

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

(2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal’s jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.^{[404] 127}

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

^{[404] 127} *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).

when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.^{[405] 128}

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such ... autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.^{[406] 129}

(5) The justification for attributing to the State under international law the conduct of “parastatal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (*e.g.* the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; *i.e.* where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is

^{[405] 128} League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (footnote [147] 88 above), p. 90. The German Government noted that these remarks would extend to the situation where “the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force”, *ibid.*

^{[406] 129} *Ibid.*, p. 92.

not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

IRAN-UNITED STATES CLAIMS TRIBUNAL

Phillips Petroleum Co. Iran v. Islamic Republic of Iran

In its 1987 award in the *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* case, the Tribunal, in determining whether the Islamic Republic of Iran was responsible for expropriation of goods of the claimant when it allegedly took the latter's property interests through the National Iranian Oil Company (NIOC), observed in a footnote, with reference to draft article 7 provisionally adopted by the International Law Commission:^[407] ⁶⁶

International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. See article 7(2) of the draft articles on State responsibility adopted by the International Law Commission, *Yearbook International Law Commission 2 (1975)*, at p. 60. The 1974 Petroleum Law of Iran explicitly vests in NIOC "the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources". NIOC was later integrated into the newly-formed Ministry of Petroleum in October 1979.^[408] ⁶⁷

[A/62/62, para. 43]

WORLD TRADE ORGANIZATION PANEL

Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products

In its 1999 reports on *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the panel referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading^[409] ⁶⁸ in support of its finding that

^[407] ⁶⁶ This provision was amended and incorporated in article 5 finally adopted by the International Law Commission in 2001. The text of draft article 7 provisionally adopted was as follows:

Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook ... 1980*, vol. II (Part Two), para. 34.)

^[408] ⁶⁷ IUSCT, Award No. 326-10913-2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 21 (1989), p. 79, para. 89, footnote 22.

^[409] ⁶⁸ Draft article 7 adopted on first reading was amended and incorporated in article 5 as finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook ... 1996*, vol. II

the Canadian provincial marketing boards acting under the explicit authority delegated to them by either the federal Government or a provincial Government were “agencies” of those Governments in the sense of article 9.1(a) of the Agreement on Agriculture, even if they were not formally incorporated as Government agencies. In a footnote, the panel reproduced the text of article 7, paragraph 2, and noted that this provision “might be considered as reflecting customary international law”.^{[410] 69}

[A/62/62, para. 44]

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Duško Tadić

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, observed:

It would ... seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as “a well-established rule of international law” [see page 65 above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.^{[411] 70}

In a footnote,^{[412] 71} the Appeals Chamber quoted draft article 7 adopted by the International Law Commission on first reading, as well as the corresponding draft article provisionally adopted by the Commission’s Drafting Committee in 1998.^{[413] 72}

Later in the same judgement, the Appeals Chamber twice referred to draft article 7 adopted by the ILC on first reading in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals.^{[414] 73} In a footnote corresponding to the statement that “the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of indi-

(Part Two), para. 65) was identical to that of article 7 provisionally adopted. (See footnote [407] 66 above.)

^[410] 69 WTO, Panel Report, WT/DS103/R and WT/DS113/R, 17 May 1999, para. 7.77, footnote 427.

^[411] 70 ICTY, Appeals Chamber, Judgement, Case No. IT-94-I-A, 15 July 1999, para. 109 (footnotes omitted).

^[412] 71 *Ibid.*, para. 109, footnote 130.

^[413] 72 The text of draft article 5 (Attribution to the State of the conduct of entities exercising elements of the governmental authority) adopted by the International Law Commission Drafting Committee in 1998 was the following:

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question. (*Yearbook ... 2000*, vol. II (Part Two), p. 65.)

^[414] 73 For the complete passage of the Appeals Chamber’s judgement on that issue, see [p. 128] below.

viduals must answer for their actions, even when they act contrary to their directives”,^[415] 74 the Appeals Chamber noted that

[t]his sort of “objective” State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in article 7 of the International Law Commission draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member states of federal States, *etc.*) even if under the national Constitution these organs enjoy broad independence or complete autonomy.^[416] 75

Subsequently, the Appeals Chamber also observed that

[i]n the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State’s public entity.^[417] 76

[A/62/62, para. 45]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Maffezini v. Kingdom of Spain

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini v. Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading:

a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil. Paragraph 2 of article 7 of the International Law Commission’s draft articles on State responsibility supports this position.^[418] 77

[A/62/62, para. 46]

INTERNATIONAL ARBITRAL TRIBUNAL

Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention referred to article 5 (as well as article 4) finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 69] above.

[A/62/62, para. 47]

^[415] 74 ICTY, Appeals Chamber, Judgement, Case No. IT-94-1-A, 15 July 1999, para. 122.

^[416] 75 *Ibid.*, para. 122, footnote 140.

^[417] 76 ICTY, Appeals Chamber, Judgement, Case No. IT-94-1-A, 15 July 1999, para. 123 (footnotes omitted).

^[418] 77 ICSID, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 78 (footnotes omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 29.

INTERNATIONAL ARBITRAL TRIBUNAL

Eureko B.V. v. Republic of Poland

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV v. Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, referred to the commentary to article 5 finally adopted by the International Law Commission in 2001.^{[419] 78}

[A/62/62, para. 48]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Noble Ventures, Inc. v. Romania

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc. v. Romania* case, in determining whether the acts of a Romanian “institution of public interest” (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 5 finally adopted by the International Law Commission in 2001:

The 2001 draft articles ... attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by article 5 of the 2001 International Law Commission draft.^{[420] 79}

[A/62/62, para. 49]

Consorzio Groupement LESI-DIPENTA v. People's Democratic Republic of Algeria and LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria

In its 2005 and 2006 awards, the arbitral tribunal constituted to hear the *Consorzio Groupement LESI-DIPENTA v. Algeria* and the *LESI and Astaldi v. Algeria* cases referred, *inter alia*, to article 6 finally adopted by the International Law Commission in 2001 in support of its finding according to which “the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence”.^{[421] 80}

[A/62/62, para. 50]

^{[419] 78} See footnote [55] 11 above, para. 132. The arbitral tribunal referred in particular to paragraph (1) of the commentary to article 5 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

^{[420] 79} ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 70.

^{[421] 80} ICSID, Case No. ARB/03/08, Award, 10 January 2005, para. 19, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 2, 2004, pp. 455–456 (unofficial English translation by ICSID of the French original) and Case No. ARB/05/3, Award, 12 July 2006, para. 78. Although in these awards the tribunal inadvertently refers to article 8 (concerning the conduct of private persons directed or controlled by a State), the situation it was dealing with involved the conduct of a public entity

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Encana Corporation v. Republic of Ecuador

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp. v. Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, after having found that the conduct at issue of Petroecuador, a State-owned and State-controlled instrumentality of Ecuador, was attributable to the latter, noted that it “does not matter for this purpose whether this result flows from the principle stated in article 5 of the International Law Commission’s articles on responsibility of States for internationally wrongful acts or that stated in article 8”, and quoted the text of these provisions as finally adopted by the Commission in 2001.^{[422] 81}

[A/62/62, para. 51]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* case referred, *inter alia*, to article 5 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 52]

Helnan International Hotels A/S v. The Arab Republic of Egypt

The arbitral tribunal in the *Helnan International Hotels A/S v. Egypt* case considered a challenge by the Respondent to its jurisdiction on the ground that the actions of the domestic entity under scrutiny in the case were not attributable to Egypt, despite the fact that the entity was wholly owned by the Government of Egypt. While the tribunal found that it did have jurisdiction on other grounds, it nonetheless proceeded to consider the Respondent’s challenge and found that the claimant had convincingly demonstrated that the entity in question was “under the close control of the State”. In making this finding, it referred to the commentary to article 5 of the State responsibility articles, first by way of acknowledgment that the

fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State.^{[423] 12}

Nonetheless, the tribunal noted that “[the domestic entity] was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government” and proceeded to recall article 5 (which is quoted in full) and then held that “[e]ven if [the domestic entity]

exercising elements of governmental authority, which is covered by article 5 of the International Law Commission articles. These references are accordingly included under this section of the compilation.

^[422] 81 London Court of International Arbitration, Case No. UN3481, Award, 3 February 2006, para. 154.

^[423] 12 Paragraph (3) of the commentary to article 5.

has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State”^[424] 13

[A/65/76, para. 17]

Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.^[425] 36 The tribunal concluded that “there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent”^[426] 37

[See A/68/72, footnote 55 and para. 32]

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* case indicated that “[i]n order for an act to be attributed to a State, it must have a close link to the State”^[427] 56 Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when “the person performing the act is part of the State’s organic structure (Article 4); or is utilising the State’s specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control ... of the State, even if it is a private or public party (Article 8)”^[428] 57 The tribunal noted that, under article 5, “[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority”^[429] 58

Upon consideration of the relevant law and facts, the tribunal concluded that, under article 5, the entity exercised “elements of governmental authority”^[430] 59 Nonetheless, the tribunal indicated that such a conclusion

in itself clearly does not resolve the issue of attribution [F]or an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity. This approach has been followed in national as well as international case law.^[431] 60

In applying article 5 to the particular acts at issue, the tribunal “concentrated on the utilisation of governmental power”, and assessed whether the entity in question

^[424] 13 ICSID, Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras. 92 and 93.

^[425] 36 See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

^[426] 37 *Ibid.*, paras. 274 and 280.]

^[427] 56 See footnote [105] 20 above, para. 172.

^[428] 57 *Ibid.*

^[429] 58 *Ibid.*, paras. 175–177.

^[430] 59 *Ibid.*, para. 192.

^[431] 60 *Ibid.*, para. 193.

acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.^{[432] 61}

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that “attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed ‘on the instructions of, or under the direction or control’ of that State”.^{[433] 62}

[A/68/72, paras. 45–48]

[Alpha Projektholding GmbH v. Ukraine

The arbitral tribunal in *Alpha Projektholding GmbH v. Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a “State organ . . . is clearly attributable to the State under Article 4(1) of the ILC Articles”.^{[434] 39} The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ’s conduct “was based on commercial or other reasons is irrelevant with respect to the question of attribution”.^{[435] 40}

[See A/68/72, footnote 55 and para. 34]]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (SEABED DISPUTES CHAMBER)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that certain rules on the liability of sponsoring States in UNCLOS

are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).^{[436] 63}

[A/68/72, para. 49]

WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of

^[432] 61 *Ibid.*, para. 202; see also paras. 255, 266 and 284.

^[433] 62 *Ibid.*, para. 198.

^[434] 39 See footnote [293] 39, para. 401.]

^[435] [40 *Ibid.*, para. 402.]

^[436] 63 See footnote [12] 10 above, para. 182.

attribution contained in the State responsibility articles are “relevant rules of international law applicable in the relations between the parties”.^[437]⁶⁴ The Appellate Body held that, “[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be ‘relevant’ in the sense of the Vienna Convention [on the Law of Treaties]”.^[438]⁶⁵ The Appellate Body indicated that both the State responsibility articles and the SCM Agreement “set out rules relating to the question of attribution of conduct to a State”, though it noted “certain differences” in their respective approach to attribution.^[439]⁶⁶

Concerning whether the State responsibility articles are “rules of international law ... applicable in the relations between the parties”, the Appellate Body noted that “Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties”.^[440]⁶⁷

The Appellate Body also indicated that, “despite certain differences between the attribution rules”, its interpretation of the term “public body” as found in the SCM Agreement “coincides with the essence of Article 5”.^[441]⁶⁸

In the light of its determination that article 5 supported, rather than contradicted, its interpretation of the SCM Agreement, and “because the outcome of [its] analysis [did] ... not turn on Article 5”, the Appellate Body indicated that it was “not necessary ... to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law”.^[442]⁶⁹

[A/68/72, paras. 50–53]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

[*Sergei Paushok et al. v. The Government of Mongolia*]

The arbitral tribunal in the *Sergei Paushok et al. v. The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting “international law rules of attribution” applicable to the dispute “which are generally considered as representing current customary international law”.^[443]⁴¹ While noting that the State responsibility articles “do not contain a definition of what constitutes an organ of the State”,^[444]⁴² the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article’s reference to “State organ”.^[445]⁴³

^[437] ⁶⁴ See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(c)).

^[438] ⁶⁵ *Ibid.*, para. 308.

^[439] ⁶⁶ *Ibid.*, para. 309.

^[440] ⁶⁷ *Ibid.*, para. 308; see below, p. 537, for discussion of the Appellate Body’s consideration of whether articles 4, 5 and 8 of the State responsibility articles would “be superseded by ... the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles”; *ibid.*, para. 314.

^[441] ⁶⁸ *Ibid.*, para. 310.

^[442] ⁶⁹ *Ibid.*, para. 311.

^[443] [41 See footnote [299] 41, paras. 576 and 577.]

^[444] [42 *Ibid.*, para. 581.]

^[445] [43 *Ibid.*, para. 582.]

The tribunal also indicated that the distinction between articles 4 and 5 was “of particular relevance in the determination of potential liability of the State”.^[446] 44]

[See A/68/72, footnote 55 and paras. 35–36]

[White Industries Australia Limited v. The Republic of India

In its award, the arbitral tribunal in *White Industries Australia Limited v. The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was “patently ... not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5.”^{[447] 87}

[See A/68/72, footnote 55 and para. 67]]

EUROPEAN COURT OF HUMAN RIGHTS

Kotov v. Russia

In its judgment in *Kotov v. Russia*, the European Court of Human Rights referred to the commentary to article 5 as part of its elaboration of the law relevant to the attribution of international responsibility to States.^{[448] 70} The Court quoted excerpts of the commentary relevant to the determination of which entities, including “parastatal entities”, were to be regarded as “governmental” for the purposes of attribution under international law.^{[449] 71}

[A/68/72, para. 54]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Claimants v. Slovak Republic

The arbitral tribunal in *Claimants v. Slovak Republic* noted that “there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission ...”.^{[450] 72} Upon consideration of articles 5 and 8, the tribunal determined that, on the basis of the evidence presented, the acts of certain non-State entities and individuals could not be said to have been “carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State”.^{[451] 73}

[A/68/72, para. 55]

^[446] ^[44] *Ibid.*, para. 580.]

^[447] ^[87] See footnote [303] 87 above, para. 8.1.2.]

^[448] ^[70] See footnote [16] 14 above, paras. 31–32 (quoting paras. (3) and (6) of the commentary to article 5).

^[449] ^[71] *Ibid.*

^[450] ^[72] See footnote [305] 46 above, paras. 150–151.

^[451] ^[73] *Ibid.*, paras. 156–159; the tribunal added that, “if it were established that a State organ had acted under the influence of [a non-state entity], such acts would be attributable to the State.”; see also *ibid.*, para. 163.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Ulysseas, Inc. v. The Republic of Ecuador

The arbitral tribunal in the *Ulysseas, Inc. v. The Republic of Ecuador* case determined that the conduct of certain entities, despite not constituting organs of the Ecuadorian State, “may nonetheless fall within the purview of Article 5 of the ILC Articles and [the relevant] BIT to the extent governmental authority has been delegated to it with the consequence that some of their acts can be attributed to the State, provided that they are ‘acting in that capacity in the particular instance.’”^[452] 74

[A/68/72, para. 56]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise v. Ukraine

In its award, the arbitral tribunal in *Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise v. Ukraine* relied upon article 5 in its analysis of whether a university’s conduct was attributable to Ukraine.

The tribunal considered (1) whether the university was “empowered by the law of Ukraine to exercise elements of governmental authority”, and (2) whether “the conduct of the University relates to the exercise of that governmental authority”.^[453] 75

With regard to the second aspect of its analysis, the tribunal relied upon the commentary to article 5 in indicating that “the question that falls for determination is whether the University’s conduct in entering into and terminating the [relevant contract] can be understood or characterised as a form of ‘governmental activity’, or as a form of ‘commercial activity’”.^[454] 76

The tribunal also referred to article 5 as part of its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term “Party”, as used in the umbrella clause, referred “to any situation where the Party is acting *qua* State”, namely “where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) ...”.^[455] 77

[A/68/72, paras. 57–60]

Teinver S.A., et al. v. The Argentine Republic

The arbitral tribunal in *Teinver S.A., et al. v. The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the “fact-intensive nature of [the claimants’] allegations”, the tribunal decided to postpone adjudication of the attribution issue until the merits phase.^[456] 99 Nonetheless, the tribunal

^[452] 74 See footnote [308] 49 above, para. 135 (quoting article 5).

^[453] 75 See footnote [310] 75 above, para. 164 (citing James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 100).

^[454] 76 *Ibid.*, para. 176.

^[455] 77 *Ibid.*, para. 246. The tribunal stated, in dictum, that it “could not agree that the [university in question] is a ‘State organ’ within the meaning of Article 4 of the ILC Articles”.

^[456] 99 See footnote [315] 99 above, para. 274.]

accepted the assertion of both parties “that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions’ conduct ...”^[457] 100

[See A/68/72, footnote 55 and para. 73]]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Luigiterzo Bosca v. Lithuania

The arbitral tribunal in *Luigiterzo Bosca v. Lithuania* concluded that “[t]he SPF [State Property Fund] is an entity empowered to exercise governmental authority, as described in Article 5” of the State responsibility articles. The question for the arbitral tribunal was thus “whether the SPF was acting in a sovereign capacity”.^[458] 70

[A/71/80, para. 56]

EUROPEAN COURT OF HUMAN RIGHTS

Jones and Others v. the United Kingdom

The European Court of Human Rights in *Jones and Others v. the United Kingdom* referred to article 5 as relevant international law,^[459] 71 and noted that the acts of “persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles” could be attributed to the State.^[460] 72

[A/71/80, para. 57]

Samsonov v. Russia

In *Samsonov v. Russia*, the European Court of Human Rights referred to article 5 of the State responsibility articles as relevant international law.^[461] 73

[A/71/80, para. 58]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that “the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties”.^[462] 59

^[457] ^[100] *Ibid.*, para. 275.]

^[458] ^[70] See footnote [169] 26 above, para. 127 (misnumbered).

^[459] ^[71] See footnote [323] 49 above, paras. 107–109.

^[460] ^[72] *Ibid.*, para. 207.

^[461] ^[73] See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

^[462] ^[59] See footnote [333] 59 above, para. 308]

The arbitral tribunal, relying on article 5, agreed with the investor's contention that even if the Joint Review Panel was not "an integral part of the government apparatus of Canada ... it is empowered to exercise elements of Canada's governmental authority".^[463]⁷⁴

[A/71/80, paras. 49 and 59]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Dan Cake S.A. v. Hungary

The arbitral tribunal in *Dan Cake S.A. v. Hungary* considered that "it is not relevant to the question whether the *liquidator* is, pursuant to Article 5 of the ILC Draft Articles on State Responsibility, 'a person or entity ... which is empowered by the law of [the] State to exercise elements of the governmental authority'".^[464]⁷⁵

[A/71/80, para. 60]

INTER-AMERICAN COURT OF HUMAN RIGHTS

Gonzales Lluy et al. v. Ecuador

In *Gonzales Lluy et al. v. Ecuador*, the Inter-American Court of Human Rights cited the case of *Ximenes Lopes v. Brazil*, noting that in that case the Court had

indicated that the assumptions of State responsibility for violation of rights established in the Convention may include the conduct described in the Resolution of the International Law Commission, 'of a person or entity that, although not a State body, is authorized by the laws of the State to exercise powers entailing the authority of the State. Such conduct, by either a natural or legal person, must be deemed to be an act of the State, provided that the latter was acting in this capacity'.^[465]⁷⁶

[A/71/80, para. 61]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Adel A Hamadi Al Tamimi v. Sultanate of Oman

In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal noted that article 5 "provides a useful guide as to the dividing line between sovereign and commercial acts".^[466]⁷⁷

[A/71/80, para. 62]

Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* stated that as regards attribution of the conduct of Emlak to Turkey under

^[463] ⁷⁴ *Ibid.*

^[464] ⁷⁵ ICSID, Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, para. 158 (quoting article 5).

^[465] ⁷⁶ IACHR, Judgment, 1 September 2015, note 205 (quoting *Case of Ximenes Lopes v. Brazil, Merits, Reparations and Costs*, Judgment, 4 July, 2006, para. 86).

^[466] ⁷⁷ See footnote [340] 66 above, para. 324.

article 5 “it must be established both that (1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and (2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority”.^{[467] 78}

[A/71/80, para. 63]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, the arbitral tribunal considered the question

whether CVG FMO [Ferrominera del Orinoco] was empowered by Venezuela to exercise elements of governmental authority, and was so acting in the case of the Supply Contract, and, specifically, the discriminatory supply of pellets, such that its actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles.^{[468] 79}

[A/71/80, para. 64]

[The arbitral tribunal in *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela* was “mindful of Note 3 of the commentary to Article 5” of the State responsibility articles when rejecting the applicant’s submission that “[CVG FMO]’s actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles”.^{[469] 65}

[A/74/83, p. 14]]

Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that “[i]n order for an act to be attributed to a State, it must have a close link to the State”.^{[470] 52}

[A/74/83, p. 12]]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. The Republic of India*, the arbitral tribunal concluded that “when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles”.^{[471] 38}

[A/74/83, p. 11]]

^[467] 78 See footnotes [210] 40 and [128] 16 above, para. 292.

^[468] 79 See footnote [342] 68 above, para. 414.

^[469] ^[65] ICSID, Case No. ARB/11/26, Award, 29 January 2016, paras. 414–415.]

^[470] ^[52] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

^[471] ^[38] PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.]

Mesa Power Group v. Government of Canada

In *Mesa Power Group v. Government of Canada*, the arbitral tribunal relied on article 5 of the State responsibility articles to find that “the OPA [Ontario Power Authority] was acting in the exercise of delegated governmental authority. Thus, the OPA’s acts in ranking and evaluating the FIT Applications are attributable to Canada”.^[472] 66

[A/74/83, p. 15]

[In *Mesa Power Group v. Government of Canada*, the arbitral tribunal referred to article 55 of the State responsibility articles when finding that “Article 1503(2) [of NAFTA] constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles”.^[473] 249

[A/74/83, p. 42]]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Antoine Abou Lahoud et Leila Bounafteh-Abou Lahoud v. République Démocratique du Congo

In *Antoine Abou Lahoud et Leila Bounafteh-Abou Lahoud v. République Démocratique du Congo*, the committee established to annul the award found that the arbitral tribunal did not exceed its powers because, as its mandate required, it had verified the criteria for attribution of conduct under article 5 of the State responsibility articles.^[474] 67

[A/74/83, p. 15]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* found that “the termination of the Lease Agreement was not attributable to Poland under ILC Article 5”^[475] 68 after deciding that the Polish Agricultural Property Agency’s termination of the Lease Agreement took place in a “purported exercise of contractual powers”.

[A/74/83, p. 15]

Flemingo DutyFree Shop Private Limited v. The Republic of Poland

In *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, the arbitral tribunal noted that

[t]he Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles.^[476] 69

[A/74/83, p. 15]

^[472] 66 PCA, Case No. 2012–17, Award, 24 March 2016, para. 371.

^[473] ^[249] PCA, Case No. 2012–17, Award, 24 March 2016, paras. 359, 362 and 365.]

^[474] 67 ICSID, Case No. ARB/10/4, Decision on Annulment, 29 March 2016, para. 185.

^[475] 68 PCA, Case No. 2015–13, Award, 27 June 2016, para. 251.

^[476] 69 PCA, Award, IIC 883 (2016), 12 August 2016, para. 439.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Garanti Koza LLP v. Turkmenistan

The arbitral tribunal in *Garanti Koza LLP v. Turkmenistan*, citing article 5 of the State responsibility articles,

confirm[ed] that the acts of TAY [State Concern ‘Turkmenavtoyollary’] in furtherance of the Contract were attributable to Turkmenistan. Road and bridge construction is in any event a core function of government. Any entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of State.^{[477] 70}

[A/74/83, p. 15]

Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela

In *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, the arbitral tribunal noted that “although PDVSA is a State-owned company with distinct legal personality, its conduct is attributable to [the] Respondent pursuant to Article 5 of the ILC Draft Articles” because “[b]oth in its alleged function as a ‘caretaker’ and its capacity as supervisor and promoter of the nationalization of the plant, PDVSA was vested with governmental authority”.^{[478] 71}

[A/74/83, p. 15]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

WNC Factoring Limited v. The Czech Republic

In *WNC Factoring Limited v. The Czech Republic*, the arbitral tribunal stated that “[b]ased on the material available to the Tribunal, there are serious issues which arise in attributing the conduct of CEB [Czech Export Bank] and GAP [Export Guarantee and Insurance Corporation] to the Respondent under Article 5 of the ILC Articles”.^{[479] 72}

[A/74/83, p. 16]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Beijing Urban Construction Group Co. Ltd. v. Yemen

In *Beijing Urban Construction Group Co. Ltd. v. Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were “the mirror image of the attribution rules in Articles 5 and 8 of the ILC’s *Articles on State Responsibility*”.^{[480] 73}

[A/74/83, p. 16]

^[477] 70 ICSID, Case No. ARB/11/20, Award, 19 December 2016, para. 335.

^[478] 71 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 457–458.

^[479] 72 PCA, Case No. 2014–34, Award, 22 February 2017, para. 376.

^[480] 73 ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.

UAB E Energija (Lithuania) v. Republic of Latvia

The arbitral tribunal in *UAB E Energija (Lithuania) v. Republic of Latvia* stated:

Like Article 4, Article 5 of the ILC Articles merely codifies a well-established rule of international law. [...] There are thus three aspects to the analysis: (i) the Regulator must have exercised elements of governmental authority; (ii) it must have been empowered by the Respondent's law to do so; and (iii) it was acting in that capacity in regulating tariffs and granting or revoking licences.^{[481] 74}

The tribunal found that “even if Rēzeknes Siltumtikli and Rēzeknes Enerģija had been empowered to exercise any element of governmental authority, they were not exercising such authority ‘in the particular instance’, as Article 5 requires”.^{[482] 75}

[A/74/83, p. 16]

Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia* cited article 5 of the State responsibility articles and noted that “[t]he Croatian Fund is an entity empowered by Croatian law to exercise elements of governmental authority, as exemplified above, and there is no suggestion that the Fund acted other than in its professional capacity. The Croatian Fund may thus be considered an entity within the ambit of Article 5.”^{[483] 76} The tribunal concluded that “the Claimants have not made out any wrongful conduct in violation of the BIT on the part of the Croatian Fund that is to be attributed to the Respondent. The principles of attribution, as codified in the ILC Articles, do not otherwise operate in respect of the Croatian Fund”.^{[484] 77}

[A/74/83, p. 16]

Unión Fenosa Gas, S.A. v. Arab Republic of Egypt

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the arbitral tribunal relied on article 5 of the State responsibility to find that:

[t]he Tribunal does not consider that the Claimant's case is separately advanced by Article 5 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company]. The Claimant has not established that EGPC or EGAS are ‘empowered’ by Egyptian law to exercise governmental authority ... The Tribunal has not been shown any provision of Egyptian law ‘specifically authorising’ EGPC to conclude the SPA [Natural Gas Sale and Purchase Agreement] in the exercise of the Respondent's public authority.^{[485] 78}

[A/74/83, p. 16]

^{[481] 74} ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 806–807.

^{[482] 75} *Ibid.*, para. 816.

^{[483] 76} ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 810–811.

^{[484] 77} *Ibid.*, para. 816.

^{[485] 78} ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.114.

INTER-AMERICAN COURT OF HUMAN RIGHTS

Women Victims of Sexual Torture in Atenco v. Mexico

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco v. Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.^{[486] 79}

[A/74/83, p. 17]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ampal-American Israel Corporation and others v. Arab Republic of Egypt

The arbitral tribunal in *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.^{[487] 96}

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

were ‘*in fact acting on the instructions of, or under the direction or control of*’ the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus ‘*acknowledge[d] and adopt[ed] the conduct in question as its own*’ within the terms of Article 11.^{[488] 97}

[A/74/83, p. 20]]

Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* concluded, citing the text of articles 5 and 8 of the State responsibility articles, that “Lakhra’s acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan”.^{[489] 101}

[A/74/83, p. 20]]

^[486] 79 IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 205 and footnote 303.

^[487] ^[96] ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

^[488] ^[97] *Ibid.*, para. 146.]

^[489] ^[101] ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.]

[INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)]

Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria* took the view that “all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles”.^[490]⁴² The tribunal also cited articles 1, 5, 9, 34, 36 and 38.^[491]⁴³

[A/77/74, p. 11]]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria

In *Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria*, the arbitral tribunal cited the text of article 5 and the commentary thereto,^[492]⁵⁴ and noted that “jurisprudence consistently indicates that article 5 ... imposes two conditions that must both be fulfilled, namely: (i) under national law, the entity in question is authorized to exercise elements of governmental authority, and (ii) the act in question involves the exercise of governmental authority.”^[493]⁵⁵ The tribunal noted that “acts *jure gestionis* of public or private entities cannot be attributed to the State in principle under article 5, since the article concerns precisely the determination of whether the entity in question is exercising the functions, or elements, of governmental authority”.^[494]⁵⁶

Furthermore, the tribunal noted that, despite the absence in the State responsibility articles of a definition of the term “elements of governmental authority”, it took the view that “this involves establishing in each case, in the light of the circumstances and evidence of the effective exercise of elements of sovereign authority, what the situation is”,^[495]⁵⁷ and that the commentary “provides certain criteria that make it possible to identify the scope of governmental authority, such as (i) the content of the powers, (ii) the way they are conferred on an entity, (iii) the purposes for which they are to be exercised and (iv) the extent to which the entity is accountable to government for their exercise”.^[496]⁵⁸

[A/77/74, p. 12]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State

^[490] ^[42] Final Award, 26 March 2021, para. 72.]

^[491] ^[43] *Ibid.*, paras. 72 and 134–135.]

^[492] ⁵⁴ See footnote [381] 32 above, paras. 193 and 195–197.

^[493] ⁵⁵ *Ibid.*, para. 194; see also paras. 196–197.

^[494] ⁵⁶ *Ibid.*, para. 200.

^[495] ⁵⁷ *Ibid.*, para. 201.

^[496] ⁵⁸ *Ibid.*, para. 202.

responsibility “only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6.” The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.^{[497] 70}

[A/77/74, p. 14]]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

Strabag SE v. Libya

In *Strabag SE v. Libya*, the arbitral tribunal analysed whether Libya had entered into a contract with the investor through the conduct of local authorities.^{[498] 59} The tribunal considered that to interpret “Libya” as only the Government of Libya would fail to take into account that, as noted in the commentary to article 5, “States may operate through ‘parastatal entities, which exercise elements of governmental authority in place of State organs ...]’. The Tribunal therefore believes that [the text of the treaty] does not mean only the Government of Libya, but may also include other Libyan bodies”.^{[499] 60}

[A/77/74, p. 13]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela

The arbitral tribunal in *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela* referred to article 5, noting that “[t]he concept of ‘governmental authority’ is not defined in the ILC Articles. What, however, is required is that the law of the State authorizes an entity to exercise some aspects of that State’s power, that is, public authority”.^{[500] 61}

[A/77/74, p. 13]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria

In *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, the arbitral tribunal recalled that “[i]n principle, State-controlled entities are considered as separate from the State, unless they exercise elements of governmental authority within the meaning of ILC Article 5”.^{[501] 62}

[A/77/74, p. 13]

^[497] ^[70] *Ibid.*, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l’État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

^[498] ^[59] ICSID (Additional Facility), Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 168.

^[499] ^[60] *Ibid.*, para. 170.

^[500] ^[61] See footnote [126] 14 above, para. 198.

^[501] ^[62] ICSID, Case No. ARB/13/20, Award, 6 October 2020, para. 297.