CHAPTER 13 Who's Afraid of the Articles on State Responsibility

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I The Articles on State Responsibility: Outside the Comfort Zone?

Our panel has so far looked at the Articles on State Responsibility ('ASR' or 'Articles') as a text that investment law and investment lawyers *receive*, and with which we have to work even though it originates elsewhere, namely in the world of general/public international law..

This approach fits well with the rubric for our panel, which refers to the ASR as a 'crucial point of reference for international arbitration lawyers', but at the same time portrays this 'crucial text' as one developed by others, and perhaps primarily for other contexts, namely for a world of 'inter-State disputes' based on public international law. Looking at the panel description, perhaps we can say that it suggests or implies that arbitration lawyers confronted with arguments about State responsibility are required to leave their comfort zone, or in a different metaphor: must play an away game. And if we bear in mind Bruno Simma's account of the genesis of the Articles,[1] then who could disagree? The Articles were elaborated by the ILC, the UN's Law Commission, widely regarded as one of the (not so many remaining) guardians of general international law. In elaborating them, the ILC, in turn, was guided (at times in a process of 'normative ping-pong'[2]) by the jurisprudence of the World Court in its two incarnations, viz. the Permanent Court of International Justice and the International Court

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[1] Bruno Simma, 'The International Law Commission and Its Articles on State Responsibility', Chapter 11, this volume.

[2] On this aspect, *see* Christian J. Tams, Law-Making in Complex Processes: The World Court and the Modern Law of State Responsibility, in Chinkin and Baetens (eds), Sovereignty, Statehood and State Responsibility Essays in Honour of James Crawford (Cambridge University Press, 2015), 287.

of Justice, which are, equally, perceived to be bastions of generalist thinking about international law. And of course, the ILC's work was closely followed by governments who offered comments notably in the UN Sixth Committee – and again, it was the foreign office lawyers that commented, who would have been unlikely, in the 1970s, 1980s and 1990s, to have had much contact with the world of investment arbitration. So in short, in terms of their pedigree, it is difficult to think of a more generalist text – a text that was prepared by generalists, and that of course is meant to be of general application, across international law's manifold branches, as it lays down 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.[3]

II The Standard Perspective: Do Investment Lawyers Get Their State Responsibility Right?

All this explains the common perspective on the Articles as a body of rules that investment lawyers receive and with which they have to work with. And it perhaps also explains why a prominent strand of the literature devoted to the relationship between investment law/arbitration and the law of State responsibility (certainly in the general international law literature), is in the form of a performance assessment: Do the investment lawyers get the law of State responsibility right? Does their engagement with the Articles meet the expectations and standards of a general/public international law audience?

Three quotes by James Crawford, whose competence in both fields – State responsibility here, investment law there – is beyond dispute, are illustrative of this approach. All three are taken from 'Investment Arbitration and the ILC Articles on State Responsibility' published in the 2010 issue of the ICSID Law Review. First, the *Wintershall* tribunal's observation that the Articles 'contai[n] no rules and regulations of State Responsibility vis-à-vis non-State actors' was in for criticism: Part One of the Articles of course applied to the entirety of a State's obligations, including those owed to non-State actors, and so, on this point, the 'Wintershall Tribunal's analysis is incorrect'.[4] *UPS v. Canada* fared better: here Crawford saw 'careful use of the ILC Articles' on attribution, and to the extent that this careful use led the tribunal to consider that NAFTA contained a special rule of attribution, its 'decision, to [James

[3] Introductory ILC Commentary, in YbILC 2001, vol. II/2, at 31.
[4] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 127, at 130 (citing *Wintershall Aktiengesellshaft v. Argentina*, Award (ICSID Case No. ARB/04/14, 8 December 2008)).

Crawford's] mind, is completely correct'.[5] Third, the overall verdict is somewhere in the middle. '[T]the universe of [investment] cases is, on the whole, of variable quality', and many awards referred to the text 'by way of signposting rather than actually integrating the substance of the [ILC] Articles into the decision'.[6] What is more, 'there has been a certain tendency for investment tribunals to seize on the Articles as a tabula in naufragio, "a plank in a shipwreck", especially 'where the members of the tribunal are not public international lawyers'.[7] But still, there generally has been a 'very conscientious and careful attempt in general to apply the Articles'.[8] Perhaps we could say that the overall performance was *quite ok*, certainly *decent* – the equivalent, in academic terms, of a 'merit' (but not a 'distinction'), or what in classes at Law Schools in Edinburgh or Glasgow might be a 'B3' (i.e. on the lower end of an 'upper second')..

Performance assessments like these are important, in fact indispensable: we need a robust debate about the quality of investment awards, and it is right that this debate is had not just among investment lawyers, but with increasing input from international lawyers specialising in other fields, especially when awards rely on general international law doctrines such as State responsibility, but also the general law of treaties, State succession, questions of statehood and territorial integrity. Investment arbitration, after all, is 'not a self-contained closed legal system' but has to be 'envisaged within a wider juridical context'; and a failure to conform to the accepted standards of the wider juridical system will affect the legitimacy of awards.

III A Change of Perspective: Investment Law's Contribution to State Responsibility

[5] *Ibid*., 130-131 (citing *United Parcel Service of America Inc. v. Canada*, Award on the Merits (NAFTA Chapter 11 Arbitration, 11 June 2007)).
[6] *Ibid*., 132.
[7] *Ibid*., 135.
[8] *Ibid*.; and, for a slightly more 'robust' assessment, James Crawford, 'Keynote Address: International Protection of Foreign Direct Investment' in Rainer Hofmann and Christian J. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011), 17, at 24 (noting that 'the references to [the ILC Articles] are rather variable. Some cases are quite profound engagements with the issues addressed in the ILC Articles ... In other cases it has seemed that "a little knowledge is a dangerous thing", and as you would guess from my account of the sociology of the investment arbitration profession, "a little knowledge" is something quite a lot of professionals have').

Still, this final presentation of our panel is an invitation to adopt a different perspective. I am hoping to get us to look at the ASR not as something produced by others and received by the investment law world – but as a text that investment lawyers influence and shape. The central point I would like to make is that investment law and investment lawyers have a lot to contribute to debates about State responsibility. Precisely because, in adjudicating claims based on breaches of investment standards, investment tribunals participate in international law's general quest – assessing State conduct against internationally agreed obligations and, where necessary, holding States accountable for failing to honour their obligations – their jurisprudence can and should contribute to the development of international law's general regimes, such as the rules governing State Responsibility.

This central point is part of a bigger inquiry into the relationship between international investment law and general international law, which goes beyond the remit of our panel.[9] But let me sketch out two aspects, as a teaser: *first*, despite their generalist pedigree, investment law and arbitration is quite present in the ASR; and *second*, more significantly, since 2001, investment lawyers (and investment tribunals in particular) have made an important huge contribution to clarifying and specifying the substance of the law on State responsibility, often affirming the ILC's approach, but quite frequently also moulding it in a particular manner. This significant body of jurisprudence of course needs to be tested and scrutinised, but it seems to me it has a real potential of influencing how we think about responsibility – not just in the investment field, but about responsibility as a general doctrine.

IV Useful Guidance on Select Issues: Investment Law and Its Antecedents in the 2001 ASR

The first point is a modest one: while the ASR were elaborated by the ILC and other actors of public/general international law, and primarily for an inter-State setting, international investment law is not absent from them. I am putting this purposefully cautiously, as clearly, investment lawyers did not shape the text. And how could they: the Articles were developed between the 1960s and 2001; a first reading draft was completed in 1996, and the second reading undertaken between 1997 and 2001 was essentially an exercise in cleaning up, in simplification and in clarification. So while the Articles often distil propositions developed in the case law of international courts and tribunals (and in that sense, it has been said that '[t]he

[9] For an attempt to deal with these questions, *see* the contributions to Christian J. Tams, Stephan Schill and Rainer Hofmann, *International Investment Law and General International Law: Radiating Effects?* (Edward Elgar 2023).

law of responsibility [is] ... essentially judge-made'[10]), the last two decades of burgeoning investment jurisprudence simply could not be reflected: the ILC's project was completed just before investment arbitration 'took off'. As a result, investments awards – whether rendered on the basis of the International Convention for the Settlement of Investment Disputes (ICSID) or other frameworks -are referred to sparingly: a google-search of the entire ILC's Commentaries (114 pages, no less) yields only seven references to 'ICSID', and the only cases referred to are the very early ones: *AGIP v. Congo*, *Amco Asia v. Indonesia*, *Santa Elena v. Costa Rica.*

Yet, if we take a more holistic view of investment disputes, the picture changes perceptibly. Once we broaden the perspective to include decisions of earlier tribunals dealing with claims relating to alien property and property-related interests (i.e., decisions rendered before the 'cut-off' of 2001), then the Articles seem in fact quite 'investment-attuned'. The precursors to contemporary treaty-based arbitration play a significant role, most obviously the Iran-US Claims Tribunal (IUSCT),[11] but also the early twentieth-century mixed-claims commissions and *ad hoc* tribunals dealing with claims involving injury to the property of aliens.[12] This body of this early property-related jurisprudence provided useful guidance for the Commission's elaboration of general concepts, not across the board, but on select issues: Three examples illustrate the point:

– The jurisprudence of the IUSCT had a significant influence on the shape of the ILC's rules on attribution of conduct, notably insofar as the tribunal had come up with plausible principles governing the conduct of actors that, while outside the State's official apparatus, but controlled by it (such as an autonomous foundation established by the State[13]); or had overstepped their mandate, but acted as if 'cloaked with governmental authority'.[14]

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[10] Alain Pellet, 'Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues', *in* Kovacs (ed.), *International Law – A Quiet Strength. Miscellanea in Memoriam Geza Herczegh (*Pazmany Press, 2011), 111, at 112.

[11] On the value of Iran-US Claims Tribunals decisions in the development of the law of State responsibility, *see*: Richard B. Lillich et al. (eds), *The Iran-US Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1998); and Christopher Gibson and Christopher Drahozal, 'Iran-US Claims Tribunal Precedent in Investor-State Arbitration' in Christopher Gibson and Christopher Drahozal (eds), *The Iran-US Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration* (Oxford University Press 2007) Ch. 1.

[12] On their relevance *see* generally Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford Univerisity Press 2012) 1-7.

[13] *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88-94 (1985) (relied on in the Commentary to Article 5, at para 4).

[14] *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991) (as quoted in the Commentary to Article 7, at para. 7).

– Investment decisions also feature in the Commission's work on the defences to State responsibility, especially in relation to Articles 23 (*force majeure*) and 25 (state of necessity).[15] A detailed study by Federica Paddeu suggests that it was in decisions concerning property claims of aliens – aliens affected by armed conflict and disturbances in a foreign country, such as *Venezuelan Railroads*,[16] *Russian Indemnity*,[17] *Serbian Loans*[18] and *Brazilian Loans*[19] – that the plea of *force majeure* took shape. And it took shape as a narrow excuse requiring the State to establish that the external event made it 'materially impossible' to perform the obligation, as Article 23 now clarifies.[20]

– Decisions on property-related claims informed the principles governing reparation and notably compensation for financially assessable damages. These feature in Part II of the Articles, whose provisions do not directly apply to claims by non-State actors.[21] But nonetheless, the ILC found many of the propositions emerging from the case law of the IUSCT, from the United Nations Claims Commission (UNCC) and also from contract-based arbitrations to be useful. These, e.g., inform the Commentary's sections emphasising that lost profits can be recovered if they are reasonably established, including under concessions: in these, the Commission, e.g., relies on *LIAMCO*,[22] *Sapphire*,[23] *Amco Asia*,[24] and is very complimentary of the UNCC's methodical approach to compensation for business losses[25] – i.e., decisions that not only originate from property-related claims, but that also remain relevant to the contemporary compensation discourse in investment cases. Similarly, there is much more than a nod to the early property-related cases and indeed the investment treaty practice in the Commentary's sections underlining the importance of the fair market value for compensation claims[26] and commenting on the use of the discounted cash flow (DCF) method.[27]

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[15] *See* notably the detailed study prepared by the UN Secretariat, '"Force majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine' (1978) ILC Yearbook, vol. II(1), 148-187; and *see* the references in the ILC's Commentary to Article 23 (at fn. 366) and Article 25 (at fns 376 and 381).

[16] *French Company of Venezuelan Railroads* (1904) 10 RIAA 285.

[17] *Russian Indemnity Case (Russia/Turkey)* (1912) Scott Hague Court Rep 297.

[18] *Case Concerning the Payment of various Serbian Loans issued in France (France v. Kingdom of the Serbs, Croats and Slovenes)* (1929) PCIJ Series A No. 20, 5.

[19] *Case Concerning the Payment of various Brazilian Loans issued in France (France v. Brazil)* (1929) PCIJ Series A No. 21, 93.

[20] Paddeu's conclusion is worth setting out: discussing nineteenth and early twentieth-century disputes, she notes that 'it was slowly recognised that wars and other internal conflicts did not obliterate the State's will and that so long as the State remained in control of the behavior of its armed forces, it could be responsible; .... These changes paved the way for the recognition of the plea of *force majeure*, as we now understand it, in the first half of the 20th century': *see* Federica Paddeu, The Impact of Investment Arbitration on the Development of State Responsibility Defences, in Tams, Schill and Hofmann, ***supra*** n. 9.

[21] *See* Article 33(2) ASR.

[22] Libyan American Oil Company (LIAMCO), p. 140 (relied on in the Commentary to Article 36, at para. 27).

[23] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, ILR, vol. 35, p. 136, at pp. 187 and 189 (1963) (relied on in the Commentary to Article 36, at para. 27).

[24] *Amco Asia Corporation and Others v. The Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted case (1990), ICSID Reports (Cambridge, Grotius, 1993), vol. 1, p. 377 (relied on in the Commentary to Article 36, at para. 27).

[25] *See* paras 23 and 26 of the Commentary to Article 36, citing Decision No. 9 of the UNCC Governing Council in 'Propositions and conclusions on: types of damages and their valuation' (S/AC.26/1992/9).

[26] *See* para. 22 of the Commentary to Article 36, stating that 'Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is

I do not wish to overstate the point, which remains a modest one. But I believe the examples serve to at least protect the ILC against the charge that it was purely focused on inter-State disputes. It could not take into account twenty-first-century investment arbitrations. Yet it was quite open to investment law's antecedents. These informed a number of propositions reflected in the ILC's text. If we envisage the Articles as a mighty river, perhaps we can say that the early proto-investment case law was one of the tributary streams that fed into the mighty stream: a mid-level tributary most likely – not the Ohio River to the Mississippi, but perhaps the River Illinois or Wisconsin, contributing usefully and perceptibly, but not in any way dominant. This, in turn, means: there is something of the early investment law in the Articles; these are not alien, investment lawyers of earlier generations have contributed to them. And we should not view them as something alien, foreign – something that received without agency. This is my first, modest proposition.

V 'Almost Ubiquitous Reliance': 'Consolidating and Refining' the Articles in Investment Treaty Jurisprudence Since 2001

The second proposition moves us forward to the present age. The Articles were adopted 21 years ago: even by the strictest tests, they have now reached maturity. And more than that, as the ICCA programme committee noted in announcing this panel, they have become 'a crucial point of reference'. Indeed they have: In James Crawford' phrase, they 'represent the modern framework of state responsibility';[28] and while adopted as a formally non-binding text, they

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generally assessed on the basis of the "fair market value" of the property lost.' In support, reference is, e.g., made to Article 13(1) of the Energy Charter Treaty, to the World Bank's Guidelines on the Treatment of Foreign Direct Investment (Washington, D.C., 1992, vol. II, p. 41), to *American International Group, Inc. v. The Islamic Republic of Iran*, Iran-US C.T.R., vol. 4, p. 96, at p. 106 (1983); and to *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112, at p. 201 (1987).

[27] *See* para. 26 of the Commentary to Article 36, noting that 'The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets' and notably referring to the case law of the IUSCT: *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189; *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987); *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 21, p. 79 (1989); and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

[28] James Crawford, *State Responsibility: The General Part* (CUP 2013), at 45.

are now almost inevitably taken to reflect general international law, as the outcome of a process that has been referred to as 'codification light'.[29]

My second point is this: investment law and investment lawyers have played a very significant role in facilitating the ILC Articles' rise to prominence and in ensuring the success of the ILC's exercise in 'codification light'. There are three aspects to this: one, through twenty years of constant engagement with the text, investment lawyers have embraced the Articles; they are the Articles' most important 'user'. Two, in the process, they have not just mechanically applied rules written down by the ILC, but also tested these rules, and specified and moulded their content. And three, this investment law practice of specifying and moulding the ILC's rules is gradually being taken up by international lawyers outside the investment law field – the investment law practice on State responsibility is beginning to *radiate*. Let me say a word about each of these aspects.

1 Embracing the ILC Articles

While today, the ICCA programme committee's take on the Articles as a 'crucial point of reference' is uncontroversial, it is important to note that their success was not a foregone conclusion. The Articles were adopted, by the ILC, as a set of non-binding provisions: of course elaborated in a process intended to produce an authoritative text, but not as such binding – a fact that certainly eased the final stages of the ILC's work, but meant the text was released into an uncertain future.[30] What is more, the General Assembly, rather than incorporating them into a programmatic resolution, has so far merely 'noted' the ASR and commended them to the attention of Governments, beginning with Resolution 56/83.[31] Other than that, though, in its engagement with State responsibility the General Assembly has remained hesitant and continues to prevaricate (for now twenty years) over whether it should initiate debates about a binding Convention on State responsibility: a project that would proceed from the ILC's Articles, but open these up to discussion by State representatives in

[29] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) 8 Anuário Brasileiro de Direito Internacional 117.

[30] For much more on the chosen form, and its allegedly 'paradoxical' relationship to their authority, *see* David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857; and further Fernando Lusa Bordin, 'Still Going Strong: Twenty Years of the Articles on State Responsibility's "Paradoxical" Relationship Between Form and Authority', in Federica I. Paddeu and Christian J. Tams, *The ILC Articles at 20* (GCILS Working Paper 11/2021), p. 15.

[31] Responsibility of States for Internationally Wrongful Acts UNGA Res 56/83, Annex (12 December 2001) 56th Session (2001) UN Doc. A/RES/56/83.

the traditional form of multilateral treaty-making.[32] As States have so far not embarked upon the 'high road' of treaty-making, the Articles' success has been achieved via the 'low road' of gradual acceptance by international laws' many stakeholders. This success has been remarkable, as uptake has exceeded all expectations. Since 2001, the Articles have become the natural point of reference for a wide range of law appliers, working in fields as diverse as human rights, international humanitarian law, WTO law, international environmental law, the law of the sea, and many more: NGOs and domestic courts cite them, as do scholars, governments, and international courts and tribunals.[33] This twenty-year 'embrace', conveniently chronicled in successive editions of the Secretary-General's compilation of decisions referencing the ILC's work on State responsibility,[34] suggests that the Articles' 'ultimate test of acceptance ha[s] [now been] met'.[35]

It certainly has been met in investment arbitration. From early on, investment tribunals have taken note of the Articles and referenced them in their decisions. Recent studies covering the last decade suggest that '[i]nvestment tribunals' extensive reliance on the ILC

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[32] These discussions, while not advancing very far, seem to reflect growing momentum towards a treaty on responsibility. In UN GA debates, over ninety States have expressly supported the treaty option. However, as the Sixth Committee has decided to proceed by consensus, no final decision has been taken. *See* most recently, United Nations, 'Sixth Committee (Legal) – 74th Session: Responsibility of States for Internationally Wrongful Acts (Agenda Item 75)' www.un.org/en/ga/sixth/74/resp_of_states.shtml. For recent commentary, *see* Federica Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2017) 21 Max Planck Yearbook of United Nations Law 83; Arman Sarvarian, 'The Ossified Debate on a UN Convention on State Responsibility' (2021) 70 International and Comparative Law Quarterly 769; as well as Patricia Galvão Teles, 'The Impact and Influence of the Articles on State Responsibility on the Work of the International Law Commission and Beyond', in Federica Paddeu and Christian J. Tams, The ILC Articles at 20, at 10.

[33] For more on this 'embrace', *see* the contributions to Paddeu and Tams, The ILC Articles at 20, a symposium hosted on the EJIL Talk! blog in 2021 and since republished as a GCILS Working Paper (11/2021).

[34] *See* most recently, UNGA, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, 29 April 2022, UN Doc A/77/74, referencing eighty-three cases, decided between 2019 and 2022, that cite the Articles. The Technical Annex to the Compilation (pp. 39-51) lists 786 references to the Articles in publicly available decisions since 2001, plus 680 references in member State submissions before courts, tribunals and other bodies.

[35] Cf. James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) AJIL 889. It seems to me that this significantly weakens the case for a treaty approach, but this approach nonetheless remains attracrtive to many States, as suggested in the penultimate footnote.

Articles remains unabated':[36] As Esmé Shirlow and Kabil Duggal highlight, since 2010, 'there has been a greater and almost ubiquitous reliance in investment treaty arbitration decisions on the ILC Articles';[37] large sections of the ILC's text are referred to, reflecting the growth of investment arbitration as much as 'an increased propensity on the part of parties and tribunals to cite the ILC Articles in their analysis of the issues arising in investment treaty disputes'.[38] What is more, with 219 decisions referencing the Articles, investment tribunals 'are still the most prolific users of the ILC Articles'.[39] Even as prolific users, tribunals can of course, in their use of the Articles, get things wrong (as suggested at the outset). But the practice of the past twenty years clearly reflects the willingness of arbitral tribunals to embrace the text – a willingness not precluded by the fact that investment arbitration in its contemporary variation could not materially shape the drafting of the Articles. This embrace has been a significant factor in the Articles' consolidation, from 'promising text finally adopted' (2001) to a 'natural framework for any debate about responsibility' (2022).

2 Working with the Articles, and Making Them Their Own

Have investment tribunals made the Articles their own, though? One can be a 'prolific user' and not develop any sense of ownership, merely referring to a text, grudgingly perhaps, that remains alien. The statements quoted in the introductory section of this comment suggest that some investment tribunals, even where they cited them, initially approached the Articles with some reservation. James Crawford's 'shipwreck' metaphor[40] confirms this – conjuring up an image of tribunals desperately clutching at a plank/text deemed to be authoritative, to somehow justify a particular decision.

It seems to me that, in the course of the past two decades, investment tribunals have become more experienced and more confident users. Their engagement with the Articles of course remains of variable depth and quality, and certain trends in the jurisprudence to me remain puzzling. (The tendency to misuse attribution rules to extend the scope of contractual

[36] James Crawford and Freya Baetens, 'The ILC Articles on State Responsibility: More Than a "Plank in a Shipwreck"'?, (2022) 37 ICSID Review (in print).
[37] Esmé Shirlow and Kabil Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37 ICSID Review (in print).
[38] *Ibid*.
[39] *See* Crawford and Baetens, *supra* n. 36 and Shirlow and Duggal, *supra* n. 37. The Annex to Shirlow and Duggal's piece, as well as Crawford's 2010 article (cited in footnote 2), contain very helpful tables.
[40] *See supra* n. 3.

liability and permit contractual claims against States, is anobvious example.[41]) But overall, twenty years and 219 decisions on, it seems high time to me to supplement the traditional 'have investment tribunals got State responsibility wrong?' question with another one: how does the systematic and long-standing engagement, by investment tribunals, contribute to our understanding of the ILC's text? My own response to this question is that it contributes quite a lot, and more specifically: investment tribunals have made a significant contribution by spelling out and specifying the meaning of vague ILC provisions. What is more, some of these specifications reflect a gradual moulding of the law of State responsibility. Let me illustrate this by reference to three select examples:

(i) The first is an instance of spelling out the meaning of the ILC's text. This is a crucial task, as so many of the ILC's provisions are general – not just in terms of their potential application (across the board), but also in their vagueness. Article 39 on contributory fault is an example in point; according to it '[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.'[42] This provision sets out a fairly common-sense principle, but it does little more. The ILC's Commentary is brief and does not say much beyond the principle. And it leaves us with hardly any guidance on central questions, such as: What does 'take into account' mean? How far can contributory fault reduce reparation claims? What qualifies as 'wilful or negligent action'? Two decades after the adoption of the Articles, the questions are by no means satisfactorily resolved. And they may never be: clearly, courts and tribunals need to be able to exercise discretion in assessing the impact of contributory fault in particularly instances raised and pleaded before them. But still, we might hope for some more clarity, at least some guidelines, so that the law is not just a vague statement of principle. Some such guidance has been provided by investment awards, which have recently begun to engage seriously with the matter. The guidance is by no means consistent, and it is not specific enough. But we now have at least five examples – *Occidental Petroleum, Copper Mesa, Yukos, Veteran Petroleum* and *Anatolie Stati*[43] – of tribunals weighing arguments based on Article 39, and beginning a discourse on the impact of contributory fault on compensation claims. In their detailed assessment, Esme Shirlow and Kabir Duggal note that investment tribunals had 'unfortunately, not ... exercised [their discretion] in a consistent or principled manner'[44] – and they have a point: much remains yet to be clarified. But my expectations may be lower: I would argue that

[41] In his 2010 article, Crawford noted 'confusion' among tribunals 'over the relationship between the law of attribution and issues of contractual responsibility or liability' (Crawford, footnote 3, at 134). As this confusion has not really disappeared, it may be convenient to restate Crawford's reminder: 'The rules of attribution have nothing to do with questions of contractual responsibility' (*ibid*.).

[42] YbILC 2001, vol. II/2, at 109.

[43] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 Award (5 October 2012); *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award (15 March 2016); *Yukos Universal Limited (Isle of Man); Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case Nos 2005-04/AA227, 2005-05/AA228, Final Award (18 July 2014); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case Nos 2005-04/AA227, 2005-05/AA228, Final Award (18 July 2014); Anatolie Stati and Gabriel Stati, *Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No V 116/2010, Award (19 December 2013).

[44] Shirlow and Duggal, *supra* n. 37; and see the much more principled critique by Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (CUP 2019).

if we want any guidance on the meaning of Article 39 (whatever field of international law we look at), investment arbitration is our best hope for *some* clarity. In that sense, I would look to cases such as *Occidental* and others as first steps towards clarifying the meaning of a nebulous ASR provision.

(ii) In another area, the impact of investment awards is more profound: this is Chapter II of Part One of the ILC Articles on attribution of conduct.[45] Articles 4-11 are among the most influential elements of the ILC's exercise in 'codification light': they clarify that States only have to stand in for conduct of actors that are related to the apparatus of government and go on to identify the types of links that are sufficient in this respect (such as designation as a State organ, control over conduct, or the conferral of regulatory power). Investment tribunals have engaged with these rules in detail and significantly extended the debate about them. They have done so by 'kissing awake' hitherto dormant rules[46] such as Article 11, according to which private conduct becomes attributable if the State adopts it as its own: this provision had risen to prominence in the International Court of Justice's (ICJ) *Tehran Hostages* case,[47] but was considered to be of limited relevance – until a sequence of recent investment awards began to test the limits of attribution through adoption.[48] This testing continues, with tribunals, e.g., discussing which level of endorsement is required.[49] But even now, it is clear that in a world of privatised government agencies, Article 11 has real potential to implicate States.[50] More generally, investment arbitrations of the last two decades have explored avenues for holding States accountable in times of privatised government: for the most part, and with the exception of a number of NAFTA awards,[51] investment tribunals seem to be working from within the ILC's attribution regime.[52] But while affirming it in principle, their jurisprudence contains helpful

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[45] For a much fuller discussion of the issues sketched out in the following, *see* Carlo de Stefano, 'Attribution of Conduct to a State', (2022) 37 ICSID Review (in print); and Stephan Wittich, Investment Arbitration as an Engine of Development of the Rules of Attribution, in Tams, Schill and Hofmann, *supra* n. 9.

[46] In addition to Article 11, *see also* the Electrabel tribunal's reliance on Article 6, one of the least cited provisions of the ILC Articles: *Electrabel SA v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction Applicable Law and Liability (30 November 2012) para. 6.74.

[47] ICJ Reports 1980, 3, 35 (prominently cited in the ILC's Commentary to Article 11, at para. 4).

[48] *See, e.g., InterTrade Holding GmbH v. The Czech Republic* (PCA Case No. 2009-12), Final Award, 29 May 2012; *Luigiterzo Bosca v. Lithuania* (UNCITRAL), Award, 17 May 2013; *Icon of Delaware et al v Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss, 21 February 2017.

[49] *See, e.g., Luigiterzo Bosca v. Lithuania* (UNCITRAL), Award, 17 May 2013, considering it sufficient that 'the Government acted at multiple steps, projecting its sovereign authority'; and *InterTrade Holding GmbH v. The Czech Republic* (PCA Case No. 2009-12), Final Award, 29 May 2012 (insisting that 'words or actions [reflecting a governmental adoption of conduct] must be clear and unambiguous').

[50] *See also* Shirlow and Duggal (noting that 'tribunals since [2010] have shown greater propensity to analyse attribution of conduct to States on the basis that the State has endorsed and adopted conduct as its own').

[51] *United Parcel Service of America Inc (UPS) v. Government of Canada*, UNCITRAL, Award on the Merits (24 May 2007); *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (24 March 2016); and also the hints in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009).

[52] From the many decisions working with the ILC's rules on attribution, *see, e.g., Tulip Real Estate and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28,

suggestions cautiously to 'open up' narrowly formulated provisions such as Article 5 (conduct of separate entities that, while not State organs, are authorised to exercise governmental authority)[53] and Article 8 (conduct of private actors directed and/or effectively controlled by the State).[54] These decisions free the discussion from the shackles of debates of the '*Tadic v. Nicaragua* type' on which general international lawyers remained fixated for far too long; they meaningfully develop provisions that the ILC formulated without fully rationalising the concept of 'public power' or the 'public function' which inform the rules on attribution.[55] Looked at in aggregate, recent investment awards clarify the meaning of important provisions of the ILC text, but they also shape these provisions in a particular direction — tribunals clearly do not just receive guidance from the ILC's work, but specify the content of the ILC's rules, potentially providing guidance to international lawyers more generally.

(iii) Lastly, some decisions seem to point towards a more fundamental readjustment, adopting approaches that would shape the Articles in a particular 'investment light'. This has so far been rare, but the treatment, by some NAFTA tribunals, of the ILC's regime of countermeasures provides an example. Under Articles 22 and 49 of the ILC's text, otherwise unlawful conduct may be justified as countermeasure if directed against a prior wrongful act, but such countermeasures must be 'directed against' the State 'responsible for an internationally wrongful act'. This latter limitation excludes the application of countermeasures against third States – but does it also preclude countermeasures against third-party nations? The question arose in a series of three NAFTA cases brought against Mexico,[56] namely those brought by *ADM, Corn Products* and *Cargill*.[57] The tribunals in the latter two cases

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Award (10 March 2014) para. 281; *Antoine Abou Lahoud and Leila BounafehAbou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award (7 February 2014) para. 375; *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para. 148. As de Stefano notes in his detailed assessment, 'international investment tribunals have generally recognized the rules of attribution in Articles 4, 5, 7 and 8 ARSIWA as a codification of customary international law'.

[53] *See, e.g., Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016); *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award (1 October 2014) para. 328; *Luigiterzo Bosca v. Lithuania*, UNCITRAL, Award (17 May 2013).

de Stefano (*supra* n. 45) summarises one aspect of this opening up when noting that recent investment decisions 'seem to suggest that in order to qualify an act of a parastatal entity as attributable to the State it is not necessary to demonstrate that it was exercised strictly out of governmental authority (imperium), but it may also be taken into consideration that said act was "growing out" of the public functions of the State instrumentality'.

[54] *See, e.g., Ampal-American Israel Corporation v. Egypt* (*supra* n. 48) – considering it sufficient for the purposes of attribution under Article 8 that decisions by a public-sector holding company with separate legal personality 'were all taken with the blessing of the highest levels of the Egyptian Government'; and further *Bayindir v. Pakistan* (*supra* n. 51); *UAB E Energija v. Latvia*, ICSID Case No. ARB/12/33, Award (22 December 2017).

[55] A point made by Alex Mills: see his 'State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework', in Paddeu and Tams (*supra* n. 30), p. 23.

[56] The backdrop of these cases was a Mexican tax on soft drinks with high-fructose corn syrup (HFCS). HFCS was exported by US producers, which argued that the tax caused them to lose the value of their investment. Mexico responded that its tax was a lawful countermeasure in response to the USA's illegally blocking Mexican sugar producers from access to US markets, in violation of NAFTA.

[57] *Corn Products International, Inc v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008); *Archer Daniels Midland*

essentially equated the position of investors to that of third States: they considered Mexico to be prevented from relying on countermeasures against US investors.[58] This approach, while developed on the basis of Article 49, indeed involves 'some element of innovation':[59] it further restricts the availability of countermeasures under the ILC Articles. This in itself may not be problematic, but it is worth noting that it would amount to a development – a development that the ILC did not seem to anticipate.[60] In that sense, decisions like *Cargill* and *Corn Products*, if accepted, would have an impact that goes beyond a mere finessing and/or adaptation of the ILC's Articles.

The line between clarification, shaping and remaking the ILC Articles is not fixed and may be a question of perspective. I do not assume that my own assessment of where clarification and specification become development is universally shared. But what I hope is acceptable is the basic point emerging from the short summaries: investment lawyers do not just mechanically apply the Articles, they work with them, mould them, construe them – and in the process have made them their own. And this is how it should be: writing in 2002, James Crawford noted that the ILC Articles were a useful exposition of the general rules on State responsibility – and went on to observe that these rules would now be 'consolidated and refined' in international practice. This is precisely what has happened over twenty years of investment arbitrations: these have consolidated the ILC's text, and they have refined it, including by adapting it to novel challenges and to the particular needs of the investment law regime.

VI Radiating Effects?

A final question – much more briefly, as it takes us away from investment arbitration and into the terrain of general international law: What is the impact of the significant investment

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Company and Tate & Lyle Ingredients Americas, Inc v. United Mexican States, ICSID Case No ARB(AF)/04/05, Award (21 November 2007) (ADM Award); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)05/2, Award (18 September 2009).

[58] For a much fuller discussion *see* Eran Sthoeger and Christian J. Tams, 'Swords, Shields and Other Beasts: The Role of Countermeasures in Investment Arbitration', (2022) 37 ICSID Review (in print).

[59] Paddeu in Tams, Schill & Hofmann (*supra* n. 20), at 15; Sthoeger and Tams (*supra* n. 57); and further Junianto J. Losari and Michael Ewing-Chow, 'A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law' (2015) 16 Journal of World Investment and Trade 274. For the opposite view, endorsing the position adopted in *Corn Products* and *Cargill*, *see* Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264.

[60] While the ILC's position is not entirely clear, a passage from the commentary to Article 49 suggests that countermeasures could have effects on other third parties: 'other parties, including third States, may be affected thereby [by countermeasures]. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided' (Commentary to Article 49, at para. 5).

practice on the general regime of State responsibility? As so many decisions now are public, and as arbitration naturally relies on references back to prior decisions, we can expect statements by tribunals – say, on the scope of attribution rules, or on contributory fault – to enter the investment law discourse. But will the investment law practice reverberate outside the investment law context? Will it radiate?[61]

This is clearly not guaranteed: even if we admit some form of soft precedential effects within particular dispute settlement regimes (e.g., in investment arbitration), there is clearly no doctrine of precedent across different fields of international law: parties arguing before a human rights court, or before the ICJ, might rely on pronouncements by investment tribunals – but the human rights court, or the ICJ, are of course entirely free to disregard them or to treat them as inapposite. So just as with all other judicial or arbitral pronouncements, investment tribunal's decisions on State responsibility will have to persuade to 'radiate' into other fields.[62]

So far, this process of 'radiation' is at an early stage. The enormous body of investment law practice on State responsibility is only beginning to be used in other contexts and has by no means been fully digested. First steps have been taken: the Secretary-General's compilation and scholarly works document and highlight how investment law tribunals use the ILC's text – this is now all out in the open, permitting robust peer review and enabling radiation effects. But to my knowledge, courts and tribunals outside the investment field (and other bodies applying rules of State responsibility) are relatively slow to take it up. Silo-thinking may be part of this – as may be the traditional perception (which has done a lot of harm) that investment law is somehow 'exotic',[63] situated somewhere on the fringes of international. But I am quite hopeful that things are about to change: the aggregated body of investment law jurisprudence on State responsibility is just too rich and too pervasive to be ignored by general international lawyers. On questions of attribution in particular it is the key to a more relevant debate, one that takes the ILC Articles into the twenty-first century and engages with the implications of lean government and the regulatory State (which challenge international

[61] This is the central question addressed in Tams, Schill and Hofmann, *supra* n. 9.
[62] As noted by Christoph Schreuer, 'it is not any legislative power but their intellectual persuasiveness that will determine the influence of investment tribunals on the development of international law': *see* his 'Development of International Law by ICSID Tribunals', (ICSID Review 2016, 728).
[63] As famously stated by the ILC in 2006(!): *see* ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group, finalised by Martti Koskenniemi' (13 April 2006) UN Doc. A/CN.4/L.682, at para. 18.

law in many areas) on State responsibility. This does not mean that investment law decisions must be generally accepted; propositions advanced in the arbitral jurisprudence need to be tested and scrutinised – and as suggested above, I remain cautious about the jurisprudence of ICSID tribunals on countermeasures. But even where they disagree, general international lawyers will benefit from engaging fully with the output of the 'most prolific users' of the ILC's text, viz. investment tribunals.

VII Concluding Thoughts

And so I conclude this comment with a plea – or rather: two pleas: One to general international lawyers, whom I would encourage to tap (more than they have done so far) into the rich body of investment jurisprudence on State responsibility whose potential often remains 'untapped'.[64] And the other to the investment arbitration community: a plea to appreciate that in engaging with State responsibility, investment lawyers have long ceased to be mere rule-takers without agency, who are required to work with an alien text. Not only have earlier generations of 'investment lawyers' had some influence on the text. Twenty years of investment arbitration have embraced, clarified and shaped it. And going forward, investment lawyers play an important role in adapting the ILC's often vague and general rules to new challenges. There is, in one phrase, no need to be afraid of State responsibility.

[64] As noted (in a separate context) by James Devaney: *see* his 'On The Contribution of Investment Arbitration to Issues of Evidence and Procedure Before Other International Courts and Tribunals', in Tams, Schill and Hofmann, *supra* n. 9.