

THE ALABAMA ARBITRAL AWARD AND INDIRECT DAMAGES IN INTERNATIONAL LAW

Alabama Tahkimi Kararı ve Uluslararası Hukukta Dolaylı Zararlar

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Abstract

The Alabama Arbitral Award is of crucial importance in the field of international law. One of its many significant rulings is that which regards indirect damages. Although the arbitral tribunal rejected all American indirect claims; this decision is nonetheless considered political and it is deemed necessary to analyze the question of whether these claims constitute indirect damages for which Great Britain was responsible.

This article, composed of three chapters, begins by examining the Tribunal Award. Firstly, it examines the American Civil War, which was the source of the two countries' disagreement and the Treaty of Washington which established the Alabama arbitral tribunal. In addition, the United States' direct and indirect claims against Great Britain and the award granted to the States will be analyzed. In the second chapter, the notion of indirect damages in international law will be examined. It is preferred to focus on the notion's interpretation according to ARSIWA Commentary. In the last chapter, an analysis of American indirect claims as indirect damages will be discussed in light of various legal opinions and link of causality.

Keywords: Indirect damages, ARSIWA, Treaty of Washington, link of causality

Özet

Uluslararası hukuk alanında Alabama Tahkimi kararı büyük önemi haizdir. Kararın pek çok kayda değer hükmünden bir tanesi, tali zararlarla ilişkin olmaktadır. Kuşkusuz, tahkim mahkemesi tüm Amerikan tali taleplerini reddetmiştir; ancak bu karar siyasi kabul edilmekte ve bu nedenle Birleşik Krallık'ın söz konusu tali zararlardan sorumlu olup olmadığı sorusunun irdelenmesi gerekli olmaktadır.

Üç bölümden oluşan bu makale, kararın incelenmesiyle başlamaktadır; ilk olarak iki ülke arasındaki anlaşmazlığın kaynağı olan Amerikan İç Savaşı ve Alabama tahkim mahkemesini kuran Washington Antlaşması aktarılabilecektir. Akabinde, Amerika Birleşik Devletleri'nin Birleşik Krallık'tan olan doğrudan ve tali talepleri ile Birleşik Devletler lehine verilen hükümden bahsedilecektir. İkinci bölümde, uluslararası hukuktaki tali zarar kavramı irdelenecektir; kavramın ARSIWA Yorumları uyarınca anlamı üzerinde durulması tercih edilmiştir. Son bölümde, çeşitli görüşler ve nedensellik bağı ışığında tali zarar teşkil edip edemeyeceği noktasında Amerikan tali talepleri tahlil edilecektir.

Anahtar Kelimeler: Tali zararlar, ARSIWA, Washington Antlaşması, nedensellik bağı.

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INTRODUCTION

The Alabama Claims of the United States of America against Great Britain, known as Alabama Claims or Geneva Arbitration, was an arbitral award rendered on 14 September 1872 on the United States' claims against Great Britain. The conflict was resolved by the Arbitral Tribunal established by Article I of the Treaty of Washington of 8 May 1871.

The Alabama Arbitration is significant in various points. Firstly, the arbitration is considered as the origin of interstate arbitration and a mediation of respectable and peaceful settlement of international disputes¹.

Secondly, the rule expressed in Articles on State Responsibility of States for Internationally Wrongful Acts (ARSIWA)² Article 3, that the characterization of an internationally wrongful act is governed by international law and such characterization is not affected by its characterization as lawful by internal law, was stated pointedly in the Alabama case; a State cannot rely on its internal law as an excuse for not performing its international obligations³.

The third important aspect of the Alabama Claims Arbitration is its ruling on indirect claims of the United States, which is the subject of this paper, composed of three chapters. The first chapter will examine the facts of the award, the United States' claims and the award granted to the States. In the second chapter, the meaning of indirect damages under international law will be explained. Lastly, in the third chapter, the question of whether the American indirect claims can be considered as indirect damages in international law will be analyzed.

I. THE ALABAMA ARBITRAL AWARD

The Alabama arbitral award's ruling on indirect damages is notable in international law. In order to better comprehend its significance and the discussion revolving around the ruling, several matters need to be scrutinized. In this chapter, the facts leading to the Alabama arbitration will be firstly conveyed. Secondly, the United States' claims against Great Britain will be explained under two subcategories. Thirdly and lastly, the award granted to the States and the arbitral tribunal's decision will be reviewed.

¹ Wolfgang Friedmann, "Half a Century of International Law", *Virginia Law Review*, Vol. 50, No. 8, December 1964, pp. 1333-1358, p. 1334.

² Text adopted by the International Law Commission of the United Nations at its 53rd session in 2001.

³ James Crawford, "State Responsibility", *Max Planck Encyclopedia of Public International Law*, September 2006, paragraph 17.

A. Facts Leading the Alabama Arbitration

The disaccord between the United States and Great Britain did not arise overnight, and therefore the historical facts leading to the arbitration are warrant examination. The event that gave rise to the divergence of these two great powers was the American Civil War, which will be explained under the first subcategory. To settle their differences, these two powers agreed to have recourse to arbitration under the Treaty of Washington, which will be discussed under the second subcategory.

1. American Civil War

The American Civil War was the origin of the United States and Great Britain's differences. This American war was between the Union States and the Confederacy and lasted for four years, between 1861 and 1865⁴. The Union was comprised of Northern States, which were loyal to federal government. In opposition, there were the breakaway Confederate States, which are mainly referred as the Southern States.

The Confederacy, originally composed of seven southern states, seceded from United States following Abraham Lincoln's election to the presidency in 1860⁵. The Confederate States consisted of states in which slavery was legal (often referred to as "slave states") including South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. These seven were later joined by Arkansas, North Carolina, Tennessee and Virginia, for a total of 11 Confederate states⁶.

Slavery was foundational to the economies of the Southern 'Slave States'. The plantation system used and depended on the forced labor of slaves brought to the United States from Africa. President Lincoln, and the Northern States were opposed to this practice and vowed to end it. Thus, the southern secession and the resulting conflict occurred due to differing convictions about the enslavement of Black Americans⁷.

During the Civil War, the Union and the Confederacy used every available resource in order to secure victory. The Confederacy sought to cripple the Union's commerce by hunting and sinking Northern merchant vessels. To this aim, their agents traveled to Great Britain to procure ships⁸. They managed to

⁴ Dwight T. Pitcaithley, "The American Civil War and the Preservation of Memory", *Cultural Resource Management*, Vol. 25, No. 4, 2002, pp. 5-9, p. 5.

⁵ <https://www.britannica.com/event/American-Civil-War> (Date of access: 04.12.2020).

⁶ Ibidem (Ibid.).

⁷ Karen Byrne, "'We Have a Claim on This Estate', Remembering Slavery at Arlington House", *Cultural Resource Management*, Vol. 25, No. 4, 2002, pp. 27-29, p. 27.

⁸ Tom Bingham, "The Alabama Claims Arbitration", *International and Comparative Law Quarterly*, 54/1, 2005, pp. 1-25, pp. 3-4.

buy thirteen vessels including Confederate States Ship (CSS) Alabama, CSS Florida, CSS Georgia, and CSS Shenandoah. These ships were delivered with no arms or ammunition. However, when they sailed out to sea and reached waters over which Britain had no jurisdiction, they linked up with other vessels and were loaded with guns and ammunition. These armed Southern vessels were then used to capture, burn or sink Union merchant vessels.

The Union, for their part, used a different naval strategy to prevent the Confederate States from trading, a strategy commonly referred to as the ‘Union Blockade’ or ‘Southern Blockade’. In international law, a maritime blockade constitutes a legal acknowledgement of a state of war⁹. Following the introduction of the blockade, several countries declared neutrality, with Great Britain becoming the first to do so.

To explain neutrality briefly, it is a practice that allows states to declare that they will not become involved in outbreaks of war among two or more other states¹⁰. This is temporary neutrality, not permanent neutrality of which Switzerland is an example¹¹. States that declare neutrality in armed conflicts abstain from the hostilities and they are to be impartial towards the belligerents. States generally declare neutrality in order to protect their interests, including trade relations, since the laws of neutrality allowed neutral and belligerent state citizens to have the same opportunities to buy and sell goods in markets¹².

2. Treaty of Washington

The relations between the United States and Great Britain began to fissure during the Civil War. There were numerous British statements, many of them official, expressing support for the Confederacy and antipathy to the Union¹³. The United States alleged that Great Britain was negligent in its neutrality obligations during the Civil War, with particular complaints about British shipbuilding for the Confederacy.

In order for the two countries to resolve their differences, negotiations began in Geneva, Switzerland under the 1871 Treaty of Washington. The treaty’s full name was “Treaty Between Great Britain And the United States for The Amicable Setting of All Causes of Difference Between the Two Countries”. This document is regarded as a complete diplomatic triumph for the United States¹⁴.

⁹ Elizabeth Chadwick, **The British View of Neutrality in 1872**, 2018, p. 3.

¹⁰ Chadwick, p. 3.

¹¹ Chadwick, p. 2.

¹² Chadwick, pp. 3-4.

¹³ Bingham, p. 3.

¹⁴ Frederick Trevor Hill, **Decisive Battles of the Law-Narrative Studies of Eight Legal Contests Affecting the History of the United States between the Years 1800 and 1886**,

Article 1 of the Treaty is considered as its core: “*Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the Acts committed by the several vessels which have given rise to the claims generically known as the Alabama Claims; ... the regret felt by Her Majesty’s Government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels;*

Now, in order to remove and adjust all complaints and claims on the part of the United States and to provide for the speedy settlement of such claims, which are not admitted by Her Britannic Majesty’s Government, the High Contracting Parties agree that all the said claims, growing out of Acts committed by the aforesaid vessels, and generically known as the Alabama Claims, shall be referred to a tribunal of arbitration to be composed of five arbitrators.”

With this treaty, the United States and Great Britain mutually agreed on specific standards of neutrality in advance, and these neutral rules formulated ex-post facto Britain’s negligence¹⁵. In fact, this document formed the law of their arbitration. The Treaty of Washington constituted a clear codification of the law applicable to the obligations of a neutral power towards belligerents and an agreement to submit the Alabama claims to binding international arbitration¹⁶.

Article 6 of the Treaty comprises “Three Rules of Washington”, which were the rules of public international law by which British liability was to be judged¹⁷: Firstly, a neutral government must use due diligence¹⁸ to prevent the arming, equipping or departure, in or from its jurisdiction of vessels the neutral government had reasonable grounds to believe were intended for the war effort. Secondly, a neutral government must not permit belligerents to make use of its ports or waters to serve as operational bases for either belligerent. Thirdly, a

1906, p. 189.

¹⁵ Chadwick, p. 2, 8.

¹⁶ Bartram S. Brown, “Humanitarian Intervention at a Crossroads”, **William&Mary Law Review**, Vol. 41 (1999-2000), Issue 5, 2000, pp. 1683-1741, p. 1716.

¹⁷ Bingham, pp. 15-16. “...*The arbitrators are bound under the terms of the said VIth article, in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case...*” (Alabama claims of the United States of America v. Great Britain, Arbitration Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871 (“Arbitration Award”), **Reports of International Arbitral Awards**, Volume XXIX, pp.125-134, p. 129.).

¹⁸ In the Corfu Channel Case, the Court sums up due diligence principle as “*Every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*” (Corfu Channel Case (United Kingdom v. Albania); Merits, International Court of Justice, 9 April 1949, p. 22).

neutral government must prevent any violation of these rules in its own ports and waters. The Geneva arbitrators had to interpret the content of due diligence as per the Three Rules of Washington.

Additionally, the United States and Great Britain agreed to take this matter to be resolved by arbitration under the Treaty of Washington. Thanks to the Treaty, the discord between these two states was to be amicably and peacefully resolved by arbitration. Even though there had been other treaties, such as the Jay Treaty of 1794 between the United States and Great Britain, with provisions having recourse to arbitration, the Alabama arbitration is considered as the origin of interstate arbitration with its binding award¹⁹. Five arbitrators were appointed by the Treaty; Charles Francis Adams for the United States, Sir Alexander Cockburn for Great Britain, Count Frederic Sclopis for Italy, Jacob Staempfli for Switzerland and Baron d'Itajuba for Brazil were selected by each state.

B. United States' Claims:

After the Civil War concluded, the United States demanded compensation from Great Britain; claiming that the British government did not act with due diligence in maintaining relations equally with both belligerents²⁰ and their tacit support for construction of the CSS Alabama and other vessels resulted in massive damage to the United States. The United States had two set of claims in their contention of Great Britain's breach of neutrality duties and thus, their responsibilities. These claims, categorized as direct and indirect claims, will be examined in turn.

1. Direct Claims

The United States' first and main allegations were direct claims, which were damages the Union suffered as a direct result of Great Britain's negligence in permitting Confederate warships to be built in and depart from British ports. Great Britain had a Foreign Enlistment Act of 1819 and its provisions did not prohibit the construction in Britain of a ship capable of being adapted for warlike purposes. It only prohibited the equipping and arming of belligerent ships within Britain's jurisdiction²¹.

To illustrate, the CSS Alabama was constructed for Confederate use in 1862 in Liverpool, yet it was equipped and armed elsewhere but with the help of two

¹⁹ Mikael Schinazi, "The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System", *ICC Dispute Resolution Bulletin*, Issue 2, 2020, pp. 63-75, p. 65.

²⁰ Chadwick, p. 7.

²¹ William Park/ Bruno de Fumichon, "Retour sur L'Affaire de L'Alabama: De l'Utilité et de l'Histoire pour l'Arbitrage International", *Revue de l'Arbitrage*, 2019, No. 3, pp. 743-834, p. 766.

British vessels²². Great Britain claimed the ships were "innocent" when they were in their ports. However, they were in fact destined for the Confederacy in breach of the Southern blockade.

Great Britain contended that a neutral state and its subjects may continue to engage in trade, although an abstaining and impartial, neutral state does not supply either belligerent directly with war articles²³. Therefore, the issue of whether the sale of a ship of war as a commercial transaction could or could not be a breach of neutrality needed to be resolved²⁴.

The Americans' first set of claims consisted of "extensive direct losses in the capture of a large number of vessels with their cargos, and in the heavy national expenditures in pursuit of the cruisers"²⁵. The first claim - of direct losses - derives from destruction of vessels and their cargos; the second - national expenditures - derive from the expenditures in pursuit of Confederate commercial raiders.

The States alleged that the CSS Alabama, together with other Confederate raiders, deprived the United States government and its suppliers and agents of 250 vessels actually destroyed with an estimated loss of 500.000 tons of shipping²⁶. In short, the direct claim is the damages demanded for losses incurred and depredations committed, directly resulting from, the failure of Britain honestly and faithfully to fulfill the obligations of neutrality.

2. Indirect Claims

The second set of American claims were the indirect claims, which caused great controversy. The direct claim was the cost of lost ships and property with a value of 15 million dollars. Charles Sumner, the senator for Massachusetts, delivered a speech in 1869 where he transformed the scale of the American claim²⁷ by adding the indirect damages.

The indirect claims included firstly a claim for the increased cost of marine insurance; secondly, a claim for diminution in the American carrying trade;

²² <http://www.encyclopediaofalabama.org/article/h-973> (Date of access: 08.12.2020).

²³ Sir Alexander Cockburn's Dissenting Opinion in the Alabama Claims Arbitration of September 14th, 1872 in Papers Relating to the Treaty of Washington (1872), at 230 et seq., p. 235 (https://www.trans-lex.org/262138/_/sir-alexander-cockburns-dissenting-opinion-in-the-%C2%A0alabama-claims-arbitration-of%C2%A0september-14th-1872-in:-papers-relating-to-the-treaty-of-washington-at-230-et-seq/) (Date of access: 10.12.2020).

²⁴ Chadwick, p. 23.

²⁵ The Executive Documents Printed by Order of The House of Representatives During the Second Session of the Forty-Second Congress, 1871-1872, Washington Government Printing Office, 1872, s. 39.

²⁶ John E. Robinson, "The Alabama Claims and the Development of Modern Admiralty Arbitration", *Malabu: Maritime Law Bulletin*, Vol. 3, No. 1, Winter 2012, pp. 22-25, p. 23.

²⁷ Bingham, p. 12.

and thirdly, a claim for a decrease in overall American merchant tonnage. The second and the third claims are the business losses incurred by the transfer of the American commercial marine vessels to the British flag, that is, the cost of the lost cargo that was allegedly diverted from the States vessels to safer foreign vessels (primarily Britain)²⁸. American indirect claims also consisted of a fourth claim for loss of import and export business and a fifth claim for the loss of expected economic growth.

These five claims together were valued at 110 million dollars²⁹. Factually, these complaints were not without foundation. The losses inflicted on Northern merchant ships did lead to greatly increased insurance premiums, many Northern ship-owners registered their vessels under foreign flags, and knowledgeable commentators have asserted that the American merchant marine never fully recovered from the Civil War³⁰.

The United States included one more claim, which is a claim for the cost of suppressing the rebellion for a period of two years³¹: Senator Sumner contended that the war had been prolonged by the damage the cruisers inflicted on the Union. The Americans claimed that prolongation of the war resulted from British failure to intervene against the Confederacy's actions in the British empire³². This claim was valued at two billion dollars, which is equal to 30 trillion dollars today³³.

It is crucial to explain what happened during the Arbitration process in Geneva in order to understand the arbitral tribunal's decision on indirect damages. The negotiations were quiet until the British found out that the States advanced indirect claims that Sumner had advanced in his Senate speech three years earlier³⁴. The British government contended that these claims could not be the subject of arbitration, and that an award on these claims would bankrupt the country³⁵. According to them, the war itself would have been a preferable alternative than to pay this sum³⁶.

²⁸ Robinson, p. 24.

²⁹ Marion Mills Miller, **Great Debates in American History, from the Debates in the British Parliament on the Colonial Stamp Act (1764-1765) to the Debates in Congress at the Close of the Taft Administration (1912-1913)**, Current Literature Pub. Co., New York, p. 439.

³⁰ Bingham, p. 12, f.n. 46.

³¹ Désiré Girouard, "The Alabama Indirect Claims", **Revue Critique de Legislation et de Jurisprudence du Canada**, Vol. 2, No. 2, 1872, pp. 185-205, p. 186.

³² Robinson, p. 25.

³³ Park/Fumichon, p. 759. Senator Sumner proposed that the United States seize Canada in return for the Britain's indemnity debt (Ibid.).

³⁴ Bingham, p. 19.

³⁵ Bingham, p. 20.

³⁶ Roundell Palmer, **Memorials**, Macmillan&Co., London, 1898, p. 231.

It must be mentioned that the Americans had no confidence in these indirect claims, yet it was politically impossible for them to abandon them³⁷. The United States claimed that the treaty itself provided for the settlement "of all differences", and that the arbitrators were authorized "to examine and decide all questions that should be laid before them by either government.". As a result, they insisted that the arbitrators should rule on the claims, but the British insisted they should not; so, there was an impasse³⁸.

The British didn't present their argument to the arbitral tribunal and asked for an adjournment of eight months³⁹, which would mean the end of the arbitration, and also violation of an international agreement. For three days, there was intense negotiation on these indirect claims, which was actually a skillful diplomatic move⁴⁰. In the end, both sides concluded an agreement, and the arbitral tribunal delivered an extra-judicial opinion which referred to the parties' disagreement over whether the tribunal was competent to rule on the indirect claims⁴¹. However, it neither expressed nor implied any opinion on the point regarding the competency of the Tribunal itself.

According to the Geneva Tribunal's decision on indirect claims; "...*The Arbitrators...have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the Tribunal in making its award even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon...⁴².*"

In sum, the American party informed the tribunal that they would no longer pursue the indirect claims⁴³. One can reasonably conclude that they were abandoned in the hope of an amicable settlement⁴⁴. This means, in effect, that the tribunal didn't offer a conclusion on the indirect claims, but rather it was the litigant- the British- that pronounced judgement⁴⁵.

³⁷ The Alabama Claims, **American Law Review**, Vol. 4, No. 1, October 1869, pp. 31-39.

³⁸ Bingham, p. 20.

³⁹ Caleb Cushing, **Treaty of Washington: Its Negotiation, Execution, and the Discussion Relating Thereto**, Harper&Bros, New York, 1873, p. 68.

⁴⁰ Bingham, p. 20-21.

⁴¹ Park/Fumichon, p. 771.

⁴² Jackson H. Ralston, **Law and Procedure of International Tribunals: Being a Resume of the Views of Arbitrators upon Questions Arising under the Law of Nations and of the Procedure and Practice of International Courts**, Stanford University Press, 1926, p. 242.

⁴³ Marjorie M. Whiteman, **Damages in International Law**, U.S. Government Printing Office, Washington, 1943, p. 1774.

⁴⁴ Girouard, p. 189.

⁴⁵ Hill, p. 192. To understand the political reasons behind the Tribunal's decision, Great

C. The Award Granted to the United States

The Geneva tribunal, after a negotiation process of 9 months, found unanimously against Britain on the direct claim regarding the CSS Alabama and on the CSS Florida. According to the arbitral tribunal, neutral states must exercise their due diligence obligation “*in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part*”⁴⁶.

With regards to the CSS Alabama, the Award states that the British government failed to use due diligence in the performance of its neutral obligations. During the construction of said vessel in the British port of Liverpool, diplomatic agents of the States issued warnings, yet Britain “... omitted... to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable...”⁴⁷.

Regarding the CSS Florida, the free admission of the vessel into the ports of British colonies and its armament with the co-operation of the British vessel “Prince Alfred” were additional reasons for the Tribunal to admit Britain’s failure, by omission, to fulfil its duties⁴⁸. For the CSS Shenandoah, the enlistment of men to the vessel within the port at Melbourne was found indicative of negligence on behalf of Great Britain. Thus, regarding the CSS Shenandoah, the Tribunal found against Britain by a majority of three to two, from and after the vessel’s entry into port at Melbourne⁴⁹.

The United States had asked for an award of 24 million dollars. Eventually a majority of the arbitrators accepted the final figure of \$15.5 million dollars to be paid in gold, including interest on 14th September 1872⁵⁰. This sum is equivalent approximately to 225 billion dollars today⁵¹.

Britain’s Queen’s speech constitutes a good example. In her speech to Parliament on the 6th of February 1872, the Queen said “*In the Case so submitted on behalf of the United States, large claims have been included which are understood on my part not to be within the province of the arbitrator. On this subject, I have caused a friendly communication to be made to the Government of the United States.*” (Thomas Willing Balch, *The Alabama Arbitration* 1-2, 1900, p. 123-124 <https://archive.org/stream/alabamiarbitration00balcuoft?ref=ol#page/123/mode/1up> (Date of access: 26.12.2020).)

⁴⁶ Arbitration Award, p. 129.

⁴⁷ Arbitration Award, p. 130.

⁴⁸ Arbitration Award, p. 131.

⁴⁹ Arbitration Award, p. 132.

⁵⁰ Arbitration Award, p. 133-134. For copies of the certificate of deposit and bonds for this payment, see Frank W. Hackett, *Geneva Award Acts: With Notes, and References to Decisions of the Court of Commissioners of Alabama Claims*, Little, Brown and Co., Boston, 1882, pp. 179-180.

⁵¹ Fumichon/Park, p. 747; Schinazi, p. 65.

The award, by assigning Britain’s responsibility, became the pioneering landmark in applying the principle that a State cannot rely on its internal law as an excuse for not performing its international obligations. Britain’s Foreign Enlistment Act of 1819, which did not prohibit the construction of warships in British ports, could not justify Britain’s omission of acting in due diligence. Notwithstanding that construction of Confederate vessels in British ports was lawful according to the British law, due diligence obligations were of an international nature, thus incurring Britain’s responsibility.

As stated above, indirect claims were excluded from the arbitration process. With regards to direct damages, according to the Geneva Tribunal, the costs of pursuit of the confederate cruisers was not properly distinguishable from general expenses of the war carried by the United States, so the States were not awarded this sum⁵². Furthermore, the tribunal decided that prospective earnings cannot be properly made subject to compensation as they depend upon future and uncertain contingencies⁵³, and thus the States weren’t awarded this sum either.

I humbly disagree with the Tribunal’s decision. It is possible to calculate prospective earnings by the average net profits of a ship’s seasonal voyages, and there are several cases that conclude these kinds of indirect damages such as the Orinoco Asphalt Company case⁵⁴ and the American and British Claims Tribunal⁵⁵ ⁵⁶. The United States and Germany Mixed Claims Commission’s decision has distinctive importance as to its order to pay to the owner of a ship the net annual profit it would probably have yielded the owner during its potential life, taking into account war conditions, and the amount paid by owner to crew as wages and allowances during the dates of internment⁵⁷.

Lastly, as for direct damages; the Tribunal set aside double claims for the same losses and all claims for “gross freights” if they exceeded “net freights”, in order to arrive at an equitable compensation for the damages which had been sustained. The Tribunal ruled that interest at a reasonable rate is just and reasonable⁵⁸.

⁵² Arbitration Award, p. 133.

⁵³ Arbitration Award, p. 133.

⁵⁴ Orinoco Asphalt Case, **Reports of International Arbitral Awards**, Volume X, pp. 424-428.

⁵⁵ Decisions of Arbitral Tribunal Great Britain-United States, **Reports of International Arbitral Awards**, Volume VI.

⁵⁶ For more arbitral decisions allowing prospective earnings, see Ralston, pp. 251-253.

⁵⁷ Mixed Claims Commission (United States and Germany), 1 November 1923-30 October 1939, **Reports of International Arbitral Awards**, Volume VII, pp.1-391, p. 251.

⁵⁸ Arbitration Award, p. 133.

II. INDIRECT DAMAGES IN INTERNATIONAL LAW

The Alabama Arbitration Award is renowned for its ruling on United States' indirect damages. The notion of 'indirect damages' has two meanings in international law, therefore the duality of the term "indirect damages" will be firstly discussed. Subsequently, it is crucial to mention the controversial nature of this notion, as uncertainty prevails within international law doctrine and jurisprudence. Lastly, the solution of the International Law Commission (ILC) will be discussed to guide us through an analysis of American indirect claims.

A. Duality of the Term

The term "indirect damage" corresponds to different scenarios under international law. There exist two types of indirect damages, used in separate contexts. The first type is used in describing the responsibility of the state, and this is the indirect injury the state suffers through its nationals. This principle's origin lies in the Vattelian idea that an injury to a person amounts to an indirect injury to that person's state of nationality⁵⁹, which establishes the basis for diplomatic protection.

The second implication of the term is indirect damage that is in relation with the link of causality. A state, having committed an internationally wrongful act, is under the obligation to repair damages, whether material or moral, direct or indirect, to the opposing state. The context in which indirect damages are discussed in the Alabama Arbitration is this second meaning of the term.

B. Problematic Nature of Indirect Damages

The term "indirect damages" is vague in its meaning⁶⁰, since it is not easy to determine which damages constitute indirect damages. To give examples of typical indirect claims, loss of profits, loss of possible business gains, loss of workers, loss of credit, premiums of war risk insurance and liability for life insurance policies paid by insurers fall under this category⁶¹.

The real problem is not the question of whether indirect damages should be allowed at all, but of the degree, or kind, of damages which it is permissible to award⁶². Indirect damages are common to being awarded, yet a criterion needs to be established in order to take the burden of consequences too far removed

⁵⁹ James Crawford, *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law), Cambridge University Press, Cambridge, 2013, p. 569.

⁶⁰ Clyde Eagleton, "Measure of Damages in International Law", *Yale Law Journal*, Vol. 39, 1929, pp. 52-75, p. 66.

⁶¹ Ralston, pp. 243-250.

⁶² Eagleton, p. 73.

from the wrongful act of the responsible state. It is important to determine to what extent a consequential damage is linked by a claim of causation to an earlier act or omission⁶³.

Another problem with indirect damages is the inability to determine precisely the damage. This issue is relevant to evidence. A tribunal must be satisfied with the evidence before them; and if it is established that the loss is due to the illegal act, the loss occurred must be calculated as reasonably certain as possible. Hypothetical and entirely conjectural losses should be thrown out by the tribunal; only where the loss can be calculated with a reasonable degree of certainty should it be permitted⁶⁴. For instance, in the *Mora & Arango* case, the umpire Lewenhaupt concluded that because of the speculative character of the notion "loss of possible business gains", only interest on the capital was to be awarded as part of prospective earnings⁶⁵.

C. Two-Stage Test According to the ARSIWA Commentary

ARSIWA, draft articles prepared by the ILC within the United Nations, is a document considered to be an accurate codification of customary international law on state responsibility⁶⁶. Subsequent to ruling that every internationally wrongful act of a State entails the international responsibility of that State, in article 31, it is stated that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act, and injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

ILC's commentary on this article, under paragraph 10, underlines the obligation for the existence of a link which must exist between the wrongful act and the injury, in order for the obligation of reparation to arise⁶⁷. According to the commentary, it is deduced that there are two conditions for reparation of damages: Causality and exclusion of remote or consequential injury⁶⁸.

The first stage is causality: Causality may exist when losses are attributable to an act as a proximate cause, and there must be a direct causal link between

⁶³ F.V. Garcia Amador, Sixth Report on International Responsibility, *Yearbook of the International Law Commission*, Vol. II, 1966, p. 40.

⁶⁴ Eagleton, p. 75.

⁶⁵ John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Washington, 1898, p. 3783.

⁶⁶ Crawford, p. 43.

⁶⁷ International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("Commentary"), Supplement No. 10 (A/56/10), Chapter IV. E. 1, November 2001, pp. 92-93.

⁶⁸ For the debate over the usage of both terms of "damage" and "injury" in the Commentary, see Crawford, p. 54 et seq.

the unlawful international conduct and the damages incurred⁶⁹. The damage must be the normal or natural consequence of the act or omission by which it was occasioned⁷⁰. Should the first test be considered passed, then it becomes possible to continue with the second test.

With regards to the rule of proximate cause; in the United States and Germany Mixed Claims Commission, the umpire Parker pointed out that it doesn't matter whether the loss is sustained directly or indirectly as long as there is a clear unbroken connection between the illegal act and the loss. There may be several links in the chain of causation connecting an act with the loss sustained; provided that there is no break in the chain. It must be considered that there is a break in the chain when the loss cannot be clearly, unmistakably, and definitely traced, link by link to the illegal act⁷¹.

The second test is the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. These are criteria of directness, foreseeability, or proximity according to the relevant jurisprudence; damages must be a reasonably foreseeable consequence of the act that constituted the breach⁷². This test requires the determination of whether a reasonable man in the position of the wrong-doer at the time would have foreseen the damage as likely to ensue from his action⁷³. In conclusion, injury which is too indirect, remote and uncertain is excluded. The ILC cites Hauriou's opinion that the Alabama arbitration is considered as the most striking application of the rule excluding "indirect" damage⁷⁴.

Nonetheless, it must not be forgotten that in some situations, such as if State organs deliberately cause the harm, or the harm caused is within the ambit of the breached rule; then it should be concluded that these remote or indirect damages are admitted injury⁷⁵. This means that the requirement of a causal link may vary according to the breach of an international obligation.

To sum up, the commentary states that 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.

By this commentary, ILC informs us that compensation is limited to damage actually suffered as a result of the internationally wrongful act and excludes damage which is indirect or remote. As for indirectness or remoteness

⁶⁹ Commentary, p. 92.

⁷⁰ Amador, p. 40.

⁷¹ Mixed Claims Commission (United States and Germany), pp. 29-30.

⁷² Commentary, p. 93.

⁷³ Whiteman, p. 1780.

⁷⁴ Commentary, p. 92, f.n. 460.

⁷⁵ Commentary, p. 93.

of damage, the commentary avoids providing a formula, leaving complexities of causation to courts and practitioners⁷⁶. Thus, the circumstances of each case must be considered.

This view is also asserted by authors of international law doctrine. It is emphasized that it would be impossible to devise a rule which would cover every case. Shelton states "*A general statement of obligation to make reparation for harm caused masks many difficult legal issues that probably could not be adequately answered by a single set of articles, because the principles are intended to apply to every breach of an international obligation regardless of the source of the obligation or nature of the breach*"⁷⁷. Yet, Crawford contends that it is regrettable that the ILC did not clarify the difficult issues relating to the causal link⁷⁸.

III. ANALYSIS OF AMERICAN INDIRECT CLAIMS AS INDIRECT DAMAGES

In Alabama Arbitration, were American indirect claims indemnifiable? This is a question that one must seek to answer regardless of the Geneva Tribunal's decision. Primarily, for guidance, it must be mentioned how Alabama Arbitration is regarded by authors. According to Hauriou, the expense of pursuing the Confederate cruisers, the prolongation of the war and the increased insurance rates are classic examples of *damnum emergens*, direct damage. And yet, they were classified as indirect damages⁷⁹. I respectfully disagree with the author. From my standpoint, especially for the claimed expenses for the prolongation of the war, it is not possible to classify them as direct damages.

Additionally, in Eagleton's opinion, Alabama Claims arbitration is not considered as a binding precedent for rejecting indirect damage, because the order excluding indirect damages was dictated by political considerations, and is, therefore, of little judicial value⁸⁰. Also, the Tribunal didn't decide that indirect claims were generally to be disallowed.

Conversely, according to Professor Yntema, all the Alabama claims were indirect because the liability of the British Government resulted only from the non-enforcement of the neutrality laws by British officials and the evasions

⁷⁶ Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility" *The American Journal of International Law*, Vol. 96, No. 4, 2002, pp. 833-856, p. 846.

⁷⁷ Shelton, p. 833, f.n. 2.

⁷⁸ Crawford, pp. 492-494.

⁷⁹ André Hauriou, *Les Dommages Indirects dans les Arbitrages Internationaux*, *Revue Generale de Droit International Public*, Vol. 31, 1924, p. 213 (as cited in Eagleton, p. 67, f.n. 47).

⁸⁰ Eagleton, p. 67.

by persons for whom the British Government was not directly responsible⁸¹. Hence, the Alabama Award may be cited as authority for the allowance of claims for indirect damage in international law. According to Professor Yntema, the reasons why the state is responsible must be considered⁸².

In my estimation, ILC's commentary should be of assistance while analyzing American indirect claims in the Alabama arbitration. Firstly, the rule of proximate cause must be examined. I contend that the wrongful omission of Great Britain was the legal cause of the damage sustained. Great Britain, having acted without due diligence with regards to shipbuilding in its own ports for the Confederacy, caused injury to the Union⁸³. Without the vessels the Confederate States obtained from Great Britain, the Civil War could have been over long before 1865. Thus, American indirect claims passed the first test.

Secondly, the issue of whether these damages are either too remote or consequential to the omission should be examined. From my standpoint, it is safe to say that the indirect claims are derivative of shipping losses themselves. In the context of modern damages, these constitute loss of profits and expected future losses, and other damage that could not be attributed to direct loss of tonnage or cargo at the hands of the Confederacy⁸⁴.

While I believe that these damages are consequential; the United States' indirect claims are too far removed from the illegal breach of neutrality of Great Britain. Indirect damages that the United States suffered are too remote from Great Britain's omission. Hence, American indirect claims didn't pass the second test. Moreover, the transfer of American commercial maritime vessels to the British flag and loss of import and export business are extremely difficult to estimate reasonably⁸⁵. On these grounds, I consider that it is rightful not to indemnify the States for their indirect claims.

⁸¹ Hessel E. Yntema, "The Treaties with Germany and Compensation for War Damage, IV. The Measure of Damages in International Law." *Columbia Law Review*, Vol. 24, No. 2, 1924, pp. 134-153, p. 151.

⁸² Ibid.

⁸³ "The decline of national commerce, the expense and inconvenience of convoys, the frequent and expensive search and pursuit after the rovers, enter into the sum total of the national loss." (The Alabama Claims, *American Law Review*, pp. 34-35).

⁸⁴ Robinson, p. 24.

⁸⁵ "The loss of profits, the difficulty of procuring insurance, the abandonment of contemplated voyages, and the very general transfer of our tonnage into foreign hands, threw us a long way behind, in the competition with other countries, for the carrying trade of the world, and inflicted upon us an immense national loss. But if we were to bring forward this great national loss as, a matter of pecuniary claim, we should certainly find ourselves embarrassed with certain well established, and not wholly pedantic, rules, familiar to the courts of law, as to remote and proximate causes of damage." (The Alabama Claims, *American Law Review*, p. 34).

CONCLUSION

The Alabama Claims Arbitration is a decision of great importance. It is considered a key arbitral award in the context of direct and indirect damages. Following the American Civil War, the United States claimed that Great Britain had breached rules of neutrality, since the Confederacy had made use of vessels that had been built in British ports. These warships sank or burnt the Union's vessels, and the States incurred great losses.

To resolve this dispute, the United States and Great Britain formulated a mutually agreeable codification of the applicable rules of international law⁸⁶, which was the Treaty of Washington. This international document included neutrality rules as well as agreement by the two nations on this matter being resolved by arbitration. The Geneva Arbitration, composed of five arbitrators, had to conclude the States' direct and indirect damages, the former being the cost of loss of ships and their cargos and the latter being the cost of business losses, increased marine insurance premiums, loss of expected economic growth and the cost of prolongation of the war for two years.

The Geneva Tribunal, after intense negotiation on indirect claims, decided to exclude these claims from the consideration of the tribunal. The arbitral tribunal's decision is considered as political; and therefore, it is necessary to discuss whether the American indirect claims amounted to indirect damage and were indemnifiable. The ILC sets forth a two-stage test in the ARSIWA Commentary: the causality and the exclusion of remote or consequential injuries. In my opinion, the American indirect claims passed the test of causality, indirect losses were attributable to Great Britain's breach of neutrality as a proximate cause. Yet, for the test of remoteness, the indirect claims didn't meet this criterion because they didn't constitute a reasonably foreseeable consequence of Britain's breach of its international duties. In conclusion, for different reasoning, I agree with the Arbitral Tribunal's decision to not compensate the United States for their indirect claims.

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⁸⁶ Brown, p. 1711.

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List of Abbreviations

ARSIWA	: Articles on State Responsibility of States for Internationally Wrongful Acts
CSS	: Confederate States Ship
et seq.	: And what follows
f.n.	: Footnote
Ibid.	: Ibidem
ILC	: International Law Commission
No.	: Number
p.	: Page
pp.	: Pages
Vol.	: Volume