profits calculated on a DCF basis until the time originally set for the termination of the concession, on the other. The tribunal, however, does not go any further in the analysis of the discrepancy. It confines itself to the rejection of DCF as a method applicable to the case at hand. 69/ In Starret Housing 69 bis/on the other hand, the Tribunal made no distinction in

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64/ Decision of 20 November 1984 (Ibid., vol. XXIV (1985), pp. 1022 et seq.).

65/ Ibid. p. 1037, para. 271 of the award.

66/ Ibid., vol. XXVII (1988), pp. 1314 et seq.

67/ Ibid., pp. 81 et seq., paras. 189-206.

68/ Ibid., p. 82, para. 192.

69/ Ibid., p. 105, para. 240.

69 bis/ Starret Housing Corp. v. Islamic Rep. of Iran, (Case No. 24) 14 August 1987 AWD 314-24-1 (1/8/87).

terms of the lawfulness of the taking and its award included compensation for lost profits. In Phillips Petroleum Co. Iran v. Iran the tribunal stated:

> "The Tribunal believes that the lawful/unlawful taking distinction, which in customary international law flows largely from the Case Concerning the Factory at Chorzow (Claim for indemnity) (Merits), P.C.I.J. Judgment No. 13, Ser. A., No. 17 (28 September 1928), is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of taking and the date of the judicial or arbitral decision awarding compensation. The Chorzow decision provides no basis for any assertion that a lawful taking requires less compensation than that which is equal to the value of the property on the date of taking." 69 ter/

(38) In view of the divergences of opinion which exist with regard to compensation for lucrum cessans, the Commission has come to the conclusion that it would be extremely difficult to arrive in this respect at specific rules commanding a large measure of support. It has therefore felt it preferable to leave it to the judge or other third party involved in the settlement of the dispute to determine in each case whether compensation for loss of profits should be paid. The decisive element in reaching a decision on this point is the necessity of ensuring full reparation of the damage as provided in article 6 bis.

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69 ter/ Phillips Petroleum Co. Iran v. Iran, (Case No. 39) 29 June 1989 AWD 425-39-2.