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SPECIAL ISSUE ON 20TH ANNIVERSARY OF ARSIWA
The ILC Articles on State Responsibility: More than a 'Plank in a Shipwreck'?

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I. INTRODUCTION

In 2010, James Crawford contributed an article on investment arbitration and the ILC Articles on State Responsibility[2] to a special issue of the *ICSID Review*.[3] In its conclusion, the article noted that 'investment tribunals [displayed a certain tendency] to seize on the Articles as a *tabula in naufragio*, "a plank in a shipwreck"'. Now that another decade has passed, we have the chance to reassess this notion in an introductory comment for the Special Issue of the *ICSID Review* in a year which marks the 20th anniversary of the ILC Articles. As we shall see, while the world has changed since 2010, many of the original article's observations still hold true today. Investment tribunals' extensive reliance on the ILC Articles remains unabated: they are still the most prolific users of the ILC Articles, as demonstrated by the comprehensive list of ICSID cases in the Appendix of this Special Issue.[4] It also remains true that some tribunals read more authority and certainty into the Articles than warranted by their formal status—without providing any methodology or reasoning for the application of the ILC Articles as if they were binding law.[5]

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[2] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, UN GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10 (2001) ('ILC Articles' or 'ARSIWA').

[3] James Crawford, 'Investment Tribunals and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Rev—FILJ 127.

[4] See eg UNSG–UNGA, 'Responsibility of States for Internationally Wrongful Acts–Compilation of Decisions of International Courts, Tribunals and Other Bodies–Report of the Secretary-General–Addendum' (27 June 2017) A/71/80/Add1.

[5] eg Robert Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447, 452; Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission'(2015) 85 BYIL 10, 17–20; for recent examples of such decisions, see eg *Infinito Gold Ltd v Costa Rica*, ICSID Case No ARB/14/5, Decision on Jurisdiction (4 December 2017) para 198 (regarding ILC art 4); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018), para 288 (regarding ILC art 4); *Cengiz İnşaat Sanayi ve Ticaret AS v Libya*, ICC Case No 21537/ZF/AYZ, Award (7 November 2018) paras 424–25 (regarding ILC art 10); *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 515 (regarding ILC art 15); *Bernhard von Pezold and Others v Republic of*

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The enduring significance of the ILC Articles in investment arbitration becomes apparent in the case comments section of this Special Issue, which updates the list of ARSIWA citations compiled in 2010. Indeed, this Special Issue—filled with articles by the current and future generations of experts in the field—speaks for itself: the ILC Articles have lost none of their buoyancy in the case law of investment arbitration. The lasting importance of the ILC Articles comes as no surprise; since the adoption of the Articles by the ILC in 2001, no other guidelines (let alone treaty law) have evolved to assist investment tribunals with questions of State responsibility. Yet, developments on a global scale such as the looming environmental crisis and the ongoing COVID-19 pandemic may confront investment tribunals with new challenges not specifically envisioned by the ILC or its Articles on State Responsibility.[6] Issues of attribution, causation, shared responsibility, necessity and *force majeure* might (in the absence of *lex specialis* in the relevant treaty regime) give rise to new case law which draws from the ILC Articles. Furthermore, it is possible that such decisions reflect a change of course among some investment tribunals, alert after a decade of an actual or supposed back-lash against investor-State dispute settlement, partly due to alleged constraints on States' 'right to regulate'.[7] This Special Issue informs any such predictions by taking stock of the first 20 years of the ILC Articles. The purpose of this introduction is not to summarize comprehensively the contributions which follow. Rather, it is to spark the curiosity of the reader by teasing out a few common threads of the pieces and contextualizing them as part of the larger development of the ILC Articles in international investment law. If these pages encourage further engagement with the role of the ILC Articles in the discipline of investment law, one should consider its goal more than fulfilled.

II. CONTINUITY AND CHANGE

A cursory look at the table of contents of the Special Issue demonstrates the breadth of issues in investor-State dispute settlement closely linked to State responsibility and the ILC Articles. In their piece, Esmé Shirlow and Kabir Duggal flesh this out in a formidable fashion by building on the case survey, mentioned at the outset, from 2001–2010 and supplementing it with an overview of the use of the ILC Articles in investment arbitrations during the past decade.[8] The statistics in their contribution demonstrate the rise in references to the ILC Articles in sheer numbers over the last 11 years and accessibly demonstrate which of the Articles are referred to most often. In the latter regard one can discern a few usual suspects. The ARSIWA on

Zimbabwe, ICSID Case No ARB/10/15, Award (28 July 2015) para 657 (regarding ILC arts 25 and 26); *Serafín García Armas and Karina García Gruber v Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No 2013-3, Final Award (26 April 2019) paras 476–77 (regarding ILC art 31); *RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) para 685 (regarding ILC art 35).

[6] Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019); Mao-wei Lo, 'Legitimate Expectations in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defenses under International Investment Agreements' (2020) 13 CAAJ 249; Julien Chaisse, 'Both Possible and Improbable—Could COVID-19 Measures Give Rise to Investor-State Disputes?' (2020) 13 CAAJ 99.

[7] Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer International Law 2010); Georgios Dimitropoulos, 'The Conditions for Reform: A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration' (2020) 18 LPICT 416.

[8] Esmé Shirlow and Kabir Duggal, 'The Articles on State Responsibility in Investment Treaty Arbitration' in this Special Issue.

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attribution are referred to most often numerically (especially Articles 4, 5 and 8) and Carlo de Stefano examines their employment closely in his contribution.[9] While the acceptance of the rules laid down in the ILC Articles by a high number of investment tribunals is beyond doubt, de Stefano, *inter alia*, highlights how some tribunals refrain from clarifying which Article they are in fact relying on when attributing conduct to a State. Attribution is also a good example of the use of the ILC Articles, because practice demonstrates how States may have an interest to lay down special rules that diverge from the general regime of the ILC Articles. This aspect is showcased by de Stefano with reference to the latest Indian Model BIT.[10] In light of the prominent role of the attribution rules which could already be discerned a decade ago, one expects that they will maintain their relevance in investment arbitrations in the future.[11]

Other parts of the ILC Articles, which had not found their way to an international tribunal in 2010 still remain outside the ambit of investment arbitration in 2021. For example, ILC Articles 17–19 and 46–47 have not been referred to by tribunals at all. This is hardly surprising, bearing in mind their function in governing State responsibility in connection with the act of other States (Articles 17–19) and pluralities of States (Articles 46–47). Both of these areas seem rarely relevant in investment arbitrations. Another area of the ARSIWA that has not been discussed frequently before international tribunals is the regime on countermeasures (Articles 49–54). Christian Tams and Eran Shtoeger, nonetheless, argue that there is some room for the arguably 'archaic' notion of countermeasures in international investment law.[12] As their contribution highlights, cases addressing the possibility for host States to justify their acts as countermeasures also link international investment law with another major question of general international law: who is the ultimate rights holder—the investor or the State?[13]

Beyond these continuities, Shirlow and Duggal point to new key developments that have occurred over the past years. For one, their survey showcases an increasing number of references to Articles 12–15 ARSIWA that deal with circumstances where a tribunal had to decide on the temporal limits of a breach. Also, their analysis of the case law demonstrates that there has been a significant rise in references to Article 39 ARSIWA, as tribunals have begun to consider contributory fault of claimants more frequently in proceedings.[14] Whereas Article 39 had not been referred to once by tribunals before 2010, the new survey can point to almost 30 invocations in the context of investor-State dispute settlement. In his commentary on the case *Copper Mesa v Ecuador,*[15] Peter Muchlinski criticizes how contributory fault was approached

[9] Carlo de Stefano, 'Attribution of Conduct to a State' in this Special Issue.

[10] See generally, Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32 ICSID Rev—FILJ 216.

[11] For a comprehensive survey on the matter, see Carlo de Stefano, *Attribution in International Law and Arbitration* (OUP 2020), reviewed in this Special Issue.

[12] Christian Tams and Eran Sthoeger, 'Swords, Shields and Other Beasts: The Role of Countermeasures in Investment Arbitration' in this Special Issue.

[13] On this, in the context of countermeasures, see also Kate Partlett, 'The Application of the Rules on Countermeasures in Investment Claims: Visions and Realities of International Law as an Open System' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 397–402.

[14] See generally, Martin Jarrett, *Contributory Fault and Investor Misconduct in investment Arbitration* (CUP 2019); also reviewed in this Special Issue.

[15] *Copper Mesa Mining Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No 2012-2, Award (15 March 2016).

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by the tribunal. More generally, this case in which the tribunal assessed the contribution of the investor's human rights violations to the loss in value of the investment, may serve as an example of the difficult questions tribunals have to grapple with when extending the rules of the ILC Articles to non-State actors. Albeit only one particular point of view, the growing debate on investors' obligations may be considered part of a 'coming of age' of international investment law that is beginning to move beyond the paradigm of exclusive State responsibility.[16] The arguable imbalance underlying investment law because it only lays down obligations of States is also one of the points Pierre-Marie Dupuy encourages us to consider in his comments.[17] His concluding remarks points us to possible areas of future development of investment law.

III. REMEDIES

The ILC Articles have also proved to be a particularly popular point of reference concerning remedies as the underlying IIAs frequently do not contain special provisions in this regard. Remedies have also been the concern of several contributions to this Special Issue, in which the authors invite us to engage with difficult questions that have arisen in the context of remedies. For example, the challenges of establishing causation when determining State responsibility are addressed by Patrick Pearsall.[18] At a general level, claimants in investment arbitration have always sought most frequently to be awarded compensation for breaches of international law. What was correct in 2010 regarding Part Two of the ILC Articles still holds true today: it does not directly apply to the investor-State relationship but was drafted with the relations between States in mind.[19] As a consequence, some respondents have argued that they should be disregarded in investment arbitration proceedings.[20] Some tribunals have reacted to this argument and applied the relevant provisions by analogy.[21]

Because of this broad acceptance of the rules on remedies laid out in the ILC Articles, claimants frequently rely on Article 31(1) ARSIWA, enshrining the obligation to make 'full reparation' as a starting point for their analysis of consequences of an internationally wrongful act.[22] In the investor-State relationship the application of this principle, famously first pronounced on by the Permanent Court of International Justice in *Chorzów Factory*,[23] can prove difficult to apply.[24] One issue that has caused consternation is the amount of compensation to be granted to claimants for breaches of State obligations. In recent years not only the quantity of investment

[16] See on investor obligations eg Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35 ICSID Rev—FILJ 82.

[17] Pierre-Marie Dupuy, 'ARSIWA - A Reference Text Partially Victim of Its Own Success?' in this Special Issue.

[18] Patrick Pearsall, 'Causation and the Draft Articles on State Responsibility' in this Special Issue.

[19] James Crawford, 'Investment Tribunals and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Rev—FILJ 127, 130.

[20] *AES Corporation and Tau Power v Kazakhstan*, ICSID Case No ARB/10/16, Award (1 November 2013) para 460: 'In particular, Part Two of the ILC Articles do [*sic*] not apply to investment treaty arbitration between a company and a state.'

[21] See eg *Burlington Resources v Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award (7 February 2017) para 177.

[22] So often has this principle been referred to that Pierre-Marie Dupuy describes the reference to it as a 'ritual reminder'. See Pierre-Marie Dupuy, 'ARSIWA - a Reference Text Partially Victim of Its Own Success?' in this Special Issue.

[23] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep 1928, Series A, No 17, 47.

[24] On the original character of 'full restitution' as *obiter*, see Zachary Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 829ff.

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arbitration proceedings increased drastically, but since 2010 several awards have been handed down providing for compensation in amounts previously unheard of against sometimes fragile States.[25] Martins Paparinskis investigates this phenomenon when exploring the possibility of an exception for cases of 'crippling compensation' in the law of State responsibility.[26] In a nutshell, the author argues that tribunals and States should strive to limit the amount of compensation ordered, otherwise this could affect the functioning of the State itself. Despite his criticism of the status quo Paparinskis, interestingly, does not consider the ILC Articles generally incapable of doing justice to these scenarios. Rather, he sees opportunities for tribunals to accommodate the problem of arguably 'crippling compensation' within the framework of the ARSIWA, if States were to argue for their cause more decisively and tribunals were more responsive to it.

Another area of tension between arbitral practice and the stipulations of the ILC Articles concern the treatment of interest, which Christina L Beharry and Juan Pablo Hugues address in their article.[27] The decisive provision in this regard is Article 38 ARSIWA which lays down that interest 'shall be payable when necessary in order to ensure full reparation'. As Beharry and Hugues note, Article 38 ARSIWA leaves leeway to arbitrators but some central questions regarding interest are addressed in the wording of the Article and the corresponding commentary. Yet, this is not necessarily reflected in arbitral practice. For one, Article 38 ARSIWA states that interest shall be awarded when 'necessary in order to ensure full reparation'. Yet, in many cases tribunals seem to have almost automatically granted interest instead of inquiring whether this was actually 'necessary'. Further, the ILC advocated in its commentary to Article 38 ARSIWA for a restrictive approach with regard to the grant of compound interest.[28] However, Beharry and Hugues point out a shift over the past decades, in which tribunals have increasingly moved towards granting compound interest. The increased acceptance of this practice in investment law may also be a sign of the growing influence the discipline of international commercial arbitration has exercised in the field of investment arbitration.[29]

IV. CIRCUMSTANCES PRECLUDING WRONGFULNESS

Of the circumstances precluding wrongfulness laid down in Articles 20–25 ARSIWA, no rule has caused similar engagement in the area of investment law as Article 25, governing necessity. It is the circumstance precluding wrongfulness of the ILC Articles referred to by far the most often and one cannot help but notice that its relevance seems to have only increased since the first survey, when quantitatively comparing the references to Article 25 ARSIWA to those of Articles 20–24 ARSIWA. Accordingly,

[25] A frequently cited example in this regard is *Tethyan Copper Company v Pakistan,* ICSID Case No ARB/12/1, Award (12 July 2019) which ordered Pakistan to pay almost US$6 bn to the investor.

[26] Martins Paparinskis, 'Crippling Compensation in the International Law Commission and Investor-State Arbitration' in this Special Issue.

[27] Christina L Beharry and Juan Pablo Hugues, 'Article 38: The Treatment of Interest in International Investment Arbitration' in this Special Issue.

[28] ARSIWA (n 4) art 38, commentary para 8.

[29] On the nature of investment arbitration, see Zachary Douglas, 'The Hybrid Foundations of International Investment Law' (2004) 74 BYIL 151.

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it is no wonder that Article 25 ARSIWA has received particular scholarly attention in the past.[30]

The high number of invocations seems to suggest that States consider themselves frequently in a situation of crisis when facing investment claims. The significance of Article 25 ARSIWA in the context of investment arbitrations is also extensively dealt with in this Special Issue. In their article Federica Paddeu and Michael Waibel provide a comprehensive critique of how investment tribunals have interpreted Article 25 ARSIWA in their jurisprudence.[31] In sum, Paddeu and Waibel contend that tribunals may have applied too strict an approach when considering Article 25 ARSIWA. Concretely, the authors suggest, among other things, that tribunals often made it too easy for themselves by taking an *ex post* perspective when assessing necessity.[32] At a more general level, Paddeu and Waibel point out that tribunals' contributions highlight that the secondary rules of State responsibility by themselves cannot remedy primary rules that are 'insufficiently flexible' to deal with the exigencies of crisis situations.

Beyond interpretations that may give rise to criticism, the important pioneering role of investment tribunals becomes particularly evident with regard to their jurisprudence on the doctrine of necessity and Article 25 ARSIWA: investment tribunal decisions far outnumber those of any other international courts that have had the chance to consider pleas of necessity. Naturally, one can assume that their interpretations will radiate beyond investment law in the future. Within investment law itself, one can expect many opportunities for investment tribunals to address the plea of necessity in the coming years once the consequences of State reactions to the COVID-19 pandemic find their way into international courtrooms.[33]

That being said, the plea of necessity is not the only circumstance precluding wrongfulness which may be associated with the current pandemic in the future. While Article 23 ARSIWA regulating *force majeure* has hardly been referred to in investment arbitrations in the past, the current pandemic may prove a turning point in this regard. Wenhua Shan and Lu Wang note this possibility in their contribution.[34]

V. STATE RESPONSIBILITY, INVESTMENT LAW AND OTHER AREAS OF INTERNATIONAL LAW

Neither the ILC Articles nor international investment law exist in a vacuum. Rather, they both form part of the broader corpus of international law.[35] This Special Issue also addresses intersections of investment law and State responsibility with other areas of international law. August Reinisch and Sara Mansour Fallah assess the consequences for the law of State responsibility if host States attempt to terminate, suspend

[30] See eg Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 ICLQ 325; August Reinisch, 'Necessity in Investment Arbitration' (2011) 41 NYIL 137; Alan O Sykes, 'Economic "Necessity" in International Law' (2015) 109 AJIL 296, 310ff; Avidan Kent and Alexandra Harrington, 'The Plea of Necessity under Customary International Law: A Critical Review in Light of the Argentine Cases' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Arbitration* (CUP 2011).

[31] Federica Paddeu and Michael Waibel, 'Necessity 20 Years On: The Limits of Article 25′ in this Special Issue.

[32] In this regard they refer to the ARSIWA (n 4) art 25, commentary para 15.

[33] Mark C Weidemaier and Mitu Gulati, 'Necessity and the Covid-19 Pandemic' (2020) 15 Capital Markets Law Journal 277.

[34] Wenhua Shan and Lu Wang, '*Force Majeure* and Investment Arbitration' in this Special Issue.

[35] See generally regarding investment law's relationship with other areas of international law, Freya Baetens (ed), *Investment Law within International Law—Integrationist Perspectives* (CUP 2013).

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or modify investment treaties.[36] This issue has already become practically relevant in the past as a consequence of Venezuela's renunciation of the ICSID Convention.[37] The effect of mutual termination of IIAs including so-called sunset clauses, which the authors address in their contribution, is another example of the challenges that still remain to be addressed in this area.

Another issue at the intersection of different regimes, which has not arisen in arbitral proceedings but may well in the future concerns the relationship of investor-State dispute settlement and State succession in relation to State responsibility. As the Convention on Succession of States in Respect of Treaties[38] has no equivalent in the area of State responsibility, Patrick Dumberry and Marcelo Kohen look to the resolution of the Institut de Droit International and recent work of the ILC to fill this gap with regard to investment law.[39]

VI. OUTLOOK

The Special Issue demonstrates that the ILC Articles constitute a well-established point of reference in international investment law proceedings. In 2010, Jürgen Kurtz already noted 'the deep penetration of the ILC Articles into investment treaty arbitration' and the phenomenon has only become more marked since.[40] The contributions in this Special Issue raise one's hope that the relationship between the ILC Articles and international investment law is a mutually beneficial one. For one, they show how international investment law fulfils a pioneering role in letting the ILC Articles come to life in the practice of international courts to an extent unforeseen at the time of their drafting. In the framework of international investment law, State practice and opinio juris, as identified through judicial engagement, may allow customary international law to crystallize. By means of the integration of the ARSIWA into their jurisprudence, of which we could only scratch the surface in this introduction, investment tribunals serve as something of a laboratory for the usability of the ILC Articles in practice. By far and large, the experiment seems to be a success. Maybe there is less of a 'shipwreck' and more of a 'seaworthy ship' today compared to a decade ago.

[36] August Reinisch and Sara Mansour Fallah, 'Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors' in this Special Issue.

[37] See eg *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/13, Decision on Liability and the Principles of Quantum (30 December 2016) para 358; *Venoklim Holding BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015) paras 65ff.

[38] Vienna Convention on Succession of States in Respect of Treaties (opened for signature 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3.

[39] Marcelo Kohen and Patrick Dumberry, 'State Succession and State Responsibility in the Context of Investor-State Dispute Settlement' in this Special Issue.

[40] Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Rev—FILJ 200, 201.

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