DAMAGES IN INTERNATIONAL INVESTMENT LAW
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with

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Summary of Contents

Preface v
Table of Cases xix
Introduction xxxiii

PART I

1 Contours of the Study 3
   1.1 Damages and Compensation 4
   1.2 Foreign Investment 5
   1.3 Governmental Interference 7
   1.4 International Law and Relevant International Tribunals 12

2 Sources of International Law on Damages 19
   2.1 International Investment Agreements 21
   2.2 Customary International Law 25
   2.3 General Principles of Law 43
   2.4 International Jurisprudence and Scholarly Writings 45
   2.5 Order of Application of Sources 47

3 Compensation in the System of Remedies 49
   3.1 Availability of Remedies 49
   3.2 Restitution and Compensation 53

PART II

4 General Approach to Compensation by Cause of Action 63
   4.1 Expropriation 64
   4.2 Breaches of International Law Unrelated to Expropriation 88
   4.3 Breach of Contract 101

5 Cross-cutting Issues 111
   5.1 Dimensions of Full Compensation 112
   5.2 Use of Unjust Enrichment 129
   5.3 Causation and Remoteness 135
   5.4 Indirect Investment: The Flow-through of Damage 148
   5.5 Proof and Evidence 161

6 Investment Valuation 181
   6.1 Value and Fair Market Value 182
## Summary of Contents

6.2 Valuation Methods: Theory and Arbitral Practice 188  
6.3 Date of Valuation 243  

7 Heads of Damages 261  
7.1 Value of Investment 262  
7.2 Investment Expenditure 264  
7.3 Lost Profits 278  
7.4 Incidental Expenses 299  
7.5 Moral Damages 307  

8 Limitations on Compensation 313  
8.1 Contributory Fault 314  
8.2 Mitigation of Damages 319  
8.3 Investment Risk 325  
8.4 Necessity as a Circumstance Precluding Wrongfulness 338  
8.5 Limitations Arising from the Public Nature of a State 353  

### PART III

9 Interest 361  
9.1 General Issues 362  
9.2 Rate of Interest 366  
9.3 Date from which Interest Accrues 374  
9.4 Compounding of Interest 379  
9.5 Post-Award Interest 387  
9.6 Integral Assessment of All Elements 390  

10 Currency and Taxation Issues 393  
10.1 Currency 393  
10.2 Taxation 401  

Annex I: Analytical Table of Investor-State Cases (1963–2007) 405  
Annex II: Analytical Table of Selected Iran-US Claims Tribunal Cases 436  
Annex III: Selected Pre-1950 Cases (various international courts and tribunals) 486  
Annex IV: Expropriation Provisions in Investment Treaties 507  

Index 541
# Contents

**Preface**
**Table of cases**  
**Introduction**  

**PART I**

1 Contours of the Study  
1.1 Damages and Compensation  
1.2 Foreign Investment  
1.2.1 Investment as a Transaction  
1.2.2 Investment as an Asset  
1.3 Governmental Interference  
1.3.1 Interference with Property Rights  
1.3.2 Interference with Contract Rights  
1.3.3 Interference with Management Rights  
1.3.4 Interference with Administrative or Fiscal Rights  
1.3.5 Changes to the Regulatory Framework  
1.4 International Law and Relevant International Tribunals  
1.4.1 Causes of Action  
1.4.1(a) Expropriation (lawful and unlawful)  
1.4.1(b) Breach of international law  
1.4.1(c) Breach of contract  
1.4.1(d) Multiple breaches  
1.4.2 Relevant International Tribunals  
1.4.2(a) Investment treaty arbitrations  
1.4.2(b) Contractual investment arbitrations  
1.4.2(c) The Iran-US Claims Tribunal  
1.4.2(d) The World Court  
1.4.2(e) State-State arbitrations  
1.4.2(f) Mixed claims commissions  
1.4.2(g) Other international courts, tribunals and commissions  

2 Sources of International Law on Damages  
2.1 International Investment Agreements  
2.1.1 Claims-enabling Provisions  
2.1.2 Expropriation Clauses  
2.1.3 ‘Armed Conflict’ Clauses
2.2 Customary International Law 25
  2.2.1 Features and Evidences of Customary International Law 26
  2.2.2 ILC Articles on State Responsibility 27
    2.2.2(a) May the ILC Articles be applied in investor-State disputes? 28
    2.2.2(b) Do the ILC Articles embody customary international law? 32
    2.2.2(c) Relevant provisions of the ILC Articles 33
  2.2.3 Customary Law as Recognized by International Courts and Tribunals 34
  2.2.4 UN General Assembly Resolutions 36
  2.2.5 World Bank Guidelines on Investment 38
  2.2.6 Lump-sum Settlement Agreements 39
  2.2.7 Influence of Bilateral Investment Treaties 41
2.3 General Principles of Law 43
2.4 International Jurisprudence and Scholarly Writings 45
  2.4.1 Decisions of International Tribunals 46
  2.4.2 Scholarly Writings 47
2.5 Order of Application of Sources 47
3 Compensation in the System of Remedies 49
  3.1 Availability of Remedies 49
  3.2 Restitution and Compensation 53
    3.2.1 Meaning and Forms of Restitution 54
    3.2.2 Relationship between Restitution and Compensation 55
    3.2.3 Limitations of Restitution 57
4 General Approach to Compensation by Cause of Action 63
  4.1 Expropriation 64
    4.1.1 Relevant Concepts of Expropriation 64
      4.1.1(a) Direct and indirect expropriation 64
      4.1.1(b) Lawful and unlawful expropriation 65
      4.1.1(c) Expropriation of contractual rights 69
    4.1.2 Compensation for Lawful Expropriation 71
      4.1.2(a) Development of customary international law 71
      4.1.2(b) Advent of investment treaties 78
      4.1.2(c) ECHR experience 80
      4.1.2(d) Conclusion 83
    4.1.3 Compensation for Unlawful Expropriation 83
      4.1.3(a) Treaty or custom? 83
4.1.3(b) Compensation under customary law 85
4.1.3(c) Differences in compensation for lawful and unlawful expropriation 86
4.1.3(d) Conclusion 88
4.2 Breaches of International Law Unrelated to Expropriation 88
4.2.1 Customary Law and Full Compensation 89
4.2.1(a) Principle of full compensation 89
4.2.1(b) Type of obligation breached is irrelevant 90
4.2.2 Compensation Methodologies 90
4.2.2(a) Introduction: tribunals’ discretion 90
4.2.2(b) Full loss of investment’s value 92
4.2.2(c) Diminution in the investment’s value 93
4.2.2(d) Unpaid taxes or contract price 94
4.2.2(e) Loss of dividends by shareholder 96
4.2.2(f) Losses due to temporary interference 97
4.2.2(g) Loss of invested amounts 97
4.2.2(h) Comments 98
4.2.3 Multiple Violations 99
4.2.3(a) Expropriation coupled with a treaty breach 99
4.2.3(b) Multiple treaty breaches not involving expropriation 100
4.3 Breach of Contract 101
4.3.1 Introduction 101
4.3.2 Application of International Law 103
4.3.3 Principle of Full Compensation 105
4.3.4 Damnum Emergens and Lucrum Cessans 106
5 Cross-cutting Issues 111
5.1 Dimensions of Full Compensation 112
5.1.1 Existence of Loss 113
5.1.2 Legally Relevant Loss 114
5.1.3 Past and Future Losses 115
5.1.4 Punitive Damages 116
5.1.5 Hypothetical Analysis 117
5.1.6 Non Ultra Petita and Compensation Methodologies 119
5.1.7 Approximations 120
5.1.8 Equitable Considerations 124
5.1.8(a) Reliance on equity by arbitral tribunals 124
5.1.8(b) Legitimacy of reliance on equity 127
5.2 Use of Unjust Enrichment 129
5.2.1 Unjust Enrichment as a Cause of Action 129
5.2.2 Unjust Enrichment as a Basis of Compensation 130
5.3 Causation and Remoteness 135
5.3.1 Factual and Legal Tests of Causation 135
5.3.2 Causation in General International Law 136
5.3.3 Investment Arbitration Practice 138
  5.3.3(a) The relevant test(s) of causation 138
  5.3.3(b) Causation as a means of identifying compensable damages 141
  5.3.3(c) Causation in expropriation cases 142
5.3.4 Concurrent Causes 144
  5.3.4(a) Third party state 144
  5.3.4(b) Third party conduct 145
  5.3.4(c) Relevance of concurrent causes 147
5.4 Indirect Investment: The Flow-through of Damage 148
  5.4.1 The Issue in Brief 148
  5.4.2 Protected Investment 149
    5.4.2(a) Indirect investment 149
    5.4.2(b) Provisions of the applicable investment treaty 150
    5.4.2(c) Majority and minority interests 152
  5.4.3 Identity of the Claimant 154
  5.4.4 Claims on Behalf of the Subsidiary 155
  5.4.5 Flow-through of Damage 155
  5.4.6 Quantifying the Loss to a Shareholder 157
    5.4.6(a) Focus on loss of dividends 157
    5.4.6(b) Focus on loss in share value 158
    5.4.6(c) Comments 159
  5.4.7 Treatment of Receivables 160
  5.4.8 Conclusion 161
5.5 Proof and Evidence 161
  5.5.1 Burden of Proof 161
  5.5.2 Standard of Proof 162
    5.5.2(a) Generally 162
    5.5.2(b) Damages claims: the requirement of reasonable certainty 164
    5.5.2(c) Prima facie case 167
  5.5.3 Evidentiary Issues 170
    5.5.3(a) Insufficiency of evidence and approximation 170
    5.5.3(b) Adverse inferences 172
    5.5.3(c) Use of experts 174
6 Investment Valuation 181
  6.1 Value and Fair Market Value 182
6.1.1 ‘Willing-buyer/Willing-seller’ Framework

6.1.2 Limitations of a Hypothetical Transaction

6.2 Valuation Methods: Theory and Arbitral Practice

6.2.1 General Remarks

6.2.1(a) Object of valuation

6.2.1(b) Technical nature of valuation

6.2.1(c) Reference sources on valuation

6.2.1(d) Three valuation approaches

6.2.1(e) No hard and fast rules

6.2.1(f) Outline

6.2.2 Income-based Approach (DCF method)

6.2.2(a) Rationale and mechanics

6.2.2(b) Investment arbitration practice

6.2.2(c) Comment

6.2.3 Market-based Approach

6.2.3(a) Multiples method

6.2.3(b) Transactions involving the evaluated asset

6.2.4 Asset-based Approach

6.2.4(a) Replacement value

6.2.4(b) Book value

6.2.4(c) Liquidation value

6.2.5 Valuation by Reference to Amounts Invested

6.2.5(a) Explanation

6.2.5(b) Investment arbitration practice

6.2.5(c) Comment

6.2.6 Hybrid Approach

6.2.6(a) Explanation

6.2.6(b) Investment arbitration practice

6.2.6(c) Comment

6.2.7 Additional Remarks

6.2.7(a) Factors affecting the choice of a valuation method

6.2.7(b) Combination of methods: ‘triangulation’

6.2.7(c) Guidance to valuation experts

6.2.8 Table 6.1: Valuation Methods Used by Arbitral Tribunals

6.3 Date of Valuation

6.3.1 Introduction

6.3.2 Expropriation Cases

6.3.2(a) Lawful expropriation

6.3.2(b) Unlawful expropriation

6.3.2(c) Creeping expropriation
## Contents

6.3.3  Non-expropriatory Breaches  
6.3.4  Impact of Information  
  6.3.4(a)  Information relating to expropriation or unlawful conduct  
  6.3.4(b)  *Ex-ante* information  
  6.3.4(c)  *Ex-post* information  

7  Heads of Damages  
7.1  Value of Investment  
7.2  Investment Expenditure  
  7.2.1  Investment Expenditure, Causes of Action and Approaches to Compensation  
  7.2.2  Eligibility of Expenses  
    7.2.2(a)  Link with the investment  
    7.2.2(b)  Link with the investor  
    7.2.2(c)  Reasonableness  
    7.2.2(d)  Evidence  
  7.2.3  Pre-contract Expenses  
    7.2.3(a)  Comparative law context  
    7.2.3(b)  Investment arbitration practice  
    7.2.3(c)  Comment  
7.3  Lost Profits  
  7.3.1  Lost Profits, Causes of Action and Approaches to Compensation  
  7.3.2  Recoverability of Lost Profits: Reasonable Certainty  
    7.3.2(a)  Sufficiently long record of profitability  
    7.3.2(b)  Start-up businesses and lost profits  
    7.3.2(c)  Evidence  
  7.3.3  Calculation of Lost Profits  
    7.3.3(a)  Modalities of awarding lost profits  
    7.3.3(b)  Lost profits as a measure of investment’s fair market value  
    7.3.3(c)  Profits lost during a business interruption  
    7.3.3(d)  *Lucrum cessans* in contractual damages  
    7.3.3(e)  Loss of a business opportunity  
    7.3.3(f)  Positive impact on the claimant to be taken into account?  
7.3.4  DCF Value and *Lucrum Cessans* Compared  
  7.3.4(a)  *Lucrum cessans* should not be recoverable far beyond the date of award  

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.3.3 Non-expropriatory Breaches</td>
<td>248</td>
</tr>
<tr>
<td>6.3.4 Impact of Information</td>
<td>250</td>
</tr>
<tr>
<td>6.3.4(a) Information relating to expropriation or unlawful conduct</td>
<td>251</td>
</tr>
<tr>
<td>6.3.4(b) <em>Ex-ante</em> information</td>
<td>252</td>
</tr>
<tr>
<td>6.3.4(c) <em>Ex-post</em> information</td>
<td>253</td>
</tr>
<tr>
<td>7.1 Value of Investment</td>
<td>262</td>
</tr>
<tr>
<td>7.2 Investment Expenditure</td>
<td>264</td>
</tr>
<tr>
<td>7.2.1 Investment Expenditure, Causes of Action and Approaches to Compensation</td>
<td>264</td>
</tr>
<tr>
<td>7.2.2 Eligibility of Expenses</td>
<td>266</td>
</tr>
<tr>
<td>7.2.2(a) Link with the investment</td>
<td>266</td>
</tr>
<tr>
<td>7.2.2(b) Link with the investor</td>
<td>268</td>
</tr>
<tr>
<td>7.2.2(c) Reasonableness</td>
<td>269</td>
</tr>
<tr>
<td>7.2.2(d) Evidence</td>
<td>271</td>
</tr>
<tr>
<td>7.2.3 Pre-contract Expenses</td>
<td>273</td>
</tr>
<tr>
<td>7.2.3(a) Comparative law context</td>
<td>273</td>
</tr>
<tr>
<td>7.2.3(b) Investment arbitration practice</td>
<td>275</td>
</tr>
<tr>
<td>7.2.3(c) Comment</td>
<td>277</td>
</tr>
<tr>
<td>7.3 Lost Profits</td>
<td>278</td>
</tr>
<tr>
<td>7.3.1 Lost Profits, Causes of Action and Approaches to Compensation</td>
<td>279</td>
</tr>
<tr>
<td>7.3.2 Recoverability of Lost Profits: Reasonable Certainty</td>
<td>280</td>
</tr>
<tr>
<td>7.3.2(a) Sufficiently long record of profitability</td>
<td>281</td>
</tr>
<tr>
<td>7.3.2(b) Start-up businesses and lost profits</td>
<td>283</td>
</tr>
<tr>
<td>7.3.2(c) Evidence</td>
<td>287</td>
</tr>
<tr>
<td>7.3.3 Calculation of Lost Profits</td>
<td>288</td>
</tr>
<tr>
<td>7.3.3(a) Modalities of awarding lost profits</td>
<td>288</td>
</tr>
<tr>
<td>7.3.3(b) Lost profits as a measure of investment’s fair market value</td>
<td>289</td>
</tr>
<tr>
<td>7.3.3(c) Profits lost during a business interruption</td>
<td>289</td>
</tr>
<tr>
<td>7.3.3(d) <em>Lucrum cessans</em> in contractual damages</td>
<td>290</td>
</tr>
<tr>
<td>7.3.3(e) Loss of a business opportunity</td>
<td>291</td>
</tr>
<tr>
<td>7.3.3(f) Positive impact on the claimant to be taken into account?</td>
<td>293</td>
</tr>
<tr>
<td>7.3.4 DCF Value and <em>Lucrum Cessans</em> Compared</td>
<td>294</td>
</tr>
<tr>
<td>7.3.4(a) <em>Lucrum cessans</em> should not be recoverable far beyond the date of award</td>
<td>295</td>
</tr>
</tbody>
</table>
7.3.4(b) Lucrum cessans refers to net lost profit
7.3.4(c) Post-interference information should be taken into account
7.3.4(d) Discounting may be unnecessary

7.4 Incidental Expenses
7.4.1 Recoverability of Incidental Expenses
7.4.1(a) Exception: cases of lawful expropriation
7.4.1(b) Comparative law context
7.4.2 Investment Arbitration Practice
7.4.2(a) Past incidental expenses
7.4.2(b) Future incidental expenses
7.4.3 Limitations on Recoverability
7.4.4 Emerging Principles

7.5 Moral Damages
7.5.1 Introduction
7.5.2 Moral Damages in International Law
7.5.3 Investment Arbitration Practice
7.5.4 Some Unsettled Issues

8 Limitations on Compensation
8.1 Contributory Fault
8.1.2 Contributory Fault in International Law
8.1.3 Contributory Fault in Investment Arbitration
8.2 Mitigation of Damages
8.2.1 Mitigation in International Law
8.2.2 Mitigation in Investment Context
8.3 Investment Risk
8.3.1 Investment Risk and Its Allocation
8.3.1(a) Types of investment risk
8.3.1(b) Assessment and allocation of risks
8.3.2 International Law Does Not Protect Against Investment Risks
8.3.3 Accounting for Investment Risks in Compensation
8.3.3(a) Which party bears the risk?
8.3.3(b) Inadequate assessment of the risks by the claimant
8.3.3(c) Voluntary assumption of risks
8.3.4 Modes of Reducing Compensation on Account of Risk
8.4 Necessity as a Circumstance Precluding Wrongfulness
8.4.1 Introduction
8.4.2 Customary International Law
8.4.3 Investment Treaty Regimes
8.4.3(a) Necessity-type clauses
8.4.3(b) ‘Armed conflict’ clauses
8.4.4 Additional Considerations
8.4.5 Conclusion

8.5 Limitations Arising from the Public Nature of a State
8.5.1 Absence of Enrichment of the State
8.5.2 Ability to Pay and Effect on a State’s Welfare

PART III

9 Interest

9.1 General Issues
9.1.1 Function of Interest
9.1.2 Inherent Power of Tribunals to Award Interest
9.1.3 Sources of International Law on Interest
9.1.4 Margin of Discretion
9.1.5 Pre-Award and Post-Award Interest

9.2 Rate of Interest
9.2.1 In Investment Treaties and under Customary Law
9.2.2 ‘Investment Alternatives’ Approach
9.2.3 ‘Borrowing Rate’ Approach
9.2.4 Rate in the Host Country
9.2.5 ‘Reasonable’, ‘Fair’ or ‘Appropriate’ Rate
9.2.6 Preferred Approach

9.3 Date from which Interest Accrues
9.3.1 Treaty and Customary Rules
9.3.2 Investment Arbitration Practice
9.3.2(a) From the date of expropriation (breach)
9.3.2(b) From the date of formal demand/request for arbitration
9.3.2(c) From the date of award
9.3.2(d) Multiple dates

9.4 Compounding of Interest
9.4.1 Difference between Simple and Compound Interest
9.4.2 Traditional Position in International Law
9.4.3 Criticism of the Simple Interest Rule
9.4.4 Investment Arbitration Practice
9.4.5 Conclusion

9.5 Post-Award Interest
9.5.1 Power to Grant Post-Award Interest
9.5.2 Peculiarities of Post-Award Interest
9.5.3 Grace Period

9.6 Integral Assessment of All Elements
Contents

10 Currency and Taxation Issues 393
   10.1 Currency 393
      10.1.1 Appropriate Currency of Compensation 393
      10.1.2 Depreciation of Currency 395
         10.1.2(a) Which party is to bear the risk? 395
         10.1.2(b) Using past conversion rates 398
         10.1.2(c) Assessing the loss in a non-depreciated currency 399
         10.1.2(d) Special adjustment 400
      10.1.3 Conclusion 401
   10.2 Taxation 401
      10.2.1 Accounting for Taxes in Damages Assessment 401
      10.2.2 Taxation of the Awarded Amount 403

Annex I Analytical Table of Investor-State Cases (1963–2007) 406
Annex II Analytical Table of Selected Iran-US Claims Tribunal Cases 436
Annex III Selected Pre-1950 Cases (various international courts and tribunals) 486
Annex IV Expropriation Provisions in Investment Treaties 507

Index 541
Thus the party to a contract will choose to breach it when its gain from the
breach is higher than the loss from paying the damages (provided the latter is
based on the other party’s loss). This is economically efficient. But this
efficiency would be undermined if one measured damages on the basis of
enrichment rather than the loss.

As far as lawful expropriation is concerned, it would not seem appro­
priate ever to rely on the unjust-enrichment method for the simple reason
that the respondent’s financial gain (even if it exceeds the claimant’s loss)
cannot be deemed unjust. Expropriation, being expressly allowed under
international law, is a legitimate transfer of wealth and the requirements for
compensation are specifically based on the value of the assets taken. As the
Tribunal noted in Amoco International Finance v Iran:

[It] would be difficult to understand why an enrichment resulting from a
lawful act—a lawful expropriation—would be ‘unjust,’ except, precisely,
if it were the consequence of the refusal adequately to compensate the
expropriated party for the loss it sustained.95

Note also that there is some authority for the proposition that the absence
of any enrichment of the respondent State as a result of its wrongful inter­
ference may be taken into account as a compensation-limiting factor.96

Conclusion
In sum, in investment disputes to date, unjust enrichment has not been
accepted as a basis for determining compensation. Tribunals have focused
on the primary function of compensation, which is to wipe out the conse­
quences of the unlawful act for the claimant rather than prevent unjust
enrichment of the respondent. It appears, at the same time, that unjust
enrichment may be helpful as a yardstick for measuring compensation in
circumstances where there are difficulties in estimating the claimant’s loss,
while the amount of enrichment can be established with greater certainty.
There is also some indication that the amount of unjust enrichment may be
taken into account as an equitable factor, to the extent that application of
equitable considerations is permitted by law.97

95 Amoco International Finance Corp v Iran, Award of 14 July 1987, 15 Iran-US CTR 189,
269, para 259.
96 See section 8.5.1.
97 On equitable considerations, see section 5.1.8.
5. Cross-cutting Issues

5.3 CAUSATION AND REMOTENESS

A State responsible for an internationally wrongful act is under an obligation to make reparation only for the injury caused by that act. In other words, reparation (including compensation) is conditioned upon the existence of a causal link between the wrongful act and the damage suffered. The issue of causation is thus central to the scope of compensation.

5.3.1 Factual and Legal Tests of Causation

Legal scholars have emphasized the distinction between the factual test of causation (or causation in fact) and the legal test of causation (or legal causation). Under the factual test of causation, the issue is whether the wrongful conduct played some part in bringing about the harm or injury or was irrelevant to its occurrence. In domestic legal systems, this is also known as the conditio sine qua non or the ‘but-for’ test (ie, would the harm have occurred but for the unlawful conduct?)

On the other hand, under the legal test of causation, the key issue is whether the wrongful conduct was a sufficient, proximate, adequate, foreseeable or direct cause of the harm or injury. The legal test(s) of causation may be qualified by different adjectives, in positive or negative terms (such as ‘direct vs indirect’, ‘sufficient vs insufficient’, ‘proximate vs remote’, etc) emphasizing a particular underlying theory of causation.

Equally, the relevant legal test may at times use several of these concepts interchangeably: for example, in some common law countries, the causation test revolves around the ‘remoteness of damages’, according to which recoverable losses must be ‘reasonably foreseeable’ (tort law) or ‘reasonably contemplated’ (contract law). Both factual and legal causation are relevant in determining the existence of the required causal relationship between the wrongful act and the injury, but factual causality alone is insufficient.

The central point to be emphasized is that the legal tests of causation are used to limit the amount of legally relevant, and thus recoverable, damages to the extent that it would be just and consonant with legal


99 For example, while the directness standard makes a strict conceptual distinction between direct and indirect losses based on whether or not there was an intervening event that broke the chain of causation, the proximate cause theory distinguishes between proximate and remote causes in terms of whether the alleged loss can be reasonably considered the defendant’s fault.

policy.\textsuperscript{101} As clearly described by Professor Honoré in his seminal work on comparative tort law:

[A]n aggrieved party who has suffered harm which in law amounts to injury may fail to recover compensation for it either because the alleged tortfeasor did not cause it or because, though he did, some reason of policy or justice prevents recovery. In either of these cases the damage is said in Common Law systems to be 'too remote' or 'not proximate'. These expressions are not taken literally. They do not refer to what is far or near in space or time. They are simply shorthand used to denote all those considerations, causal or other, which may make the connection between the tortfeasor and the damage legally insufficient. In German law and related systems the non-recoverable damage is said not to be 'adequately' caused. In French and related systems the irrecoverable damage is often called 'indirect'.\textsuperscript{102}

It will be apparent that if the test of causation is also based on notions of justice and legal policy, whatever the terminology used, the adjudicator enjoys a relatively broad margin of appreciation in determining in each specific case whether the wrongful act is the proximate (direct, foreseeable, etc) cause of the harm suffered.

\textbf{5.3.2 Causation in General International Law}

In 1953, on the basis of an examination of international jurisprudence, Cheng reached the following conclusion on the topic of 'the principle of proximate causality':

[I]t may be said that the principle of integral reparation in responsibility has to be understood in conjunction with that of proximate or effective causality which is valid both in municipal and international law. By virtue of the latter principle, the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all intended damages.\textsuperscript{103}

\textsuperscript{101} Honoré (n 98) Vol XI, 16.
\textsuperscript{102} ibid 4.
\textsuperscript{103} Cheng (n 4) 253 (footnote omitted).