

DAMAGES IN INTERNATIONAL
INVESTMENT LAW

DAMAGES IN INTERNATIONAL INVESTMENT LAW

SERGEY RIPINSKY
with
KEVIN WILLIAMS



**British Institute of
International and
Comparative Law**

Published and Distributed by
British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

© Sergey Ripinsky with Kevin Williams 2008

British Library Cataloguing in Publication Data
A Catalogue record of this book is available from the British Library

ISBN 978-1-905221-24-0

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, or stored in any restricted system of any nature without the written permission of the copyright holder, application for which should be addressed to the distributor. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Typeset by Cambrian Typesetters
Camberley, Surrey
Printed and bound in Great Britain by MPG Biddles Ltd
King's Lynn, Norfolk

Summary of Contents

<i>Preface</i>	v
<i>Table of Cases</i>	xix
<i>Introduction</i>	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

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

<i>Preface</i>	v
<i>Table of cases</i>	xix
<i>Introduction</i>	xxxiii

PART I

1	Contours of the Study	3
1.1	Damages and Compensation	4
1.2	Foreign Investment	5
1.2.1	Investment as a Transaction	5
1.2.2	Investment as an Asset	6
1.3	Governmental Interference	7
1.3.1	Interference with Property Rights	8
1.3.2	Interference with Contract Rights	9
1.3.3	Interference with Management Rights	10
1.3.4	Interference with Administrative or Fiscal Rights	10
1.3.5	Changes to the Regulatory Framework	11
1.4	International Law and Relevant International Tribunals	12
1.4.1	Causes of Action	13
1.4.1(a)	Expropriation (lawful and unlawful)	13
1.4.1(b)	Breach of international law	13
1.4.1(c)	Breach of contract	14
1.4.1(d)	Multiple breaches	14
1.4.2	Relevant International Tribunals	14
1.4.2(a)	Investment treaty arbitrations	15
1.4.2(b)	Contractual investment arbitrations	15
1.4.2(c)	The Iran-US Claims Tribunal	15
1.4.2(d)	The World Court	16
1.4.2(e)	State-State arbitrations	16
1.4.2(f)	Mixed claims commissions	17
1.4.2(g)	Other international courts, tribunals and commissions	17
2	Sources of International Law on Damages	19
2.1	International Investment Agreements	21
2.1.1	Claims-enabling Provisions	22
2.1.2	Expropriation Clauses	22
2.1.3	'Armed Conflict' Clauses	24

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
PART II		
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	<i>Damnum Emergens</i> and <i>Lucrum Cessans</i>	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)	<i>Prima facie</i> 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	183
6.1.2	Limitations of a Hypothetical Transaction	186
6.2	Valuation Methods: Theory and Arbitral Practice	188
6.2.1	General Remarks	188
6.2.1(a)	Object of valuation	189
6.2.1(b)	Technical nature of valuation	190
6.2.1(c)	Reference sources on valuation	192
6.2.1(d)	Three valuation approaches	192
6.2.1(e)	No hard and fast rules	194
6.2.1(f)	Outline	194
6.2.2	Income-based Approach (DCF method)	195
6.2.2(a)	Rationale and mechanics	195
6.2.2(b)	Investment arbitration practice	201
6.2.2(c)	Comment	210
6.2.3	Market-based Approach	212
6.2.3(a)	Multiples method	213
6.2.3(b)	Transactions involving the evaluated asset	216
6.2.4	Asset-based Approach	218
6.2.4(a)	Replacement value	219
6.2.4(b)	Book value	221
6.2.4(c)	Liquidation value	224
6.2.5	Valuation by Reference to Amounts Invested	226
6.2.5(a)	Explanation	226
6.2.5(b)	Investment arbitration practice	227
6.2.5(c)	Comment	229
6.2.6	Hybrid Approach	231
6.2.6(a)	Explanation	231
6.2.6(b)	Investment arbitration practice	232
6.2.6(c)	Comment	233
6.2.7	Additional Remarks	234
6.2.7(a)	Factors affecting the choice of a valuation method	234
6.2.7(b)	Combination of methods: 'triangulation'	235
6.2.7(c)	Guidance to valuation experts	236
6.2.8	Table 6.1: Valuation Methods Used by Arbitral Tribunals	237
6.3	Date of Valuation	243
6.3.1	Introduction	243
6.3.2	Expropriation Cases	243
6.3.2(a)	Lawful expropriation	243
6.3.2(b)	Unlawful expropriation	244
6.3.2(c)	Creeping expropriation	245

6.3.3	Non-expropriatory Breaches	248
6.3.4	Impact of Information	250
6.3.4(a)	Information relating to expropriation or unlawful conduct	251
6.3.4(b)	<i>Ex-ante</i> information	252
6.3.4(c)	<i>Ex-post</i> information	253
7	Heads of Damages	261
7.1	Value of Investment	262
7.2	Investment Expenditure	264
7.2.1	Investment Expenditure, Causes of Action and Approaches to Compensation	264
7.2.2	Eligibility of Expenses	266
7.2.2(a)	Link with the investment	266
7.2.2(b)	Link with the investor	268
7.2.2(c)	Reasonableness	269
7.2.2(d)	Evidence	271
7.2.3	Pre-contract Expenses	273
7.2.3(a)	Comparative law context	273
7.2.3(b)	Investment arbitration practice	275
7.2.3(c)	Comment	277
7.3	Lost Profits	278
7.3.1	Lost Profits, Causes of Action and Approaches to Compensation	279
7.3.2	Recoverability of Lost Profits: Reasonable Certainty	280
7.3.2(a)	Sufficiently long record of profitability	281
7.3.2(b)	Start-up businesses and lost profits	283
7.3.2(c)	Evidence	287
7.3.3	Calculation of Lost Profits	288
7.3.3(a)	Modalities of awarding lost profits	288
7.3.3(b)	Lost profits as a measure of investment's fair market value	289
7.3.3(c)	Profits lost during a business interruption	289
7.3.3(d)	<i>Lucrum cessans</i> in contractual damages	290
7.3.3(e)	Loss of a business opportunity	291
7.3.3(f)	Positive impact on the claimant to be taken into account?	293
7.3.4	DCF Value and <i>Lucrum Cessans</i> Compared	294
7.3.4(a)	<i>Lucrum cessans</i> should not be recoverable far beyond the date of award	295

7.3.4(b)	<i>Lucrum cessans</i> refers to net lost profit	296
7.3.4(c)	Post-interference information should be taken into account	297
7.3.4(d)	Discounting may be unnecessary	298
7.4	Incidental Expenses	299
7.4.1	Recoverability of Incidental Expenses	299
7.4.1(a)	Exception: cases of lawful expropriation	300
7.4.1(b)	Comparative law context	301
7.4.2	Investment Arbitration Practice	301
7.4.2(a)	Past incidental expenses	302
7.4.2(b)	Future incidental expenses	304
7.4.3	Limitations on Recoverability	305
7.4.4	Emerging Principles	306
7.5	Moral Damages	307
7.5.1	Introduction	307
7.5.2	Moral Damages in International Law	307
7.5.3	Investment Arbitration Practice	309
7.5.4	Some Unsettled Issues	310
8	Limitations on Compensation	313
8.1	Contributory Fault	314
8.1.2	Contributory Fault in International Law	314
8.1.3	Contributory Fault in Investment Arbitration	316
8.2	Mitigation of Damages	319
8.2.1	Mitigation in International Law	319
8.2.2	Mitigation in Investment Context	322
8.3	Investment Risk	325
8.3.1	Investment Risk and Its Allocation	325
8.3.1(a)	Types of investment risk	326
8.3.1(b)	Assessment and allocation of risks	326
8.3.2	International Law Does Not Protect Against Investment Risks	328
8.3.3	Accounting for Investment Risks in Compensation	330
8.3.3(a)	Which party bears the risk?	330
8.3.3(b)	Inadequate assessment of the risks by the claimant	331
8.3.3(c)	Voluntary assumption of risks	332
8.3.4	Modes of Reducing Compensation on Account of Risk	336
8.4	Necessity as a Circumstance Precluding Wrongfulness	338
8.4.1	Introduction	338
8.4.2	Customary International Law	341

8.4.3	Investment Treaty Regimes	346
	8.4.3(a) Necessity-type clauses	346
	8.4.3(b) 'Armed conflict' clauses	348
8.4.4	Additional Considerations	350
8.4.5	Conclusion	352
8.5	Limitations Arising from the Public Nature of a State	353
	8.5.1 Absence of Enrichment of the State	353
	8.5.2 Ability to Pay and Effect on a State's Welfare	355

PART III

9	Interest	361
9.1	General Issues	362
	9.1.1 Function of Interest	362
	9.1.2 Inherent Power of Tribunals to Award Interest	363
	9.1.3 Sources of International Law on Interest	364
	9.1.4 Margin of Discretion	365
	9.1.5 Pre-Award and Post-Award Interest	366
9.2	Rate of Interest	366
	9.2.1 In Investment Treaties and under Customary Law	366
	9.2.2 'Investment Alternatives' Approach	368
	9.2.3 'Borrowing Rate' Approach	369
	9.2.4 Rate in the Host Country	370
	9.2.5 'Reasonable', 'Fair' or 'Appropriate' Rate	372
	9.2.6 Preferred Approach	373
9.3	Date from which Interest Accrues	374
	9.3.1 Treaty and Customary Rules	374
	9.3.2 Investment Arbitration Practice	375
	9.3.2(a) From the date of expropriation (breach)	375
	9.3.2(b) From the date of formal demand/request for arbitration	376
	9.3.2(c) From the date of award	377
	9.3.2(d) Multiple dates	378
9.4	Compounding of Interest	379
	9.4.1 Difference between Simple and Compound Interest	380
	9.4.2 Traditional Position in International Law	380
	9.4.3 Criticism of the Simple Interest Rule	383
	9.4.4 Investment Arbitration Practice	384
	9.4.5 Conclusion	387
9.5	Post-Award Interest	387
	9.5.1 Power to Grant Post-Award Interest	388
	9.5.2 Peculiarities of Post-Award Interest	389
	9.5.3 Grace Period	390
9.6	Integral Assessment of All Elements	390

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 appropriate 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*:

[I]t 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 interference 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 consequences 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.

5.3 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.⁹⁸ 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.⁹⁹ 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).¹⁰⁰ 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

⁹⁸ AM Honoré, 'Causation and Remoteness of Damage' in A Tunc (ed) *International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1983) Vol XI, ch 7, 9.

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.

¹⁰⁰ See for the UK, see T Weir *Tort Law* (OUP, Oxford, 2002) chs 4–5; for Canada, see J Cassels *Remedies: The Law of Damages* (Irwin Law Inc., Toronto, 2000) ch 11.

policy.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'.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.

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.¹⁰³

¹⁰¹ Honoré (n 98) Vol XI, 16.

¹⁰² *ibid* 4.

¹⁰³ Cheng (n 4) 253 (footnote omitted).