RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

General commentary

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility . . . [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.[1] 32

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

   (a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

   (b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

   (c) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

   (d) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

   (e) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

   (f) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

   (g) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles. This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(a) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, mutatis mutandis, for other “sources” of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(b) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such. No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(c) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the status quo ante after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the status quo which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

[2] 33 For the purposes of the articles, the term “internationally wrongful act” includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.
(d) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled “The internationally wrongful act of a State”. It deals with the requirements for the international responsibility of a State to arise. Part Two, “Content of the international responsibility of a State”, deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled “The implementation of the international responsibility of a State”. It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 made the following assessment of the status of the State responsibility articles:

The Tribunal acknowledges the fact that the ILC Articles are the product of over five decades of ILC work. They represent in part the ‘progressive development’ of international law—pursuant to its UN mandate—and represent to a large extent a restatement of customary international law regarding secondary principles of state responsibility.\[3\] 4

\[A/65/76, para. 9]\n
\[3\] 4 ICSID, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States, Case No. ARB(AF)/04/05, award, 21 November 2007, para. 116.
International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

*Corn Products International Inc. v. The United Mexican States*

In its 2008 Decision on Responsibility, the tribunal established to consider the case of *Corn Products International Inc. v. Mexico* noted that it was “accepted” that the State responsibility articles constituted the “most authoritative statement” on the rules on State responsibility.\(^4\)\(^5\)

[A/65/76, para. 10]

International arbitral tribunal (under the ICSID Convention)

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

The tribunal in the 2008 *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case referred to the articles as “a codification of the rules of customary international law on the responsibility of States for their internationally wrongful acts”.\(^5\)\(^6\)

[A/65/76, para. 11]

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\(^4\) ICSID, *Corn Products International Inc., v. The United Mexican States*, Case No. ARB(AF)/04/01, decision on responsibility, 15 January 2008, para. 76.