State Responsibility

Ascertaining the Liability of States in Foreign Investment Disputes

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"The nation is essentially the source of all sovereignty; nor can any individual or any body of men be entitled to any authority which is not expressly derived from it."

Declaration of the Rights of Man and of Citizens

I. INTRODUCTION

The subject of State responsibility is built on two fundamental constructs under international law. The first construct relates to the rights of a State, including the right of such State to represent or espouse the rights of one of its nationals in circumstances where such State or national has incurred a loss because of the wrongful acts of another State. The second construct concerns the responsibility of the latter State to make reparations for such actions. State responsibility has been the focus of the International Law Commission's (ILC) work for a number of decades and, at its Fifty-third Session, the ILC proposed the most recent set of Draft Articles on State Responsibility (hereinafter, the Draft Articles). The Draft Articles, painstakingly developed since the 1960s, provide some useful guidelines for the practitioner but fall short of offering practical standards that can be used to determine answers to difficult questions such as whether particular conduct can be deemed to be wrongful under international law and when a State may be considered to be responsible for the actions of its sub-sovereigns and state-owned entities. The Draft Articles also fail to consider from a practical standpoint an important part of the initial construct referred to earlier, which is the right of a State to represent its nationals through diplomatic protection and the related legal ramifications such as the nationality of the claim.

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2 In this article, except with reference to the term "state-owned enterprises", the term "State" with a capitalized "S" will always refer to a country or nation as distinguished from the term "state" with a lower case "s" referring to a state as a territorial sub-division under a federal system of government.

3 It would appear, however, that the ILC's concentration has been on wrongful acts directed towards other States by a third State rather than wrongful acts directed towards a national of another State. See, in this regard, Part Three, Chapter I, Article 42 of the Draft Articles, supra, footnote 1. See also in this regard Edith Brown Weiss, Symposium: The ILC's State Responsibility Articles: Invoking State Responsibility in the Twenty-First Century, 96 A.J.L. 798, October 2002.
This article, however, seeks to review the Draft Articles in the context of the second construct of State responsibility and examines the relevant provisions of the Draft Articles and past and current case-law on investment disputes. It concludes with a proposal of some standards based on legal principles which may be helpful for a practitioner in this field to observe.

Some of the more important aspects of State responsibility, such as liability of a State for the actions of its sub-sovereigns and state-owned entities, are of critical importance to consider in complex project finance transactions involving cross-border contracts. Many of the contracts in such transactions, such as power purchase agreements, project agreements, concession agreements, joint-venture agreements and the like, are concluded with sub-sovereigns and state-owned enterprises with assurances and undertakings given to the foreign partners which do not explicitly engage the State or the sovereign. Consequently, the critical issues of State responsibility which emerge are not merely of intellectual interest but are of tremendous practical significance in modern-day business transactions.

This article will not treat, in this context, traditional concepts of State responsibility such as espousal and diplomatic protection, because these concepts have a bearing on inter-State responsibility when a dispute has reached a final stage without resolution. Indeed, many investment disputes begin as a matter of private international law application and then spiral upward to become an inter-State dispute involving public international law. To reiterate, the context will be a discussion of issues which centers on injuries suffered by an alien because of an act of a State, the act of a State here meaning more precisely acts of its central government, its other territorial sub-divisions, entities of or owned by the State, and agents of the State.

II. "INTERNATIONALLY WRONGFUL ACTS"

As a preliminary matter, perhaps one of the main shortcomings of the ILC Draft Articles is the lack of a definition or a cataloguing of what are deemed "international wrongs". This may reflect the enormous complexity surrounding what could be deemed an international wrong under international law, the political divide on such matters between developed and developing countries and issues of sovereignty, which

4 Note, however, in this connection three cases that did engender espousal by the State of the injuries suffered by one of its nationals from acts by another State, namely, the Barcelona Traction case (Barcelona Traction, Light and Power Co, Ltd (Belgium v. Spain), 5 February 1970, I.C.J. Reports, 1970); the Chorzow Factory case (Case Concerning the Factory at Chorzow (Poland v. Germany), Permanent Court of International Justice, 26 July 1927, available at: www.worldcourts.com/pcij/eng/decisions/1927.07.26.chorzow); and the F.I.S.I. case (Case Concerning Elettronica Sicula S.p.A. (United States v. Italy), International Court of Justice, Judgment of 20 July 1989, 1989 I.C.J. 15). These cases essentially arose out of property rights disputes between private nationals and State parties and were finally decided as inter-State matters in the International Court of Justice or its predecessor, the Permanent Court of International Justice. All three cases involved interference by governmental entities with private property rights.

5 Theorists have generally held that delicts and torts, breaches of contractual obligations by States accompanied always by a denial of justice, expropriation or nationalization and war claims engender State responsibility; see William W. Bishop, Jr., International Law: Cases and Materials, 3rd edition, Little, Brown and Company, New York, 1962, pp. 753–803.