Future of Articles on State Responsibility for International Wrongful Acts

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I thank Ambassador Costa, Permanent Representative of Brazil to UN, New York and the Brazilian Delegation for convening this virtual meeting, prior to 77th Session of the UN General Assembly 6th Committee, inviting delegations and importantly current and incoming ILC members.

General

Let me start by saying that the issues of form and substance are intimately linked, thus, it is not simply the format of the codification instrument, which is one of the prevalent views.

Question 1: Is the current non-binding form of the articles the most appropriate one?

Yes, the state practice and doctrine unlike some of the 300 cases which the UN Secretariat has put together indicate that the current non-binding form of the articles is the most appropriate one. I will try to substantiate. It is also quite prevalent view that the entirety does not represent customary international law or settled consensus of views among states. Which issues need attention? First, part I concerning the origin of responsibility. Article 14.3 calls for further clarification vis-à-vis obligation of conduct versus obligation of result, the discussion reveals gaps to be filled and thus clarification is necessary. Part II two concerning consequences and namely, articles 40 and 41 on special consequences of the breach of obligation protecting fundamental interests of the international community. We can also note article 40 and 41 which, respectively, identify the category of 'serious breaches' of obligations arising

under peremptory norms of general international law; and set forth as particular consequences thereof the obligation of all States to cooperate to put an end to any serious breach and the obligation not to recognize as lawful a situation created by a serious breach nor render aid or assistance in maintaining that situation.[1] In this regard, ICJ has its reservation on the matter but the Chagos case stands[2] as another indicator of the uncertainties surrounding the regime of special consequences of serious breaches of international law as enshrined in the ARSIWA. Third, part III – implementation of international responsibility - Article 54, according to which the Articles do 'not prejudice the right of any State, entitled under Article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State'. The limited state practice, although has been increasing in this century, does not enable to conclude that this constitutes *Opinio juris* and state practice per se. There is a need for reassessing the legal limits applicable to countermeasures taken by third states.

Second question which is being put is whether the current form of the draft contribute to its codification or promote a 'reverse codification' effect?

In my considerate view, reverse codification or decodification is likely to happen. This observation generates after studying case-laws which have been compiled by the Secretariat. I will make two remarks, in recent times, there has been a remarkable development of the importance of attributed to case law, both in qualitative and quantitative terms, the precedents of ICJ, tribunals and ICSID tribunals have become more important. In this regard, what I would say is we shall analyse the impact of the case law for both substantive rules and the

[1] Maurizio Arcari, "The Future of the Articles on State Responsibility: A matter of form or of substance?" in Questions of International Law Zoom-in 93 (2022), pp. 3-21.

[2] Op.cit p. 16

procedural rules. For example, admissibility of claims, exhaustion of internal remedies, principle for determining the form of reparation and especially the calculation of damages. But precedents are still few and ambiguous in certain areas, especially where environmental damage is concerned. Regard must be had to the *Trail Smelter* case, *Armed activities in the Territory of the Congo* (dealing with the exploitation of natural resources during an occupation by armed forces). While analysing the case law, one is struck to question about the authority of precedent – is it uniform or varying? Several factors, although non-exhaustive influence, namely, *the legal basis of the decision – judgment, advisory opinion, verdict based on a particular treaty is less significant than one based on general principles; the quality of the reasoning; the isolated character of the precedent, or conversely, its recurring character; the authority of the court or arbitrator; the degree of specificity of the dispute: the case law on war reparations for example is governed by criteria fixed in peace treaties that are often so unequal that one would hesitate to turn them into a general rule; the degree of coherence of the relevant precedence*.[3]

The role of case law has to be measured. What we see is that the concern of protecting the interests of developing countries has led certain countries in the codification project to prefer the development of the law over simple codification.

ILC commentary and reports by several rapporteurs have invoked international case law but there are exceptions where caselaw remains still known including

[3] Patrick Daillier, "The Development of the Law of Responsibility through the Case Law", in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford University Press, 2010, pp. 37-54

the latest compilation dated 29 April 2022. These exceptions concern articles 18 (coercion), 19, 28, 46 (plurality of injured states), 53 (termination of countermeasures), 54 (measures taken by states other than an injured state), 56 (questions not regulated by the articles). Is it possible that certain hesitation of states stems from the fact that rapporteurs works were guided only to a limited extent by the content of compilations produced by the Secretariat, in the initial and current phases? The latest report shows no caselaw on these articles. In the absence of this just one aspect, precaution may be observed when some courts and tribunals rush to give general characterization that ARSIWA reflect customary international law.

The articles are based principally on case law precedents, to a far greater extent than on state practice and doctrine. Large number of 300 cases compiled by the Secretariat lead to a conclusion that importance given by common law countries to the case law overweighs than the emphasis given to state practice and doctrine by civil law and / or several West European nations.

A considerable amount of the case law is judged to be irrelevant; furthermore, most relevant judicial precedents are the ones not dependent on particular treaty settlements; reference to be made to the most important cases which have arisen in diplomatic practice and international jurisprudence

Hierarchy in case law also needs examination. For example, reliance is placed on the case law simply for the purpose of showing the acceptance of some theory of responsibility. The case law that are most used are dealing with continuing breaches like *Gabcikovo-Nagymaros*, *Rainbow Warrior*, *Corfu Channel*, *La Grand*,

US diplomatic staff in Tehran, *Chorzow factory*, *The S. S Wimbledon*, *Certain Phosphate Lands in Nauru* and the most cited case, namely *military and paramilitary activities in and against Nicargua*.

The above leads to conclude that the current articles heavily emphasis on historical case law. Secondly, the two conditions for emergence of a true law of state responsibility, that is an obligation to submit to third party settlement of disputes and the required density of primary obligation, are yet to be met[4].

What are the consequences of the current impasse with regard to the future form of the articles on other topics of the agenda of the Commission that also examine ILC products?

Before the adoption of the draft articles on State Responsibility in 2001, the Commission had adopted sixteen sets of draft articles with the recommendation, followed in most cases, to the UNGA to take action towards concluding a convention.

After the experience of 2001 with State Responsibility, half (4) of the topics concluded were recommended to the General Assembly for the conclusion of an international treaty, and half (4) of that was subject to the two-step approach recommendation, while the remaining half (8) were subject to a format other than draft articles.[5]

[4] Daillier, op. cit 44

[5] Patriciai Galvao Teles, The impact and influence of the Articles on State Responsibility on the work of the International Law Commission and beyond, Available at: https://www.ejiltalk.org/the-impact-and-influence-of-the-articles-on-state-responsibility-on-the-work-of-the-international-law-commission-and-beyond/.

Other Procedural options

1. Certain procedural options specifically with reference to the ARSIWA.[6]

   To break the impasse, the Committee should consider the topic on an annual basis, to allow for more substantive discussions than the triennial cycle allowed; States should address the substantive and procedural issues involved in the application of the articles, in order to determine those that were the source of the greatest disagreement among them and to find possible solutions thereto; and a discussion should be held on the practical aspects of convening a conference for the negotiation of a convention, including the forum, the rules of procedure and the manner in which the articles would be used as a starting point for the negotiations. The work of the working group to be convened to that end could contribute to moving the item forward.

2. Secretary General to Provide Information on Procedural Options:

   A consensus should be reached to request the Secretary-General to provide the General Assembly with information on all procedural options regarding possible action on the basis of the articles.

3. Modify the Format of Triennial Cycle Debates:

   The format of triennial cycle debates should be modified to make them a more efficient tool of discussion and exchange of ideas – the triennial debates have consisted of procedural skirmishing on future action that has revolved around the divisive question of a codification conference. Not only have the Secretariat reports on the application of the ARSIWA in practice featured only peripherally in the debates but matters of substance have largely been absent. Although there have been a few new entrants into the debates, the participants remain relatively few in

[6] UNGA, Sixth Committee Summary record of the 13th meeting Held at Headquarters, New York, on Tuesday, 15 October 2019, at 10 a.m. A/C.6-/74/SR.13

comparison with the total membership as measured by the number of statements made.

4. Resolution adopted by the General Assembly on 13 December 2016 71/133[7]:

> *"8. Decides to include in the provisional agenda of its seventy-fourth session the item entitled "Responsibility of States for internationally wrongful acts" and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles."*
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> *"5. Acknowledges the possibility of requesting, at its seventy-fourth session, the Secretary-General to provide the General Assembly with information on all procedural options regarding possible action on the basis of the articles, without prejudice to the question of whether such possible action is appropriate."*

Conference of plenipotentiaries

The information compiled by the Secretariat is clear indicative that the any conference to consider to prepare the Convention will be a non-starter. We have seen that those who are opting against the Convention are sanctifying that the balance that is struck within the articles need no alteration and at the same time, some states who are favouring the option of convening a conference have no real substantive convincing legal arguments. Even if a conference is called and

[7] Responsibility of States for internationally wrongful acts, A/RES/71/133

instrument is concluded, no adequate number of ratifications will happen and it may actually have delegitimizing impact on the existing articles.

What are the consequences on other topics?

No real effect but delays will continue to have doubtful effect on the importance of ARSIWA and the evolving state practice such as countermeasures and other articles which I mentioned earlier may have impact on the existing articles. Responsibility of International Organisations, Liability in respect of transboundary harms, as well as newer topics, such as Dispute Settlement between International Organisations, Piracy and armed-robbery are some of the most critical topics which remain influenced.

One important area which remain deeply influenced is arbitration under investment treaties. Investment tribunals' decisions show little or no reflection as to whether any adaptation of the rules in ARSIWA is needed to apply them to such disputes. Are the general rules in ARSIWA well-suited for the hybrid nature of international investment claims which are increasing and found in state-practice but also in awards by tribunals? In the absence of *lex specialis* in the applicable International Investment Agreements, investment tribunals have rarely deviated from ARSIWA to resolve issues of state responsibility. The Secretariat compilation substantiates this observation.

The state practice even today shows that there is a tension between, on the one hand, the broad statement that the characterization of an act of a state as internationally wrongful 'is not affected' by its characterization in national law and, on the other hand, the recognition of the potential relevance of national

law 'to the question of international responsibility.' Further, as one author says, the primacy of international law may be preserved without denying a role for national law in the determination of international responsibility.[8] In fact, the lawfulness of an act under national law *may affect* the assessment of whether the same act is internationally wrongful, particularly in fields such as damage to property, investment, etc. Investment tribunals are quite generously mentioning that ARSIWA reflects customary international law which needs analysis.

This leads me to conclude that 6th Committee can consider referring the ARSIWA to analyse the state practice and doctrine, in addition to the case-law which has been compiled by the Secretariat and issue its observations to the 6th committee.

[8] Gabriel Bottini, The Articles on Responsibility of States for Internationally Wrongful Acts and the making of international investment law, EJIL: Talk, 6 August 2021