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Responsibility of States for internationally wrongful acts

Responsibility of States for internationally wrongful acts

Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

Contents

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Abbreviations

ACHPR	African Court of Human Rights and Peoples' Rights
BIT	Bilateral investment treaty
CCJ	Caribbean Court of Justice
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts at its fifty-third session, in 2001. In its resolution 56/83, the General Assembly took note of the articles (hereinafter referred to as the State responsibility articles), the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

2. As requested by the General Assembly in its resolution 59/35, in 2007 the Secretary-General prepared a compilation of decisions of international courts, tribunals and other bodies referring to the State responsibility articles.[1] A further three compilations were prepared by the Secretary-General, in 2010, 2013 and 2016 on the basis of the requests of the Assembly in its resolutions 62/61[2] 65/19,[3] and 68/104,[4] respectively. In 2017, pursuant to a request by the Assembly in its resolution 71/133, the Secretary-General prepared a technical report listing, in a tabular format, the references to the articles contained in the compilation of decisions of international courts, tribunals and other bodies referring to the articles prepared since 2001, as well as references to the articles made in submissions presented by Member States before international courts, tribunals and other bodies since 2001.[5]

3. In its resolution 71/133, the General Assembly acknowledged the importance of the State responsibility articles and commended them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly also requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles, to invite Governments to submit information on their practice in that regard and to submit that material to the Assembly well in advance of its seventy-fourth session.

4. By a note verbale dated 16 January 2017, the Secretary-General invited Governments to submit, no later than 1 February 2019, information regarding decisions of international courts, tribunals and other bodies referring to the articles for inclusion in an updated compilation. By a note verbale dated 8 January 2018, the Secretary-General reiterated that invitation.

5. The present compilation includes an analysis of a further 86 cases in which the State responsibility articles were referred to in decisions taken during the period from 1 February 2016 to 31 January 2019.[6] Such references were found in the decisions of: the International Court of Justice; the International Tribunal for the Law of the Sea; the International Criminal Court; panels of the World Trade Organization; international arbitral tribunals; the African Court on Human and Peoples' Rights; the African Commission on Human and Peoples' Rights; the European Court of Human Rights; the Inter-American Court of Human Rights; the Caribbean Court of Justice; the Economic Community of West African States Court of Justice; and the General Court of the European Union.

6. The present compilation, which supplements the four previous Secretariat compilations on the topic, reproduces the relevant extracts of publicly available

[1] A/62/62, A/62/62/Corr.1 and A/62/62/Add.1.
[2] A/65/76.
[3] A/68/72.
[4] A/71/80.
[5] A/71/80/Add.1.
[6] Joined cases that resulted in the same decision have been counted as one case. The compilation also includes a limited number of cases decided in January 2016 that became available only after the issuance of document A/71/80.

decisions under each of the articles referred to by international courts, tribunals or bodies, following the structure and numerical order of the State responsibility articles. Under each article, decisions appear in chronological order. In view of the number and length of the decisions, the compilation includes only the relevant extracts of the decisions referring to the State responsibility articles, together with a brief description of the context in which the reference was made.[7]

7. The compilation contains those extracts of publicly available decisions in which the State responsibility articles are invoked as the basis for the decision or where the articles are referred to as reflecting the existing law governing the issue at hand. It does not cover the submissions of the parties invoking the State responsibility articles nor the opinions of judges appended to a decision.

II. Extracts of decisions referring to the articles on responsibility of States for internationally wrongful acts

Part One
The internationally wrongful act of a State

Chapter I
General principles

Article 1[8]
Responsibility of a State for its internationally wrongful acts

International Criminal Court

In *Prosecutor (on the application of Victims) v. Ruto (William Samoei) and Sang (Joshua Arap)*, the International Criminal Court referred to article 1 of the State responsibility articles in discussing whether it does "amount to an internationally wrongful act for the government of a State to set out to meddle with an on-going case before an international criminal court, with the view to occasioning its abortion without proper consideration of the charges".[9]

International Tribunal for the Law of the Sea

In *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, a Special Chamber of the International Tribunal for the Law of the Sea observed that the Seabed Disputes Chamber of the Tribunal, in its advisory opinion on *Responsibilities and Obligations of States with Respect to Activities in the Area*, established the customary international law status of several articles of the State responsibility articles, and added that article 1 "also reflects customary international law".[10]

[7] Unless otherwise indicated, footnote references in the decisions are omitted.

[8] See also *Vestey Group Limited Ltd. v. Bolivarian Republic of Venezuela*, referred to under article 2, and *Benson Olua Okomba v. Republic of Benin* and *Chief Damian Onwuham and Others v. Federal Republic of Nigeria and Anor*, referred to under article 2.

[9] International Criminal Court, Trial Chamber V(A), Decision on defence applications for judgments of acquittal, ICC-01/09-01/11-2027-Red, Case No ICC-01/09-01/11, 5 April 2016, paras. 207–210.

[10] ITLOS, Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017, para. 558, citing Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, para. 169.

European Court of Human Rights

The European Court of Human Rights, in *Abu Zubaydah v. Lithuania*, recited articles 1, 2, 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[11]

European Court of Human Rights

The European Court of Human Rights, in *Al Nashiri v. Romania*, referred to articles 1, 2, 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[12]

Article 2[13]
Elements of an internationally wrongful act of a State

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Vestey Group Limited Ltd. v. Bolivarian Republic of Venezuela*, also relying on articles 1 and 31 of the State responsibility articles, found that "Venezuela has committed an internationally wrongful act as defined by Article 2 of the ILC Articles on State Responsibility, which entails the international responsibility of the state, and gives rise to an obligation to make full reparation for the injury caused by the illicit act".[14]

Permanent Court of Arbitration (under UNCITRAL rules)

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India*, the arbitral tribunal stated that "[i]t is important to note that Article 2 of the ILC Articles states that two conditions must be met for the attribution to a State of an internationally wrongful act: (i) the act must be attributable to the State under international law; and (ii) it must constitute a breach of an international obligation of the State".[15]

Arbitral tribunal (under the SCC rules)

In *Busta and Busta v. The Czech Republic*, the arbitral tribunal referred to article 2 of the State responsibility articles, when noting that "a State's international responsibility can be engaged by both action and inaction of its organs".[16]

Economic Community of West African States Court of Justice

In *Benson Olua Okomba v. Republic of Benin*, the Economic Community of West African States Court of Justice observed, in considering articles 1 and 2 of State responsibility articles, that "[t]he rules of state responsibility appl[y] to international human rights law".[17]

International arbitral tribunal (under the ICSID Convention)

In *UAB E Energija (Lithuania) v. Republic of Latvia*, the arbitral tribunal stated, with reference to article 2 of the State responsibility articles, that "[t]he issue for the purposes of the present Award is the threshold question whether the conduct of which

[11] ECHR, First Section, Application No. 46454/11, Judgment, 31 May 2018, para. 232.
[12] ECHR, First Section, Application No. 33234/12, Judgment, 31 May 2018, para. 210.
[13] See also *Abu Zubaydah v. Lithuania* and *Al Nashiri v. Romania*, referred to under article 1.
[14] ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 326 and note 306.
[15] PCA Case No. 2013-09, Award on Jurisdiction and the Merits, 25 July 2016, para. 283.
[16] SCC Case No. V (2015/014), Final Award, 10 March 2017, para. 399.
[17] ECOWAS Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, p.20.

the Claimant complains is attributable to the Respondent under international law".[18] The arbitral tribunal found that "[t]he Respondent's breaches of Article 3(1) of the BIT amount to an internationally wrongful act as this provision gives rise to an international obligation on the Respondent and the Tribunal has found the breaches of this provision to be attributable to the Respondent (Article 2 of the ILC Articles)".[19]

Economic Community of West African States Court of Justice

In *Chief Damian Onwuham and Others v. Federal Republic of Nigeria and Imo State Government*, the Economic Community of West African States Court of Justice, quoting articles 1 and 2 of the State responsibility articles, observed that "[i]t is trite that the rules of state responsibility appl[y] to international human rights law. […] This implies that states will be responsible for acts done without due care and diligence in preventing human right[s] violations and for failure to investigate and punish acts violating those rights".[20]

Article 3
Characterization of an act of a State as internationally wrongful

International arbitral tribunal (under the ICSID Convention)

In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 3 when noting that "[a]s is well-established in investment treaty jurisprudence, treaty and contract claims are distinct issues".[21]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Vestey Group Limited Ltd. v. Bolivarian Republic of Venezuela* decided "not [to] consider the provisions of the Land Law in assessing [applicant's] ownership over allegedly expropriated land", noting that this was also in line with article 3 of the State responsibility articles as a "cornerstone rule of international law".[22]

Permanent Court of Arbitration (under UNCITRAL rules)

In *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, the arbitral tribunal cited article 3 to emphasize that "the circumstance that an entity is not considered a State organ under domestic law does not prevent that entity from being considered as such under international law for State responsibility purposes".[23]

International arbitral tribunal (under the ICSID Convention)

In *Pac Rim Casado Llc v. Republic of El Salvador*, the arbitral tribunal, citing article 3, noted that "[i]t is well established that a State cannot justify the non-observance of its international obligations in an international arbitration by invoking provisions of its domestic law".[24]

[18] ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 795.
[19] Ibid., para. 1127.
[20] ECOWAS Case No. ECW/CCJ/JUD/22/18, Judgment, 3 July 2018, pp. 24–25.
[21] ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 474, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 95–96.
[22] ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 254 and note 234.
[23] PCA, Award, IIC 883 (2016), 12 August 2016, para. 433.
[24] ICSID Case No. ARB/09/12, Award, 14 October 2016, para. 5.62.

Ad hoc committee (under the ICSID Convention)

In *Venezuela Holdings BV and ors v. Venezuela*, the ad hoc committee constituted to decide on the annulment of the award referred to the commentary to article 3 of the State responsibility when stating that it seemed "obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires".[25]

Chapter II
Attribution of conduct to a State

General comments

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* cited the commentary to Chapter II of the State responsibility when stating that "ANR [the Polish Agricultural Property Agency] does not meet the criteria usually applied to determine whether an entity is a *de facto* State organ".[26]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, noted that it "does not have to decide whether CVG Bauxilum's conduct is attributable to Respondent under the ILC Draft Articles and whether a breach of contract could give rise to Respondent's liability under international law in light of CVG Bauxilum's State-granted monopoly over the supply of bauxite in Venezuela".[27]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* characterized resolution 56/83 of 12 December 2001, containing the State responsibility articles, as "as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties".[28]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia* observed that "the ILC Articles are the relevant rules on attribution that are widely considered to reflect international law. They concern the responsibility of States for their internationally wrongful acts, given the existence of a primary rule establishing an obligation. These principles of attribution do not operate to attach responsibility for 'non-wrongful acts' for which the State is assumed to have knowledge".[29]

The tribunal also noted that "the rules of attribution under international law as codified in the ILC Articles do not operate to define the content of primary obligations, the breach of which gives rise to responsibility. Rather, the rules concern the responsibility of States for their internationally wrongful acts. It follows that the

[25] ICSID Case No. ARB/07/27, Decision on annulment, 9 March 2017, paras. 161 and 181.
[26] PCA Case No. 2015-13, Award, 27 June 2016, para. 210 (original emphasis).
[27] ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 536.
[28] ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 167.
[29] ICSID Case No ARB/12/39, Award of the Tribunal, 26 July 2018, paras. 779 and 804.

rules of attribution cannot be applied to create primary obligations for a State under a contract".[30]

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal "determine[d] the issues of attribution by reference to Articles 4, 5, 8 and 11 of the ILC's Articles on State Responsibility, being declaratory of customary international law, as argued by the Parties".[31]

Article 4[32]
Conduct of organs of a State

Arbitral tribunal (under the ICSID Convention)

In *Joseph Houben v. Republic of Burundi*, the arbitral tribunal referred to article 4 of the State responsibility articles as a reflection of customary international law when finding that the Burundian authorities, who were aware of the damage on Claimant's investment, had not only failed to take the minimum measures necessary to protect this investment, but had also directly contributed to the damage.[33]

International arbitral tribunal (under the ICSID Convention)

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, the arbitral tribunal, agreeing with the respondent, "conclude[d] that CVG FMO is not an organ of the State for the purposes of ILC Article 4…".[34]

Permanent Court of Arbitration (under UNCITRAL rules)

In *Mesa Power Group v. Government of Canada*, the arbitral tribunal found "no basis for holding that the OPA [the Ontario Power Authority], Hydro One and the IESO [the Independent Electricity System Operator] are organs of Canada under Article 4 of the ILC Articles".[35]

Caribbean Court of Justice

In *Maurice Tomlinson v. The State of Belize and The State of Trinidad and Tobago*, the Caribbean Court of Justice observed that "Article 4 clarifies that an act of State may be constituted by conduct of the legislature, executive or the judiciary. Accordingly, in deciding whether a State has breached its international obligation, it is necessary to examine the relevant acts of the State, that is to say, the relevant State practice, to ascertain whether those acts are inconsistent with the international obligation of the State. In this regard, acts of the legislature constitute important indications of State practice and as such warrant close examination".[36]

[30] Ibid., para. 856.
[31] ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.49 (see also para. 9.90).
[32] See also *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, referred to under article 7, and *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, referred to under article 8.
[33] ICSID Case No. ARB/13/7, Award, 12 January 2016, paras. 172 and 175.
[34] ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 413.
[35] PCA Case No. 2012-17, Award, 24 March 2016, para. 345.
[36] CCJ, Judgment, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* concluded, referring to article 4 and the commentary thereto, that "[i]n light of its autonomous management and financial status, ANR [Polish Agricultural Property Agency] is not a *de facto* organ of the Polish State".[37]

Permanent Court of Arbitration (under UNCITRAL rules)

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[38]

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Flemingo DutyFree Shop Private Limited v. The Republic of Poland* observed that the conduct of the Governor of Mazovia, the Polish courts, and the Polish custom authorities as State organs "can trigger Poland's international responsibility under Article 4 of the ILC articles".[39] Holding that the Polish Airports State Enterprise (PPL) is a *de facto* State organ,[40] the tribunal explained that "Article 4(2) of the ILC Articles, however, only provides that entities, which in accordance with the internal law of a State are qualified as State-organs, are State organs for purpose of State responsibility; it does not *per se* exclude entities which are not qualified as State organs under domestic law".[41]

Arbitral tribunal (under the SCC rules)

In *Busta and Busta v. The Czech Republic*, the arbitral tribunal cited article 4 of the State responsibility articles, noting that "it is undisputed between the Parties that a State's police authorities are organs of that State".[42]

International arbitral tribunal (under the ICSID Convention)

In *Eli Lilly and Company v. The Government of Canada*, the arbitral tribunal, following a reference to article 4 of the State responsibility articles in the claimant's arguments,[43] stated that "the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility".[44]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* observed that "the Parties agree that insofar as the conduct of Mr. Cirielli as the Undersecretary of Air Transportation is concerned, the applicable principles are contained in Article IV of the ILC Articles on State Responsibility"[45] and concluded "that the only conduct of Mr. Cirielli that

[37] PCA Case No. 2015-13, Award, 27 June 2016, para. 213 (original emphasis).
[38] PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.
[39] PCA, Award, IIC 883 (2016), 12 August 2016, para. 424.
[40] Ibid., para. 435.
[41] Ibid., para. 433.
[42] SCC Case No. V (2015/014), Final Award, 10 March 2017, para. 400.
[43] ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 175.
[44] Ibid., para. 221.
[45] ICSID Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 702.

was attributable to Respondent was his conduct while he was in office as Undersecretary of Air Transportation".[46]

Economic Community of West African States Court of Justice

In *Wing Commander Danladi A Kwasu v. Republic of Nigeria*, the Economic Community of West African States Court of Justice referred to article 4 of the State responsibility articles when stating that "[i]nternational Law admits the duty of due diligence which enjoins States to take action to prevent violations of human rights of persons within its territory. This obligation cannot be derogated from nor even by any purported agreement or consent. All actions of institutions or officials of States are imputed to a State as its own conduct".[47]

Economic Community of West African States Court of Justice

In *Benson Olua Okomba v. Republic of Benin*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte v. Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, and concluded that "it is well-established that the conduct of any organ of a state is regarded as act of that state".[48]

Economic Community of West African States Court of Justice

In *Dorothy Chioma Njemanze and Others v. Federal Republic of Nigeria*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte v. Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, noting that "[a]part from any other acts or omission alleged on the part of the State or its officials, failure to investigate such allegations [following formal complaints] itself constitutes a breach of the States duty under International law".[49]

International arbitral tribunal (under the ICSID Convention)

In *UAB E Energija (Lithuania) v. Republic of Latvia*, the arbitral tribunal citing article 4 and the commentary thereto, found that "[p]rovided that the acts in question are performed in an official capacity, they are attributable to the State. There is no dispute that the acts of the Municipality in this case were performed in an official capacity … All of the actions of the Municipality at issue in this case are therefore attributable to the Respondent".[50] Moreover, the arbitral tribunal noted that "the nature of the Regulator as a State organ as understood under Article 4 of the ILC Articles may be inferred from provisions of the Public Utilities Regulators Act".[51]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[52]

[46] Ibid., para. 711.
[47] ECOWAS Case No. ECW/CCJ/JUD/04/17, Judgment, 10 October 2017, p.25.
[48] ECOWAS Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, pp.21–22, citing Judgment No. ECW/CCJ/JUD/11/14.
[49] ECOWAS Case No. ECW/CCJ/JUD/08/17, Judgment, 12 October 2017, pp.39–40, citing Judgment No. ECW/CCJ/JUD/11/14.
[50] ICSID Case No. ARB/12/33, Award, 22 December 2017, paras. 800–801.
[51] Ibid., para. 804.
[52] ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 168.

Economic Community of West African States Court of Justice

In *Hembadoon Chia and Others v. Federal Republic of Nigeria and Others*, the Economic Community of West African States Court of Justice explained that "[a] state cannot take refuge on the notion that the act or omissions were not carried out by its agents in their official capacity or that the organ or official acted contrary to orders, or exceed its authority under internal law".[53] Referring to its earlier decision in *Tidjane Konte v. Republic of Ghana* in which it had relied on article 4 of the State responsibility articles, Community Court of Justice concluded that "the Nigerian Police and its officers are agents of the 1st Defendant who carried out the alleged act in their official capacity. Therefore, the 1st Defendant being responsible for the acts of its agents is a proper party in this suit".[54]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia* cited the text of article 4 of the State responsibility articles and the commentary thereto when observing that "[the] conduct of an organ of the State in an apparently official capacity may be attributable to the State, even if the organ exceeded its competence under internal law or in breach of the rules governing its operations. The corollary of this is that acts that an organ commits in its purely private capacity are not attributable to the State, even if it has used the means placed at its disposal by the State for the exercise of its function."[55] The tribunal concluded that "[i]t follows from Article 4 of the ILC Articles that the actions of the Bankruptcy Judge and the Bankruptcy Council are, at first sight, attributable to the Respondent".[56]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. Republic of Cyprus* recited the text of article 4 and "agree[d] with Claimants that such organs [of Cyprus] include: the President of the Republic, the Attorney General and the Deputy Attorney General, the CBC, the CySEC, the Cypriot courts, the Minister of Finance and the Cypriot Parliament. Consequently, any and all acts committed by these organs are attributable to Respondent pursuant to ILC Article 4".[57]

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* found that "by the acts of its judicial branch, attributable to the Respondent under Article 4 of the ILC Articles on State Responsibility, the Respondent violated its obligations under Article II(3)(c) of the Treaty, thereby committing international wrongs towards each of Chevron and TexPet".[58]

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal stated that "[a]rticle 4 of the ILC Articles on State Responsibility confirms that, under international law, the conduct of a State's executive branch shall be considered as an act of that State. Hence, the conduct of the Ministry of Petroleum, as with other

[53] ECOWAS Case No. ECW/CCJ/JUD/21/18, Judgment, 3 July 2018, p.15, citing Judgment No. ECW/CCJ/JUD/11/14.
[54] Ibid.
[55] ICSID Case No ARB/12/39, Award, 26 July 2018, para. 801.
[56] Ibid., para. 803.
[57] ICSID Case No. ARB/13/27, Award, 26 July 2018, paras. 670–671.
[58] PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 8.8.

Ministries and the Council of Ministers, is attributable to the Respondent."[59] The tribunal further stated that "[a]ccording to the ILC Commentary to Article 4, '[t]he reference to a 'State organ' covers all the individual or collective entities which make up the organization of the State and act on its behalf.' Of course, a State may become subject to obligations entered into on its behalf by entities other that organs of the State, but this is governed by general principles of the law of agency (not attribution)".[60] The tribunal concluded that the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were not an organs of the respondent "within the meaning of Article 4 of the ILC Articles on State Responsibility".[61]

General Court of the European Union

In *Ahmed Abdelaziz Ezz et al. v. Council*, the General Court of the European Union did not accept:

> [t]he applicants' argument that the Council's assessment does not comply with 'general international law'.... In that regard, it suffices to note that the applicants refer to the concept of 'organ of the State', as defined in the commentary of the United Nations International Law Commission on the 2001 Resolution on Responsibility of States for Internationally Wrongful Acts and in international arbitral decisions ruling on responsibility of States in the context of disputes between States and private companies. Thus, those references, for reasons similar to those set out in paragraph 268 above, are irrelevant in the present case.[62]

World Trade Organization Panel

The panel established in *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines* "consider[ed] that Article 4(1) of these Articles [on State responsibility] is an expression of customary international law".[63]

Article 5[64]
Conduct of persons or entities exercising elements of governmental authority

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela* was "mindful of Note 3 of the commentary to Article 5" of the State responsibility articles when rejecting the applicant's submission that "[CVG FMO]'s actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles".[65]

[59] ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.92.
[60] Ibid., para. 9.93.
[61] Ibid. para. 9.112.
[62] EU, General Court, *Ahmed Abdelaziz Ezz et al. v. Council*, Case T 288/15, Judgment of 27 September 2018, para. 272.
[63] WTO, Panel Report, WT/DS371/RW, 12 November 2018, paras. 7.636 and 7.771 (note 1654); see also WTO, Panel Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, WT/DS371/R, 15 November 2010, para. 7.120.
[64] See also *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, referred to under article 8, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, referred to under article 4, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, referred to under article 8, *Mesa Power Group v. Government of Canada*, referred to under article 55, and *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India*, referred to under article 4.
[65] ICSID Case No. ARB/11/26, Award, 29 January 2016, paras. 414–415.

Permanent Court of Arbitration (under UNCITRAL rules)

In *Mesa Power Group v. Government of Canada*, the arbitral tribunal relied on article 5 of the State responsibility articles to find that "the OPA [Ontario Power Authority] was acting in the exercise of delegated governmental authority. Thus, the OPA's acts in ranking and evaluating the FIT Applications are attributable to Canada".[66]

Ad hoc committee (under the ICSID Convention)

In *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. République Démocratique du Congo*, the committee established to annul the award found that the arbitral tribunal did not exceed its powers because, as its mandate required, it had verified the criteria for attribution of conduct under article 5 of the State responsibility articles.[67]

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* found that "the termination of the Lease Agreement was not attributable to Poland under ILC Article 5"[68] after deciding that the Polish Agricultural Property Agency's termination of the Lease Agreement took place in a "purported exercise of contractual powers".

Permanent Court of Arbitration (under UNCITRAL rules)

In *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, the arbitral tribunal noted that "[t]he Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles".[69]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Garanti Koza LLP v. Turkmenistan*, citing article 5 of the State responsibility articles, "confirm[ed] that the acts of TAY [State Concern 'Turkmenavtoyollary'] in furtherance of the Contract were attributable to Turkmenistan. Road and bridge construction is in any event a core function of government. Any entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of State".[70]

International arbitral tribunal (under the ICSID Convention)

In *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, the arbitral tribunal noted that "although PDVSA is a State-owned company with distinct legal personality, its conduct is attributable to [the] Respondent pursuant to Article 5 of the ILC Draft Articles" because "[b]oth in its alleged function as a '*caretaker*' and its capacity as supervisor and promoter of the nationalization of the plant, PDVSA was vested with governmental authority".[71]

[66] PCA Case No. 2012-17, Award, 24 March 2016, para. 371.
[67] ICSID Case No ARB/10/4, Decision on annulment, 29 March 2016, para. 185.
[68] PCA Case No. 2015-13, Award, 27 June 2016, para. 251.
[69] PCA, Award, IIC 883 (2016), 12 August 2016, para. 439.
[70] ICSID Case No. ARB/11/20, Award, 19 December 2016, para. 335.
[71] ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 457–458.

Permanent Court of Arbitration (under UNCITRAL rules)

In *WNC Factoring Limited v. The Czech Republic*, the arbitral tribunal stated that "[b]ased on the material available to the Tribunal, there are serious issues which arise in attributing the conduct of CEB [Czech Export Bank] and GAP [Export Guarantee and Insurance Corporation] to the Respondent under Article 5 of the ILC Articles".[72]

International arbitral tribunal (under the ICSID Convention)

In *Beijing Urban Construction Group Co. Ltd. v. Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[73]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *UAB E Energija (Lithuania) v. Republic of Latvia* stated: "Like Article 4, Article 5 of the ILC Articles merely codifies a well-established rule of international law. […] There are thus three aspects to the analysis: (i) the Regulator must have exercised elements of governmental authority; (ii) it must have been empowered by the Respondent's law to do so; and (iii) it was acting in that capacity in regulating tariffs and granting or revoking licences."[74] The tribunal found that "even if Rēzeknes Siltumtīkli and Rēzeknes Enerģija had been empowered to exercise any element of governmental authority, they were not exercising such authority 'in the particular instance', as Article 5 requires".[75]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia* cited article 5 of the State responsibility articles and noted that "[t]he Croatian Fund is an entity empowered by Croatian law to exercise elements of governmental authority, as exemplified above, and there is no suggestion that the Fund acted other than in its professional capacity. The Croatian Fund may thus be considered an entity within the ambit of Article 5."[76] The tribunal concluded that "the Claimants have not made out any wrongful conduct in violation of the BIT on the part of the Croatian Fund that is to be attributed to the Respondent. The principles of attribution, as codified in the ILC Articles, do not otherwise operate in respect of the Croatian Fund".[77]

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the arbitral tribunal relied on article 5 of the State responsibility to find that:

> [t]he Tribunal does not consider that the Claimant's case is separately advanced by Article 5 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company]. The Claimant has not established that EGPC or EGAS are 'empowered' by Egyptian law to exercise governmental authority… The Tribunal has not been shown any provision of Egyptian law 'specifically authorising' EGPC to conclude the SPA

[72] PCA Case No. 2014-34, Award, 22 February 2017, para. 376.
[73] ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.
[74] ICSID Case No. ARB/12/33, Award, 22 December 2017, paras. 806–807.
[75] Ibid., para. 816.
[76] ICSID Case No ARB/12/39, Award, 26 July 2018, paras. 810–811.
[77] Ibid., para. 816.

[Natural Gas Sale and Purchase Agreement] in the exercise of the Respondent's public authority.[78]

Inter-American Court of Human Rights

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco v. Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[79]

Article 6
Conduct of organs placed at the disposal of a State by another State

European Court of Human Rights

In *Big Brother Watch and others v. the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles "would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17)".[80]

Article 7[81]
Excess of authority or contravention of instructions

European Court of Human Rights

The European Court of Human Rights in *Nasr et Ghali v. Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[82]

World Trade Organization Panel

In *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[83]

International arbitral tribunal (under the ICSID Convention)

In *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, the arbitral tribunal, referring to article 7 of the State responsibility articles, noted that "it is not open to the State to plead the patent irregularities of a bankruptcy proceeding overseen and

[78] ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.114.
[79] Inter-American Court of Human Rights, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment of 28 November 2018, para. 205 and note 303.
[80] ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.
[81] See also *Abu Zubaydah v. Lithuania* and *Al Nashiri v. Romania*, referred to under article 1.
[82] ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.
[83] WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.

authorised at critical junctures by its own court or the making of an extraordinary loan approved by a senior government minister, which might or might not have been unlawful under Croatian law, in opposition to the BIT claim. Put another way, if this investment was not made in conformity with the legislation of Croatia, on the evidence before this Tribunal, this is due to the acts of organs of the State".[84]

Discussing the question of legitimate expectations to ownership over property by the claimant, the arbitral tribunal held:

> [I]n *Kardassopoulos* the contracting entities were an organ of the State or an entity empowered to exercise elements of the governmental authority, such that their conduct was considered an act of the State under ILC Article 7. The concession was also signed and "ratified" by a ministry of the respondent government. Further, some of the most senior government officials were involved in the negotiation of the agreements. There are no comparable findings on the attribution of conduct to the Respondent in the instant case. For example, the Tribunal finds that the contracting entity was not an entity within the meaning of ILC Article 7, and the Respondent is not a party to the Purchase Agreement or otherwise bound. Further, the actions of the Liquidator are not attributable to the Respondent.[85]

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* discussed article 7, and the commentary thereto, when finding that a judge had acted in his official capacity.[86]

Inter-American Court of Human Rights

In *Villamizar Durán et al. v. Colombia*, the Inter-American Court of Human Rights observed that the practice and *opinio juris* of States, as well as the jurisprudence of international courts, had confirmed the existence of an exception to the "general rule" in Article 7, namely when the organ or person was not acting in an official capacity, but rather acting in the capacity of a private entity or person. The Court further referred to the indication in the commentary to the provision that "the problem of drawing the line between unauthorized but still 'official' conduct, on the one hand, and 'private' conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it".[87]

Inter-American Court of Human Rights

In *Women Victims of Sexual Torture in Atenco v. Mexico*, the Inter-American Court of Human Rights cited Article 7 when discussing the defendant's argument that its agents had acted *ultra vires*.[88]

[84] ICSID Case No ARB/12/39, Award, 26 July 2018, para. 384.

[85] Ibid., para. 1009, discussing *Ioannis Kardassopoulos v. Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007.

[86] PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 8.48.

[87] Inter-American Court of Human Rights, Preliminary Objection, Merits, Reparations and Costs. Series C No. 364 (Spanish), Judgment of 20 November 2018, para. 139.

[88] Inter-American Court of Human Rights, Preliminary Objection, Merits, Reparations and Costs, Series C No. 371 (Spanish), Judgment of 28 November 2018, para. 165 and note 237.

Article 8[89]
Conduct directed or controlled by a State

Permanent Court of Arbitration (under UNCITRAL rules)

In *Mesa Power Group v. Government of Canada*, "[h]aving concluded that the OPA [Ontario Power Authority], Hydro One and IESO [Independent Electricity System Operator] are state enterprises and that Article 1503(2) of the NAFTA governs attribution, the Tribunal [could] dispense with reviewing whether their acts are attributable to Canada pursuant to Article 8 of the ILC Articles".[90]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, observed that mere acts of supervision do not place a private bank "under the Central Bank's control for the purposes of Article 8 of the ILC Articles… It follows, therefore, that the Respondent is not responsible for Prva Banka's actions in this respect".[91]

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* found "no evidence that ANR [Polish Agricultural Property Agency] acted under Poland's instructions, direction or control when terminating the Lease, and correspondingly no basis for attribution under Article 8".[92]

Permanent Court of Arbitration (under UNCITRAL rules)

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India*, the arbitral tribunal found that "Antrix's notice of annulment is attributable to the Respondent under Article 8 of the ILC Articles".[93]

International arbitral tribunal (under the ICSID Convention)

In *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "it is a well-established principle under international law that, in general, the conduct of private persons or entities is not attributable to the State. This general principle is clearly reflected, *inter alia*, in Article 8 of the ILC Draft Articles".[94] The tribunal considered that "even though members of the SINPROTRAC union may have actually taken President Chávez '*at his word*,' […] they did not act '*on the instructions of, or under the direction or control of*' President Chávez within the meaning of Article 8 of the ILC Draft Articles".[95]

[89] See also *Beijing Urban Construction Group Company Limited v. Yemen*, referred to under article 5, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, referred to under article 4, and *Mesa Power Group v. Government of Canada*, referred to under article 55.

[90] PCA Case No. 2012-17, Award, 24 March 2016, para. 365.

[91] ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 299.

[92] PCA Case No. 2015-13, Award, 27 June 2016, para. 272.

[93] PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 290.

[94] ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para.448.

[95] Ibid., para.453.

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and "formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law".[96] The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS "were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11".[97]

International arbitral tribunal (under the ICSID Convention)

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, the arbitral tribunal, observing that the parties had agreed that article 8 of the State responsibility articles was applicable to the facts of the case,[98] disagreed "that the conduct of the unions of which the Claimant complain can be attributed to Respondent".[99] The tribunal further reiterated that the appropriate test to be applied was "effective control" and not "overall control".[100]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* concluded, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[101]

International arbitral tribunal (under the ICSID Convention)

In *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* the arbitral tribunal determined that "FertiNitro [a series of joint venture companies] remained fully and effectively controlled by the Respondent, whereby FertiNitro was precluded by the Respondent from making any further *ad hoc* sales to KNI [the claimant] from 28 February 2012, just as it had been precluded from performing the Offtake Agreement from 11 October 2010 onwards. Throughout, FertiNitro (with Pequiven) thus acted under the Respondent's 'direction or control' within the meaning of Article 8 of the ILC Articles on State Responsibility".[102]

International arbitral tribunal (under the ICSID Convention)

In *UAB E Energija (Lithuania) v. Republic of Latvia*, the arbitral tribunal cited article 8 and the commentary thereto when affirming that "the Respondent instructed,

[96] ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.
[97] Ibid., para. 146.
[98] ICSID Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 721.
[99] Ibid., para. 724.
[100] Ibid., paras. 722 and 724.
[101] ICSID Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.
[102] ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.46.

directed or controlled Rēzeknes Siltumtīkli's or Rēzeknes Enerģija's bringing of the litigation which resulted in [the claimant's] bank accounts being frozen".[103]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, quoted article 8 and noted that "[a]n 'effective control' test has emerged in international jurisprudence, which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake".[104] The tribunal explained that "due to the change in the control of Holding d.o.o. when the Emergency Board was appointed on 12 July 1991, it is necessary to consider whether the Respondent exercised 'effective control' before and/or after this date"[105] and held that "Holding d.o.o. does not fall within Article 8 of the ILC Articles".[106]

International arbitral tribunal (under the ICSID Convention)

The tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. Republic of Cyprus* discussed the relevant case law on article 8 of the State responsibility articles and "note[d] that arbitral jurisprudence has consistently upheld the standard set by the ICJ. The Tribunal sees no reason to depart from this *jurisprudence constante*."[107] The tribunal observed that:

> …Claimants have not demonstrated with evidence that these specific acts that they challenge were directed or controlled by Respondent. The evidence put forward by Claimants attempts to show Respondent's overall control over Laiki, but does not contain instructions or directions emanating from the Cypriot Government that Laiki and/or its Board of Directors adopt a specific conduct. For this reason alone, Claimants' case on attribution under ILC Article 8 must fail.[108]

The tribunal further stated that even if it "were to adopt a less stringent test for attribution under ILC Article 8 – a test which this Tribunal does not endorse – this would not assist Claimants' case".[109] In particular, "[t]o the Tribunal, it is not sufficient for the Board of Directors to elect an executive who enjoyed the trust of the regulator in order to establish attribution under ILC Article 8".[110] Furthermore, "any coordination in strategies between Laiki and Cyprus as regards the financial crisis likewise does not support Claimants' contention that Respondent had complete control over the Bank".[111] Finally, "the Tribunal recall[ed] that the mere ownership of shares in Laiki by the Cypriot Government, along with the powers that this ownership entails, does not establish attribution under ILC Article 8. Claimants remain bound by the obligation to demonstrate that the challenged conduct was carried out under the instructions, direction or control of Cyprus:".[112]

[103] ICSID Case No. ARB/12/33, Award, 22 December 2017, paras. 825 and 830.
[104] ICSID Case No ARB/12/39, Award, 26 July 2018, para. 828.
[105] Ibid., para. 829.
[106] Ibid., para. 831.
[107] ICSID Case No. ARB/13/27, Award, 26 July 2018, para. 675 (original emphasis).
[108] Ibid., para. 679.
[109] Ibid., para. 680.
[110] Ibid., para. 685.
[111] Ibid., para. 687.
[112] Ibid., para. 691.

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal stated that "[u]nder Article 8 of the ILC Articles on State Responsibility, the conduct of a person (not being an organ of the State) shall be considered an act of a State under international law if the person is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. Its application, as the ILC Commentary states, depends upon 'a specific factual relationship' between the person engaging in the conduct and the State… Moreover, there is a distinction to be drawn between the conduct of the State itself and the conduct of a person attributable to the State, as was held by the ICJ in *Nicaragua v. USA*".[113] The tribunal did not consider that the acts of the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were attributable to the respondent "within the meaning of Article 8 of the ILC Articles".[114]

Article 9
Conduct carried out in the absence or default of the official authorities

African Court of Human Rights and Peoples' Rights

In *African Commission on Human and Peoples' Rights v. Libya*, the African Court of Human Rights and Peoples' Rights determined, while expressing "aware[ness] of the volatile political and security situation in Libya" cited article 9 of the State responsibility articles and found that it "is competent *ratione personae* to hear the instant case".[115]

Article 11[116]
Conduct acknowledged and adopted by a State as its own

International arbitral tribunal (under the ICSID Convention)

In *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, the arbitral tribunal found that:

> by means of its conduct after the plant takeover of 15 May 2010 carried out by the members of the SINPROTRAC union, PDVSA [Gas S.A.] acknowledged and adopted the union's actions as its own. On the basis of the applicable principles of customary international law on State responsibility as reflected in Article 11 of the ILC Draft Articles, the plant takeover on 15 May 2010 therefore has to be considered as an act of Respondent. In any event, PDVSA took effective control over the plant and started the expropriation process shortly after 15 May 2010, as confirmed by its internal memoranda and reports of early June 2010.[117]

Relying on the commentary to article 11, the arbitral tribunal also explained: "In contrast to cases of mere State support, endorsement or general acknowledgment of a factual situation created by private individuals, attribution under this rule requires that the State clearly and unequivocally '*identifies the conduct in question and makes it its own*'".[118]

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[113] ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.116.
[114] Ibid., paras. 9.117–9.118.
[115] ACHPR, App. No. 002/2013, Judgment on Merits, 3 June 2016, paras. 50 and 52.
[116] See also *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, referred to under article 8.
[117] ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 456.
[118] Ibid., para. 461 (original emphasis).

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal quoted article 11 of the State responsibility articles and the commentary thereto, based on the claimant's arguments, but did "not consider that Article 11 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company] separately advances the Claimant's case".[119]

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

Caribbean Court of Justice

The Caribbean Court of Justice in *Maurice Tomlinson v. The State of Belize and The State of Trinidad and Tobago* accepted that "[a]rticle 12 [of the State responsibility articles] repeats the rule of customary international law that there is a breach of an international obligation by a State when an act of the State is not in conformity with what is required of it by that obligation".[120]

African Commission on Human and Peoples' Rights

In *Hossam Ezzat & Rania Enayet v. The Arab Republic of Egypt*, the African Commission on Human and Peoples' Rights, citing article 12, observed that "[a] [S]tate breaches an international obligation when its conduct or conduct attributable to it in the form of action or omission is not in conformity or is inconsistent with what is expected of it by the obligation in question".[121]

Article 13
International obligation in force for a State

Permanent Court of Arbitration (under UNCITRAL rules)

In *Mesa Power Group v. Government of Canada*, the arbitral tribunal cited article 13 with regard to the non-retroactivity of treaties when concluding that "State conduct cannot be governed by rules that are not applicable when the conduct occurs".[122]

Article 14[123]
Extension in time of the breach of an international obligation

Permanent Court of Arbitration (under UNCITRAL rules)

In *Resolute Forest Products Inc. v. Government of Canada*, the arbitral tribunal explained, after quoting article 14, paragraph 2, of the State responsibility articles on a breach having a continuing character, that "the breach nonetheless occurs when the State act is first perfected and can be definitely characterized as a breach of the relevant obligation".[124]

[119] ICSID Case No. ARB/14/4, Award, 31 August 2018, paras. 9.120–9.121.
[120] CCJ, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.
[121] African Commission on Human and Peoples' Rights, Communication No. 355/07, Decision, 28 April 2018, para. 124.
[122] PCA Case No. 2012-17, Award, 24 March 2016, para. 325 and note 69.
[123] See also *Abu Zubaydah v. Lithuania* and *Al Nashiri v. Romania*, referred to under article 1, and *Nasr et Ghali v. Italy*, referred to under article 7.
[124] PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, para. 179.

Article 15[125]
Breach consisting of a composite act

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* explained that "State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC's Articles on State Responsibility".[126]

International arbitral tribunal (under the ICSID Convention)

In *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "the general thrust of the ILC Articles regarding composite acts is clear, the Articles do not address every single question, and in particular do not solve how time bar affects a string of acts which gives rise to a composite breach of a treaty".[127] The tribunal considered "the better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately".[128]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Blusun A.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* stated that "Article 15 only applies to a breach 'through a series of acts or omissions defined in aggregate as wrongful' – for example, genocide. The first two sentences of ECT Article 10(1) do not define an aggregate of acts as wrongful in the way that Article 1 of the Genocide Convention does".[129]

International arbitral tribunal (under the ICSID Convention)

In *Burlington Resources Inc. v. Republic of Ecuador*, the arbitral tribunal noted that "[t]he cases relied upon by Burlington are inapposite since they deal with breaches consisting of composite acts, as set out in Article 15 of the ILC Articles… In the present case, the Tribunal excluded the hypothesis of creeping expropriation".[130]

[125] See also *Abu Zubaydah v. Lithuania* and *Al Nashiri v. Romania*, referred to under article 1, and *Nasr et Ghali v. Italy*, referred to under article 7.
[126] ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 669.
[127] ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 227.
[128] Ibid., para. 231.
[129] ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 361.
[130] ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 452.

Chapter IV
Responsibility of a State in connection with the act of another State

Article 16[131]
Aid or assistance in the commission of an internationally wrongful act

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* referred to article 16 under "principal legal and other texts",[132] and noted that "[a]s the International Court of Justice decided in the Bosnia Genocide Case (2007), Article 16 of the State responsibility articles reflects a rule of customary international law".[133]

Article 17
Direction and control exercised over the commission of an internationally wrongful act

European Court of Human Rights

In *Big Brother Watch and others v. the United Kingdom*, the European Court of Human Rights referred to article 17 of the State responsibility articles.[134]

Chapter V
Circumstances precluding wrongfulness

Article 25[135]
Necessity

Ad hoc committee (under the ICSID Convention)

In *Total S.A. v. Argentine Republic*, the ad hoc committee constituted to hear Argentina's application for annulment of the award considered, inter alia, article 25 of the State responsibility articles when concluding that "Argentina is not correct in claiming that the Tribunal never specified the legal standards to be met in relation to the necessity of protection of essential interest and the 'only way' requirement".[136]

Ad hoc committee (under the ICSID Convention)

The ad hoc committee constituted to decide on the annulment of the award in *EDF International SA and ors v. Argentina*, did:

> not consider that the Tribunal can be faulted for having taken the provisions of ILC Article 25 as its point of reference. It is true that Argentina questioned whether all of the detail of Article 25 reflected customary international law and disputed what it described as the Claimants' propensity to 'refer to each of the paragraphs of Article 25 as though it were the final text of a treaty in full force

[131] See also *Abu Zubaydah v. Lithuania* and *Al Nashiri v. Romania*, referred to under article 1, *Big Brother Watch and others v. the United Kingdom*, referred to under article 6, and *Nasr et Ghali v. Italy*, referred to under article 7.

[132] PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 3.33.

[133] Ibid., para. 9.10.

[134] ECHR, First Section, Application Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420. See article 6 for the full text of the reference.

[135] See also *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. the Argentine Republic*, referred to under article 27.

[136] ICSID Case No. ARB/04/01, Decision on Annulment, 1 February 2016, para. 238.

> and effect'. At no point, however, did Argentina indicate what aspects of Article 25 it considered did not reflect customary international law. Nor, more importantly, did it at any stage advance a positive case in favour of a standard of necessity materially different from that set out in Article 25.

The committee "therefore conclude[d] that the Tribunal was correct in stating that 'neither side has argued for application of a standard more favourable to host states than the norms of Article 25' and committed no annullable error in treating Article 25 as a statement of the applicable customary international law".[137]

Permanent Court of Arbitration (under UNCITRAL rules)

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India*, the arbitral tribunal, referring to article 25 of the State responsibility articles, determined "that the conditions attached to the state of necessity defence under customary international law are not applicable in the present situation".[138]

Ad hoc committee (under the ICSID Convention)

The ad hoc committee constituted to decide on the annulment of the award in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* determined that, although both the "only way" and the "non-contribution" requirements under article 25 were "susceptible to a certain degree of interpretation",[139] "[r]egardless of the merits of the interpretation adopted by the Tribunal, which is not for this Committee to re-consider, the Committee is of the view that the Tribunal thereby sufficiently established the standard it was going to apply to the facts of the case".[140]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* found that "it is not necessary for the Tribunal to consider Respondent's defense of necessity or Claimants' specific arguments opposing that defense" under article 25 of the State responsibility articles because it had previously dismissed the claims that the defendant had breached the relevant obligations.[141]

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal, while addressing the defence of necessity under customary international law,[142] quoted article 25 and:

> decide[d] that the Respondent bears the legal burden of proving its defence of 'necessity' under customary international law, as a positive allegation. Moreover, the elements of that defence, as listed in Article 25 of the ILC Articles, are cumulative. In other words, it is for the Respondent to prove each of the relevant elements and not for the Claimant to disprove any of them. That is clear from the negative formulation of Article 25(1) and 25(2) ('may not be invoked', 'unless' and 'if"), together with elements that fall almost exclusively

[137] ICSID Case No ARB/03/23, Decision on Annulment, 5 February 2016, para. 319.
[138] PCA Case No. 2013-09, Award on Jurisdiction and the Merits, 25 July 2016, para. 256.
[139] ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment, 5 May 2017, para. 290.
[140] Ibid., para. 295.
[141] ICSID Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, paras. 1045–1046.
[142] ICSID Case No. ARB/14/4, Award, 31 August 2018, paras. 8.2–8.3.

within the actual knowledge of the State invoking the defence of 'necessity.' This approach also accords with the ILC's Commentary applicable to Article 25 of the ILC Articles.[143]

Ad hoc committee (under the ICSID Convention)

In *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, the ad hoc committee constituted to hear Zimbabwe's application for annulment of the award noted that "Zimbabwe raised its necessity defense in the arbitration proceedings primarily in terms of Article 25 of the ILC Articles, and that the Tribunal devoted a significant part of the Award to this issue. Having analyzed the issue extensively, the Tribunal eventually dismissed the defense, concluding that Zimbabwe had not satisfied the requirements of Article 25. Consequently, the Tribunal did apply international law rather than Zimbabwean law when determining Zimbabwe's necessity defense".[144]

Ad hoc committee (under the ICSID Convention)

In *Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A. v. Argentine Republic*, the ad hoc committee, discussing the arbitral tribunals application of article 25, found that the tribunal had not manifestly exceeded its powers or failed to state reasons when applying the necessity defence under article 25 of the State responsibility articles.[145]

Article 26
Compliance with peremptory norms

European Court of Human Rights

In *Al-Dulimi and Montana Management Inc. Switzerland*, the European Court of Human Rights referred to article 26 and the commentary thereto as relevant international law.[146]

Inter-American Court of Human Rights

In *Herzog et al. v. Brazil*, the Inter-American Court of Human Rights, citing the commentary to article 26 of the State responsibility articles, recalled that the Commission had confirmed that the prohibition on crimes against humanity was clearly accepted and recognized as a peremptory norm of international law.[147]

Article 27
Consequences of invoking a circumstance precluding wrongfulness

International arbitral tribunal (under the ICSID Convention)

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[148]

[143] Ibid., paras. 8.38 et seq.
[144] ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, paras. 278–279.
[145] ICSID Case No. ARB/03/17, Decision on Annulment, 14 December 2018, paras. 182–190.
[146] ECHR, Grand Chamber, Application No. 5809/08, Judgment, 21 June 2016, para. 57.
[147] Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs. Series C No. 353 (Spanish), Judgment, 15 March 2018.
[148] ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 709.

International arbitral tribunal (under the ICSID Convention)

The tribunal in *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, referred to the commentary of Article 27 and stated that "the defence of necessity under international law lapses 'if and to the extent that the circumstance precluding wrongfulness no longer exists'".[149]

Part Two
Content of the international responsibility of a State

Chapter I
General principles

Permanent Court of Arbitration (under UNCITRAL rules)

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

Article 28[152]
Legal consequences of an internationally wrongful act

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* referred to the commentary to article 28 of the State responsibility articles when noting that it:

> … is aware that Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts, may not apply, at least directly, to cases involving persons or entities other than States, such as in investment disputes as is the case here… That being said, the ILC Articles reflect customary international law in the matter of state responsibility, and to the extent that a matter is not addressed by the Treaty applicable to this case and that there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles for guidance.[153]

Article 30
Cessation and non-repetition

International arbitral tribunal (under the ICSID Convention)

In *Mobil Investments Canada Inc. v. Government of Canada*, the arbitral tribunal stated that:

> [o]nce a Chapter Eleven tribunal found that the imposition and enforcement of the 2004 Guidelines was contrary to Article 1106 [of NAFTA], it is difficult to see how Canada could discharge its duty to perform its obligations under Article 1106 in good faith while still enforcing the Guidelines. That conclusion

[149] ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 8.47.
[150] PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 3.34–3.45.
[151] Ibid., para. 9.9.
[152] See also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, referred to under article 31, and *Burlington Resources Inc. v. Republic of Ecuador*, referred to under article 33.
[153] ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 848 and note 1242.

is reinforced by the ILC Articles on State Responsibility, Article 30 of which provides that a State which is responsible for an internationally wrongful act is under an obligation to cease that act if it is a continuing one.[154]

European Court of Human Rights

In *Case of Georgia v. Russia (I)*, the European Court of Human Rights stated "[t]hat the just-satisfaction rule [under the European Convention on Human Rights] is directly derived from the principles of public international law relating to State liability … Those principles include both the obligation on the State responsible for the internationally wrongful act 'to cease that act, if it is continuing' and the obligation to 'make full reparation for the injury caused by the internationally wrongful act', as laid down in Articles 30 and 31 respectively of the Articles on Responsibility of States for Internationally Wrongful Acts."[155]

Article 31[156]
Reparation

Arbitral tribunal (under the ICSID Convention)

In *Joseph Houben v. Republic of Burundi*, the arbitral tribunal stated that article 31 of the State responsibility articles codified the customary international law standard of integral reparation in cases in which a State violates its international obligations.[157] Interpreting articles 35 and 36 of the State responsibility articles, the tribunal noted that the responsible States may only provide compensation to the extent that restitution is not possible.[158]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* referred to article 31 when discussing the applicable standard of compensation,[159] and observed that "compensation for violation of a treaty will only be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant".[160]

International arbitral tribunal (under the ICSID Convention)

In *Vestey Group Limited Ltd. v. Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 31 when finding that Venezuela had committed an internationally wrongful act that "gives rise to an obligation to make full reparation for the injury caused by the illicit act".[161] The tribunal also noted that "while the ILC Articles govern a State['s] responsibility vis-à-vis another State and not a private person, it is generally accepted that the key provisions of the ILC, such as Article 31(1) can be transposed in the context of the investor-State disputes".[162]

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[154] ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, para. 165.
[155] ECHR, Grand Chamber, Application No. 13255/07, Judgment, 31 January 2019, para. 54.
[156] See also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, and *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, referred to under article 34, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, referred to under article 36, and *Marco Gavazzi and Stefano Gavazzi v. Romania*, referred to under article 39.
[157] ICSID Case No. ARB/13/7, Award, 12 January 2016, para. 222.
[158] Ibid., paras. 223–224.
[159] ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 849.
[160] Ibid., para. 860 and note 1247.
[161] ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 326 and note 306.
[162] Ibid., para. 326.

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Murphy Exploration and Production Company International v. The Republic of Ecuador*, referring to article 31 of the State responsibility articles, explained that the "principle of full reparation applies to breaches of investment treaties unrelated to expropriations. This is reflected in the practice of investment tribunals."[163] The tribunal further noted that "[t]he applicable international law standard of full reparation, as reflected in the *Chorzów Factory* judgment and Article 31 of the ILC Articles on State Responsibility, does not determine the valuation methodology".[164] Therefore, "[t]ribunals enjoy a large margin of appreciation in order to determine how an amount of money may 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'".[165]

Permanent Court of Arbitration (under UNCITRAL rules)

In *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, the arbitral tribunal observed that the Poland-India BIT "itself does not set forth the standard of compensation for these breaches. Under customary international law, as codified in Article 31(1) of the ILC Articles, Claimant is entitled to full reparation in an amount sufficient to wipe out all of the injury it has incurred due to Respondent's wrongful acts. Full reparation encompasses both actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*)".[166]

International arbitral tribunal (under the ICSID Convention)

In *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, the arbitral tribunal indicated that "absent any specific Treaty language, damages must be calculated in accordance with the rules of international law", including, in particular, article 31 of the State responsibility articles.[167]

International arbitral tribunal (under the ICSID Convention)

The arbitration tribunal in *Victor Pey Casado and President Allende Foundation v. Republic of Chile* observed, that "[i]t is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights…. But equally it follows directly from the principles of State responsibility in international law reflected in Article 31 of the ILC Articles".[168] The tribunal further noted that "the distinction between injury (and the associated question of causation) and the assessment of the compensation due for that injury […] is fundamental to the operation of Article 31 of the ILC Articles".[169]

International arbitral tribunal (under the ICSID Convention)

In *Burlington Resources Inc. v. Republic of Ecuador*, the arbitral tribunal stated that "the appropriate standard of compensation is thus the customary international law standard of full reparation set out in Article 31 of the ILC Articles, applied by analogy".[170] Relying on the commentary to article 31, the tribunal further noted that

[163] PCA Case No. 2012-16, Partial Final Award, 6 May 2016, para. 425.
[164] Ibid., para. 481.
[165] Ibid.
[166] PCA, Award, IIC 883 (2016), 12 August 2016, para. 865 (original emphasis).
[167] ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 640.
[168] ICSID Case No. ARB/98/2, Award, 13 September 2016, para. 205.
[169] Ibid., para. 215(see also para. 204).
[170] ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 177.

"[t]he only unlawful act identified in the Decision on Liability was the expropriation of Burlington's investment through Ecuador's permanent physical takeover of the Blocks. As a result, the Tribunal's task is circumscribed to awarding damages 'arising from and ascribable to' that takeover."[171] On the question of whether "using information post-dating the expropriation would somehow conflict with the requirement of causation", the tribunal determined, further citing the commentary to article 31, that "the fact that some of the information used to quantify lost profits on the date of the award may not have been foreseeable on the date of the expropriation does not break the chain of causation. What matters is that the injury suffered must have been caused by the wrongful act".[172]

Arbitral tribunal (under the ICSID Convention)

In *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, the arbitral tribunal observed that article 31 of the State responsibility articles codified the principle of full reparation.[173]

International arbitral tribunal (under the ICSID Convention)

The arbitration tribunal in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain* "regards Article 31 [of the State responsibility articles] as accurately reflecting the international law rules that are to be applied here. International law requires that Respondent make full reparation for the injury caused by failing to comply with its obligation to accord fair and equitable treatment under ECT article 10(1), so as to remove the consequences of the wrongful act".[174]

Arbitral tribunal (under the ICSID Convention)

In *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, the arbitral tribunal stated that the International Commission, in article 31 of the State responsibility articles, had codified the principle of full reparation.[175]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* concluded, in the view of articles 31, 35 and 36 of the State responsibility articles, that "Karkey is entitled to an award of damages that will erase the consequences of Pakistan's wrongful acts and re-establish the situation that would have existed but for such wrongful acts".[176]

International arbitral tribunal (under the ICSID Convention)

In *UAB E Energija (Lithuania) v. Republic of Latvia*, the arbitral tribunal stated that "[u]nder Article 31 of the ILC Articles the State responsible for an internationally wrongful act must make 'full reparation for the injury caused' by such act;" and noted that for damage to be recoverable under the terms of article 36 of the State responsibility articles, "the damage must have been caused by the State's internationally wrongful act complained of by the investor, Article 31 of the ILC Articles".[177]

[171] Ibid., para. 212.
[172] Ibid., para. 333.
[173] ICSID Case No. ARB/13/2, Final Award (Spanish) (7 March 2017), para. 700.
[174] ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 424.
[175] ICSID Case No. ARB/13/11, Award (Spanish) (25 July 2017), para. 693.
[176] ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 663.
[177] ICSID Case No. ARB/12/33, Award, 22 December 2017, paras. 1127–1129.

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* concluded that the "Claimant is entitled to full reparation of the damage caused by Respondent's breach of the ECT FET [fair and equitable treatment] standard. This is the standard prescribed by the *Chorzów Factory* principle and Article 31(1) of the ILC Articles, which the Tribunal considers fully applicable here".[178] The arbitral tribunal also observed that "[t]he status of the principles set out in the ILC Articles as customary international law is also undisputed between the Parties".[179]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* considered article 31 of the State responsibility articles "as reflecting the international law rules that are to be applied here and therefore, the Claimants under international law are entitled to full reparation for damages caused by the breach by the Respondent of its obligation to accord FET [fair and equitable treatment] under ECT [Energy Charter Treaty] Article 10(1), so as to remove the consequences of the wrongful act".[180]

International Criminal Court

In *Prosecutor v. Germain Katanga*, the Trial Chamber cited the commentary to article 31 of the State responsibility articles when finding that "if the person who committed the initial act could not have reasonably foreseen the event in question, the initial act cannot be considered to be the proximate cause of the harm suffered by the victim and, consequently, the person who committed the initial act cannot be held liable for the harm in question".[181]

Arbitral tribunal (under the SCC rules)

In *Novenergia II — Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, the arbitral tribunal, relying, inter alia, on article 31 of the State responsibility articles, held that "[t]he principle of full reparation under customary international law therefore dictates that the aggrieved investor shall through monetary compensation be placed in the same situation it would have been but for the breaches of the state's international law obligations. The compensation includes the loss already sustained as well as loss of profits".[182]

International Chamber of Commerce (under the ICC Rules of Arbitration)

In *Olin Holdings Limited v. State of Libya*, the tribunal "reviewed the ILC Articles on State Responsibility which require a State '*to make a full reparation for the injury caused by the internationally wrongful act*', covering '*any financially assessable damage including loss of profits insofar as it is established*.'".[183]

[178] ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 552.
[179] Ibid., para. 551.
[180] ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 664.
[181] International Criminal Court, Trial Chamber II, *Prosecutor v. Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07, 19 July 2018, para. 17 and note 36.
[182] SCC Case No. 2015/063, Final Arbitral Award, 15 February 2018, para. 808.
[183] ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 473.

International arbitral tribunal (under the ICSID Convention)

In *UP and CD Holding Internationale v. Hungary*, the arbitral tribunal noted that "the customary international law principle of full reparation was defined in the oft-cited PCIJ Chorzow Factory case, and this principle has since been reflected in Art. 31 of the ILC Articles. Under this standard, compensation must wipe out the consequences of the illegal act. Thus, the customary international law principle of full reparation includes reparation for consequential damages."[184]

Arbitral tribunal (under the SCC rules)

In *Foresight Luxembourg Solar 1 S.À.R.L. et al. v. The Kingdom of Spain*, the arbitral tribunal quoted article 31 of the State responsibility articles when "look[ing] to customary international law for the applicable standard of compensation".[185] The tribunal "further consider[ed] that the principle of full reparation is generally accepted in international investment law".[186]

Article 33
Scope of international obligations set out in this part

International arbitral tribunal (under the ICSID Convention)

In *Burlington Resources Inc. v. Republic of Ecuador*, the arbitral tribunal cited article 33 and the commentary to article 28 of the State responsibility articles when observing that "[w]hile Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts and to which Article 31 belongs, is not applicable to the international responsibility of States vis-à-vis non-States, it is generally accepted that the ILC Articles can be transposed to the context of investor-State disputes".[187]

Chapter II
Reparation for injury

Article 34[188]
Forms of reparation

International arbitral tribunal (under the ICSID Convention)

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, after summarizing the parties' arguments regarding articles 28, 31, 34, 35 and 36 of the State responsibility articles,[189] the arbitral tribunal stated:

> The adoption of the ILC Articles, which clearly articulate a State's obligation to provide full reparation in the event of a breach of an international obligation, and the practice of States in paying reparations in these circumstances, suggest that States accept this obligation. This is not to say that the general principle of international law that a State that has been found to have breached an international obligation must make full reparation for any damages caused by its breach has any impact on a State's right to expropriate a foreigner's property

[184] ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 512.
[185] SCC Case No. V (2015/150), Final Award, 14 November 2018, paras. 432 and 435.
[186] Ibid., para. 436.
[187] ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 177 and note 236.
[188] See also *Moreira Ferreira v. Portugal (No. 2)*, referred to under article 37.
[189] ICSID Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, paras. 1077–1088.

> at international law. A State's right to do so exists at international law and, so long as the property is lawfully expropriated, there is an obligation to compensate the owner, but not to make full reparation. The State's obligation to make full reparation is related to its breach of international law. Respondent's concerns about the obligation to make full reparation leading to disproportionate compensation are dealt with in the limiting factors that the Parties agree are principles relating to damages in international law.[190]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* concluded, after referring to articles 31, 34 and 36 of the State responsibility articles, that "the damages actually incurred by CIOC [Caratube International Oil Company LLP] as a result of the Respondent's unlawful expropriation of the Contract (as determined by a majority of the Tribunal) are appropriately assessed using a subjective and concrete valuation approach providing full reparation for the damages actually incurred by CIOC, without FMV [fair market value]".[191]

Article 35[192]
Restitution

European Court of Human Rights

In *Ryabkin and Volokitin v. Russia*, the European Court of Human Rights considered articles 35 and 36 of the State responsibility articles as relevant international law.[193]

European Court of Human Rights

The European Court of Human Rights in *Guja v. The Republic of Moldova (No. 2)* cited article 35, as relevant international law and observed, with reference to article 35, that "[t]he States should organise their legal systems and judicial procedures so that this result [of restitution] may be achieved".[194]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* stated that "[p]ursuant to Article 35 of the ILC Articles, restitution is the primary remedy for reparation of wrongful acts under international law".[195] However, the tribunal held that "juridical restitution should not be granted", stating that "Article 35(b) of the ILC Articles exempts responsible States from their primary obligation to make restitution when restitution is disproportionately burdensome compared to the benefit which would be gained".[196]

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[190] Ibid., para. 1089.
[191] ICSID Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, para. 1085.
[192] See *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, referred to under article 31, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, referred to under article 31, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, referred to under article 36, and *Moreira Ferreira v. Portugal (No. 2)* referred to under article 37.
[193] ECHR, Third Section, Application Nos. 52166/08 and 8526/09, Judgment, 28 June 2016, para. 30.
[194] ECHR, Second Section, Application No. 1085/10, Judgment, 15 March 2018, paras. 26 and 31.
[195] ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 558.
[196] Ibid., para. 562.

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain* considered the order of restitution sought by the claimants based on article 35 of the State responsibility articles "disproportional to its interference with the sovereignty of the State compared to monetary compensation".[197]

Article 36[198]
Compensation

Arbitral tribunal (under the ICSID Convention)

In *Joseph Houben v. Republic of Burundi*, the arbitral tribunal referred to article 36 of the State responsibility articles when stating that it is generally recognized that in matters of expropriation, the value of the expropriated good(s) has to assessed with reference to the fair market value.[199]

International arbitral tribunal (under the ICSID Convention)

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, the arbitral tribunal stated that the State responsibility articles "are currently considered to be the most accurate reflection of customary international law" regarding the assessment of compensation.[200] Regarding the determination of fair market value, the arbitral tribunal noted that "[e]ach tribunal must, thus, attempt to give meaning both to the words of the treaty regarding the putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles, and the ruling of the PCIJ in the *Chorzów* case".[201]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* cited article 36 and the corresponding commentary to note that "[a]ppraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished".[202] The tribunal also noted that "the ILC Articles recognize that in certain cases compensation for loss of profits may be appropriate".[203]

Ad hoc committee (under the ICSID Convention)

In *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, the ad hoc committee, in discussing the respondent's arguments for an excess of powers by the tribunal, noted that the tribunal had considered the "World Bank Guidelines [on the Treatment of Foreign Direct Investment]… together with case law, doctrine and the International Law Commission Draft on the Responsibility

[197] ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 636.

[198] See also *Ryabkin and Volokitin v. Russia*, referred to under article 35, *UAB E Energija (Lithuania) v. Republic of Latvia*, referred to under article 31, *Marco Gavazzi and Stefano Gavazzi v. Romania*, referred to under article 39, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, referred to under article 34, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, referred to under article 34, and *Moreira Ferreira v. Portugal (No. 2)*, referred to under article 37.

[199] ICSID Case No. ARB/13/7, Award (French), 12 January 2016, paras. 224–225 and note 157.

[200] ICSID Case No. ARB/11/26, Award, 29 January 2016, paras. 515–516.

[201] Ibid., para. 543.

[202] ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 849–850.

[203] Ibid., para. 873.

of States, as providing ‘reasonable guidance’ for the interpretation of Articles 5 and 8 of the BIT”[204] to find “a proper standard for the determination of the ‘market value’”.[205]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, referred to articles 35 and 36 of the State responsibility articles in support of its view that “the fair market value also reflects the compensation standard under customary international law”.[206]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Burlington Resources Inc. v. Republic of Ecuador* concluded, citing article 36 of the State responsibility articles, that “Burlington has not proven, with the reasonable certainty that international law requires for a lost profits claim, that an extension capable of being ‘taken’ [by expropriation] would in fact have materialized from its [Burlington’s] right to negotiate [a contractual extension]”.[207]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, with reference to article 36 of the State responsibility articles, calculated “compensation reflecting the capital value of property taken as a result of an internationally wrongful on the basis of the ‘fair market value’ of the property lost”, taking into account “the nature of the asset concerned”.[208]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* concluded, citing the text of article 36, paragraph 1, that the claimant “is entitled to full reparation of the loss that it has suffered from Respondent’s breaches of the treaty”.[209] It further observed that “moral damages are not covered by the principle set out in Article 36 of the ILC Articles”.[210]

International arbitral tribunal (under the ICSID Convention)

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal stated that “[i]t follows that any compensation to be awarded by this Tribunal is to be decided by applying principles of customary international law, namely ‘full reparation’ to wipe out, as far as possible, the consequences of the Respondent’s international wrongs under the general principle long established in the PCIJ’s judgment in *Chor[z]ów Factory* (1928), as also confirmed by Articles 31 and 36 of the ILC Articles on State Responsibility.”[211] The tribunal “decide[d] to use Three-Month LIBOR + 2.0% compounded quarterly as the appropriate rate for pre-award interest [and] considered that rate to reflect a reasonable rate of interest applicable to the Project as an

[204] ICSID Case No. ARB/10/5, Decision on annulment, 27 December 2016, para. 144.
[205] Ibid., para. 132.
[206] ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 627 and 711.
[207] ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 278.
[208] ICSID Case No. ARB/13/1, Award, 22 August 2017, paras. 872–73.
[209] ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 564.
[210] Ibid., para. 565.
[211] ICSID Case No. ARB/14/4, Award, 31 August 2018, paras. 10.96–10.97.

investment by the Claimant, in concordance with the principles in *Chorzów Factory* (1928) and Article 36 of the ILC Articles on State Responsibility".[212]

Article 37
Satisfaction

European Court of Human Rights

In *Moreira Ferreira v. Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[213]

Article 38
Interest

International arbitral tribunal (under the ICSID Convention)

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, the arbitral tribunal quoted article 38 of the State responsibility articles and the commentary thereto[214] with regard to the actualization of the loss caused by an expropriation.[215] The tribunal stated: "While the rationale and rate of interest applied by investment tribunals has varied widely, a consensus appears to have evolved around the principle of the claimant's opportunity cost."[216]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* referred to article 38 of the State responsibility articles as an "authoritative statement" that "[t]he substantive international legal obligation to pay interest on monies due is well established",[217] and relied on the corresponding commentary to discuss the award of simple or compound interest.[218]

Permanent Court of Arbitration (under UNCITRAL rules)

The arbitral tribunal in *Murphy Exploration and Production Company International v. The Republic of Ecuador* referred to article 38 and its commentary thereto, when "deem[ing] it appropriate to award interest for damages so as to ensure full reparation to Claimant".[219]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* noted "[a]s to the standard under customary international law, Article 38 of the ILC Draft Articles provides that '[t]he interest rate and mode of calculation shall be set so as to achieve [the] result [of ensuring full reparation]'".[220]

[212] Ibid., para. 10.138.
[213] ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and note 6.
[214] ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 575.
[215] Ibid., para. 576.
[216] Ibid., para. 577.
[217] ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 930.
[218] Ibid., para. 935 and note 1319.
[219] PCA Case No. 2012-16, Partial Final Award, 6 May 2016, paras. 511–513.
[220] ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 872.

International arbitral tribunal (under the ICSID Convention)

In *Burlington Resources Inc. v. Republic of Ecuador*, the arbitral tribunal awarded compound interest, thereby diverging from the commentary to article 38 to the State responsibility articles, because "compound interest achieves full reparation better than simple interest".[221]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, citing article 38, "note[d] that the ILC Articles also address interest as a component of a State's obligation to make full reparation"[222] and "ha[d] no hesitation in accepting that the payment of interest forms part of the obligation to make full reparation for a breach of an international obligation".[223]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* "noted that neither the BIT nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined".[224]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* stated that article 38 of the State responsibility articles confirmed the general premise that "[a]n award of interest compensates the claimant for the loss of the use of its money as a result of the respondent's wrong. Thus, limiting the reparation for the deprivation of the use of money to a period shorter than the actual time during which the deprivation lasted can only be an exception."[225] The tribunal awarded interest upon finding "no reason to depart from the general principles set forth in article 38 of the ILC Articles".[226]

International Court of Justice

The International Court of Justice in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* referred to article 38 and the commentary thereto when it recalled that "in the practice of international courts and tribunals, pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case."[227]

International Chamber of Commerce (under the ICC Rules of Arbitration)

In *Olin Holdings Limited v. State of Libya*, the tribunal "refer[red] to Article 38.1 of the ILC Articles on State responsibility, formulating the basic rules of international law concerning the responsibility of States for their internationally wrongful acts".[228]

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[221] ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 540.
[222] ICSID Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 1120.
[223] Ibid., para. 1121.
[224] ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 992, also referring to *Yukos Universal Ltd. (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1678.
[225] ICSID Case No. ARB/13/13, Award of the Tribunal, 27 September 2017, paras. 1217–1218.
[226] Ibid., para. 1221.
[227] International Court of Justice, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018, para. 151.
[228] ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 531.

The tribunal further noted the "[p]arties' positions in relation to the rate of interest, and considers that the five percent (5%) commercial rate of interest applicable in Cyprus would achieve the result of ensuring full compensation pursuant to the ILC Articles on State Responsibility for the following reasons:

> (1) "The Tribunal acknowledges that neither the Cyprus-Libya BIT nor international law more generally prompts the Tribunal to award interest based on the commercial rate of interest applicable in Libya;
>
> (2) "The Tribunal recognizes that Olin is a Cypriot company and the interest rate applicable in Cyprus represents Olin's cost of borrowing this same sum from Cypriot banks and that as such, awarding interests at the commercial rate applicable in Cyprus would enable the Claimant to achieve the result of full reparation."[229]

International arbitral tribunal (under the ICSID Convention)

In *UP and CD Holding Internationale v. Hungary*, the arbitral tribunal cited article 38 of the State responsibility articles when stating that "guidance should be taken from the principle of *restitutio ad integrum* under international law as reflected in Art. 38 of the ILC Articles".[230]

Article 39
Contribution to the injury

Permanent Court of Arbitration (under UNCITRAL rules)

In *Cooper Mesa Mining Corporation v. The Republic of Ecuador*, the arbitral tribunal noted that "[a]s to 'contributory fault', the Tribunal refers to Article 39 of the ILC Articles on State Responsibility, entitled 'Contribution to the Injury' as being declaratory of international law".[231] The tribunal "decide[d] that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands. Given that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles".[232] The tribunal further noted that "Article 39 requires a factual assessment as regards the Claimant's conduct…".[233]

International arbitral tribunal (under the ICSID Convention)

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

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Marco Gavazzi and Stefano Gavazzi v. Romania*, agreeing with the discussion of articles 31, 36 and 39 of the State responsibility articles in previous arbitral cases, "determine[d] that the Respondent caused the losses suffered by the

[229] Ibid., para. 532.
[230] ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 596.
[231] PCA Case No. 2012-2, Award, 15 March 2016, para. 6.91.
[232] Ibid., para. 6.97.
[233] Ibid., para. 6.98.
[234] ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 572.
[235] Ibid., para. 585.

Claimants as assessed in this Award, without any reduction for 'contributory negligence' or other fault, as alleged by the Respondent".[236]

International arbitral tribunal (under the ICSID Convention)

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

International arbitral tribunal (under the ICSID Convention)

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

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 40
Application of this chapter

European Court of Human Rights

In the case of *Güzelyurtlu And Others V. Cyprus and Turkey*, the European Court of Human Rights referred to articles 40 and 41, as well as the commentary to article 41, as relevant international law.[239]

Article 41
Particular consequences of a serious breach of an obligation under this chapter

International Criminal Court

The International Criminal Court in *Prosecutor (on the application of Victims) v. Bosco Ntaganda* indicated that "as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law", citing article 41, paragraph 2, of the State responsibility articles.[240]

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[236] ICSID Case No. ARB/12/25, Award of the Tribunal, 18 April 2017, para. 280, referring to *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 583; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, SCC Case No. V (116/2010), Award, (19 December 2013), paras. 1330–1332; and *Gemplus, S.A., SLP, S.A., Gemplus Industrial, S.A. de C.V. and Talsud S.A. v. United Mexican States* (ICSID Cases Nos. ARB(AF)/04/03 & ARB(AF)/04/), Award (16 June 2009), para. 11.12.

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

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

[239] ECHR, Grand Chamber, Application no. 36925/07, Judgment, 29 January 2019, paras. 157–158.

[240] International Criminal Court, Trial Chamber VI, Second decision on the defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Case no ICC-01/04-02/06-1707, ICL 1730, 4 January 2017, para. 53 and note 131.

Part Three
The implementation of the international responsibility of a State

Chapter I
Invocation of the responsibility of a State

Article 43
Notice of claim by an injured State

International Court of Justice

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands v. United Kingdom* and *Marshall Islands v. India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to "reject the [respondent's] view that notice or prior negotiations are required" in accordance with article 43 of the State responsibility articles. The International Court of Justice further observed that "[t]he Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified".[241]

Article 44[242]
Admissibility of claims

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* noted that "[t]he reference [by the claimants] to article 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[243]

Article 45
Loss of the right to invoke responsibility

International Tribunal for the Law of the Sea

In *M/V "Norstar" (Panama/Italy)*, the International Tribunal for the Law of the Sea relied on the commentary to article 45 of the State responsibility articles to find "that Panama has not failed to pursue its claim since the time when it first made it, so as to render the Application inadmissible"[244] and to "rejec[t] the objection raised by Italy based on extinctive prescription".[245]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal deciding on jurisdiction and admissibility of the claim in *Salini Impregilo S.p.A. v. Argentine Republic* noted with regard to "extinctive prescription as a matter of international law" that:

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[241] International Court of Justice, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, para. 45; and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment of 5 October 2016, para. 42.

[242] See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* and *(Marshall Islands v. India)* referred to under articles 43 and 48.

[243] ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 135.

[244] ITLOS, Preliminary Objections, Judgment of 4 November 2016, paras. 310 and 313.

[245] Ibid., para. 314.

> this is not mentioned as a separate ground for loss of the right to invoke responsibility in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The ILC rejected the idea that lapse of time alone might entail the loss of a claim. Rather, Article 45(b) specifies that the responsibility of a state may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.[246]

Having regard to all circumstances, the arbitral tribunal concluded that "the delay here was not unreasonable, did not entail any acquiescence by Salini Impregilo in the lapse of its claim and did not trigger the principle of extinctive prescription".[247]

Article 48
Invocation of responsibility by a State other than an injured State

International Court of Justice

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament between Marshall Islands v. United Kingdom* and *Marshall Islands v. India*, the International Court of Justice stated that "Article 48, paragraph 3, applies that requirement [to give notice of a claim under Article 43 of the State responsibility articles] *mutatis mutandis* to a State other than an injured State which invokes responsibility".[248]

Part Four
General provisions

Article 55
Lex specialis

Permanent Court of Arbitration (under UNCITRAL rules)

In *Mesa Power Group v. Government of Canada*, the arbitral tribunal referred to article 55 of the State responsibility articles when finding that "Article 1503(2) [of NAFTA] constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles".[249]

International arbitral tribunal (under the ICSID Convention)

The arbitral tribunal in *Vestey Group Limited v. Bolivarian Republic of Venezuela* cited article 55 to note that "States are free to derogate from this general framework of responsibility".[250]

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[246] ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 85.

[247] Ibid., para. 91.

[248] International Court of Justice, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, para. 45; and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment of 5 October 2016, para. 42.

[249] PCA Case No. 2012-17, Award, 24 March 2016, paras. 359, 362 and 365.

[250] ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 326 and note 307.