Second Reading of the ILC Draft Articles on State Responsibility: Further Progress

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Introduction

At its 51st session, held in Geneva from May to July 1999, the International Law Commission resumed its work on the topic of State responsibility with the view to completing the second reading of the Draft articles at the end of its current quinquennial mandate (2001). Basing itself on a Second Report by the present Special Rapporteur, the ILC continued the task of systematically considering the draft articles in the light of the comments of Governments and developments in State practice, judicial decisions and in the literature. The remaining chapters in Part One, namely Chapters III (“Breach of an International Obligation”), IV (“Implication of a State in the Internationally Wrongful Act of Another State”) and V (“Circumstances Precluding Wrongfulness”), were reviewed by the Commission and further considered by the Drafting Committee. The question of the treatment to be reserved to counter-measures, and other remaining strategic issues concerning the following parts of the draft articles, was also considered.

In this note, we review the issues discussed in 1999 and give some preliminary idea of the range of issues remaining to be decided as to Parts 2 and following of the Draft articles.¹

Consideration of Chapters III, IV and V of Part One (Articles 16-35)

Chapter III

Chapter III deals with the element of breach, the second constituent of State responsibility identified in Article 3 (b). It devotes no less than 11 articles to the

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question of breach, dealing with a range of issues such as the intertemporal factor, the distinction between obligations of conduct and result, the exhaustion of local remedies and the notions of continuing, complex and composite wrongful acts.

There is however a conceptual difficulty with Chapter III. The draft articles on State responsibility are concerned with the codification and progressive development of secondary rules, but the existence of a breach of an international obligation largely relies upon the specific content of the primary rule in question. This is not to say that the whole of this Chapter has no relevance to the Draft articles. But as a number of Governments pointed out, some of the fine distinctions drawn in Chapter III (e.g. between obligations of conduct and obligations of result) lacked consequences within the framework of the Draft articles, while others (e.g. the distinction between composite and complex wrongful acts) were of doubtful validity. Thus the Chapter needed to be reviewed as a whole, to ensure that the treatment of breach was consistent with the basis of the text as whole (i.e. that it did not unduly trespass into the field of the primary rules), and also that it dealt with the issues in a practical and satisfactory way.

As a consequence of this re-examination, Chapter III underwent substantial modification and compression. The basic provision of Chapter III, article 16, was retained but redrafted. It is now proposed that it read:

“There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”

The last words were added in order to include clarifications previously made in article 17 (1) and 19 (1), which have been deleted. Of course it is the case that, if an international obligation has been breached, the fact that the origin of the obligation was to be found in a treaty as distinct from, say a unilateral act or a rule of general international law does not affect the matter. Moreover the secondary rules of state responsibility apply quite generally, and do not draw distinctions based on the customary or conventional nature of the primary obligation alleged to have been breached. These propositions, which are in the nature of axioms, were affirmed by the Arbitral Tribunal in the Rainbow Warrior Case and by the International Court in the Case Concerning the Gabcikovo-Nagymaros Project. They

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2 It should be recalled that the structure of the Draft and the location and content of the articles remain provisional until final adoption by the Commission of the whole text on second reading.

3 (1990) 20 UNRIAA 217 at p. 251.