Investment Arbitration and the ILC Articles on State Responsibility

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I. INTRODUCTION

THERE IS A CLOSE CONNECTION BETWEEN the evolution of the rules of State responsibility and the modern field of what we now think of as investment protection law. During the first phase of the International Law Commission's (ILC) work on State responsibility during the 1950s and early 1960s, an attempt was made to set out substantive rules of international law relating to the protection of alien property in host States.[1] That effort failed entirely, though not surprisingly given the contestation between developed and newly independent States over such politically charged issues during this period.

The difficulties of reaching agreement in this highly contested area drove a distinct shift in perspective and strategy in the work of the ILC by the 1960s. Rather than formulating substantive rules of international law, the ILC would try to set out the framework rules of international law in the context of State responsibility. A distinction was now drawn between primary and secondary rules: the Commission's function was not to identify the primary obligations of States—these obviously depend on treaty commitments and/or customary

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[1] *See, e.g.,* F.V. García Amador, Special Rapporteur, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of the Alien, Part II: The International Claim, Third Report on State Responsibility*, U.N. Doc. A/CN.4/111, *in* 2 Y.B. Int'l L. Comm'n 47 (1958).

international law—but to reveal the secondary conditions under which States can be held to be responsible for breaches of those obligations and with what consequences. The Commission then worked under Special Rapporteurs Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz to produce the first reading of the Articles in 1996.[2] I had the responsibility of producing the second reading text over the next four years. The text was adopted by the Commission in 2001[3] and then forwarded to the General Assembly of the United Nations.[4]

There are some important preliminary points that should be made about the Articles before considering their use in investment arbitration. The first point to make is that the text is not and may never be a treaty. The Commission recommended that it simply sit as a text to be used in accordance with the views of tribunals and writers, as appropriate. The Commission did not anticipate that the Articles would be used to the extent that they have been. There are over 100 decisions of international and, in some cases, national courts in which the texts have been referenced. Of those cases, a significant proportion—approximately 60 reported cases—are decisions of investment treaty tribunals. The extensive use of the ILC Articles in investment treaty arbitration is charted in detail in the enclosed Appendix.

The fact that the Articles have been so widely used does not mean that they necessarily constitute general international law. An adjudicator must always consider the relationship between each of the ILC Articles and general international law. One of the things that the Commission learned about codification at a very early stage is that it is impossible to write down any proposition of international law without engaging in an act of creation. Questions will arise as to the precise formulation of the rule, even if there is no doubt about it in principle. It is equally difficult to segregate a rule into those parts which constitute a declaration of the existing law and those that do not. The two relate to each other in subtle ways.

With this background in mind, we encounter a slight paradox in the way that certain investment treaty tribunals have tended to refer to the ILC Articles. They have done so a bit like a drowning man might grab a stick at sea in the hope of having certainty. But the rules themselves are predicated upon a process of integration into practice, which is inherently uncertain. That uncertainty may possibly go away if the ILC's work on State responsibility is codified in the

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[2] Gaetano Arangio-Ruiz, Special Rapporteur, *State Responsibility, Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/476 and Add. 1, *in* II (Part Two) Y.B. Int'l L. Comm'n 58 (1996).

[3] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10 (2001) ["ILC Articles"].

[4] GA Res. 56/83 (Dec. 12, 2001).

manner of its earlier efforts on the law of treaties. The process of turning the ILC's draft text into the Vienna Convention on the Law of Treaties[5] (VCLT) consolidated its work in a powerful way, and now there is hardly any proposition of a general law of treaties that diverges from what is found in the VCLT.

There is an increasing view amongst governments that the same process should occur with the ILC Articles, so that there should be a Convention on State Responsibility. Whether that course is desirable, however, remains an open question. It took the ILC some 40 years to produce the Articles, in the course of which there were titanic disagreements over a series of issues, not least State crimes, obligations owed to the international community as a whole, the relationship between breach and damage, and countermeasures. It may well be that some of the governments who are agitating for the conversion of the ILC Articles into a treaty text are doing so because they would like to reopen some of the questions which the Commission laboriously closed. With this in mind, it is unlikely that we will see the rapid emergence of a Convention on State Responsibility.

II. APPLICATION OF THE ILC ARTICLES IN INVESTMENT ARBITRATION

Turning now to the Articles, there is a fundamental and often misunderstood difference between three substantive parts of the text. In particular, Part One is different in scope from Parts Two and Three, and this difference is extremely relevant to investment treaty arbitration.

Part One of the Articles sets out the conditions under which the State is responsible for breach of an obligation incumbent on that State. The content of the obligation is not spelled out in the Articles. That is a matter left to the primary rules. What the Articles do set out are the conditions under which responsibility can be engaged, including attribution, certain general propositions surrounding questions of breach (in particular a guarantee against retrospective application of international law) and so-called circumstances precluding wrongfulness defenses and excuses.

Because of the way the text disaggregates questions of obligations from invocation, Part One has a general scope. It is concerned with all breaches of international law by States and it has no relevance to breaches committed by, for example, international organizations or non-State actors. In the context of investment treaty arbitration, this means that general questions surrounding breach of an international obligation contained in an investment treaty is a matter in principle covered by Part One of the ILC Articles. In general,

[5] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (1969).

investment treaty tribunals have accepted this starting position. To illustrate this point, I turn to two cases which have used the Articles with differing degrees of conceptual clarity.

First, in *Wintershall v. Argentina*, the Tribunal engaged in some discussion of the scope of ILC Article 33.[6] Article 33 is one of the introductory articles to Part Two of the ILC Articles. This raises once again the fundamental distinction between Parts One and Two-Three of the Articles. Parts Two and Three are concerned only with the consequences of breach, and, in particular, Part Three is concerned with the invocation of State responsibility by other States.

There was a time when we thought of international law as exclusively an inter-State phenomenon. That, of course, is no longer true. But Part Three reflects that history as it is concerned with State claims against other States. Article 33(1) also embodies this position by providing that the obligations of the responsible State under Part Two "may be owed to another State or to several States or the international community as a whole."[7] In *Wintershall*, the Tribunal expressly noted an exclusion from this coverage ("not to an individual")[8] and then sought to trace the consequences of that exclusion:

> The ILC's Articles on State Responsibility is a detailed and official study on the subject but it contains no rules and regulations of State Responsibility vis-a-vis non-State actors. Tribunals are left to determine "the ways in which State Responsibility may be invoked by non-State entities" from the provisions of the text of the particular Treaty under consideration.[9]

That *Wintershall* Tribunal's analysis is incorrect to the extent that the basic requirements for determining whether there has been a breach of international law are governed by Part One, to which Article 33 makes no reference. But it is true—as confirmed by Article 33(2)—that the ILC Articles make no attempt to regulate questions of breach between a state and a private party such as a foreign investor. Those rules must be found elsewhere in the corpus of international law, to the extent that they exist at all.

A second case in which we find careful use of the ILC Articles is *United Parcel Service of America Inc. v. Canada.*[10] This concerned a claim by UPS, an

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[6] *Wintershall Aktiengesellshaft v. Argentina*, Award (ICSID Case No. ARB/04/14, Dec. 8, 2008).

[7] ILC Articles, *supra* note 3.

[8] *Wintershall*, *supra* note 6, at para. 112.

[9] *Id.* at para. 113.

[10] *United Parcel Service of America Inc. v. Canada*, Award on the Merits (NAFTA Chapter 11 Arbitration, June 11, 2007).

American company, which provided courier services in Canada. Canada Post, a State-owned entity, operated in competition with UPS in the liberalized courier services market but also maintained a statutory monopoly on the delivery of letter mail. UPS alleged that Canada Post had acted inconsistently with Canada's obligations under the investment Chapter 11 of the NAFTA by, among other things, using its monopoly infrastructure to compete unfairly with UPS in the courier services market. One of the critical issues in this case was the question of attribution. Canada Post had been established under legislation as a Crown Corporation with distinct legal personality and powers to set pricing of some of its services.[11] The question, therefore, was whether the claimed anti-competitive conduct of Canada Post could be attributed to Canada as a party to the NAFTA.

The Tribunal, presided over by Justice Sir Kenneth Keith, pointed out that this is a subject area for which the NAFTA contains very specific provisions. NAFTA Chapter 15 specifically regulates the conduct of monopolies and State enterprises and therefore the general rules of State responsibility on attribution (in ILC Article 5) had no application.[12] In so ruling, the Tribunal made express reference to ILC Article 55, which reflects the *lex specialis* principle and provides that the ILC Articles do not apply to the extent an issue is governed by special rules of international law.[13] That decision, to my mind, is completely correct. The ILC Articles are residual articles and an adjudicator must first look at the treaty under review and see what it says on the subject. If the treaty (such as a BIT) covers the field of the issue at stake, the ILC Articles have no role to play.

In the Appendix, we can see that—on a quantitative basis—references to the ILC Articles by investment treaty tribunals have been very frequent. In fact, 32 of the 59 Articles have been referred to at least once by tribunals (in many cases there have been multiple references). Articles 1 to 3—which set out general principles of responsibility—are often used by tribunals but almost as part of a throat-clearing exercise before they get down to the real work. On the other hand, there have been significant references in the field of attribution—in Articles 4 to 5—which I examine in greater detail below. There have also been some important decisions on the difficult subject of continuing breach of international obligations. This subject has particular relevance for the field of international investment law. Many BITs have come into force relatively recently, and one may encounter long-standing investments where breach has arguably been occurring over a period of time which predates entry into force of the relevant BIT. There are numerous examples of this in the case law, including

[11] *Id.* at paras. 50–52.
[12] *Id.* at paras. 59–62.
[13] *Id.* at paras. 59, 62–63.

Jan de Nul v. Egypt,[14] *Walter Bau v. Thailand*,[15] and in the context of NAFTA Chapter 11, *Mondev v. USA*.[16] Tribunals have frequently referred to ILC Articles 13 to 15 in trying to cope with the problem of continuing breach. There have been quite a number of references to circumstances precluding wrongfulness, especially in the Argentine necessity cases. While there have been divergences between the tribunals on the application of the doctrine of necessity, they have all accepted that ILC Article 25 formulates the customary rule on necessity. When it comes to Part Two, there have been frequent references by way of analogy to those provisions dealing with compensation and interest, especially Articles 31–38. Finally, there have been very few references to Part Three for the very good reason that Chapter I of that Part is concerned with invocation of obligations by States, and is therefore in principle irrelevant to investment treaty arbitration involving private parties.

While the quantitative picture is clear, it is more difficult to get a sense of the qualitative use of the Articles in investment treaty arbitration. By the latter, I mean the extent to which the ILC Articles have actually made a contribution to the outcome of decisions. To what extent have they been part of what might be described as the wallpaper or the furniture rather than the architecture or structure of the decisions? In my view, many of the references are by way of signposting rather than actually integrating the substance of the Articles into the decision. There are important exceptions to this general position, especially in the context of temporal jurisdiction, and also in the context of the defense of necessity. The universe of cases is, on the whole, of a variable quality. When it comes to the intersection between investment treaties and the ILC Articles, there is a great deal of disagreement on core questions, including necessity, the application of countermeasures and issues of compensation. Some of these questions are not actually resolved by the ILC Articles but, to the extent they are, tribunals have at least sought to rely on them. In sum then, we find a slightly mixed record when it comes to the use of the Articles in investment treaty arbitration.

III. A CASE-STUDY: ATTRIBUTION

Questions surrounding attribution are the primary subject area in which arbitral tribunals have referred to the ILC Articles. This is, in principle, a justifiable use of the Articles. In the absence of a *lex specialis*—such as that found

[14] *Jan de Nul N.V. and Dredging International N.V. v. Egypt*, Decision on Jurisdiction (ICSID Case No. ARB/04/13, Jun. 16, 2006).

[15] *Walter Bau v. Thailand*, Award (unpublished) (UNCITRAL, Jul. 1, 2009).

[16] *Mondev International Ltd. v. USA*, Award (ICSID Case No. ARB(AF)/99/2, Oct. 11, 2002).

by the Tribunal in *UPS v. Canada*—the ILC Articles dealing with attribution are regarded by international lawyers and by the International Court of Justice as reflecting customary international law. Those parts of the Articles have their origins in the work originally undertaken by Rapporteur Roberto Ago in the 1960s, although there have been some more recent modifications and a certain amount of clarification and simplification since then.

There are three core ILC Articles governing attribution: (i) Article 4 which deals with organs of the State; (ii) Article 5 which deals with separate entities authorized to exercise governmental authority; and (iii) Article 8 which deals with private entities whose conduct is under the direction or control of the State. All three articles have been referred to very widely.

The fundamental rule of attribution at international law is reflected in Article 4. The State is regarded as a single person at international law and is responsible for the conduct of all its organs, whatever their status. Moreover, the State is responsible for its organs whether or not they are acting *intra vires* or *ultra vires* as a matter of the domestic law, a rule that is clarified in ILC Article 3. So there is general responsibility for the acts of organs.

Those organs also include autonomous bodies which have the status of organs under the law of the State, for example, local government entities. A number of NAFTA cases have concerned acts of a component unit of a federal State.[17] For the purposes of attribution, it is irrelevant whether the constitutional structure of the State gives the federal government power to compel the component unit to abide by the State's international legal obligations. These units are nonetheless organs of the State and their conduct is attributable to the State. The State then, for the purposes of attribution, is a very broad concept, especially when we bear in mind that, provided that the organ is acting under the color of its status as an organ, it does not matter that it is acting *ultra vires*. Those rules have been comprehensively applied by investment treaty tribunals and, generally speaking, without too much difficulty.

In fact, tribunals have been rather good at drawing the distinction between cases governed by Article 4 (dealing with organs of the State) and those governed by Article 5. The latter Article deals with separate entities that are not State organs but which are nonetheless authorized to exercise governmental authority by the State for certain purposes. Article 5 has particular importance where a State-owned corporation has been privatized but retains public or regulatory functions. There have been a number of arbitral cases in which separate entities

[17] *See, e.g.*, *Methanex Corporation v. USA*, Final Award of the Tribunal on Jurisdiction and Merits (NAFTA Chapter 11 Arbitration, Aug. 3, 2005) (concerning a California law banning the use of a gasoline oxygenate, for which the foreign investor supplied a key input).

have been held to have engaged the responsibility of the State pursuant to Article 5.

Perhaps surprisingly, there have been far fewer references to ILC Article 8. In the general international law context, Article 8 is of enormous importance because it covers the whole field of support by the State to acts of irregular armed forces, which has given rise to so much difficulty in cases involving international and internal armed conflict. Fortunately, most investment treaty cases are a long way away from that terrain, and so the issues that have been contentious in the context of Article 8 have tended not to arise.

To sum up, when applying the ILC Articles on attribution to questions of international responsibility, Tribunals have generally read the Articles carefully (in particular Articles 4 and 5), and applied them in appropriate ways. But there has also been some confusion, particularly over the relationship between the law of attribution and issues of contractual responsibility or liability.

Attribution is an international law doctrine. Municipal legal systems have similar rules but tend to use different names. Those domestic schemes regulate the way in which liabilities are distributed amongst different parts of the State, there being, in general, no conception of the unity of the State in domestic law. When international investment tribunals deal with questions of contractual liability, those questions are governed by the proper law of the contract. The international legal rules on attribution have nothing to do with this inquiry, a point made very clear in several awards, particularly *Bayendir v. Pakistan*.[18] It is often assumed that because a State organ has entered into a contract, the State is therefore responsible for compliance with the contract. This depends, however, on what is specified in the proper law of the contract. In most cases, it is the individual legal entity that has entered into the contract that is responsible for breach. The rules of attribution have nothing to do with questions of contractual responsibility.

Finally, questions of attribution in the context of corrupt dealings have also given rise to a good deal of confusion. If a private entity corruptly procures a successful tender with the State and an issue then arises between the entity and the State about the resulting contract, there may be a question as to whether the contract is tainted by corruption. But no issue of attribution will arise in that context. The question is whether the contract is tainted by corruption, and that depends upon the applicable law in relation to the rules of corruption. The applicable law may make a distinction between involvement of senior and junior officials, which could be a relevant factor in a given case. While international

[18] *Bayindir Insaat Turizm Ticaret VE Sanayi A.Ş. v. Pakistan*, Award (ICSID Case No. ARB/03/29, Aug. 27, 2009), at paras. 111–139.

law does not generally make such a distinction, it will not necessarily be the applicable law when it comes to the question whether the contract is tainted by corruption. Of course, the transaction may give rise to a separate issue of responsibility. For example, the losing tenderer may have a claim against the State in respect of the circumstances in which the tender was concluded. That could conceivably give rise to an issue of attribution. But that is a conceptually different issue of responsibility from the underlying question of whether the contract has been tainted by corruption.

IV. CONCLUSION

To conclude, there has been a certain tendency for investment tribunals to seize on the Articles as a *tabula in naufragio*, "a plank in a shipwreck." That tendency is magnified where the members of the tribunal are not public international lawyers, which is increasingly the case in investment treaty arbitration. That has given rise in a few cases to what I would describe as slightly awkward handling of the ILC Articles. On the other hand, there has been a very conscientious and careful attempt in general to apply the Articles, notably in the field of attribution. In so doing, despite all the disagreements on substantive questions of investment arbitration, those tribunals have made a real contribution to the field.

Appendix

References to ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) by Investment Treaty Tribunals[1]

James Crawford

ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 1. Responsibility of a State for its internationally wrongful act	*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, 25 September 2007	• The *ad hoc* Committee made reference to "the well-known principle of international law recalled in Article 1 of the ILC Articles" (para. 149). • Reference was made in support of the Committee's conclusion that, given that the Tribunal had concluded that Argentina had breached its obligations under the applicable BIT, "Argentina was responsible for the wrongful measures it had taken" and compensation was therefore payable (para. 149).
	Eureko BV v. Republic of Poland, Partial Award, 19 August 2005	• The Tribunal addressed, as a preliminary question, the more general issue of whether omissions alleged to have been committed by the Respondent were capable of resulting in its international responsibility under the BIT. • The Tribunal observed that "[…] several contemporary sources of international law, including the UN International Law Commission in its fundamental and extended labors on State Responsibility confirm that 'measures taken' include omissions" (para. 187). • The Tribunal (in addition to referring to a passage taken from the Commentary to Article 2), made reference to two passages from the Commentary to Article 1 in which the Commission had noted that "[a]n internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both" and that "the term 'act' is intended to encompass omissions" (para. 188).

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[1] My thanks to Simon Olleson, Barrister, and to Lucas Bastin, Associate, Latham & Watkins, London, for drawing up this Table.

ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Duke Energy International Peru Investments Ltd. v. Peru (ICSID Case No. ARB/03/28), Award and Partial Dissent, 25 July 2008	• The Claimant argued that a company called SUNAT was an interrelated Government agency and for this the Claimant cited the ILC Articles on State Responsibility that "make it absolutely unambiguous that SUNAT is as much a part of the same Government as, for example, the Minister of Energy and Mines." The Claimant further contended that it is not the Claimant's responsibility to "bear the risk of Government ambiguity and inconsistency" (para. 235). • "[F]or the purposes of estoppel, the Tribunal does not find helpful the principles on State attribution in the ILC's Articles on State Responsibility. Rather the Tribunal draws inspiration, by analogy, from the test that applies in international law to determine whether a treaty is binding even though it was signed in violation of a country's internal law" (para. 235). • The Tribunal states that the "Claimant goes too far…in asserting that principles of State responsibility should apply, for purposes of estoppel, in attributing conduct of various State bodies or agencies to the State as a whole." The Tribunal's reasoning for rejecting this argument is based upon the notion that "there is an important and material distinction between, on the one hand, estoppel vis-à-vis the State created by acts or statements of its organs and, on the other hand, State responsibility for internationally wrongful acts of its organs" (para. 242).
Article 2. Elements of an internationally wrongful act	*Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Objections to Jurisdiction, 25 August 2006	• The Tribunal made express reference to the two positive conditions for responsibility contained in Article 2, as well as referring to the Commentary thereto, in rejecting an argument that Total had suffered no damage, and that there was therefore no dispute between the Parties (para. 89). • In a footnote referring to Article 2, the Tribunal said: "A basic issue in the present dispute is whether Argentina has committed an internationally wrongful act, that is whether it has breached the international obligations contained in the BIT by conduct attributable to it. As held by the I.L.C. these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused damage is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation not to cause damages […]" (note 51).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal made reference to both Articles 2 and 31: "Article 1131 (1) of the NAFTA provides that Chapter Eleven Tribunals '…shall decide the issues in dispute in accordance with [the NAFTA] and applicable rules of international law.' A breach of an international obligation of the state will be deemed to be an 'international wrongful act' (International Law Commission Articles on State Responsibility, Art. 2) and that states are required to make 'full reparation' for any injury caused by an internationally wrongful act (ILC Article 31). A breach by a state party to an investment treaty is 'an internationally wrongful act' that triggers the obligation to make 'full reparation for the injury caused. These rules are applicable under customary international law as well'" (para. 275).
	Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002	• The Tribunal stated: "In considering the Tribunal's findings on the merits, 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, claims relating to conduct of the Tucumán authorities which are nonetheless brought against Argentina and 'rely … upon the principle of attribution'" (para. 16). • In a footnote: "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 ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Resolution 54/83, 12 December 2001 (hereafter 'ILC Articles'), 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 standard 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. ILC 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" (note 17). • The Tribunal also stated: "[I]n 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" (para. 96).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Eureko BV v. Republic of Poland, Partial Award, 19 August 2005	• The Tribunal referred to the Commentaries to Articles 1 and 2 of the Articles in relation to the issue of whether the term "measures" contained in Article 5 of the applicable BIT included not only acts, but also omissions (para. 187). • The Tribunal cited the following passage from the commentary to Article 2: "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 […]" (para. 188).
	Fireman's Fund Insurance Company v. United States of Mexico (ICSID Case No. ARB(AF)/02/01), Final Award, 11 July 2007	• In a footnote, the Tribunal observed: "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" (note 155, para. 176).
	Biwater Gauff (Tanzania) Ltd. v. Tanzania (ICSID Case No. ARB/05/22), Award, 18 July 2008	• The Tribunal states that "by this Article, there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State" (para. 466). • In referring to whether or not absence of economic loss of damage precludes a finding of expropriation the Tribunal drew attention to Article 2 of the Articles. The Tribunal notes that this Article states that "there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an obligation of the State." The Tribunal then quotes commentary to Article 2 that states "whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect" (para. 466). • On the facts, the Tribunal held that "the BIT does not include 'economic damage' as a requirement for expropriation, and the Arbitral Tribunal does not consider that it must or should be imported" (para. 467).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Fireman's Fund Insurance Company v. Mexico (ICSID Case No. ARB(AF)/02/01), Award, 17 July 2006	• A footnote stated: "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. See Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), Article 2, hereinafter 'ILC Draft Articles'" (note 155).
Article 3. Characterization of an act of a State as internationally wrongful	*Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002	• The Tribunal stated: "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 BIT 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 BIT. The point is made clear in Article 3 of the ILC Articles […] In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT 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 BIT, 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 ILC Articles […]" (paras. 95–97).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
		The Tribunal also stated that: "On the other hand, where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty. In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties. Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16 (4) of the Concession Contract could have prevented its characterization as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty" (paras. 101–103).
	SGS Société Génerale de Surveillance SA v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Procedural Order No. 2, 16 October 2002	• The Tribunal made reference to Article 3 of the Articles in the context of its decision on an application made by the Claimant for the indication of a provisional measure relating to contempt proceedings instituted before the Respondent's domestic courts: "[I]t is important that the possibility of contempt proceedings in relation to the Supreme Court's 3 July 2002 Judgment not in any way impair the rights discussed above. The right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law" (p. 300). • In support of its statement that a State cannot "plead its internal law in defence of an act that is inconsistent with its international obligations," the Tribunal made reference in a footnote to Article 3 of the Articles (p. 300).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction, 6 August 2003	• The reasoning of the *ad hoc* Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* set out above, including the references to Article 3 and the Commentary thereto, was quoted *in extenso* (paras. 147–148).
	SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, 29 January 2004	• The Tribunal stated: "[T]he *ad hoc* Committee therefore did not need to consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law. Certainly it might do so, as the International Law Commission observed in its commentary to Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts" (para. 122). • In an accompanying footnote, the Tribunal made reference to a passage from the ILC's Commentary to Article 3 (note 54).
	Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11), Award, 12 October 2005	• The Tribunal stated: "An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law. 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" (para 53).
	Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003	• The Tribunal emphasized that the task of an arbitral tribunal applying a bilateral investment treaty was different, and that the characterization of a particular measure as legal under a State's internal law could not affect its characterization under the treaty. In support of that proposition, the Tribunal cited a passage from the ILC's Commentary to Article 3.

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), Decision on Jurisdiction, 22 February 2006	• The Tribunal noted "the important statement of the ICJ in the *ELSI* case: '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 municipal law and what is unlawful in the municipal law may be fully innocent of violation of a treaty provision.'" (para. 88). It noted that Article 3 ARSIWA was to the same effect (note 21).
	Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award, 6 February 2007	• The Tribunal stated: "Siemens also refers to the Draft Articles on Responsibility of States adopted by the International Law Commission […], which state: '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'" (para. 70). • The Tribunal did not refer to Article 3 in its discussion of the question of the applicable law (paras. 76–80).
Article 4. Conduct of organs of the State	*Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006	• The Tribunal stated: "As the Claimants correctly pointed out, the issue of whether a State is responsible for the acts of a State entity is to be resolved in accordance with international law, and in particular with the principles codified in the Articles on State Responsibility for internationally wrongful acts" (para. 84). • The Tribunal also stated: "When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. In particular, the Tribunal will consider the following provisions: Art. 4 of the ILC Articles which codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so—called de jure organs which are empowered to act for the State within the limits of their competence […]" (para. 89).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Saipem SpA v. People"s Republic of Bangladesh (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007	• The Tribunal stated: "When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 […] as a codification of customary international law. The Tribunal will in particular consider the following provisions: Art. 4 of the ILC Articles which codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so-called de jure organs which are empowered to act for the State within the limits of their competence […]" (paras. 147–148).
	Helnan International Hotels A/S v. Republic of Egypt (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction, 17 October 2006	• The Claimant relied upon the Articles (in particular Articles 4 and 5) to argue that, despite its separate legal personality, EGOTH was "de jure and de facto an emanation of the Egyptian State," and that, consequently, Egypt could be held responsible for its actions (paras. 85–86). • The Tribunal concluded that the conduct of EGOTH was attributable to Egypt under Article 5, implicitly rejecting the Claimant's argument that EGOTH was to be treated as an organ of Egypt under Article 4 (para. 93).
	Eureko BV v. Republic of Poland, Partial Award, 19 August 2005	• The Tribunal stated: "In the perspective of international law, it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State" (para. 127). • The Tribunal then referred to Article 4 of the Articles, which—it observed —was "crystal clear" (para. 128). • The Tribunal stated: "[T]here can be no doubt that the Minister of the State Treasury [in entering into the share purchase agreement and its addenda] was acting pursuant to clear authority conferred on him by decision of the Council of Ministers of the Government of Poland in conformity with the officially approved privatization policy of that Government" (para. 129). • In support of that conclusion, the Tribunal quoted a passage from the Commentary to Article 4, and a further passage from the Commission's Introductory Commentary to Chapter II of Part One (paras. 130–131).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, 16 September 2003	• The Tribunal stated: "The Respondent has failed to differentiate between disputes arising under domestic law and dispute arising under the BIT. Insofar as this statement relates to a cause of action based on the BIT, it discloses a confusion about the juridical nature of such a cause of action. By invoking Article III of the BIT, the Claimant is seeking to invoke the international responsibility of Ukraine on the basis that various acts or omissions of officials of the Kyiv City State Administration are attributable to Ukraine in accordance with the rules of international law and that such acts or omissions amount to an expropriation. The relevant international rule of attribution is summarised in Article 4 of the ILC's Articles on State Responsibility […]" (para. 10.2).
	Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003	• The Tribunal concluded that the actions of INE (an agency of the Federal Government of the United Mexican States within the Ministry of the Environment, Natural Resources and Fisheries, which was in charge of Mexico's national policy on ecology and environmental protection, and which was also the regulatory body on environmental issues) "are attributable to the Respondent under international law" (para. 151). In support of that conclusion, a reference was provided in a footnote pointing to Article 4 of the Articles and the Commission's Commentary thereto (note 187).
	M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), Award, 31 July 2007	• The Tribunal announced at the beginning of its Award that it would: "[…] decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN (hereinafter referred to as 'the ILC') Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries […]" (para. 42). • The Tribunal stated: "INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State. In this case, the customary rules codified by the ILC in their Articles on Responsibility of States for Internationally Wrongful Acts are applicable. Therefore, any acts or omissions of INECEL in breach of the BIT or of other applicable rules of general international law are attributable to Ecuador, and engage its international responsibility" (para. 225).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002	• The Tribunal took note of the fact that the United States did not dispute that actions of municipal authorities and decisions of sub-federal courts were attributable to it for the purposes of NAFTA, although the United States denied that any actions taken prior to the entry into force of NAFTA on 1 January 1994 could constitute a breach of the standards of protection contained in Chapter 11 of NAFTA. In that regard, the Tribunal made reference in a footnote to Article 4 of the Articles, as well as making referring to Article 105 NAFTA (para. 67, note 12).
	Grand River Enterprises Six Nations Ltd et. al v. United States of America, Decision on Objections to Jurisdiction, 20 July 2006	• The Tribunal, in its decision on objections to jurisdiction, took note of the fact that the United States "acknowledge[d] that that it is internationally responsible under NAFTA" for the actions taken by its various constituent states. In a footnote, the Tribunal referred to Article 4(1), as well as the passage of the ILC's Commentary thereon, in which the Commission stated "[i]t does not matter […] whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations" (note 1).
	Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002	• The *ad hoc* Committee made reference to Article 4 and the Commentaries thereto in relation to the question of attribution of the conduct of sub-federal entities, including in particular the conduct of the Province of Tucumán, with which the concession contract at issue in the dispute had been concluded: "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 [ILC Articles] Articles 2 (a), 4 and the Commission's commentary to Article 4, paras. (8)–(10)" (note 17). • Subsequently, having referred to a passage from the Award which was the subject of the application for annulment, the Tribunal observed that it: "appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, *a priori*, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights" (para. 110). In that regard, the *ad hoc* Committee again referred to the Commentary to Articles 4 and 12 (note 78).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004	• The Tribunal stated: "The Argentine Republic has expressed the view that because the taxes have been assessed by the Argentine Provinces, and irrespective of whether this is a lawful or unlawful action or whether it violates the federal arrangements in force, the responsibility and liability of the Argentine Republic cannot be engaged. The Tribunal is mindful in this respect that under international law the State incurs international responsibility and liability for unlawful acts of its various agencies and subdivisions. The same holds true under Article XIII of the Bilateral Investment Treaty when providing that this '…Treaty shall apply to the political subdivisions of the Parties.'" (para. 32). • In a footnote, the Tribunal referred to Article 4 and the accompanying Commentary (note 5).
	Azurix Corporation v. Argentine Republic (ICSID Case No. ARB/01/12), Award, 14 July 2006	• The Tribunal stated: "The responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The [Articles], as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration" (para. 52).
	Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11), Award, 12 October 2005	• The Tribunal stated: "Article 4 2001 ILC Draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called de jure organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as de jure organs" (para. 69). • The Tribunal made further reference to the Articles, and implicitly to the Commentary to Article 4, in addressing an argument made by the Respondent that a distinction was to be drawn between the attribution of governmental and commercial conduct, the latter not being attributable:

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
		"The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called acta iure gestionis, should by definition not be attributable while governmental acts, so call acta iure imperii, should be attributable. The ILC draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its draft articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor" (para. 82).
	United Parcel Services, Inc. v. Canada, Award, 11 June 2007	• The Tribunal stated: "In support of its argument, UPS draws on relevant provision of the [Articles] as accepted propositions of customary international law, a status recently recognized (at least in relation to article 4) by the International Court of Justice in the Genocide Convention case […]" (para. 47). • The Tribunal then proceeded to set out the text of Article 4, as well as various passages from the Commentary thereto relied upon by UPS (para. 47), as well as noting UPS' reliance on Article 5, and referring to a passage from the Commentary thereto (para. 48). • The Tribunal held that Article 4 did not govern the question of attribution: "Articles 1102–1105 are not however to be read alone. They are to be read with chapter 15 and, so far as this Tribunal is concerned, with the jurisdictional provisions of Articles 1116 and 1117. The immediately relevant provisions of chapter 15 are the two specific provisions which UPS contends Canada is breaching. They are articles 1502(3)(a) and 1503(2) […] Several features of these provisions read as a whole lead the Tribunal to the conclusion that the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances. The special rules of law stated in chapters 11 and 15, in terms of the principle reflected in article 55 of the ILC text, 'govern' the situation and preclude the application of that law […]" (paras. 58–59).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
		• The Tribunal concluded: "[A]ctions of Canada Post are not in general actions of Canada which can be attributed to Canada as a 'Party' within the meaning of articles 1102 to 1105 or for that matter in articles 1502(3)(a) and 1503(2). Chapter 15 provides for a lex specialis regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case" (para. 62).
	Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova, Award, 22 September 2005	• The Tribunal stated: "[A] central Governmental body of the Republic of Moldova, delegated by Governmental regulations to carry out state functions, and the effects of its conduct may be attributed to the State. It is generally recognised, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions (See Article 4 of the ILC Articles on State Responsibility […]). The State of the Republic of Moldova is therefore the correct Respondent" (section 2.2.2).
	Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3) (*"Waste Management II"*), Award, 30 April 2004	• The Tribunal stated: "[I]t is doubtful whether Banobras is an organ of the Mexican State within the meaning of Article 4 of the [Articles]. Shares in Banobras were divided between the public and private sector, with the former holding a minimum of 66%. The mere fact that a separate entity is majority-owned or substantially controlled by the state does not make it ipso facto an organ of the state" (para. 75).
	Tokios Tokelės v. Ukraine (ICSID Case No. ARB/02/18), Decision on Objections to Jurisdiction, 29 April 2004	• The Tribunal observed, with reference in a footnote to Article 4 of the Articles, that "actions of municipal authorities are attributable to the central government" (para. 102, note 113).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	CMS Transmission Company v. Republic of Argentina (ICSID Case No. ARB/01/08), Decision on Objections to Jurisdiction, 17 July 2003	• The Tribunal stated: "In so far as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the Articles on State responsibility adopted by the International Law Commission is abundantly clear on this point. Unless a specific reservation is made in accordance with articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other State institutions does not necessarily make them separate disputes. No such reservation took place in connection with the BIT" (para. 108, note 58).
	ADF Group Inc. v. United States of America (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003	• The Tribunal noted that Article 4 was "in line with the established rule of customary international law that acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units" (para. 166, see also note 161).
	EDF (Services) Ltd. v. Romania (ICSID Case No. ARB/05/13), Award, 3 October 2009	• The Tribunal stated: "As stated by ILC Article 4(2), the State internal law determines whether an entity is a State organ" (para. 188).
	Bayindir Insaat Turizm Ticaret ve Sanayi v. Pakistan (ICSID Case No. ARB/03/29), Award, 24 August 2009	• The Tribunal rejected the Claimant's argument that the National Highway Authority of Pakistan ["NHA"] was a State organ. The Tribunal's reasoning for this was due to NHA's "separate legal status" and, as such, "the Tribunal discard[ed] the possibility of treating NHA as a State organ under Article 4 of the ILC Articles" (para. 119).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Award, 1 June 2009	• The Respondent State submitted that "Article 4 of the ILC Articles applied only to the responsibility of a state for the acts of its organs. It did not attribute to the state the knowledge of every decision rendered by its courts" (para. 171). • The Claimants, in response to the above, "asserted that Article 4 was a general principle of international law, which was not limited to the wrongful acts of a state organ" (para. 194). • The Tribunal preferred the Claimants' arguments and stated in respect of Article 4 that "acts of a State's organs that are not contrary to law or in excess of authority will be applied a fortiori to the State. Accordingly the non-wrongful acts of Egypt's judiciary are the acts of the Egyptian State. As the Claimants have submitted, Egypt cannot deny knowledge of its own acts" (para. 195). • The Claimant stated that Article 4 of the ILC Articles was not based on an attribution of wrongful conduct but rather a general principle of international law. The Tribunal agreed (para. 197).
	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan (ICSID Case No. ARB/05/16), Award, 29 July 2008	• The Claimants argued "that Article 4 on the Responsibility of States for Internationally Wrongful Acts (the 'ILC Articles') attributes to the State the conduct of 'any State organ … whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State'" (para. 338).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Toto Costruzioni Generali S.P.S. v. Republic of Lebanon (ICSID Case no. ARB/07/12), Decision on Jurisdiction, 11 September 2009	• The Tribunal stated: "The principal rule of international law on attribution are (sic) presently reflected in Articles 4 and 5 of the International Law Commission's ('ILC') Draft Articles on Responsibility of States for Internationally Wrongful Acts" (para. 44). • The Tribunal also stated: "In the event that the domestic law of Lebanon would consider CEDP and/or the CDR [with whom Toto contracted] as State organs, they would unquestionably have the status of State organs under international law. Indeed, under Article 4.2 of the ILC Draft Articles, '[a]n organ includes any person or entity which has that status in accordance with the internal law of the State'" (para. 45). • The Tribunal also stated: "In the event that Lebanese law would not give the CEGP and/or the CDR the status of State organs, the Tribunal will have to examine whether these bodies exercise executive or any other functions of the Republic of Lebanon, as required under Article 4.1 of the ILC Draft Articles" (para. 26). • The Tribunal also stated: "If the CEGP and/or the CDR do not have the status of State organs under Lebanese law, but they exercise some of the functions of governmental authority, enumerated in Article 4.1 of the ILC Draft Articles, their acts and/or omissions in the exercise of governmental authority would still be attributable to Lebanon under the principle formulated in Article 5 of the ILC Draft Articles" (para. 47).
Article 5. Conduct of persons or entities exercising elements of governmental authority	*Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005	• The Tribunal made reference to the Commentary to Article 5 in ruling upon whether conduct of the Minister of the State Treasury, in relation to a share purchase agreement and subsequent agreements entered into by the Polish State Treasury and the Claimant in respect of the privatization of a State-owned insurance company (PZU), were attributable to the Respondent. • The Tribunal stated: "The principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is in fact acting on the instructions of, or under the direction or control of, that State" (para. 132). • In that regard, the Tribunal made reference to a passage in the Commentary to Article 5 which noted that Article 5 was intended to take account of parastatal entities (para. 132).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11), Award, 12 October 2005	• The Tribunal stated: "The 2001 Draft Articles go on to 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 Art. 5 2001 ILC Draft" (para. 70).
	EnCana Corporation v. Republic of Ecuador (LCIA Case No. UN3481), Award, 3 February 2006	• The Tribunal stated: "Petroecuador was […] subject to instructions from the President and others, and that the Attorney-General pursuant to the law had and exercised authority 'to supervise the performance of … contracts and to propose or adopt for this purpose the judicial actions necessary for the defence of the national assets and public interest.' According to the evidence this power extended to supervision and control of Petroecuador's performance of the participation contracts and their potential renegotiation. Thus the conduct of Petroecuador in entering into, performing and renegotiating the participation contracts (or declining to do so) is attributable to Ecuador. 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. The result is the same" (para. 154). • In an accompanying footnote, the Tribunal set out the full text of Articles 5 and 8 of the Articles (note 107).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006	• The Tribunal stated: "When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. Art. 5 of the ILC Articles which goes on to 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. Such provision restates the generally recognized rule that the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions" (para. 89).
	Saipem SpA v. People's Republic of Bangladesh (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007	• The Tribunal stated: "When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. The Tribunal will in particular consider the following provisions: […] Art. 5 of the ILC Articles which goes on to 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 […]" (para. 148).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Helnan International Hotels A/S v. Republic of Egypt (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction, 17 October 2006	• The Tribunal stated: "[I]t must be pointed out that according to Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts 'the conduct of a person or entity which is not a 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 as an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.' Even if EGOTH 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" (para. 93). • The Tribunal also referred to Commentary to Article 5 (para. 92).
	Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3) ("*Waste Management II*"), Award, 30 April 2004	• The Tribunal stated: "Nor is it clear that in its dealings with the City and the State in terms of the Line of Credit it was exercising governmental authority within the meaning of Article 5 of those Articles. The Organic Law of 1986 regulating Banobras' activity confers on it a variety of functions, some clearly public, others less so" (para. 75). • The Tribunal also stated: "The ILC's commentary describes the notion of a 'para-statal' entity as a narrow category: the essential requirement is that the entity must be '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 [which is the subject of the complaint] relates to the exercise of the governmental authority concerned'" (note 23).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	United Parcel Services, Inc. v. Canada, Award, 11 June 2007	• The Tribunal stated: "It will be recalled that UPS also contends, as an alternative to the argument based on the rules of customary international law reflected in article 4 of the ILC text, that the proposition reflected in its article 5 apply to make Canada directly responsible for actions of Canada Post. That provision […] is concerned with the conduct of non-State entities. It attributes to the State [t]he conduct of a person or activity [sic] which is not an organ of the State … but which is empowered by the law of that State to exercise elements of the governmental authority […] provided the person or entity is acting in that capacity in the particular instance. For reasons we have already given, there is real force in the argument that in many if not all respects the actions of Canada Post over its long history and at present are 'governmental' in a broad sense […]. We again recall however the proposition in article 5 of the ILC text (as in other provisions) has a 'residual character' and does not apply to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of a State's international responsibility are governed by special rules of international law—the *lex specialis* principle […]. For the reasons which we have just given in relation to the argument based on article 4, and in particular the careful structuring and drafting of chapters 11 and 15 which we need not repeat, we find that this argument also fails, as a general proposition. It would be otherwise if in a particular situation Canada Post were in fact exercising 'governmental authority', as Canada indeed accepts in one respect […] But in the absence of such an exercise the consequence for the claim of the findings of law made in this part of the award is that the challenges to the actions of Canada Post […] all fail. […] The national treatment claim based on the actions of Canada Post as opposed to the direct actions of Canada […] fails for the same reason" (para. 63). • The Tribunal also stated: "It is convenient at this point to return to Article 5 of the ILC's State responsibility text, and in particular to its commentary, quoted earlier […]. That provision, it will be recalled, attributes to the State the conduct of non-State organs 'empowered by the law of that State to exercise elements of the governmental authority' when it acts in that capacity…. the Tribunal concludes that the decisions of Canada Post relating to the use of its infrastructure by Purolator and by its own competitive services are not made in the exercise of 'governmental authority' either in terms of articles 1502(3)(a) and 1503(2) or (assuming it to be relevant) in terms of the rules of customary international law reflected in article 5 of the ILC text" (paras. 76, 78).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Toto Costruzioni Generali S.P.S v. Republic of Lebanon (ICSID Case No. ARB/07/12), Decision on Jurisdiction, 11 September 2009	• The Tribunal stated: "The principal rule of international law on attribution are [sic] presently reflected in Articles 4 and 5 of the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts" (para. 44).
	EDF (Services) Ltd. v. Romania (ICSID Case No. ARB/05/13), Award, 3 October 2009.	• The Tribunal stated: "[I]n order for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority. As stated by the ILC Commentary to Article 5, 'it is accordingly a narrow category'" (para. 193). • The Tribunal also stated that the "Commentary to the ILC Draft Articles on State Responsibility indicates that the internal law must specifically authorise the conduct as involving the exercise of public authority" (para. 169). It continued by stating that "the conduct of public entities, although owned by, and therefore subject to the control of the State is not attributable to the State 'unless they are exercising elements of governmental authority within the meaning of [ILC] Article 5.'" As such, there is a "strong presumption in international law that the separateness of corporate entities should be observed" (para. 170). • The Tribunal stated that in respect of Article 5, two requirements must be fulfilled, namely that "the act must be performed by an entity empowered by the internal law of the State to exercise elements of governmental authority," and, that "the act in question must be performed by the entity in the exercise of the delegated governmental authority" (para. 191). The Tribunal further noted that the application of Article 5 "is a functional one" and that "in order for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority" (para. 193).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 6. Conduct of organs placed at the disposal of a State by another State	No cases	
Article 7. Excess of authority or contravention of instructions	*ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003	• The Tribunal referred to Article 7 in support of its observation that: "An unauthorized or ultra vires act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity. But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1) […]" (para. 190, note 184).
	Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11), Award, 12 October 2005	• The Tribunal stated: "Even if one were to regard some of the acts of SOF or APAPS as being ultra vires, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown" (para. 81).
	Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007	• The Tribunal stated: "It is […] immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law. Article 7 of the Articles on State Responsibility provides that even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State" (para. 190).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 8. Conduct directed or controlled by a State	*Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), Award, 10 January 2005	• The Tribunal stated: "Case law accepts, however, that 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 […]; see also Article 8 of the Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts […]" (para. 19(ii)).
	L.E.S.I. SpA and Astaldi SpA v. People's Democratic Republic of Algeria (ICSID Case No. ARB/05/3), Decision, 11 July 2006	• The Tribunal set out reasoning in the same terms as the *Consorzio Groupement* Tribunal (para. 144).
	Saipem SpA v. People's Republic of Bangladesh (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007	• The Tribunal stated: "When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. The Tribunal will in particular consider the following provisions: […] Art. 8 of the ILC Articles which states that the conduct of a person or group of persons acting under the instructions of or under the direction or control of the State shall be considered an act of that State under international law" (para. 148).
	EnCana Corporation v. Republic of Ecuador (LCIA Case No. UN3481), Award, 3 February 2006	• The Tribunal stated: "Thus the conduct of Petroecuador in entering into, performing and renegotiating the participation contracts (or declining to do so) is attributable to Ecuador. 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. The result is the same" (para. 154). • In an accompanying footnote, the Tribunal set out the text of Articles 5 and 8 (note 107).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3) (*"Waste Management II"*), Award, 30 April 2004	• The Tribunal stated: "A further possibility is that Banobras, though not an organ of Mexico, was acting 'under the direction or control of' Guerrero or of the City in refusing to pay Acaverde under the Agreement: again, it is far from clear from the evidence that this was so" (para. 75). • In an accompanying footnote to that passage reference was made to Article 8, as well as to the Commentary thereto (note 24).
	Plama Consortium Ltd. v. Bulgaria (ICSID Case No. ARB/03/24, Award, 27 August 2008.	• The Tribunal decided upon the question of whether the action taken by a corporation could be attributed to the State. In this respect, the Tribunal stated that "Article 8 of the ILC Articles on State Responsibility contemplates the possibility that the conduct of companies or enterprises owned or controlled by the State be attributable to that State. In the Commentary to the Articles, the ILC notes that: 'Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State, unless they are exercising elements of governmental authority'" (para. 297). • In order to determine whether the corporation was engaged in an unlawful act the Tribunal quoted the ILC, noting "if such corporations (State-owned and controlled) act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State" (para. 298).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Bayindir Insaat Turizm Ticaret ve Sanayi v. Pakistan (ICSID Case No. ARB/03/29), Award, 24 August 2009.	• In determining whether the actions of NHA could be attributed to the State through Article 8, the Tribunal held that "each specific act allegedly in breach of the Treaty was a direct consequence of the decision of the NHA to terminate the Contract, which decision received express clearance from the Pakistani Government" (para. 125). • The Tribunal further noted that "attribution under Article 8 is without prejudice to the characterization of the conduct under consideration as either sovereign or commercial in nature. For the sake of attribution under this rule, it does not matter that the acts are commercial, jure gestionis, or contractual" and that "a finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts" (para. 129). • The Tribunal stated that it was "aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different" but that these might not be suited to the realities of international economic law (para. 130).
	EDF (Services) Ltd. v. Romania (ICSID Case No. ARB/05/13), Award, 3 October 2009.	• The Tribunal stated: "The ILC Commentary makes clear that such attribution is exceptional. In order to attribute the act of a person or group of persons to a State, Article 8 stipulates that the person or group of persons must be acting on the instruction of, or under the direction or control of, the State in carrying out the conduct the attribution of which is in question" (para. 200).
	AMTO LLC v. Ukraine. (SCC Case No. 080/2005), Award, 26 March 2008.	• The Claimant argued that "it follows from Article 8 of the ILC Articles that any act, which is in fact carried out on the instructions of, or under the direction or control of the State, is attributable to it" (para. 30).
Article 9. Conduct carried out in the absence or default of the official authorities	No cases	

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 10. Conduct of an insurrectional or other movement	No cases	
Article 11. Conduct acknowledged and adopted by a State as its own	*Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002	• The Tribunal made reference to the Commentary to Article 11 in support of its statement that "[i]n general, the State is not responsible for the acts of private parties" (para. 68 and note 47).
Article 12. Existence of a breach of an international obligation	*Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002	• The Tribunal stated: "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. ILC Articles, Arts. 2, 12)" (note 17). • The Tribunal also stated: "[T]o imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, a priori, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights" (para. 110). In an accompanying footnote, the Tribunal referred to passages from the Commentary to Article 12, as well as from the Commentary to Article 4 (note 78).
Article 13. International obligation in force for a State	*Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002	• The Tribunal stated: "The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties and in the ILC's Articles on State Responsibility, and has been repeatedly affirmed by international tribunals. There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that 'this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter.' Thus, as the *Feldman* Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA" (para. 68).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003	• The Tribunal cited the passage from *Mondev* extracted above (para. 70).
	Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007	• The Tribunal stated: "It is a well-known and accepted principle of international law that treaties do not have retroactive effect. This principle is set out in Article 28 of the Vienna Convention and in Article 13 of the ILC Articles on State Responsibility" (para. 254).
	Victor Pey Casado and "President Allende" Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008	• Le Tribunal a déclaré que «Ainsi que le relève l'auteur du commentaire des articles de la C.D.I. sur la responsabilité de l'Etat pour fait internationalement illicite, 'les cas d'acceptation rétroactive de la responsabilité sont très rares […]'» (note 527).
	M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), Award, 31 July 2007	• The Tribunal stated: "According to Article 13 of the Draft Articles, in order for a wrongful act or omission to constitute a breach of an international obligation there must have been a breach of a norm of international law in force at the time that the act or omission occurs" (para. 90). • The Tribunal also stated that, "following the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility," it would "take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date" (para. 135).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (UNCITRAL), Interim Award dated 1 December 2008	• The Tribunal accepted that "according to Article 13 of the ILC Draft Articles, acts or facts prior to the entry into force of the BIT cannot on their own constitute breaches of the BIT, given that the norms of conduct prescribed by the BIT were not in effect prior to its date of entry into force" (para. 282).
Article 14. Extension in time of a breach of an international obligation	*Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002	• The Tribunal agreed "with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations. But there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage. Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached" (para. 58). • In a footnote to the penultimate sentence, the Tribunal made reference to Article 14(1).
	Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003	• In a footnote, the Tribunal observed: "Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused […]" (note 26). It also cited Article 14 and the Commentary thereto relating to continuing wrongful acts, as well as the Commentary to Article 15 relating to the question of when a breach consisting of a composite act occurs.
	Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005	• The Tribunal stated: "Whether or not [Article 14] does in fact reflect customary international law need not be addressed for present purposes. It suffices to observe that, in the Tribunal's view, the present case is not covered by Article 14. Acts attributed to Pakistan and perpetrated before 22 June 2001 could without any doubt have consequences after that date. However, the acts in question had no 'continuing character' within the meaning of Article 14; they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date" (para. 312).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), Award, 31 July 2007	• The Tribunal stated that it took note "of the content of the norms of customary international law set out in the ILC Draft in order to clarify the scope of continuing wrongful acts as well as composite wrongful acts" (para. 85). • The Tribunal then cited the Commentary to Article 14 (para. 89). • The Tribunal also stated: "[F]ollowing the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility, […] take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date" (para. 135).
	Ioan Micula and others v. Romania (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008	• The Claimants stated that "the continuing application of a piece of legislation that remains in force is an example of a continuing act under Article 14 of the ILC Articles on State Responsibility" (para. 149).
Article 15. Breach consisting of a composite act	*Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) ("*Vivendi II*"), Award, 20 August 2007	• The Claimants argued, relying on Article 15(1), that "it is well established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts, taken together, can warrant a finding that such obligation has been breached" (para. 5.3.16). • The Claimants further observed that "Article 15(1) also defines the time at which a composite act 'occurs' to be the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act without it necessarily having to be the last of the series" (para. 5.3.16). • The Tribunal stated: "It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached" (para. 7.5.31). • The Tribunal noted that art 15(1) was "to like effect where it defines the time at which a composite act 'occurs' as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series" (para. 7.5.32).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award, 6 February 2007	• The Tribunal stated: "By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break. We are dealing here with a composite act in the terminology of the Draft Articles" (paras. 263–264). • The Award also stated that: "The Tribunal has considered that the issuance of Decree 669/01 was determinant for purposes of its finding of expropriation and it is also the date that would be in consonance with Article 15 of the Draft Articles on the date of occurrence of a composite act" (para. 361).
	Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003	• The Tribunal made reference to Articles 14 and 15, and the accompanying Commentary, stating: "Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused" (note 26).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007	• The Tribunal stated: "Relying on arbitral authority and Article 15 of the International Law Commission's […] *Articles on Responsibility of States for Internationally Wrongful Acts* […], Respondent argues that acts which occur prior to a treaty's entry into force do not have a 'continuing character' simply because they have consequences after that date. Respondent contends that while the effect of the acts may be said to be continuing, in the same manner that an alleged expropriation may have a continuing effect if compensation is not paid, this fact alone is insufficient to confer jurisdiction. In respect of Claimant's contention that Georgia's conduct should be considered a continuing process, Respondent notes that this proposition is based on the assumption that Georgia's alleged expropriation could not be recognised as a violation of the BIT at the time the relevant acts occurred. […] In Respondent's words: '[T]he alleged breach in this case is not a composite act, such that it is necessary to take a series of alleged acts in aggregate in order for them to constitute a wrongful act. Rather, the Decrees and the AIOC Agreement are in themselves acts which, without further acts, are alleged to be wrongful and in breach of the BIT and to have caused the alleged damage'" (para. 86).
	M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), Award, 31 July 2007	• As regards the alleged composite nature of the acts, Ecuador argued that that notion "requires a series of actions or omissions defined as a whole as wrongful," and, in that regard, referred to the Commentary to Article 15 (para. 80 and note 7). • The Tribunal stated: "[I]n accordance with customary international law, the relevant element to determine the existence of a continuing wrongful act or a composite wrongful act is the violation of a norm of international law existing at the time when that act that extends in time begins or when it is consummated" (para. 82). • The Tribunal took "note of the content of the norms of customary international law set out in the ILC Draft in order to clarify the scope of continuing wrongful acts as well as composite wrongful acts" (para. 85). • The Tribunal concluded: "[F]ollowing the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility, […] take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date" (para. 135).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Victor Pey Casado and "President Allende" Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008	• Le Tribunal a déclaré que «Le Tribunal rappellera également que l'allégation de fait composite illicite ne permet pas, en toute hypothèse, de s'affranchir du principe de non-rétroactivité. Ainsi, '[d]ans le cas où l'obligation en question n'existait pas au début de la conduite mais est née par la suite, la 'première' des actions ou omissions de la série, aux fins de la responsabilité des Etats, sera la première à s'être produite après la naissance de l'obligation. Cela n'exclut pas pour autant que les tribunaux puissent prendre en considération des actions ou omissions antérieures à d'autres fins (par exemple, pour établir la base factuelle de violations ultérieures ou pour prouver l'intention).' De l'avis du Tribunal, la qualification d'acte illicite composite ne peut pas être retenue en l'espèce car les faits litigieux allégués par les demanderesses ne correspondent ni à une série d'actes constitutive d'une infraction distincte des manquements invoqués ni à une pratique de l'Etat chilien découlant de l' 'accumulation de manquements de nature identique ou analogue assez nombreux et liés entre eux.' Il n'y a pas dans la présente affaire de 'système' ou d' 'ensemble' d'actes illicites qui, pris de manière globale, apparaîtrait comme un fait illicite» (paras. 618–619).
	Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (UNCITRAL), Interim Award, 1 December 2008	• The Tribunal referred to the Respondent's argument in support of the idea that the Commentary to Article 15 indicates "that a composite act must be based exclusively on a post-BIT conduct." In this respect, the Tribunal notes that "while the commentary seems superficially to support this position, it is in light of the wording of Article 15 that the Commentary must be read" (para. 300). • The Tribunal noted that Article 15(1) "establishes that a BIT breach can only have arisen when the actions or inaction of the Ecuadorian judiciary, when taken with [its] other actions or omissions, became sufficient to constitute a denial of justice" (para. 301). • The Tribunal then went on to note that "Article 15(2) merely provides that the denial of justice persists for as long as the Ecuadorian courts continue to repeat the actions or omissions alleged" (para. 301). • The Tribunal concluded that the commentary cited by the Respondent "merely clarifies that the alleged breach commenced upon the occurrence of the action of inaction that consummated the denial of justice" and "does not, however, establish that pre-BIT acts may not be taken into account in evaluating when the denial of justice arose" and therefore "the Respondent's alleged conduct could constitute a composite act giving rise to a denial of justice within its jurisdiction" (para. 301).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 16. Aid or assistance in the commission of an internationally wrongful act	No cases	
Article 17. Direction and control exercised over the commission of an internationally wrongful act	No cases	
Article 18. Coercion of another State	No cases	
Article 19. Effect of this chapter	No cases	
Article 20. Consent	No cases	
Article 21. Self-defence	No cases	

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 22. Countermeasures in respect of an internationally wrongful act	*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal stated: "Under customary international law, '…the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure….' […]. Countermeasures may constitute a valid defence against a breach of Chapter Eleven insofar as the Respondent State proves that the measure in question meets each of the conditions required by customary international law, as applied to the facts of the case" (para. 121). • The Tribunal also stated: "As noted, a central defense for the Respondent in the instant case is that the Tax, even if judged to be a breach of one or more Articles of Chapter Eleven, is a countermeasure authorized under customary international law and imposed as a response to U.S. breaches of Chapter Twenty. Thus, Respondent maintains, no international responsibility can properly attach as a result of the Tax. The Tribunal takes as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice, as confirmed by the ILC Articles. Article 22 provides that '*the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure…*'"(paras. 124–125).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Corn Products International, Inc. v. United Mexican States, (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008	• "It is a well established feature of the law relating to countermeasures that a countermeasure must be directed against the State which has committed the prior wrongful act. Moreover, even if a countermeasure is directed against that State, if it also entails action inconsistent with an obligation which the State taking countermeasures owes to another party, the doctrine of countermeasures does not preclude the wrongfulness of the measure as against that other party. Thus, the Commentary to Article 49 explains that A second essential element of countermeasures is that they "must be directed against" a State which has committed an internationally wrongful act and which has not complied with its obligations of cessation and reparation under Part Two of the present articles. The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State. A countermeasure cannot, therefore, extinguish or otherwise affect the ***rights*** of a party other than the State responsible for the prior wrongdoing. On the other hand, it can affect the ***interests*** of such a party" (paras. 163–164).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 23. ***Force majeure***	*Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, 23 September 2003	• The Tribunal made no express reference to Article 23, but it described the three conditions for *force majeure* in terms corresponding to those set out in Article 23 (para. 108).
	Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Award, of 22 May 2007	• The Tribunal stated: "[I]t must be kept in mind that, at least as the theory of '*imprevisión*' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation should in addition be the occurrence of an irresistible force, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. In the commentary to this article it is stated that '*Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis.'" (para. 217 and note 33).
	Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award, 28 September 2007	• The Tribunal made an observation in identical terms as the Tribunal in *Enron* (para. 246 and note 67).
Article 24. **Distress**	No cases	

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 25. Necessity	*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005	• The Tribunal noted, "like the parties themselves, considers that article 25 of the Articles on State responsibility adequately reflects the state of customary international law on the question of necessity. This article, in turn, is based on a number of relevant historical cases discussed in the Commentary […]" (para. 315). • The Tribunal also stated: "While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law" (para. 317).
	LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006	• "The concept of excusing a State for the responsibility for violation of its international obligations during what is called a 'state of necessity' or 'state of emergency' also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion" (para. 245).
	Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Award, 22 May 2007	• The Tribunal stated its "understanding of Article 25 of the Articles on State Responsibility to the effect that it reflects the state of customary international law on the matter, is not different from the view of the parties in this respect. This is not to say that the Articles are a treaty or even a part of customary law themselves; it is simply the learned and systematic expression of the development of the law on state of necessity by decisions of courts and tribunals and other sources along a long period of time" (para. 303).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Annulment, 25 September 2007	• The Tribunal considered "that Article 25 of the ILC's Articles on State Responsibility reflects customary international law in that field and examined one by one the conditions enumerated in that Article. It took a decision on each of them giving detailed reasons. It arrived to the conclusion that two of those conditions were not fulfilled, recalled that all conditions must be cumulatively satisfied and concluded that the requirement of necessity under customary international law had not been fully met. In that part of the Award, the Tribunal clearly stated its reasons and the Committee has no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law" (para. 123). • The Tribunal also stated: "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. Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken '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,' a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25 […] On that point, the Tribunal made a manifest error of law. Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
		In doing so the Tribunal made another error of law. One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI" (paras. 129–132). • "If state of necessity means that there has not been even a prima facie breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. In other terms, […] if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been 'no breach' of the BIT. Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25" (para. 133).
	National Grid PLC v. Argentina (UNCITRAL), Award, 3 November 2008	• The Claimant argued that the necessity defence cannot be raised against the Claimant due to the fact that the United Kingdom "has consistently refused to accept it" (para. 256). • The Claimant also noted to the Tribunal that "international tribunals have required a high burden of proof to establish successfully that measures taken to safeguard an essential interest against a grave and imminent peril were the only means available" (para. 231). • The Tribunal, however, stated that it "is not convinced even if the practice was not subject to known exceptions, that this would prevent the other Contracting Party from raising the necessity defence." The Tribunal also noted that "it is accepted that the Draft Articles represent current customary international law and, therefore, the necessity defence is admissible under the conditions listed in Article 25 of the Draft Articles" and that given that "the Contracting Parties did not agree to exclude it under the Treaty, either of them is entitled to raise it" (para. 256).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
		• The Respondent argued that regarding "the 'essential interest' requirement in Article 25(1)(a) of the Draft Articles, the Respondent observes that in the Commentary on the Draft Articles, the issue of whether an interest is essential depends on the overall circumstances of the case and cannot be prejudged." The Respondent then went on to state that Professor Ago noted that an "essential interest should be exceptional but not be limited to those instances that endanger the continuity of the State." The Respondent then further relied on the case of Gabcikovo-Nagymaros in which "the ICJ stated that protection by the State of its environment qualifies as an essential interest under Article 25 of the Draft Articles even where it is limited to a specific region and not all territory of the State." • As such, the Respondent argued that the objective was one of "social stability and the maintenance of essential services vital to the health and welfare of the population" (para. 245). • Finally, the Tribunal, having found that the Respondent contributed to the state of crisis, from which the circumstances precluding wrongfulness (necessity) arose, stated that there is "no need to address whether the state of necessity alleged by the Respondent meets the other conditions set forth in Article 25 of the Draft Articles for its admissibility since these are listed as cumulative conditions: failure to meet any of them is sufficient ground to reject the necessity defense" (para. 262).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	BG Group plc v. Republic of Argentina (UNCITRAL), Final Award, 24 December 2007	• The Tribunal stated: "Article 25 may relate exclusively to international obligations between sovereign States. From this perspective, Article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-U.K. BIT" (para. 408). • The Tribunal also stated: "[T]he Commentary to the ILC Draft Articles indicates that a defense based on necessity is precluded 'where the international obligation in question explicitly or implicitly excludes reliance on necessity.' It can be argued that the Argentina-U.K. BIT implies such an exclusion. Thus, Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (e.g., a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral investment treaties operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT" (para. 409). • The principal basis on which application of the state of necessity was rejected was that Argentina had in any case not complied with the restrictive conditions for invocation of state of necessity, as set out in Article 25.
Article 26. Compliance with peremptory norms	*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005	• The Tribunal stated: "A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles" (para. 325).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 27. Consequences of invoking a circumstance precluding wrongfulness	*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005	• The Tribunal, having concluded that the state of necessity was not made out in the circumstances of the case and that reliance on the "emergency" provision contained in Article XI of the BIT was precluded, stated that it was "also mindful" of Article 27(a) of the Articles, which it then proceeded to set out (para. 379). The Tribunal continued: "The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the Rainbow Warrior and Gabčíkovo Nagymaros cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'" (para. 380). In that regard, having noted that it had not been disputed that the crisis had "been evolving towards normalcy over a period of time" (para. 381), the Tribunal observed that "[e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present" (para. 382). • The Tribunal also made reference to Article 27(b) of the Articles, observing that the rule contained in that provision that reliance on a state of necessity was without prejudice to the question of compensation of any material loss suffered found support in the judgment of the International Court of Justice in Gabčíkovo-Nagymaros Project (para. 383). Having referred to other relevant international jurisprudence on the issue, the Tribunal observed, in a passage echoing a comment by the ILC in that regard contained in the Commentary to Article 27, that, in those cases, "the concept of damages appears to have been broader than that of material loss in article 27" (para. 384). • The Tribunal concluded that it was satisfied that Article 27(b) "establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems" (para. 390).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006	• The Tribunal noted that Article XI of the BIT "does not specifically refer to the compensation for one or all the losses incurred by an investor as a result of the measures adopted by a State during a state of necessity. The commentary introduced by the Special Rapporteur establishes that Article 27 'does not attempt to specify in what circumstances compensation would be payable.' The rule does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations. In this case, this Tribunal's interpretation of Article XI of the Treaty provides the answer. Following this interpretation the Tribunal considers that Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately" (paras. 260–261). • The Tribunal also stated: "The second issue related to the effects of the state of necessity is to determine the subject upon which the consequences of the measures adopted by the host State during the state of necessity shall fall. As established in the Tribunal's Analysis, Article 27 of ILC's Draft Articles, as well as Article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, and in accordance with that expressed [above], this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor" (para. 264).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Award, 22 May 2007	• The Tribunal stated: "There is first the question that necessity is a temporal condition and, as expressed in Article 27 of the Articles on State Responsibility, its invocation is without prejudice to '(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists.' Confirmed by international decisions, this premise does not seem to be disputed by the parties, although the Respondent's argument to the effect that one thing is the temporal nature of the emergency and another the permanent effects of its measures […] does not seem to be easily reconciled with the requirement of temporality. This in turn results in uncertainty as to what will be the legal consequences of the end of the Emergency Law. The second question is that Article 27 also provides that necessity is without prejudice to '(b) the question of compensation for any material loss caused by the act in question.' Again confirmed by international decisions, this other premise has been much debated by the parties as noted above. The Respondent does not share this premise because, as was also noted above, the record shows that eventually there would be no compensation for past losses or adverse effects originating in the emergency measures in the context of renegotiations undertaken. The Respondent's view appears to be based on the understanding that Article 27 would only require compensation for the damage that arises after the emergency is over and not for that taking place during the emergency period. Although that Article does not specify the circumstances in which compensation should be payable because of the range of possible situations, it has also been considered that this is a matter to be agreed with the affected party, thereby not excluding the possibility of an eventual compensation for past events. In the absence of a negotiated settlement between the parties, this determination is to be made by the Tribunal to which the dispute has been submitted" (paras. 343–345).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award, of 28 September 2007	• The Tribunal referred to Article 27 in nearly identical terms as the Tribunal in *Enron* (paras. 392–394).
	CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Annulment, 25 September 2007	• The Tribunal stated: "Article 27 concerns, inter alia, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period. Moreover the Committee notes that Article 27 itself is a 'without prejudice' clause, not a stipulation. It refers to 'the question of compensation' and does not attempt to specify in which circumstances compensation could be due, notwithstanding the state of necessity. [The relevant paragraphs] of the Award being *obiter dicta,* it remains to be seen on which basis the Tribunal decided that compensation was due by Argentina to CMS for the damage suffered by it from 2000 to 2027 […]" (paras. 146–148).
	Mitchell v. Democratic Republic of the Congo, (ICSID Case No. ARB/99/7), Decision on Annulment, 1 November 2006	• The Tribunal stated: "[E]ven if the Arbitral Tribunal had examined Article X(1) of the Treaty, if it had checked the need for the measures—regardless of the degree of such a check—and if it had concluded that they were not wrongful, this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation" (para. 57). • In support of that statement, the *ad hoc* Committee referred in a footnote to the ILC's work on State responsibility, and in particular Article 27, noting that that provision "bears witness to the existence of a principle of international law in this regard" (note 30).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 28. Legal consequences of an internationally wrongful act	No cases	
Article 29. Continued duty of performance	No cases	
Article 30. Cessation and non-repetition	No cases	
Article 31. Reparation	*Petrobart Limited v. Kyrgyz Republic*, (SCC Case No. 126/2003), Award, 29 March 2005	• The Tribunal stated: "Petrobart refers to the judgment of the Permanent Court of International Justice in the *Factory at Chorzów* case and to the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts in order to show that the Kyrgyz Republic is obliged to compensate Petrobart for all damage resulting from its breach of the Treaty. The Arbitral Tribunal agrees that, in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred" (pp. 77–78).
	ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, 2 October 2006	• The Tribunal stated: "It may also be noted that the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, concluded in 2001, expressly rely on and closely follow *Chorzów Factory*" (para. 493). • The Tribunal also stated: "The Commission's Commentary […] on this Article states that 'The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory at Chorzów case' and then quotes the identical passage quoted by the International Court of Justice in all of the cases cited above […]. The Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded" (para. 494).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	CME Czech Republic B.V. v. Czech Republic (UNCITRAL), Partial Award, 13 September 2001	• The Tribunal stated: "As the United Nations International Law Commission in its Commentary on State responsibility recognizes, a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury" (para. 580). • The Tribunal also stated: "The U.N. International Law Commission observed that sometimes several factors combine to cause damage. The Commission in its Commentary referred to various cases, in which the injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible State. International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault. The U.N. International Law Commission referred in particular to the Corfu Channel case, according to which the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of mines at the Albanian Coast, even though Albania had not itself laid the mines […]. 'Such a result should follow a fortiori in cases, where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals […]'" (para. 583). • The Tribunal also stated: "In respect to the Claimant's remaining claims, this principle derives also from the generally accepted rules of international law. The obligation to make full reparation is the general obligation of the responsible State consequent upon the commission of an internationally wrongful act (see the Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the U.N. International Law Commission as cited above)" (para. 616).
	LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina (ICSID Case No. ARB/02/1), Award on Damages, 25 July 2007	• The Tribunal agreed "with the Claimants that the appropriate standard for reparation under international law is 'full' reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts […]. In accordance with the PCIJ, reparation: '[…] must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear […]'" (para. 31).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	BG Group plc v. Republic of Argentina (UNCITRAL), Final Award, 24 December 2007	• The Tribunal stated: "Under this rule, which seeks to codify customary international law, the obligation of the responsible State to make full reparation relates to the '... injury caused by the internationally wrongful act.' The injury, as stated by paragraph 2 of Article 31, includes any material damage caused by the wrongful act. Material damage here '... refers to damage to property ... which is assessable in financial terms. The damage, nonetheless, must be the consequence or proximate cause of the wrongful act. Damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles. The Tribunal will be guided by these principles" (paras. 427–428).
	Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal stated: "Article 1131 (1) of the NAFTA provides that Chapter Eleven Tribunals '…shall decide the issues in dispute in accordance with [the NAFTA] and applicable rules of international law.' A breach of an international obligation of the state will be deemed to be an 'international wrongful act' (International Law Commission Articles on State Responsibility, Art. 2) and that states are required to make 'full reparation' for any injury caused by an internationally wrongful act (ILC Article 31). A breach by a state party to an investment treaty is 'an internationally wrongful act' that triggers the obligation to make 'full reparation for the injury caused. These rules are applicable under customary international law as well'" (para. 275). • The Tribunal also stated: "Chapter II [of Part Two] of the ILC Articles on State Responsibility addresses the different forms of reparation for injury, spelling out the general principle under Article 31 of the ILC Articles:… Article 34 of the ILC Articles further provides the different forms of reparation—restitution, compensation and satisfaction—which separately or in combination will discharge the '… obligation to make full reparation for the injury caused…' as addressed in Article 31 of the ILC Articles" (para. 280).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 32. Irrelevance of internal law	No cases	
Article 33. Scope of international obligations set out in this Part	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, 29 January 2004	• The Tribunal stated: "It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest" (para. 154) • In support of the proposition that treaties may confer rights on individuals, the Tribunal made reference, inter alia, to Article 33(2) (note 83).
	Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal stated: "The customary international law that the ILC Articles codify do not apply to matters which are specifically governed by lex specialis—i.e., Chapter Eleven of the NAFTA in the present case. These matters also include the possibility of private claimants (who are nationals of a NAFTA Member State) invoking in an international arbitration the responsibility of another NAFTA Member State, as it is a matter of the particular provisions of Chapter Eleven to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. This is confirmed by Article 33 (2) of the ILC Articles, which provides that the customary rules on state responsibility codified by the ILC Articles operate '…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.' Customary international law—pursuant to which only sovereign States may invoke the responsibility of another State—does not therefore affect the rights of non-State actors under particular treaties to invoke state responsibility. This rule is not only true in the context of investment protection, but also in the human rights and environmental protection arena" (para. 118).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Wintershall Aktiengesellschaft v. Argentina (ICSID Case No. ARB/04/14), Award, 8 November 2008	• The Tribunal stated: "Article 33(1)—of the ILC's Articles ('ILC's Articles') provide that the obligations of the Responsible State, 'set out in this Part' (Part Two—on the Content of the International Responsibility of a State)—may be 'owed to another State or to several States or to the international community as a whole' (not to an individual). Article 33(1) deals with the primary obligation of the Responsible State (to the other State or international community as a whole) for an 'internationally wrongful act.' Article 33(2) of the ILC's Articles, however, acknowledges the 'possibility' (as yet only a possibility—the ILC having taken no definite stand on this) of a 'secondary obligation' arising from a breach of a treaty accruing directly in favour of person or entity other than a State—as to which Mr. James Crawford says: '…at some level, a modern bilateral investment treaty disaggregates the legal interests that were dumped together under the Mavrommatis formula—though it is not accompanied by any detailed regulation in the Articles of the ways in which State Responsibility may be invoked by non-State entities'" (para. 112). • The Tribunal noted that "the ILC's Articles on State Responsibility is a detailed and official study on the subject but it contains no rules and regulations of State Responsibility vis-à-vis non-State actors. Tribunals are left to determine 'the ways in which State Responsibility may be invoked by non-State entities' from the provisions of the text of the particular Treaty under consideration" (para. 113).
Article 34. Forms of reparation	*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005	• The Tribunal stated: "It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction" (para. 399). • In an accompanying footnote, the Tribunal referred to Article 34 (note 211).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Nykomb Synergetics Technology Holding AB v. Republic of Latvia, Award, 16 December 2003	• The Arbitral Tribunal held: "[I]t seems to be agreed between the parties, that the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission's Draft Articles on State Responsibility adopted in November 2001 […]). According to Articles 34 and 35 […], restitution is considered to be the primary remedy for reparation" (pp. 38–39).
	LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina (ICSID Case No. ARB/02/1), Award on Damages, 25 July 2007	• The Tribunal stated: "Reparation can thus take the form of restitution or compensation. Claimants have requested compensation measured by the fair market value of their loss" (para. 32). • In an accompanying footnote, the Tribunal noted: "Article 34 of the [Articles] also includes satisfaction as a third form of reparation. Satisfaction is, however, irrelevant for the purposes of this case and will not be considered by the Tribunal" (note 6).
	Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal stated: "Article 34 of the ILC Articles further provides the different forms of reparation—restitution, compensation and satisfaction—which separately or in combination will discharge the '…obligation to make full reparation for the injury caused…' as addressed in Article 31 of the ILC Articles" (para. 280).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 35. Restitution	*Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Award, 16 December 2003	• The Arbitral Tribunal held: "[I]t seems to be agreed between the parties, that the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in [the Articles]. • According to Articles 34 and 35 [of the Articles] restitution is considered to be the primary remedy for reparation" (pp. 38–39).
	CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award, 12 May 2005	• The Tribunal noted, referring in this regard in a footnote to Article 35, that "[r]estitution is the standard used to reestablish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation" (para. 400 and note 212).
	Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award, 28 September 2007	• The Tribunal noted (referring to Article 36) that "[i]n the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party" (para. 401).
	ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, 2 October 2006	• The Tribunal stated: "The Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded. The remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, 'payment of a sum corresponding to the value which a restitution in kind would bear', which is the matter to be decided" (paras. 494–495).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Occidental Petroleum Corporation and Occidental Petroleum and Exploration Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007	• The Tribunal stated: "[S]pecific performance must not only be possible in order to be granted to a claimant. Specific performance, even if possible, will nevertheless be refused if it imposes too heavy a burden on the party against whom it is directed. Article 35 of the ILC Articles on State Responsibility is worthy of mention in this regard" (para. 82).
	Desert Line Projects LLC v. Yemen (ICSID Case no ARB05/17), Award, 6 February 2008	• The Claimant claimed for reparation to be "determined in accordance with general principles of international law as reflected in the International Law Commission's Articles on State Responsibility. Article 31 of the ILC sets forth the principle of full reparation by the State for the injury caused by the internationally wrongful act" (para. 227).
	Burlington Resources Oriente Limited v. Ecuador and Empresa Estatal Petroleos del Ecuador (ICSID Case No. ARB/08/5), Procedural Order no. 1, 29 June 2009	• The Tribunal discussion stated that "Article 35 of the ILC Articles on State Responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate. Whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage" (para. 70).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 36. Compensation	*CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Final Award, 14 March 2003	• The Tribunal stated: "International Law requires that compensation eliminates the consequences of the wrongful act. The Articles adopted by the United Nations International Law Commission on the Responsibility of States for Internationally Wrongful Act provide for the 'obligation to compensate for the damage caused', and specify that that compensation 'shall cover any financially assessable damage including loss of profits…' (Art. 36). Paragraph 22 of the Commission's Commentary on its Articles states that: 'Compensation reflecting the capital value of property taken or destroyed as the result [of] an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost […]" (para. 501).
	CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award, 12 May 2005	• Quoting the two sub-paragraphs of Article 36 of the Articles in accompanying footnotes, the Tribunal noted that: "Compensation is designed to cover any 'financially assessable damage including loss of profits insofar as it is established.' Quite naturally compensation is only called for when the damage is not made good by restitution. The decision in Lusitania, another landmark case, held that 'the fundamental concept of "damages" is…reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.'" (para. 401). • The Tribunal observed, again referring to the Commentary to Article 36 in a footnote, that: "The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses" (para. 402, note 217).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina (ICSID Case No. ARB/02/1), Award on Damages, 25 July 2007	• The Tribunal stated: "Pursuant to Article 36 of the [Articles] '[t]he State is under an obligation to compensate for the damage caused thereby' and compensation 'shall cover all financially assessable damage including loss of profits in so far as it is established.' The determination of compensation depends on the identification of the damage caused by Respondent's wrongful acts and the establishment of lost profits. As to the damage caused, it is useful to recall the definition of this concept made in the *Lusitania* case: 'The fundamental concept of "damage" is […] reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.' After considering this definition and again the dictum of the *Factory at Chorzów* case, the ILC Commentary concludes that the function of compensation is 'to address the actual losses incurred as a result of the internationally wrongful act.'" (paras. 41–43). • The Tribunal stated: "The Claimants raise the claim for loss of profits, in response to the method proposed by the Tribunal in Procedural Order No. 6. This claim will be addressed in the context of the analysis of the Tribunal's method. However, as a matter of principle, it is necessary to outline at this point the distinction between accrued losses and lost future profits. Whereas the former have commonly been awarded by tribunals, the latter have only been awarded when 'an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable.' Or, in the words of the Draft Articles, 'in so far as it is established.' The question is one of 'certainty'. 'Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.'" (para. 51).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, 2 October 2006	• The Tribunal stated: "The Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded. The remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place and so it is, in the words of the Chorzów Factory decision, 'payment of a sum corresponding to the value which a restitution in kind would bear,' which is the matter to be decided.'" (pp. 494–495).
	Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award, 6 February 2007	• The Tribunal stated: "The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty. The Draft Articles are currently considered to reflect most accurately customary international law on State responsibility" (paras. 349–350). • The Tribunal also stated: "This Article relies on the statement of the PCIJ in the *Factory at Chorzów* case on reparation […] The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act' as opposed to compensation 'equivalent to the value of the expropriated investment' under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages" (paras. 351–352).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award, 28 September 2007	• The Tribunal stated: "In the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party. The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts adopted by the United Nations General Assembly in 2002, also state in this respect that compensation is meant to cover any 'financially assessable damage including loss of profits insofar as it is established.'" (para. 401 and note 158).
Article 37. Satisfaction	No cases	
Article 38. Interest	*CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001	• The Tribunal stated: "The Tribunal does not find particular circumstances in this case justifying the award of compound interest. The calculation of the compensation itself already fully compensates Claimant for the damage suffered. Awarding simple interest compensates the loss of use of the principal amount of the award in the period of delay." In this regard, the Tribunal made reference to Article 38, and the Commentary thereto (para. 647).
	CME Czech Republic B.V. v. Czech Republic (UNCITRAL), Partial Award, 13 September 2001	• The Tribunal observed, referring in a footnote to Article 38 of the Articles, that "[d]ecisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends" (para. 404 and note 220).
	Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award, 6 February 2007	• "As an expression of customary international law, Article 38 of the Draft Articles states:…. Thus, in determining the applicable interest rate, the guiding principle is to ensure 'full reparation for the injury suffered as a result of the internationally wrongful act.'" (paras. 394–396).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
	Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Claimant's Request for Rectification and or Supplementary Decision of the Award, 25 October 2007	• The Tribunal also "examined the text of the ILC's Article 38(2) of the Articles on State Responsibility, where, as the Claimants rightly recall, it is indicated that interest runs 'until the date the obligation to pay is fulfilled.' Yet, the Commentary to this Article explains that the actual calculation of interest by way of reparation, 'raises a complex of issues concerning… the terminal date (date of settlement agreement or award, date of actual payment)...', and that there is no uniform approach to such issues. It is then concluded that '[i]n practice the circumstances of each case and the conduct of the parties strongly affect the outcome.' Equally pertinent is the explanation of the Commentary to the effect that: (12) Article 38 does not deal with post-judgment or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgment interest is a matter of its procedure. It is apparent from the above that the ILC did not retain the distinction between compensatory and moratory interest in connection with Article 38(2) of the Articles and, therefore, the Article in question does not support the argument of the Claimants as to post-award interest in this context" (paras. 45–47).
	SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Order on Further Proceedings, 17 December 2007	• The Tribunal observed: "[W]hereas international tribunals do have the power to award interest on unpaid amounts, that is a discretionary power and depends on the circumstances. Guidance may be obtained from the decision of the Permanent Court of International Justice where interest was awarded only from the date of judgment, that being 'the moment when the amount of the sum due has been fixed and the obligation to pay has been established.'" (para. 16). • In an accompanying footnote, the Tribunal also referred to Article 38 and the accompanying Commentary (note 19).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 39. Contribution to the injury	No express references to Article 39 in decisions; the Tribunal in *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile* (ICSID Case No. ARB/01/17), Award of 25 May 2004 applied Article 39 by analogy without referencing it.	
Article 40. Application of this Chapter	No cases	
Article 41. Particular consequences of a serious breach of an obligation under this Chapter	No cases	
Article 42. Invocation of responsibility by an injured State	No cases	
Article 43. Notice of claim by an injured State	No cases	

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 44. Admissibility of claims	*The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003	• The Tribunal stated: "The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law […]" (para. 149).
	Wintershall Aktiengesellschaft v. Argentina (ICSID Case no ARB/04/14), Award, 8 November 2008	• The Tribunal stated: "Article 44 of the ILC's Articles (under the heading "Admissibility of Claims") provides that 'the responsibility of a State may not be invoked if…. (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted'; the local remedy (i) must be available and (ii) must be effective. But this is a stipulation of international law applicable between States or State entities—it is not applicable in the case of a secondary-right-holder like an investor" (para. 126). • The Tribunal then quoted from the Commentary to this Article.
Article 45. Loss of the right to invoke responsibility	No cases	
Article 46. Plurality of injured States	No cases	
Article 47. Plurality of responsible States	No cases	
Article 48. Invocation of responsibility by a State other than an injured State	No cases	

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 49. Objects and limits of countermeasures	*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal stated that it took as "an authoritative statement of customary international law on countermeasures the position of the International Court of Justice, as confirmed by the ILC Articles" (para. 125). • The Tribunal then quoted Articles 22 and 49 in full and made reference to passages from the judgment of the International Court of Justice in Gabčíkovo-Nagymaros Project (Hungary/Slovakia) setting out the pre-conditions for the adoption of countermeasures (paras. 125–126). • The Tribunal then observed: "Customary international law provides the test for the validity of countermeasures. As noted, each of the requirements, as applied to the facts of the instant case, must be met. If one fails, the defense fails" (para. 133). • The Tribunal also stated: "One of the central issues to be decided with respect to the Respondent's countermeasures defense, and which the parties debated at length, is the question whether the Tax was enacted by Mexico, in accordance with Article 49 of the ILC's Articles on State Responsibility and its Commentary, 'in order to induce' the United States to comply with its NAFTA obligations" (para. 135). • The Tribunal also stated: "If the Tax was not enacted to induce compliance by the United States with its NAFTA obligations, then the Tax was not a valid countermeasure within the meaning of Article 49 of the ILC Articles on State Responsibility" (para. 148).
Article 50. Obligations not affected by countermeasures	No cases	
Article 51. Proportionality	*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal stated: "Article 51 of the ILC Articles emphasizes the requirement of proportionality, noting that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. Therefore, proportionality plays a prominent role, limiting the power of taking countermeasures in response to an international wrongful act" (para. 152).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 52. Conditions relating to resort to countermeasures	No cases	
Article 53. Termination of countermeasures	No cases	
Article 54. Measures taken by a State other than an injured State	No casews	
Article 55. *Lex specialis*	*United Parcel Services, Inc v. Canada* (UNCITRAL), Award, 11 June 2007	• The Tribunal stated: "Several features of these provisions read as a whole lead the Tribunal to the conculsion that the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances. The special rules of law stated in chapters 11 and 15, in terms of the principle reflected in article 55 of the ILC text, 'govern' the situation and preclude the application of that law" (para. 60).
	Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007	• The Tribunal acknowledged 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. But the provisions of the ILC Articles may be derogated from by treaty, as expressly recognized in Article 55 in relation to *lex specialis:* *Lex specialis*. These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law. Accordingly, customary international law does not affect the conditions for the existence of a breach of the investment protection obligations under the NAFTA, as this is a matter which is specifically governed by Chapter Eleven" (para. 116).

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ARSIWA	Decision/s	Discussion of ARSIWA in the decision/s
Article 56. Questions of State responsibility not regulated by these articles	No cases	
Article 57. Responsibility of an international organization	No cases	
Article 58. Individual responsibility	No cases	
Article 59. Charter of the United Nations	No cases	