

# State Responsibility and International Investment Law

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# Introduction

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- The UN International Law Commission deals with the progressive development and codification of IL
- Public International Law (general)
- International Economic Law as a new branch of IL (*lex specialis*)
- Modest involvement of the ILC in IEL topics (e.g. MFN Clause)
- Much greater is an indirect impact of the general codification topics
  - Law of treaties (VCLT), esp. rules of interpretation
  - State responsibility (ARSIWA)

# Codification of int'l responsibility

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- Articles on Responsibility of States for Internationally Wrongful Acts
  - Part One (IWA) – general nature
    - Chapter I: General principles
    - Chapter II: Attribution of conduct to a State
    - Chapter III: Breach of an international obligation
    - Chapter IV: Responsibility of a State in connection with the act of another State
    - Chapter V: Circumstances precluding wrongfulness
  - Part Two: Content of the international responsibility of a State
  - Part Three: The implementation of the international responsibility of a State
    - Chapter I: Invocation of the responsibility of a State
    - Chapter II: Countermeasures

# Application of ARSIWA

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- The key question: do the general rules on responsibility (ARSIWA) apply to international investment disputes (ISDS)?
  - Article 33:
    - 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
    - 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.
  - Applicability subject to a *lex specialis* (Art. 55)

# Origins of State responsibility

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- Distinction of primary and secondary rules
  - Primary rules = rights and obligations of States
  - Secondary rules = legal consequences of breach of primary r.
- Internationally wrongful act of a State
  - Every int'l wrongful act of a State entails the int'l responsibility of that State (Article 1)
  - Objective and subjective elements of IWA (Article 2)
  - Characterization of IWA is governed by IL (Article 3)
- Breach of an int'l obligation (objective element)
  - Obligations of treaty, customary or other origin (Art. 12)
  - Only int'l obligations in force for a State (Art. 13)
  - Actions or omissions
  - Temporary aspects of the breach (Art. 14)

# Attribution of conduct

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- Attribution of conduct to a State (subjective element)
  - Normative operation, not psychological (not *mens rea*)
- Different grounds for attribution, based on IL
  - Conduct of organs of a State (Art. 4)
  - Conduct of persons or entities exercising elements of governmental authority (Art. 5)
  - Conduct of persons placed at the disposal of a State by another State (Art. 6)
  - Acts *ultra vires* (excess of authority/instructions) (Art. 7)
  - Conduct directed or controlled by a State (Art. 8)
  - Conduct carried out in the absence of the official authorities (*de facto* organs) (Art. 9)
  - Conduct of an insurrectional movement (Art. 10)
  - Conduct acknowledged and adopted by a State as its own (Art. 11)

# Attribution of conduct

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- Structural test (Art. 4) – usual situations
  - 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
- Functional test (Art. 5)
  - 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.
  - *Noble Ventures v. Romania* (2005)
  - *Bayindir v. Islamic Republic of Pakistan* (2009)
  - *Salini Construttori v. Morocco* (2001)



# Attribution of conduct

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## ■ Test of control (Art. 8)

- The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.
- Control means “effective control”
- *Jan de Nul v. Arab Republic of Egypt* (2008) – the lack of effective control
- *Nycomb v. Latvia* (2003) – conduct attributed to the State

# Circumstances precluding wrongfulness

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- Circumstances precluding wrongfulness...
  - provide a shield against an otherwise well-founded claim for breach of an international obligation
  - belong to secondary rules of IL (on State responsibility)
- Six different circumstances
  - Self-defence (Art. 21)
  - Countermeasures (Art. 22)
  - Force majeure (vis maior) (Art. 23)
  - Consent (Art. 20)
  - Distress (Art. 24)
  - Necessity (Art. 25)

# Circumstances precluding wrongfulness

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## ■ Compliance with peremptory norms (Art. 26)

- Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

## ■ Consequences of invoking a CPW (Art. 27)

The invocation of a circumstance precluding wrongfulness is without prejudice to:

- (a) compliance with the obligation in question if the CPW no longer exists;
- (b) the question of compensation for any material loss caused by the act.
- It means that in some cases compensation for material loss may be required !

# Relevance of certain circumstances to international investment law

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## ■ Force majeure (Art. 23)

- 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

## ■ Old cases with references to force majeure

- *Russian Indemnity* (1912) arbitration
- *Serbian Loans*, 1929, PCIJ, Series A, No. 20
- *Brazilian Loans*, 1929, PCIJ, Series A, No. 21
- Defences based on force majeure mostly rejected...

# Relevance of certain circumstances to international investment law

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## ■ Necessity (Art. 25)

- 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
  - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
- 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) the international obligation in question excludes the possibility of invoking necessity; or
  - (b) the State has contributed to the situation of necessity

# Relevance of certain circumstances to international investment law

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- Invocation of this circumstance (necessity) by Argentina in investment arbitrations arising from measures related the financial crisis in 1999-2002
- Majority of cases (rejection)
  - *CMS Gas v. Argentina*, 2005
  - *Azurix v. Argentina*, 2006
  - *Siemens v. Argentina*, 2007
  - *Sempra v. Argentina*, 2007
- Minority of cases
  - *LG&G v. Argentina*, 2006

# Relevance of certain circumstances to international investment law

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- Various legal problems:
- The high threshold for application of necessity:
  - “essential interest” x “grave and imminent peril”
- Concurrent application of Art. 25 of ARSIWA and a treaty clause on non-precluded measures (Art. XI of the BIT):
  - The Treaty “shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its essential security interests”.

# Relevance of certain circumstances to international investment law

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- Distinction between “necessity” (Art. 25) and “non-precluded measures” (BIT)
  - Secondary x primary rules
  - BIT (Art. XI) as a *lex specialis*?
  - Decision of the ad hoc Committee (ICSID) in CMS Gas v. Argentina (2007):
    - “Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.”
  - Exception x excuse



# Conclusion

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- Questions and comments ?
- Thank you for your attention !