

Article 38

Interest

A. The Work of the International Law Commission

Article 38 of the 2001 International Law Commission's (ILC) articles on responsibility of States for internationally wrongful acts (2001 Articles) may be traced to the second reading work of the Fifth Special Rapporteur on State responsibility Crawford.¹ Just as with the related Article 36 (Compensation), the work of the first three Special Rapporteurs is less helpful, due to the lack of engagement with the topic by either the ILC² or the Rapporteurs themselves.³ The Fourth Special Rapporteur Arangio-Ruiz addressed interest in his 1989 Second Report⁴, proposing Draft article 9 (Interest).⁵ In Crawford's later summary, it 'did not state any general rule of entitlement to simple (as distinct from compound) interest, and was limited to specifying the period of time to be covered by interest due "for loss of profits ... on a sum of money"'. This implied that interest payments were limited to liquidated claims, and even, perhaps, to claims for loss of profits (although this may have been a matter of expression only).⁶ The Commission's discussion in 1990 concluded with a strong preference for deleting Draft article 9 as a whole since 'the question of interest should be dealt with in a general formula'.⁷ In 1992, the Drafting Committee followed this approach by expressing interest as part of compensation together with loss of profits, noting the challenge of arriving at specific and acceptable rules in light of varied practice, and stated a general principle couched in flexible terms.⁸ In 1993, the ILC adopted Draft article 8 (Compensation) with commentary in the first reading, addressing interest in paragraph 2⁹ (renumbered as Draft article 44(2) in the 1996 ILC Draft articles on responsibility):

¹ 'Articles on responsibility of States for internationally wrongful acts' *Yearbook of the International Law Commission 2001: Volume II Part 2* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26 (hereafter 2001 ILC Articles) art 38.

² 'Sixth report on State responsibility, by Mr. F.V. García-Amador, Special Rapporteur' (26 January 1961) *Yearbook of the International Law Commission 1989: Volume II* UN Doc A/CN.4/SER.A/1961/Add.1 1 Chapter III.

³ Neither the Second Special Rapporteur Ago nor the Third Special Rapporteur Riphagen addressed interest in their reports.

⁴ 'Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (9 and 22 June 1989) *Yearbook of the International Law Commission 1989: Volume II Part 1* UN Doc A/CN.4/SER.A/1989/Add.1 (Part 1) 1 (hereafter Arangio-Ruiz's Second Report) Section II.E.

⁵ Arangio-Ruiz's Second Report *ibid* para 191 art 9.

⁶ 'Third report on State responsibility, by Mr. James Crawford, Special Rapporteur' (15 March, 15 June, 10 and 18 July and 4 August 2000) *Yearbook of the International Law Commission 1995: Volume II Part 1* UN Doc A/CN.4/SER.A/2000/Add.1 (Part 1) 3 (hereafter Crawford's Third Report) para 195 (internal footnotes omitted).

⁷ *Yearbook of the International Law Commission 1990: Volume II Part 2* UN Doc A/CN.4/SER.A/1990/Add.1 (Part 2) 78 para 387, generally paras 378-387; Crawford's Third Report *ibid* para 196.

⁸ *Yearbook of the International Law Commission 1992: Volume I* UN Doc A/CN.4/SER.A/1992 220 paras 48-49.

⁹ *Yearbook of the International Law Commission 1993: Volume II Part 2* UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2) 58.

For the purposes of the present article, *compensation* covers any economically assessable damage sustained by the injured State, and *may include interest* and, where appropriate, loss of profits.¹⁰

In the 1993 Sixth Committee, reactions were mixed, with some States approving the drafting as reflective of the divergent practice,¹¹ others calling for greater clarity¹² or stronger endorsement of the obligation to provide interest,¹³ and yet others preferring complete deletion of the language.¹⁴

In the second reading, Crawford addressed interest in the 2000 Third report on State responsibility.¹⁵ He noted mixed reactions by States during the second reading, from support to the reticent treatment of the first reading (France) to its strong criticism for destabilization of the established principle (particularly the United Kingdom and the United States).¹⁶ Crawford made four points. First, the common thread running through the varied dispute settlement practice was support of interest in principle where necessary to compensate, with flexibility in terms of application of that principle.¹⁷ Secondly, while compound interest was not generally awarded, special circumstances might arise which would justify it – but with particular care for the possibility of inflated or disproportionate awards.¹⁸ Thirdly, there was no uniformity in the treatment of the actual calculation of interest (the starting date, the terminal date, interest rate). While judicial discretion was important, ‘the present anarchical state of the decisions and of practice’ suggested the usefulness of establishing a presumption.¹⁹ For these reasons, Crawford proposed a provision on interest in Draft article 45 bis, expressed separately to reflect its usual treatment in practice, reflecting entitlement to interest (but not compound interest) to the extent necessary to ensure full reparation, and not limited to loss of profits:

¹⁰ ‘Draft articles on State responsibility’ *Yearbook of the International Law Commission 1996: Volume II Part 2* UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2) 58 (hereafter 1996 Draft Articles) art 44(2) (emphasis added).

¹¹ Summary Records of the 24th Meeting of the Sixth Committee (2 November 1993) UN Doc A/C.6/48/SR.24 para 57 (Brazil); Summary Records of the 26th Meeting of the Sixth Committee (3 November 1993) UN Doc A/C.6/48/SR.26 paras 6 (Poland), 65 (Argentina).

¹² Summary Records of the 27th Meeting of the Sixth Committee (4 November 1993) UN Doc A/C.6/48/SR.27 para 47 (Austria).

¹³ Summary Records of the 22nd Meeting (1993) of the Sixth Committee (1 November 1993) UN Doc A/C.6/48/SR.22 para 102 (Denmark on behalf of the Nordic countries); Summary Records of the 27th Meeting (1993) para 18 (the US).

¹⁴ Summary Records of the 24th Meeting (1993) (n 11) para 4 (Sudan). On interest and sharia, see 2001 ILC Articles (n 1) fn 620.

¹⁵ Crawford’s Third Report (n 6) Section I.B.5.

¹⁶ *Ibid* paras 152, 198.

¹⁷ *Ibid* para 203, generally paras 200-206.

¹⁸ *Ibid* para 211, generally paras 207-211.

¹⁹ *Ibid* para 212.

1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.
2. Unless otherwise agreed or decided, interest runs from the date when compensation should have been paid until the date the obligation to pay compensation is satisfied.²⁰

The 2000 ILC session expressed support for the overall thrust of Crawford's proposal. However, the first sentences of both paragraphs were suggested for deletion as unnecessary, and various proposals were made for expressing more precisely the date from which interest ran.²¹ In his concluding remarks, Crawford expressed support for the majority view of addressing interest in a separate article.²² In light of the discussion, the 2000 Drafting Committee provisionally adopted on second reading draft Article 39 (Interest), with language identical to Article 38 of the 2001 Articles.²³ Suggestion by some States to express provision for interest under the rubric for compensation was rejected, due to the distinct role in the framework of reparation that it could play.²⁴ In 2001, the ILC adopted commentary to (the renumbered) Article 38.²⁵ In the later work touching upon interest, ILC has reproduced Article 38 without change.²⁶

B. Article 38 and Customary Law

The principle of award of interest in Article 38(1) builds on international jurisprudence going back to *SS Wimbledon*.²⁷ It was uncontroversial in the ILC second reading, and despite some uncertainty over what Draft article 44(2) precisely stood for on interest, 'neither the Special Rapporteur nor any member of the Commission in the first reading debate denied that principle; indeed almost all who spoke on the subject specifically supported it'.²⁸ The mixed reactions by

²⁰ Ibid paras 213-214.

²¹ *Yearbook of the International Law Commission 2000: Volume II Part 2* UN Doc A/CN.4/SER.A/2000 (Part 2) (hereafter *Yearbook 2000 Vol II Part 2*) 39 paras 221-222.

²² Ibid para 239.

²³ *Yearbook of the International Law Commission 2000: Volume I* UN Doc A/CN.4/SER.A/2000 (hereafter *Yearbook 2000 Vol I*) 391 paras 35-37; 'Draft articles provisionally adopted by the Drafting Committee on second reading', *Yearbook 2000 Vol II Part 2* (n 21) 65 art 39.

²⁴ 'Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur' (2 and 3 April 2001) *Yearbook of the International Law Commission 2001: Volume II Part 1* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 1) 1, 24.

²⁵ *Yearbook of the International Law Commission 2001: Volume I* UN Doc A/CN.4/SER.A/2001 104 para 12, 268 paras 49-52.

²⁶ 'Articles on responsibility of international organizations' *Yearbook of the International Law Commission 2011: Volume II Part 2* UN Doc A/CN.4/SER.A/2011/Add.1 (Part 2) 40 art 38 Commentary.

²⁷ *SS Wimbledon* 1923 PCIJ Series A No 1 32, quoted in 2001 ILC Articles (n 1) art 37 Commentary 2, with further references at Commentaries 2-6.

²⁸ Crawford's Third Report (n 6) para 198.

States on drafting were underpinned by overall endorsement of the principle.²⁹ The International Court of Justice (ICJ) and other inter-State tribunals have endorsed Article 38(1),³⁰ and it is routinely cited as customary in investor-State arbitration.³¹ The conclusion is that Article 38(1) is reflective of custom.

Article 38(2) sets out the starting date and the terminal date of the obligation to pay interest as, respectively, ‘when the principal sum should have been paid’ and ‘until the date the obligation to pay is fulfilled’.³² The ILC did not purport this provision to codify existing practice,³³ and the subsequent dispute settlement practice is too varied to reflect newly emergent consensus on the issue.³⁴ The conclusion is that the status of Article 38(2) remains, as the ILC intended, a useful presumption but not a customary rule.

C. Content of Article 38

1. Content of Article 38(1)

- a) *Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation.’*

The first sentence of Article 38(1) is relevant for three points. First, entitlement to interest on the principal sum representing its loss applies if that sum is quantified as at an earlier date than the date of the settlement of, or judgment of award concerning, the claim and to the extent that it is necessary to ‘ensure full reparation’.³⁵ Secondly, ‘principal sum’ is used instead of ‘compensation’ because interest is not an autonomous form of reparation, nor is it a necessary part of

²⁹ See nn 11-14, 16.

³⁰ *Iran and the US*, IUSCT Cases nos A15 (IV) and A24, Award no 602-A15(IV)/A24-FT, 2 July 2014 (hereafter *Iran and the US* (2014)) para 283; Arctic Sunrise (*The Netherlands v Russia*) (Award on Compensation) (2017) 32 RIAA 317 (hereafter *The Netherlands v Russia*) para 119; Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v Nicaragua*) [2018] ICJ Rep 15 (hereafter *Costa Rica v Nicaragua*) para 151; The M/V “Norstar” Case (*Panama v Italy*) [2019] ITLOS Rep 10 para 457; The ‘Duzgit Integrity’ (*Malta v São Tomé and Príncipe*), Award on Reparation, 18 December 2019 (hereafter *Malta v São Tomé and Príncipe*) para 204; Armed Activities on the Territory of the Congo (*DRC v Uganda*) (Reparations) (Judgment of 9 February 2022) (hereafter *DRC v Uganda*) para 401.

³¹ Report of the UN Secretary General, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’ (29 April 2022) UN Doc A/77/74 33-5 (and entries on Article 38 in earlier compilations).

³² 2001 ILC Articles (n 1) art 38(2).

³³ Ibid Commentary 10; also Crawford’s Third Report (n 6) para 212.

³⁴ See Section C.2 below.

³⁵ Ibid Commentaries 2, 7.

compensation in every case.³⁶ By applying this proposition, the ICJ has concluded that there is no need to award interest if, in determining the amount to be awarded, passage of time has been taken into account.³⁷ Thirdly, unlike what Draft article 44(2) seemed to be suggesting,³⁸ interest is not limited to claims for loss of profits. Indeed, an example of a situation where award of interest is not necessary for full reparation is precisely when loss of profit is already included as part of the compensation because otherwise double recovery could be obtained.³⁹

b) *'The interest rate and mode of calculation shall be set so as to achieve that result.'*

The second sentence of Article 38(1) is relevant for three points. First, it does not set, even as a presumption, the applicable interest rate and mode of calculation, but only refers back to the benchmark of the overall purpose of 'necessary in order to ensure full reparation' in the first sentence. Secondly, the ILC found no uniform approach regarding the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates).⁴⁰ Nor has subsequent dispute settlement practice led to greater uniformity, with the overall purpose of ensuring full reparation implemented sometimes in setting the rate with sparse justification,⁴¹ differently before different mechanisms, different points in time in the same mechanism,⁴² different types of damage in the same case,⁴³ and different stages of dispute settlement.⁴⁴ This variety of practice is in line with the ILC's nod to the wisdom of judicial discretion.⁴⁵

The third (and hardest) question relates to compound interest. The commentary notes the (then-)general view of courts and tribunals against it, and concludes that 'it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation'.⁴⁶ In subsequent inter-State cases, compound interest has been awarded in law of the sea disputes,⁴⁷ rejected in the

³⁶ 2001 ILC Articles (n 1) art 38 Commentary 1; endorsed in *Costa Rica v Nicaragua* (n 30) [151]; *DRC v Uganda* (n 30) [401].

³⁷ *Costa Rica v Nicaragua* (n 30) para 152; *DRC v Uganda* (n 30) para 401.

³⁸ 1996 Draft articles (n 10) art 44(2); also Arangio Ruiz's Second Report (n 4) 56 draft article 9(1); Crawford's Third Report (n 6) para 195.

³⁹ 2001 ILC Articles (n 1) art 38 Commentary 11, art 36 Commentary 33.

⁴⁰ Ibid art 38 Commentary 10; further Arangio-Ruiz's Second Report (n 4) paras 95-97; Penelope Nevill, 'Award of Interest by International Courts and Tribunals' (2007) 78 BYBIL 255 Section III.

⁴¹ *Costa Rica v Nicaragua* (n 30) para 153.

⁴² *Iran and the US* (2014) (n 38) paras 284-288.

⁴³ *Malta v São Tomé and Príncipe* (n 30) paras 208-210.

⁴⁴ *Costa Rica v Nicaragua* (n 30) paras 153-155.

⁴⁵ 2001 ILC Articles (n 1) art 38 Commentary 10.

⁴⁶ Ibid art 38 Commentaries 8-9; borrowing from Crawford's Third Report (n 6) paras 208-211.

⁴⁷ *Malta v São Tomé and Príncipe* (n 30) para 212 (with further references).

Iran-United Claims Tribunal,⁴⁸ and not requested in the ICJ.⁴⁹ In investor-State arbitration, compound interest is increasingly, although not invariably, awarded when requested.⁵⁰ There is ground for reasonable disagreement on whether investment law is out of step,⁵¹ or these claims, frequently concerning the deprivation of income-producing property, are precisely where the ‘to ensure full reparation’ proviso properly applies.⁵² The concern that compound interest could result in inflated or disproportionate awards, with the amount of interest greatly exceeding the principal amount owed,⁵³ has played little explicit role in post-2001 dispute settlement practice.

2. Content of Article 38(2)

a) *Interest runs from the date when the principal sum should have been paid*

Article 38(2) raises three issues. First, the ILC did not purport to codify custom, accepting that ‘[t]here is no uniform approach’ and ‘the circumstances of each case and the conduct of the parties strongly affect the outcome’ and describing the provision set out merely as ‘useful’.⁵⁴ Secondly, the starting date is expressed as ‘when the principal sum should have been paid’,⁵⁵ mostly following Crawford’s suggested language,⁵⁶ intended to reflect his point that ‘the decisive date was that on which damage had occurred, but ... some flexibility was characteristically shown by tribunals’.⁵⁷ The subsequent dispute settlement practice is mostly consistent with this presumption,⁵⁸ but occasionally refers instead to dates of particular decisions in the proceedings.⁵⁹

b) *‘until the date the obligation to pay is fulfilled’*

⁴⁸ *Iran and the US*, IUSCT Cases nos A15 (II:A), A26 (IV) and B43, Partial Award no 604-A15 (II:A)A26 (IV)/B43-FT, 10 March 2020 para 2568.

⁴⁹ *Certain Activities* (n 30) para 153.

⁵⁰ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited and Or*, ICSID Case no ARB/10/11 and ICSID Case no ARB/10/18, Decision on the Implementation of the Decision on the Payment Claim, 14 September 2015 paras 116-150; Christina L Beharry and Juan Pablo Hugues, ‘Article 38: The Treatment of Interest in International Investment Arbitration’ (2022) 37 ICSID Review – Foreign Investment Law Journal 339, 353-354.

⁵¹ *Ibid* 354.

⁵² James Crawford, *State Responsibility: The General Part* (CUP 2013) 538; *BayWa RE Renewable Energy GmbH and Or v Spain*, ICSID Case no ARB/15/16, Award, 25 January 2021 (chaired by Crawford) para 62.

⁵³ 2001 ILC Articles (n 1) art 38 Commentary 8; Crawford’s Third Report (n 6) para 211.

⁵⁴ *Ibid* Commentary 10; also Crawford’s Third Report (n 6) para 212.

⁵⁵ *Yearbook 2000 Vol II Part 2* (n 21) para 222.

⁵⁶ Except for the change of ‘compensation’ to ‘principal sum’ for consistency with paragraph 1, *Yearbook 2000 Vol I* (n 23) 391 para 35.

⁵⁷ *Yearbook 2000 Vol II Part 2* (n 21) para 222.

⁵⁸ *Iran and the US* (2014) (n 30) paras 289-291; *Malta v São Tomé and Príncipe* (n 30) para 213 (for material damages).

⁵⁹ The date of decision on the merits, *The Netherlands v Russia* (n 29) para 127; *Costa Rica v Nicaragua* (n 29) para 153; the date of the decision on damages, *Malta v São Tomé and Príncipe* (n 30) para 214 (for moral damages).

The terminal date is expressed as ‘the date the obligation to pay is fulfilled’, a point made already in Arangio-Ruiz’s Second Report and uncontroversial throughout the drafting process.⁶⁰ It does raise indirectly the distinction between pre- and post-judgment interest, often adopted in the practice of international courts and tribunals,⁶¹ that the ILC did not engage with due to its procedural character.⁶² While analytically persuasive, the distinction underscores the challenge for formulating general secondary rules on content of responsibility, both autonomous from particular institutions or procedures *and* almost invariably implemented only in such settings. Indeed, post-judgment interest is functionally equivalent to secondary rules and applied contiguously in dispute settlement practice, hence important for striking the overall balance, but technically falls outside the scope of the ILC’s inquiry. The interaction between secondary rules on the issue and the exercise of judicial discretion within varied and decentralised dispute settlement mechanisms explain and justify the modesty of the ILC in not attempting to codify existing practices.

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Keywords interest, interest rate, mode of calculation, compound interest

⁶⁰ Arangio-Ruiz’s Second Report (n 4) para 94.

⁶¹ *Guinea v DRC* (n 30) para 56.

⁶² 2001 ILC Articles (n 1) art 38 Commentary 12.