GAR Global Arbitration Review

The Guide to Damages in International Arbitration - Sixth Edition

Principles and practices of full compensation in international arbitration

The Guide to Damages in International Arbitration - Sixth Edition

This sixth edition of Global Arbitration Review's *Guide to Damages in International Arbitration* builds on the successful reception of the earlier editions. As explained in the Introduction, this book is designed to help all participants in the international arbitration community understand damages issues more clearly and to communicate those issues more effectively to tribunals to further the common objective of assisting arbitrators in rendering more accurate and well-reasoned awards on damages.

The book is a work in progress, with new and updated material being added to each successive edition. In particular, this sixth edition incorporates updated chapters from various authors and contributions from new authors. This edition seeks to improve the presentation of the substance through the use of visuals such as charts, graphs, tables and diagrams; worked-out examples and case studies to explain how the principles discussed apply in practice; and flow charts and checklists setting out the steps in the analyses or the quantitative models. The authors have also been encouraged to make available online additional resources, such as spreadsheets, detailed calculations, additional worked examples or case studies, and other materials.

We hope this revised edition advances the objective of the earlier editions to make the subject of damages in international arbitration more understandable and less intimidating for arbitrators and other participants in the field, and to help participants present these issues more effectively to tribunals. We continue to welcome comments from readers on how the next edition might be further improved.

Principles and practices of full compensation in international arbitration

Mehmet Karlı, **Selim Can Bilgin**, **Alp Özzeybek** and **Metehan Motugan**
Kabine Law Office

Summary

INTRODUCTION

The primary objective for a party seeking arbitration after suffering damages is often to obtain the maximum possible compensation. This goal is rooted in the principle of full compensation, a cornerstone in most legal systems, international standards and international law.[1]

This chapter explores key issues surrounding the notion of full compensation in both domestic legal systems and international law. For domestic legal systems, the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles)[2] serve as the starting point, representing a balanced compromise between various national laws. In the context of international law, we focus on the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[3] and then the case law of investment arbitration tribunals, which frequently apply principles of public international law to resolve disputes between private parties and states.

We first examine principles pertinent to commercial arbitrations, following the structure of the UNIDROIT Principles. This section begins with an analysis of causality, a fundamental element in determining compensation in any adjudication. We then address the issue of foreseeability, and finally, within the framework of these two concepts, we analyse the scope of full compensation. These issues are closely tied to the concept of the 'but-for' premise, which are referenced throughout these sections.

The discussion then shifts to the principles of full compensation under international law. For this section, the point of departure is ARSIWA, with a particular focus on their application by investment arbitration tribunals. In this section, we first treat the concepts of causality and foreseeability together and then discuss the scope of full compensation. As part of the discussion on the scope of compensation, we also discuss certain relatively more discretionary factors, such as the circumstances surrounding the violation and contributory fault by the investor affecting the determination of a tribunal.

FULL COMPENSATION IN DOMESTIC LEGAL SYSTEMS

The concept of full compensation is a fundamental principle in both domestic legal systems and international law, reflecting the underlying goal of restoring the injured party to its pre-damage state. Therefore, various legal systems, despite their differences, share common principles regarding compensation, especially with regard to foreseeability, causality and the necessity of making the injured party whole.

In civil law countries such as Germany and France, the principle of full compensation is included in the statutory provisions. The German Civil Code specifies that a person who is obliged to pay damages must restore the condition that would exist if the circumstance obliging them to pay damages had not occurred, which includes both actual damage (-*damnum emergens*) and lost profits (*lucrum cessans*), ensuring comprehensive coverage of losses.[4] Similarly, the French Civil Code mandates full compensation for the harm suffered, including both material and moral damages, thus emphasising restitution to the pre-damage state while tailoring the amount through pillars of foreseeability and causality.[5] In contrast, common law systems approach full compensation through a combination of statutory provisions and judicial precedents. The US legal system allows for compensatory damages to cover actual losses and punitive damages in certain cases of gross negligence or intentional misconduct.[6] Although the UK system is generally more conservative with

punitive damages, it also emphasises compensatory damages that cover both economic and non-economic losses, guided by case law and judicial discretion.[7] In Singapore, another common law jurisdiction, principles of causation and remoteness of damage are recognised in the jurisprudence and are applied meticulously, subject to judicial discretion.[8]

The aim of the UNIDROIT Principles is to provide a harmonised framework that bridges the gap between different legal traditions and to create a universally acceptable set of guidelines.[9] They have inspired several national legislatures in reforming their domestic contract laws.[10] Both arbitrators and domestic courts increasingly reference the UNIDROIT Principles in their decisions, applying them as the governing rules of law,[11] either because of an explicit choice by the parties or a reference in the contract to 'general principles of law', *lex mercatoria* or similar terms, since arbitrators generally consider the UNIDROIT Principles as a particularly authoritative expression of supra-national or transnational principles and rules of law.[12] Additionally, the UNIDROIT Principles have been used by domestic courts and arbitral tribunals to interpret international uniform law instruments, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), and to adopt a more internationally oriented approach under applicable domestic law or to fill gaps in the latter.[13] Furthermore, the UNIDROIT Principles' comprehensive approach to the scope of full compensation, encompassing direct and indirect damages while excluding punitive damages in most cases, reflects a balanced view that resonates with various legal systems.-[14] It can also serve as a reliable foundation for arbitration and litigation, guiding decision makers in awarding fair and equitable compensation. As such it constitutes a good point of departure to examine the principles relating to the concept of full compensation because either it is directly applied by arbitral tribunals or it reflects the common approach in the legal systems that frequently serve as the applicable law in commercial arbitrations.

KEY ISSUES

CAUSALITY

Every country imposes limits on damages, although these vary from jurisdiction to jurisdiction. Generally, claimants can only recover losses that were directly caused by the breach and were foreseeable as likely consequences of the breach.[15] Commonly, to obtain damages, a causal link between the breach by the defendant and the loss suffered by the claimant is essential. The conceptual origins of causality trace back to the Roman legal maxim *in jure causa proxima non remota inspicitur* (the cause of the injury must be proximate, not remote).[16] The claimant can only recover damages for losses directly caused by the defendant's actions, not for those arising from independent causes.[17]

The basic method for understanding causality is the universally recognised 'but-for' or *condicio sine qua non* (a condition without which not) test for causation, a basic principle in legal analysis which asserts that a defendant's action is a cause of a loss if that loss would not have happened without said action; conversely, if the loss would have occurred regardless of the defendant's action, then it cannot be considered a cause.[18]

In common law countries, the theory of 'proximate cause' is used, which establishes a legal causal link between two events only if the first event, as a necessary condition for the second, was sufficiently close to be legally significant. Similarly, the 'substantial factor' test in the United States and the Anglo-Canadian 'material contribution to the risk' test hold defendants liable if their negligence is a significant but-for cause of the claimant's injury.[19] In civil law systems, the concept of proximate cause is reflected in the terms 'direct' and 'indirect',

used in France and in jurisdictions influenced by France to determine the recoverability of damages.[20] Another civil law theory, the adequacy theory, seeks to limit but-for causes by recognising only those factors likely to produce the type of result that actually occurred.[21]

FORESEEABILITY

Under the foreseeability requirement, a defendant is not liable for a loss that was not reasonably foreseeable as a result of the breach at the time the contract was formed.-[22] French law, which has served as the primary source for other jurisdictions on the foreseeability requirement,[23] codified this requirement as follows 'the debtor is only bound for the damages and interest which were foreseen, or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that the obligation has not been executed'.[24]

Under English Law, the foreseeability requirement is known as the *Hadley v. Baxendale* (1854) rule.[25] In this case, Judge Sir Edward Hall Alderson laid down a rule on damages in breach of contracts as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[26]

Similarly, the Restatement (Second) of the Law of Contracts, which stipulates the foreseeability rule under US law, excludes damages for losses 'that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made'.[27]

Likewise, Article 74 of the CISG limits the award of damages to foreseeable loss.[28] As such, foreseeability is a crucial factor for any assessment regarding the question of whether there is compensable damage and what should be the extent of the compensation.

SCOPE OF FULL COMPENSATION

Contractual remedies are based on the premise that the injured party should be fully compensated for the breach.[29] Full compensation is based on 'the basic philosophy . . . to place the injured party in the same economic position he would have been in if the contract had been performed'.[30] As noted above, the definition of full compensation in the UNIDROIT Principles covers both direct and indirect damages, and excludes punitive damages, similarly to Article 74 of the CISG.[31] Likewise, under English law, punitive damages are not awarded for breach of contract.[32]

The principle of freedom of contract allows the introduction of limitation and exclusion of liability clauses that allow contractual parties to pre-emptively define the extent of the defendant's liability, limiting the full compensation principle in the event of a breach.[33] These clauses are valid in most civil and common law jurisdictions except in cases of unlawful intent, gross negligence or contravention of mandatory norms.[34] Under the UNIDROIT Principles, such clauses are valid except in the case of gross unfairness.[35]

Contract law balances the principle of full compensation with competing principles through a general causation requirement and limitations on damages, such as foreseeability.[36] These rules address different aspects of causation, inherently limiting the scope of full compensation to ensure fairness between the parties.

FULL COMPENSATION IN PUBLIC INTERNATIONAL LAW

In international investment arbitration, public international law principles are fundamental in resolving disputes between private parties and states. For instance, most investment treaties do not contain a provision dealing with compensation save for expropriation provisions or clauses regarding damages resulting from war, armed conflict or national emergencies.[37] Therefore, it has been widely accepted that tribunals should apply international law principles on reparation for wrongful acts when determining compensation for breaches.[38]

Central to these principles is the concept of full compensation, emphasising the restoration of the injured party to its original position had the breach not occurred. The seminal Permanent Court of International Justice case of ***Factory at Chorzów***[39] established the doctrine that reparation must 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.-[40] The ***Chorzów*** requirement that compensation must 'wipe out all the consequences' of the breach is akin to the 'but-for' premise in commercial arbitration, which aims to place the injured party in the situation they would have been in if the breach had not occurred.-[41] Therefore, from the moment the breach occurs, compensation should place the injured party in a position such that there is no difference between receiving a monetary award and obtaining specific performance, compensating for the economic consequences of the breach.[42] In practice, tribunals usually ask what the financial position of the injured party would be, in all probability, if the unlawful act or omission by the respondent had not been committed; the difference between this hypothetical position and the actual financial situation in which the claimant finds itself following the breach is equal to the damage caused, which, according to the principle of full reparation, must be compensated in its entirety.[43]

The ***Chorzów*** principle has guided the assessment of damages and was later codified by the ILC under the ARSIWA, particularly Article 31, which provides critical guidelines for reparation, including restitution and compensation.[44] The ARSIWA outline the general obligation of reparation as a direct consequence of a state's responsibility, stemming from the breach itself rather than being a right of the injured state, which arises automatically upon committing an internationally wrongful act and is not dependent on a demand from any state.[45] The term 'injury' includes both material and moral damage caused by the wrongful act, excluding abstract concerns or general state interests where the provision emphasises the need for a causal link between the wrongful act and the injury, specifying that reparation is owed only for injuries directly resulting from the wrongful act.[46] This excludes injuries that are too remote or consequential, with criteria such as directness, foreseeability or proximity being applied variably depending on the breach. The requirement for a sufficient causal link is embedded in Article 31, mandating that the injury must be a consequence of the wrongful act without specifying a particular qualifying phrase.[47]

Although both the UNIDROIT Principles and Article 31 of the ARSIWA address the notion of full compensation, they differ in scope and application. The UNIDROIT Principles are designed for international commercial contracts and aim to restore the injured party to the position it would have been in had the contract been performed correctly. The framework

of the UNIDROIT Principles emphasises a direct causal link between the breach and the damage, often using the 'but-for' test, and limits compensation to foreseeable losses at the contract's formation. In contrast, the ARSIWA deal with state responsibility for internationally wrongful acts, requiring full reparation to 'wipe out all the consequences' of the breach, which include restitution, compensation and satisfaction, addressing both material and moral damages. The ARSIWA approach to causality focuses on comprehensive reparation, without explicitly limiting compensation to foreseeable damages, aiming to fully restore the injured party as if the wrongful act had not occurred. Although the UNIDROIT Principles are commercially oriented, ensuring fairness in contractual relationships, Article 31 of the ARSIWA provides a broader, more inclusive approach to state responsibility and reparation.

The primary medium of application for the law of responsibility relating to the full compensation principle, not surprisingly, is investment arbitration cases, given the role of monetary damages in these cases. Although such cases involve both elements of public international law and commercial contracts whose applicable law is usually a particular domestic law, more often than not principles of state responsibility govern the issue of damages both in terms of methodology and quantum. Therefore, the following sections provide explanations regarding the concepts of causality, foreseeability and the scope of compensation from the lens of the law of state responsibility as applied by the investment arbitration tribunals.

Frequently, causation is a focal point of contention between investors and host states. The latter frequently assert that there is no causal link between their actions and the investor's claimed injury or damage, blaming external factors instead. The causality discussions are often critical in investment arbitration cases because investment disputes often arise in contexts with global consequences for businesses, such as economic crises, armed conflicts or political upheavals. These situations typically involve state actions, creating fertile ground for causality contention.

KEY ISSUES

CAUSALITY AND FORESEEABILITY

Causality has several functions in international law, including establishing the liability of a state and determining the compensation owed by a state.[48] According to Article 31 of the ARSIWA, the establishment of a causal link is essential to the definition of 'injury' in international law as it must be shown that the damages claimed are part of the 'injury caused by' the internationally wrongful act of a state.[49] The ILC noted that the standard of causation may vary between different primary rules of conduct and decided not to define a specific causal link as a general principle.[50]

Investment arbitration tribunals have held that if an investor cannot prove that an injury was caused by the alleged breach of an investment treaty, the result may be a finding of liability without any award of damages.[51] In ***Biwater v. Tanzania***, for instance, the tribunal found that Tanzania had breached the bilateral investment treaty (BIT), but ruled that the claimant was not entitled to monetary damages because the investment had already lost value as a result of actions, some of which the investor itself had taken, prior to Tanzania's breaches, and that therefore there was no causal link for the damages claimed.[52]

Although investment tribunals use a variety of standards and methodologies to address the causality requirement, states rarely provide specific guidance on this issue in their investment treaties.[53] Treaties containing such provisions usually emphasise that the

damages claimed must be causally linked to the breach of the investment treaty.[54] For illustration, the China–Korea BIT defines the investment dispute as 'a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party'.[55]

The test used most frequently for factual causality by the investment tribunals is the 'but-for' test; for example, the ***Chevron v. Ecuador*** tribunal noted that '[c]laimants must prove the element of causation – i.e., that they would have received judgments in their favor as they allege "but for" the breach by the Respondent'.[56] The ***Clayton/Bilcon v. Canada*** tribunal stated that:

> the test is whether the Tribunal is 'able to conclude from the case as a whole and with a sufficient degree of certainty' that the damage or losses of the Investors 'would in fact have been averted if the Respondent had acted in compliance with its legal obligations' under NAFTA.[57]

In establishing the causal link between the conduct of the privatisation agency and the bankruptcy of the investors, the majority of the tribunal in ***Rand Investments v. Serbia*** found a clear causal link between the breach of the contract and the damage suffered by referring to Article 31 of the ARSIWA.[58] In investment arbitration cases, claimed losses can result not only from specific acts but also from broader administrative and legislative actions. Tribunals often assess whether there is a causal link in such cases as well. For instance, in ***Glencore v. Bolivia***, the tribunal identified a causal link between the decrees nationalising the investor's assets and the alleged damages and awarded compensation to the claimant.[59]

On the other hand, under both the ARSIWA and investment arbitration case law, foreseeability is not treated as a separate component in the assessment of compensation,[60] which contrasts with the approach of the UNIDROIT Principles and most domestic legal systems. Instead, it is evaluated alongside causality as a criterion for establishing legal causation.-[61] For instance, the tribunal in ***CME v. Czech Republic*** concluded that causality can be established only if the damage to the investment 'is foreseeable and occurs in a normal sequence of events'.[62] Similarly, the tribunal in ***Olin v. Libya*** considered foreseeability as part of the proximate cause assessment.[63] It is also possible to observe that some tribunals expressly rejected inquiries based on the foreseeability criterion to establish causation.[64] The tribunal in ***Myers v. Canada*** rejected an argument based on foreseeability, stating that it is a concept of contract law and it may not be applicable for a measure taken by a state because states may not individually foresee the losses by an investor but they can nevertheless be held liable for their conduct affecting an investor if there is sufficient proximity.[65]

SCOPE OF FULL COMPENSATION

The ***Chorzów*** principle of full compensation requires that compensation must fully eliminate all consequences of an unlawful act and restore the situation to what it would probably have been had the act not taken place. This principle is generally included in the expropriation clauses of investment treaties,[66] which also apply to other standards of protection.[67] The ***Amco v. Indonesia*** tribunal also established that the scope of full compensation includes both actual losses (***damnum emergens***) and lost profits (***lucrum cessans***).[68]

Moral damages are also compensable, as stated in Article 31(2) of the ARSIWA: '[I]injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.'[69] The ***Desert Line v. Yemen*** tribunal observed that whereas investment treaties mainly protect property and economic interests, they do not exclude the possibility of claiming compensation for moral damages in exceptional cases and confirmed that many legal systems allow moral damages to be recovered in addition to material damages.-[70] However, the 'threshold to award moral damages is high' and 'moral damages are an exceptional remedy'.[71] Although it is an exceptional remedy, some arbitral tribunals have awarded moral damages to investors.[72] On the other hand, punitive damages are not awarded by arbitral awards.[73] The award of interest is also intended to ensure the injured party is fully compensated[74] and also compound interest may be ordered if necessary to ensure full compensation.[75]

There are several factors that can affect or limit claims for full compensation. Contributory fault, country risk and the degree of fault all play a certain role in the assessment of compensation. Article 31 of the ARSIWA commentary indicates that international practice and tribunal decisions generally do not reduce reparation for concurrent causes, 'except in cases of contributory fault'.[76] Similarly, Article 39 of the ARSIWA specifies that reparation must consider the injured party's wilful or negligent actions contributing to the injury.[77] Investment tribunals have held investors accountable for damages following decisions that increased business risks[78] or their role in events leading to a loss.[79] However, not every contribution by the injured party triggers a finding of contributory negligence; the contribution must be substantial and significant, with tribunals having broad discretion in assigning fault.-[80]

Further, the ***CME v. Czech Republic*** tribunal noted: 'One of the established general principles in arbitral case law is the duty of the party to mitigate its losses.'[81] This principle implies that the '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'.[82] According to the ***Unión Fenosa v. Egypt*** tribunal, the applicable 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' and further clarified that the 'legal burden of proving such unreasonableness in this arbitration rests upon the Respondent'.[83] The conditions under which the mitigation requirement applies are as follows: '(i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty'.[84]

Tribunals also tend to limit the scope of full compensation when there is a country prone to less stability or that did not have a good prior reputation in terms of security.[85] For instance, in ***AMT v. Zaire***, the tribunal found liability but rejected the award of loss of profit.[86] In doing so, it stated that an investor making an investment in Zaire should not expect a degree of security that could have existed in Switzerland or Germany.[87] As mentioned above, in the sections titled 'Foreseeability' and 'Causality and foreseeability', foreseeability on the part of the respondent can play a role in limiting the extent of compensation. In investment arbitration cases, it is possible to observe that foreseeability on the part of the investor may play a similar role in determining the extent of the compensation even when the tribunals find liability.[88] In ***Pantechniki***, a similar approach resulted in the sole arbitrator not finding liability.[89] In other cases, however, these concerns have not prevented tribunals from finding liability but they approach the issue of compensation with a more restrictive approach to strike a balance between finding liability in favour of the investor and the circumstances

that make protection of investment relatively more difficult for the host state. Therefore, it is important for the parties to be aware of such a potential balancing approach by the tribunals and raise their arguments in a pre-emptive nature in this regard.

CONCLUSION

In concluding this comparative and international analysis on the principles and practices of full compensation in arbitration, it is evident that the concept of full compensation is fundamental in both domestic legal systems and international law. Whether dealing with commercial arbitration or public international law, the primary goal is to restore the injured party to its pre-damage state.

Domestic legal systems, such as those in Germany, France, the United States and the United Kingdom, enforce full compensation through a blend of statutory provisions and judicial precedents. These systems focus on causality and foreseeability to determine compensation, with the UNIDROIT Principles offering a harmonised framework that bridges different legal traditions.

Under international law, the principle of full compensation is clearly articulated in the ARSIWA and has been significantly influenced by landmark cases such as ***Factory at Chorzów-***. Investment arbitration tribunals apply these principles to resolve disputes between private parties and states, aiming for comprehensive reparation that seeks to 'wipe out all the consequences' of a wrongful act.

Factors such as contributory fault, country risk and the degree of fault by the respondent can affect the scope of compensation. Investment tribunals often evaluate causality and foreseeability together, using the 'but-for' test and considering other factors that might limit compensation.

Although the principle of full compensation remains a guiding principle, its application involves balancng various legal principles. The decisions of arbitration tribunals highlight the context-dependent nature of tribunals' approach in making their decisions on the compensation to be awarded.

ENDNOTES

[1] Opinion in the Lusitania Cases, Reports of International Arbitral Awards, Vol. 7, 1923, 32–44, at 39; hrefried Wöss, Adriana San Román Rivera, Pablo Spiller and Santiago Dellepiane, *Damages in International Arbitration under Complex Long-term Contracts< /em>* (Oxford University Press, 2014), at 186.

[2] UNIDROIT Principles of International Commercial Contracts 2016, International Institute for the Unification of Private Law (UNIDROIT), 2016.

[3] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Supplement No. 10 (A/56/10) (2001).

[4] German Civil Code (***Bürgerliches Gesetzbuch***), Sections 249 and 252.

[5] French Civil Code, Articles 1231-2, 1231-3 and 1231-4.

[6] Y J Gotanda, 'Damages in Private International Law (Volume 326)' in ***The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*** (Brill | Nijhoff, 2007), p. 120; Restatement (Second) of Contracts, §§ 346, 908 (Am. Law Inst. 1981).

[7] D Pearce and R Halson, 'Damages for breach of contract: compensation, restitution, and vindication', ***Oxford Journal of Legal Studies*** (2007), at 5; ***Robinson v. Harman*** (1848) 1 Exch 850 (Jan. 18, 1848), at 855.

[8] ***Sunny Metal & Engineering Pte Ltd v. Ng Khim Ming Eric*** [2007] SGCA 36, ¶¶64–74; Sale of Goods Act, Part IV.

[9] Yusuf Caliskan, 'An Overview of UNIDROIT's Work on Private Law', ***Public and Private International Law Bulletin***, 41(2) (2021), 463–81, at 470; Dimitris Liakopoulos, 'Application and integration of principles and uses of international trade in regulatory systems', ***Revista CES Derecho***, 11(1) (2020), 55–88, at 67.

[10] Stefan Vogenauer (ed.), ***Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*** (2nd Edition, Oxford University Press, 2015), at 91–106.

[11] Michael Joachim Bonell, Symposium Paper: 'The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the Future', ***Australian International Law Journal***, Vol. 17 (2010), [177]–84, at 178.

[12] ***Sabja del Valle Asmad Rivero v. Doña Ramona C.A. and Ronny Manuel Queve do***, Civil Chamber of the Venezuelan Supreme Court (Venezuela) (17 Mar. 2023); Caliskan, supra note 9, at 464; ***Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)***, supra note 10, at 70.

[13] ***Sanovo International A/S v. Ovoprot International S.A.***, Cámara Nacional de Apelaciones en lo Comercial (Argentina) (16 Oct. 2023); Case No. A21-6939/2009, Arbitrazh Court of Kaliningrad Region (Russian Federation) (15 Dec. 2011).

[14] To provide an example, commentary of Article 7.4.2 of the UNIDROIT Principles acknowledges that some legal systems allow for a reduction of compensation depending on the circumstances but nevertheless omits from its codification because of concerns about the uniformity of application. See UNIDROIT 2016 Commentary, at 272.

[15] Gotanda, supra note 6, p. 84.

[16] V Lanovoy, 'Causation in the Law of State Responsibility', ***British Yearbook of International Law*** (2022), p. 3.

[17] HHJ Newey QC in ***Board of Governors of the Hospital for Sick Children v. McLaughlin & Harvey plc*** (1987) 19 Con LR 25, 96.

[18] D P O'Gorman, 'Contracts, Causation, and Clarity,' ***University of Pittsburgh Law Review*** 78, No. 3 (Spring 2017), p. 285.

[19] M Infantino, 'Causation Theories and Causation Rules' in M Bussani and A J Sebok (eds), ***Comparative Tort Law: Global Perspectives*** (2nd edition, Elgar, 2021), p. 268.

[20] ibid.

[21] ibid.

[22] UNIDROIT Principles, Article 7.4.4: 'The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.'

[23] F Ferrari, 'Comparative Ruminations on the Foreseeability of Damages in Contract Law', 53 *La. L. Rev*. (1993), p. 1261.

[24] French Code Civil, Article 1150.

[25] *Hadley & Anor v. Baxendale & Ors* [1854] EWHC J70.

[26] *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145, 151, 9 Ex. 341, 354.

[27] Restatement (Second) of Contracts, § 351 (Am. Law Inst. 1981).

[28] United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 74.

[29] Restatement (Second) of Contracts, Ch. 16, topic 2, intro. note (Am. Law Inst. 1981): 'The initial assumption is that the injured party is entitled to full compensation for his actual loss.'

[30] Secretariat Commentary on Article 70 of the 1978 Draft [draft counterpart of CISG, Article 74], Comment 3.

[31] P Butler, 'Damages Principles under the Convention on Contracts for the International Sale of Goods' in John A Trenor (ed.), *The Guide to Damages in International Arbitration* (Fifth edition, Global Arbitration Review, 2022).

[32] *Addis v. Gramophone Co Ltd* [1909] AC 488. For discussions on punitive damages in the scope of full compensation under English law, see S Rowan (in press), 'Punitive Damages' in *Elgar Encyclopaedia of Comparative Law*, p. 2.

[33] G Nater-Baas and S Pfisterer, 'Contractual Limitations on Damages' in John A Trenor (ed.), *The Guide to Damages in International Arbitration* (Fifth Edition, Global Arbitration Review, 2022).

[34] CISG-AC Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts, Rapporteur: Prof. Lauro Gama Jr, Adopted by the CISG-AC following its 21st meeting in Bogotá, Colombia, on 16 Oct. 2015.

[35] UNIDROIT Principles, Article 7.1.6.

[36] O'Gorman, supra note 18, pp. 273–74.

[37] Jonathan Bonnitcha and Sarah Brewin, 'Compensation Under Investment Treaties: What are the Problems and what can be done?', International Institute for Sustainable Development Best Practice Series (2020), at 8.

[38] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (2000) at ¶310; *ADC Affiliate and ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2006), at ¶521.

[39] Bonnitcha and Brewin, supra note 37, at 9.

[40] *Case Concerning the Factory at Chorzow (Germany v. Poland)*, PCIJ Rep Series A No. 17, Claim for Indemnity, at 47.

[41] hrefried Wöss, Adriana San Román Rivera, Pablo Spiller and Santiago Dellepiane, *Damages in International Arbitration under Complex Long-term Contracts< /em>* (Oxford University Press, 2014), at 256.

[42] ibid.

[43] Bonnitcha and Brewin, supra note 37, at 9.

[44] ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARS IWA) with Commentaries, Supplement No. 10 (A/56/10) (2001), at 91.

[45] ibid.

[46] id., at 91-92.

[47] id., at 92–93.

[48] A Bjorklund, 'Causation, Morality, and Quantum', 32 ***Suffolk Transnational Law Review*** (2009), pp. 435, 436.

[49] See ILC, ARSIWA with Commentaries, Supplement No. 10 (A/56/10) (2001), Article 31(9): 'Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury . . . caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.'

[50] id., at Article 31(10): 'The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.'

[51] See, for example: ***Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic***, ICSID Case No. ARB/07/26, Award dated 8 Dec. 2016; ***MNSS BV & Recupero Credito Acciaio N.V. v. Montenegro***, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016; ***Nordzucker A.G. v. Republic of Poland***, UNCITRAL Arbitration Proceeding, Third Partial and Final Award dated 23 Nov. 2009; ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania***, ICSID Case No. ARB/05/22, Award dated 24 July 2008.

[52] ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania***, ICSID Case No. ARB/05/22, Award dated 24 July 2008, ¶¶787–806.

[53] J Knoll and T Singla, 'Causation in International Investment Law: Putting Article 23.2 of the India Model BIT into Context', ***Indian Journal of Arbitration Law***, Vol. 8 Issue 2 (2020), p. 94.

[54] See, for example: North American Free Trade Agreement (1993), Article 1116(1); ASEAN Agreement for the Promotion and Protection of Investments (2009), Article 32; Canada Model Agreement for the Promotion and Protection of Investments (2004), Article 22(1); Canada-Moldova Agreement for the Promotion and Protection of Investments (2018), Article 20; Mexico Model Agreement on the Promotion and Reciprocal of Investments (2008), Article 11; Mexico-Türkiye Agreement for the Promotion and Protection of Investments (2013), Article 14(1); United States Model Bilateral Investment Treaty (2012), Article 24(1); United States-Rwanda Agreement for the Promotion and Protection of Investments (2008), Article 24; India Model Bilateral Investment Treaty (2015), Article 23(2).

[55] China-Republic of Korea Agreement on the Promotion and Protection of Investments, Article 9(1) (2007).

[56] ***Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)***, PCA Case No. 2007-02/AA277, Partial Award on the Merits dated 30 Mar. 2010, ¶374.

[57] ***Clayton and Bilcon of Delaware Inc. v. Government of Canada***, PCA Case No. 2009-04, Award on Damages dated 10 Jan. 2019, ¶114.

[58] ***Rand Investments Ltd., Allison Ruth Rand, Kathleen Elizabeth Rand and others v. Republic of Serbia***, ICSID Case No. ARB/18/8, Award dated 29 June 2023, ¶¶673–80.

[59] ***Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia***, PCA Case No. 2016-39, Award dated 8 Sept. 2023, ¶¶304–14.

[60] Similarly to the causality requirement, only a few treaties contain language setting forth a foreseeability criterion in their causation provisions, namely treaties signed by India following the example of Article 23.2 of the India Model BIT. See India Model Bilateral Investment Treaty, Article 23(2) (2015): "The disputing investor at all times bears the burden of establishing: (a) jurisdiction; (b) the existence of an obligation under Chapter II of this Treaty, other than the obligation under Article 9 or 10; (c) a breach of such obligation; (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach."; India-Kyrgyzstan Bilateral Investment Treaty, Article 23(2) (2019); India-Taiwan Bilateral Investment Treaty, Article 22(2) (2018).

[61] ILC, ARSIWA with Commentaries, Supplement No. 10 (A/56/10) (2001), Article 31(10): '. . . causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity".' See P W Pearsall, 'Causation and the Draft Articles on State Responsibility', ***ICSID Review***, Vol. 37, No. 1-2 (2022), pp. 201–02.

[62] ***CME Czech Republic BV v. Czech Republic***, UNCITRAL, Partial Award dated 13 Sept. 2001, ¶527.

[63] ***Olin Holdings Limited v. State of Libya***, ICC Case No. 20355/MCP, Final Award dated 25 May 2018, ¶435: 'The Tribunal considers that in order to prove that Libya's measures caused an underperformance on the part of Olin, the Claimant had to establish (1) the causality between Libya's breaches of the BIT and Olin's underperformance and (2) that Libya's breaches are the proximate cause of Olin's underperformance, or in other words, that the underperformance was a foreseeable consequence of Libya's breaches.'

[64] See ***SD Myers, Inc v. Government of Canada***, UNCITRAL, Second Partial Award dated 21 Oct. 2002, ¶¶154–60.

[65] id., ¶159.

[66] See Mexico-Türkiye Agreement for the Promotion and Protection of Investments (2013), Article 8.

[67] P Y Tschanz and J E Vinuales, 'Compensation for Non-Expropriatory Breaches of International Investment Law', ***Journal of International Arbitration***, Vol. 26 (5) (2009), p. 735.

[68] ***Amco Asia Corporation and others v. Republic of Indonesia***, ICSID Case No. ARB/81/1, Award dated 20 Nov. 1984, ¶267.

[69] ILC, ARSIWA with Commentaries, Supplement No. 10 (A/56/10) (2001), Article 31(5): '"Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life.'

[70] ***Desert Line Projects LLC v. Republic of Yemen***, ICSID Case No. ARB/05/17, Award dated 6 Feb. 2008, ¶289. Similarly, the ***Cementownia v. Turkey*** tribunal noted that 'nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages': see ***Cementownia "Nowa Huta" S.A. v. Republic of Turkey (I)***, ICSID Case No. ARB(AF)/06/2, Award dated 17 Sept. 2009, ¶169.

[71] ***Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia***, ICSID Case No. ARB/06/2, Award dated 16 Sept. 2015, ¶618.

[72] ***Bernhard von Pezold and others v. Republic of Zimbabwe***, ICSID Case No. ARB/10/15, Award dated 28 July 2015; ***Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others***: ordered US$30 million in compensation in moral damages for damage to professional reputation.

[73] ***Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia***, ICSID Case No. ARB/09/16, Award dated 6 July 2012, ¶344. North American Free Trade Agreement (NAFTA), Article 1135(3) states that a 'Tribunal may not order a Party to pay punitive damages' and, therefore, arbitral tribunals constituted under NAFTA do not award punitive damages: see ***S.D. Myers, Inc. v. Government of Canada***, UNCITRAL, Second Partial Award dated 21 Oct. 2002, ¶6.

[74] ***LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic***, ICSID Case No. ARB/02/1, Award dated 25 July 2007, ¶55.

[75] ***OKO Pankki Oyj and others v. Republic of Estonia***, ICSID Case No. ARB/04/6, Award dated 19 Nov. 2007, ¶346.

[76] ILC, ARSIWA with Commentaries, Supplement No. 10 (A/56/10) (2001), Article 31(12); see also ***CME Czech Republic B.V. v. Czech Republic***, UNCITRAL, Partial Award dated 13 Sept. 2001, ¶583; ***Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica***, ICSID Case No. ARB/96/1, Final Award dated 17 Feb. 2000, ¶¶103–05.

[77] ILC, ARSIWA with Commentaries, Supplement No. 10 (A/56/10) (2001), at 109.

[78] ***MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile***, ICSID Case No. ARB/01/7, Award dated 25 May 2004, ¶¶242–43.

[79] ***Anatolie Stati and others v. Republic of Kazakhstan***, SCC Case No. V116/2010, Award dated 19 Dec. 2013, ¶1331.

[80] ***Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador***, ICSID Case No. ARB/06/11, Award dated 5 Oct. 2012, ¶670; ***Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia***, PCA Case No. 2016-39, Award dated 8 Sept. 2023, ¶310.

[81] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award dated 14 Mar. 2003, ¶482.

[82] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award dated 31 Aug. 2018, ¶10.124.

[83] id., ¶¶10.124, 10.126.

[84] *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 Jan. 2019, ¶204.

[85] C Schreuer, 'Investment Protection in Times of Armed Conflict', *The Journal of World Investment & Trade* 23.5-6 (2022), p. 707. See *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award dated 27 June 1990, ¶¶58–64.

[86] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award dated 21 Feb. 1997.

[87] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award dated 21 Feb. 1997, ¶¶7.02–7.15: '7.15. Preferably, the Tribunal will opt for a method that it is most plausible add realistic in the circumstances of the case, while rejecting all other methods of assessment which would serve unjustly to enrich an investor who, rightly or wrongly, has chosen to invest in a country such as Zaire, believing that by so doing the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risk, political or even economic or financial or any risk whatsoever.'

[88] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001, ¶¶584–85; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011, ¶170.

[89] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award dated 30 July 2009.

KABİNE LAW OFFICE

Mehmet Karlı mkarli@kabinelaw.com
Selim Can Bilgin scbilgin@kabinelaw.com
Alp Özzeybek aozzeybek@kabinelaw.com
Metehan Motugan mmotugan@kabinelaw.com

Tel: +90 212 278 64 13

https://www.kabinelaw.com/