Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term “international responsibility” covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the Phosphates in Morocco case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established “immediately as between the two States”.[10]34 ICJ has applied the principle on several occasions, for example in the Corfu Channel case,[11]35 in the Military and Paramilitary Activities in and against Nicaragua case,[12]36 and in the Gabčíkovo-Nagymaros Project case.[13]37 The Court also referred to the principle in its advisory opinions on Reparation for Injuries,[14]38 and on the Interpretation of Peace Treaties (Second Phase),[15]39 in which it stated that “refusal to fulfil a treaty obligation involves international responsibility”. Arbitral tribunals have repeatedly affirmed the principle, for example in the Claims of Italian Nationals Resident

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[16] 40 Ibid., p. 228.

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[24] 48 and since[25] 49 article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the “subjective” right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authoriza-

[17] 41 Seven of these awards rendered in 1901 reiterated that “a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents” (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).


[20] 44 According to the arbitrator, Max Huber, it is an indisputable principle that “responsibility is the necessary corollary of rights. All international rights entail international responsibility”, UNRIAA, vol. II (Sales No. 1949.V.I), p. 615, at p. 641 (1925).


tion accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.\[26\] \[50\] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a “sanction”.\[27\] \[51\] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State \textit{inter se}. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the \textit{Barcelona Traction} case when it noted that:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising \textit{vis-à-vis} another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations \textit{erga omnes}.\[28\] \[52\]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced “the outlawing of acts of aggression, and of genocide, as also . . . the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.\[29\] \[53\] In later cases the Court has reaffirmed this idea.\[30\] \[54\] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term “international responsibility” in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.


\[29\] \[53\] \textit{Ibid.}, para. 34.

The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the Reparation for Injuries case, the United Nations “is a subject of international law and capable of possessing international rights and duties . . . it has capacity to maintain its rights by bringing international claims”.[31] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[32] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[33]

As to terminology, the French term fait internationalement illicite is preferable to délIT or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as “tort”, “delict” or “delinquency”, or in Spanish the term delito. The French term fait internationalement illicite is better than acte internationalement illicite, since wrongfulness often results from omissions which are hardly indicated by the term acte. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term hecho internacionalmente ilícito is adopted in the Spanish text. In the English text, it is necessary to maintain the expression “internationally wrongful act”, since the French fait has no exact equivalent; nonetheless, the term “act” is intended to encompass omissions, and this is made clear in article 2.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. Tihomir Blaškić (“Lasva Valley”)

In its 1997 decision on the objection of the Republic of Croatia to the issuance of subpoenae duces tecum in the Blaškić case, which was later submitted to review by the Appeals Chamber,[34] Trial Chamber II of the International Tribunal for the Former Yugoslavia,
in considering whether individuals could be subject to orders (more specifically *subpoenaes duces tecum*) from the Tribunal, quoted the text of draft article 1 adopted on first reading,\footnote{This provision was reproduced without change in article 1 finally adopted by the International Law Commission in 2001.} which it considered to be an “established rule of international law”:

If the individual complies with the order in defiance of this government, he may face the loss of his position and possibly far greater sanctions than need be mentioned here. Given the International Tribunal’s lack of police power, it would be very difficult to provide adequate protection for an official who so defied his State. Based on the principle *ultra posse nemo tenetur*, which states that one should not be compelled to engage in a behaviour that is nearly impossible, it may not be proper to compel an individual to comply with such an order in his official capacity in such circumstances. However, these concerns must be balanced with the need of the International Tribunal to obtain the information necessary for a just and fair adjudication of the criminal charges before it. Due to these concerns and noting the established rule of international law that “[e]very internationally wrong act of a State entails the international responsibility of that State”, the duty to comply in such a scenario must be placed on the State, with appropriate sanctions or penalties for non-compliance . . .\footnote{International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor v. Tihomir Blaškić ("Lasva Valley"), Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, Case No. IT-95–14, 18 July 1997, para. 95 (footnotes omitted).}

\[A/62/62, para. 8\]

**International arbitral tribunal**

*In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV v. Republic of Poland* case, in support of its finding that a State may be responsible for omissions by its organs, quoted the commentary to article 1 finally adopted by the International Law Commission in 2001.\footnote{In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland, partial award, 19 August 2005, para. 188. The arbitral tribunal referred in particular to paragraphs (1) and (8) of the commentary to article 1 ([Yearbook of the International Law Commission, 2001, vol. II (Part Two)], para. 77).}

\[A/62/62, para. 9\]
Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the Phosphates in Morocco case. The Court explicitly linked the creation of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right[s] of another State”. ICJ has also referred to the two elements on several occasions. In the United States Diplomatic and Consular Staff in Tehran case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.

Similarly in the Dickson Car Wheel Company case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is “that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard”. 60

(3) The element of attribution has sometimes been described as “subjective” and the element of breach as “objective”, but the articles avoid such terminology. Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective”. For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .” In

[38] 58 See footnote [10] 34 above.


[40] 60 See footnote [18] 42 above.

other cases, the standard for breach of an obligation may be “objective”, in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an “omission” from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the Corfu Channel case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.\[^{42}\]\[^{62}\] In the United States Diplomatic and Consular Staff in Tehran case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the “inaction” of its authorities which “failed to take appropriate steps”, in circumstances where such steps were evidently called for.\[^{43}\]\[^{63}\] In other cases it may be the combination of an action and an omission which is the basis for responsibility.\[^{44}\]\[^{64}\]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An “act of the State” must involve some action or omission by a human being or group: “States can act only by and through their agents and representatives.”\[^{45}\]\[^{65}\] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an “act of the State” for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and


\[^{44}\] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the Factory at Chorzów case, PCIJ used the words “breach of an engagement”. It employed the same expression in its subsequent judgment on the merits. ICJ referred explicitly to these words in the Reparation for Injuries case. The arbitral tribunal in the “Rainbow Warrior” affair referred to “any violation by a State of any obligation”. In practice, terms such as “non-execution of international obligations”, “acts incompatible with international obligations”, “violation of an international obligation” or “breach of an engagement” are also used. All these formulations have essentially the same meaning. The phrase preferred in the articles is “breach of an international obligation” corresponding as it does to the language of Article 36, paragraph 2 (c), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act “contrary to the treaty right[s] of another State” in its judgment in the Phosphates in Morocco case. That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the

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[47] 67 Factory at Chorzów, Merits (ibid.).
[50] 70 At the Conference for the Codification of International Law, held at The Hague in 1930, the term “any failure . . . to carry out the international obligations of the State” was adopted (see Yearbook . . . 1956, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).
obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.\footnote{52} \footnote{72}

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.\footnote{53} \footnote{73}

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by “fault” one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (a)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (b)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (a), the term “attribution” is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term “imputation” is also used.\footnote{54} \footnote{74} But the term “attribution” avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is “really” that of someone else.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not

\footnote{52} See also article 33, paragraph 2, and commentary.


simply the existence of a rule but its application in the specific case to the responsible State. The term “obligation” is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an “obligation” is limited to an obligation under international law, a matter further clarified in article 3.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Amco Asia Corporation and Others v. Republic of Indonesia

In its 1990 award on the merits, the arbitral tribunal constituted to hear the Amco Indonesia Corporation and Others v. Indonesia case considered that draft article 3 provisionally adopted by the International Law Commission\(^{[55]}\) (as well as articles 5 and 10 provisionally adopted), which it quoted \textit{in extenso}, constituted "an expression of accepted principles of international law":

It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investments against unlawful acts committed by some of its citizens . . . If such acts are committed with the active assistance of state-organs a breach of international law occurs. In this respect, the Tribunal wants to draw attention to the draft articles on State responsibility formulated in 1979 by the International Law Commission and presented to the General Assembly of the United Nations as an expression of accepted principles of international law.\(^{[56]}\)

\[A/62/62, \text{para. 10}\]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. Argentine Republic

In its 2002 decision on annulment in the CAA and Vivendi Universal v. Argentina case, the \textit{ad hoc} committee noted that, “[i]n considering the [arbitral] Tribunal’s findings on the merits [in the award involved in the annulment proceedings], it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims ‘based directly on alleged actions or failures to act of the Argentine Republic’ and, on the other hand,

\[55\] This provision was amended and incorporated in article 2 adopted by the International Law Commission in 2001. The text of draft article 3 provisionally adopted read as follows:

\begin{quote}
\textbf{Article 3}

\textbf{Elements of an internationally wrongful act of a State}

There is an internationally wrongful act of a State when:

\begin{itemize}
\item \textbf{(a)} Conduct consisting of an action or omission is attributable to the State under international law; and
\item \textbf{(b)} That conduct constitutes a breach of an international obligation of the State. (Yearbook . . . 1980, vol. II (Part Two), para. 34.)
\end{itemize}
\end{quote}

claims relating to conduct of the [Argentine province of] Tucumán authorities which are nonetheless brought against Argentina and ‘rely . . . upon the principle of attribution’.”

In a footnote, the ad hoc committee criticized the arbitral tribunal’s terminology on the basis of the text of and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission:

. . . The terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. See International Law Commission articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 54/83, 12 December 2001 . . . , articles 2(a), 4 and the Commission’s commentary to article 4, paras. (8)-(10). A similar remark may be made concerning the Tribunal’s later reference to “a strict liability of attribution” . . . Attribution has nothing to do with the standard of liability or responsibility. The question whether a State’s responsibility is “strict” or is based on due diligence or on some other standard is a separate issue from the question of attribution (cf. International Law Commission articles, arts. 2, 12). It does not, however, appear that either of these terminological issues affected the reasoning of the Tribunal, and no more need be said of them.

[A/62/62, para. 11]

INTERNATIONAL ARBITRAL TRIBUNAL

In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland

In its 2005 partial award, the arbitral tribunal constituted to hear the Eureko BV v. Republic of Poland case, in support of its finding that a State may be responsible for omissions by its organs, quoted the commentary to article 2 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 12]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA AND THE ICSID ADDITIONAL FACILITY RULES)

Fireman’s Fund Insurance Company v. The United Mexican States

In its 2006 award, the arbitral tribunal constituted to hear the Fireman’s Fund Insurance Company v. The United Mexican States case, in the first case under NAFTA to be heard under

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[59] 16 In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland, partial award, 19 August 2005, para. 188. The arbitral tribunal referred in particular to paragraph (4) of the commentary to article 2 ([Yearbook of the International Law Commission, 2001, vol. II (Part Two)], para. 77).
Chapter Fourteen devoted to cross-border investment in Financial Services, considered the meaning of the term “expropriation” in article 1110(1) of NAFTA. Upon a review of prior decisions and “customary international law in general”, the tribunal identified a number of elements, including that expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by NAFTA. In a footnote citing article 2 of the State responsibility articles, the tribunal added that:

[a] failure to act (an ‘omission’) by a host State may also constitute a State measure tantamount to expropriation under particular circumstances, although those cases will be rare and seldom concern the omission alone.\(^{[60]}\)\(^{17}\)

\[A/65/76, \text{para. 12}\]

**INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)**

*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* considered article 2 as reflecting a rule applicable under customary international law.\(^{[61]}\)\(^{8}\)

\[A/65/76, \text{para. 13}\]

**INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)**

*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*

In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case, considered the question as to whether actual economic loss or damage was necessary for a cause of action relating to expropriation. The tribunal held that “the suffering of substantive and quantifiable economic loss by the investor [was] not a pre-condition for the finding of an expropriation” under the bilateral investment treaty in question, but that where there had been “substantial interference with an investor’s rights, so as to amount to an expropriation . . . there may be scope for a non-compensatory remedy for the expropriation (e.g. injunctive, declaratory or restitutionary relief)”. In coming to that conclusion, the tribunal referred to the commentary to article 2 of the State responsibility articles, where the Commission stated:

It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, ‘damage’ to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect.\(^{[62]}\)\(^{9}\)

\[A/65/76, \text{para. 14}\]

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\(^{[60]}\) ICSID, *Fireman’s Fund Insurance Company v. The United Mexican States*, Case No. ARB(AF)/02/01, award, 17 July 2006, para. 176(a), footnote 155.

\(^{[61]}\) *Archer Daniels Midland Company*, cited in [footnote] [3] 4 above, para. 275.

\(^{[62]}\) *Biwater Gauff*, cited in [footnote] [5] 6 above, para. 466, citing paragraph (9) of the commentary to article 2.
Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State’s own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State’s internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the Treatment of Polish Nationals case. The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted . . . [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force . . . The application of the Danzig Constitution may . . . result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law . . . However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the S.S. “Wimbledon” case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace . . . under Article 380 of the Treaty of Versailles, it was [Germany’s] definite duty to allow

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[the passage of the \textit{Wimbledon} through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.\footnote{S.S. “\textit{Wimbledon}” (see footnote [10] 34 above), pp. 29–30.}

The principle was reaffirmed many times:

\begin{quote}
it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.\footnote{Greco-Bulgarian “Communities”, Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p. 32.}
\end{quote}

\ldots it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.\footnote{Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 12; and \textit{ibid.}, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 96, at p. 167.}

\ldots a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.\footnote{Treatment of Polish Nationals (see footnote [63] 75 above), p. 24.}


For example, in the \textit{Reparation for Injuries} case, it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible \ldots the Member cannot contend that this obligation is governed by municipal law”.\footnote{Reparation for Injuries (see footnote [14] 38 above), at p. 180.} In the \textit{ELSI} case, a Chamber of the Court emphasized this rule, stating that:

\begin{quote}
Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.\footnote{Elettronica Sicula S.p.A. (\textit{ELSI}), Judgment, I.C.J. Reports 1989, p. 15, at p. 51, para. 73.}
\end{quote}

Conversely, as the Chamber explained:

\begin{quote}
the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise.
\end{quote}
A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness . . . Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.\[74\] 86

The principle has also been applied by numerous arbitral tribunals.\[75\] 87

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,\[76\] 88 as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission’s draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.\[77\] 89

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

\[74\] 86 Ibid., p. 74, para. 124.
\[75\] 87 See, e.g., the Geneva Arbitration (the “Alabama” case), in Moore, History and Digest, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); Norwegian Shipowners’ Claims (Norway v. United States of America), UNRRA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); Aguilar-Amory and Royal Bank of Canada Claims (Tinoco case) (Great Britain v. Costa Rica), ibid., p. 369, at p. 386 (1923); Shufeldt Claim, ibid., vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 (“it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter’s subject”) (1930); Wollemborg Case, ibid., vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and Flegenheimer, ibid., p. 327, at p. 360 (1958).

\[76\] 88 In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

“In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.”

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that “A State cannot avoid international responsibility by invoking the state of its municipal law” (document C.351(c) M.145(c).1930.V; reproduced in Yearbook . . . 1956, vol. II, p. 225, document A/CN.4/96, annex 3).

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[78] 90

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation “The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law”, which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term “internal law” is preferred to “municipal law”, because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of “internal law”. Still less would it be appropriate to use the term “national law”, which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[79] 91 In the French version the expression droit interne is preferred to législation interne and loi interne, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[78] 90 Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions “was manifest and concerned a rule of . . . internal law of fundamental importance”.

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 in a footnote to draft article 4 adopted by the International Law Commission on first reading in support of its assertion that “[w]hether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law” [80] 17

[A/62/62, para. 13]

Ad hoc committee (under the ICSID Convention)

Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. Argentine Republic

In its 2002 decision on annulment in the CAA and Vivendi Universal v. Argentina case, the ad hoc committee, in considering the relation between the breach of a contract and the breach of a treaty in the said instance, referred to article 3 finally adopted by the International Law Commission in 2001, which it considered to be “undoubtedly declaratory of general international law”. The ad hoc committee further quoted passages of the commentary of the Commission to that provision:

95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the bilateral investment treaty [Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments of 3 July 1991] do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the bilateral investment treaty. The point is made clear in article 3 of the International Law Commission articles, which is entitled ‘Characterization of an act of a State as internationally wrongful’...  

96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the bilateral investment treaty and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the bilateral investment treaty, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to article 3 of the International Law Commission articles, which reads in relevant part as follows:

1. The International Court has often referred to and applied the principle. For example in the Reparation for Injuries case, it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible . . . the Member cannot contend that this obligation is governed by municipal law.” In the ELSI case, a Chamber of the Court emphasized this rule, stating that:

   Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.

Conversely, as the Chamber explained:

. . . the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness . . . Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.

2. The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.\[^{[81]}\]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. United Mexican States

In its 2003 award, the arbitral tribunal constituted to hear the Técnicas Medioambientales Tecmed S.A. v. Mexico case, having stated that the fact “[t]hat the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent’s domestic laws does not mean that they conform to the Agreement [at issue in the case] or to international law”, quoted the following passage taken from the commentary to article 3 finally adopted by the International Law Commission:

An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State’s internal law—even if, under that law, the State was actually bound to act in that way.\(^{[82]}\)

\[A/62/62, para. 15\]

International arbitral tribunal (under the ICSID Convention)

SGS Société générale de Surveillance S.A. v. Islamic Republic of Pakistan

In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the SGS v. Pakistan case, in the context of its interpretation of article 11 of the bilateral investment agreement between Switzerland and Pakistan\(^{[83]}\), quoted in extenso the passage of the decision on annulment in the Vivendi case, reproduced [on pages 23-24] above, to illustrate the statement according to which “[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders”\(^{[84]}\). The tribunal thus considered that claims under the bilateral investment treaty at issue and contract claims were reasonably distinct in principle.

\[A/62/62, para. 16\]

SGS Société générale de Surveillance S.A. v. Republic of the Philippines

In its 2004 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the SGS v. Philippines case, in the context of its interpretation of article X(2) of the

\[^{[82]}\) ICSID, Técnicas Medioambientales Tecmed S.A. v. United Mexican States, Case No. ARB(AF)/00/2, award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original). The quoted passage is taken from paragraph (1) of the International Law Commission’s commentary to article 3 ([Yearbook of the International Law Commission, 2001, vol. II (Part Two)], para. 77).

\[^{[83]}\) That provision stipulated that “Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party”.

bilateral investment treaty between Switzerland and the Philippines,[85] 22 recognized the “well established” principle that “a violation of a contract entered into by a State with an investor of another State is not, by itself, a violation of international law”, as it was affirmed in the Vivendi case and relied upon by the tribunal in the SGS v. Pakistan case (see passages quoted [on pages 23-24] above). It noted however, that, contrary to the ad hoc committee in the Vivendi case, the tribunal in the SGS v. Pakistan case, as the tribunal in this case, needed to “consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law”. In this respect, it considered that “it might do so, as the International Law Commission observed in its commentary to article 3 of the International Law Commission articles on responsibility of States for internationally wrongful acts”, adding that “the question is essentially one of interpretation, and does not seem to be determined by any presumption”. [86] 23

[A/62/62, para. 17]

Noble Ventures, Inc. v. Romania

In its 2005 award, the arbitral tribunal constituted to hear the Noble Ventures, Inc. v. Romania case, in the context of its interpretation of article II(2)(c) of the bilateral investment treaty at issue, noted that the distinction between municipal law and international law as two separate legal systems was reflected, inter alia, in article 3 finally adopted by the International Law Commission in 2001:

... The Tribunal recalls the well established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in inter alia Article Three of the International Law Commission’s Articles on State Responsibility adopted in 2001.[87] 24

[A/62/62, para. 18]

[85] 22 That provision, similar to article 11 of the Switzerland-Pakistan bilateral investment treaty referred to above, stipulated that "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”.

[86] 23 ICSID, SGS Société générale de Surveillance S.A. v. Republic of the Philippines, Case No. ARB/02/6, decision on objections to jurisdiction, 29 January 2004, para. 122 and [footnote] 54. The tribunal was referring more particularly to paragraph (7) of the commentary to article 3, mentioning the possibility that “the provisions of internal law are actually incorporated in some form, conditionally or unconditionally, into [the international] standard”.

[87] 24 ICSID, Noble Ventures, Inc. v. Romania, Case No. ARB/01/11, award, 12 October 2005, para. 53.