COMMENTARY

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ARSIWA, ISDS, AND THE PROCESS OF DEVELOPING AN INVESTOR–STATE JURISPRUDENCE

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I. THE PREVALENCE OF ATTRIBUTION IN ISDS CASES

The Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") took decades to come to fruition, having been selected as a suitable topic for codification at the International Law Commission's first session in 1949. The first rapporteur for the ARSIWA was named in 1955. Ultimately the project evolved under the leadership of five special rapporteurs and was brought to a successful conclusion by (then) Professor James Crawford, the special rapporteur from 1997 to 2001. The ARSIWA were adopted by the International Law Commission in 2001 and submitted to the United Nations General Assembly that year.[1] As the ARSIWA reached their twentieth anniversary in 2021, it is especially apt that Volume 20 of the *ICSID Reports* focuses on investor–State dispute settlement ("ISDS") cases addressing attribution of responsibility to States.

The ARSIWA were published with extensive commentary on the draft articles. Together, the individual articles and the commentary have become an important source of guidance for ISDS tribunals considering whether the acts or omissions of an entity associated with the respondent State are legally attributable to that State.[2] The draft articles were purposefully drafted as a set of secondary rules, dealing with the conditions for attribution of responsibility. They are not primary rules, which are found mainly in bilateral and multilateral investment treaties (international investment agreements, "IIAs") in ISDS.[3]

* ICSID Secretary-General. The author would like to acknowledge with gratitude the work of Celeste Mowatt, ICSID Counsel, in the research and writing of this note. In addition, the work of Esmé Shirlow and Kabir Duggal in "The ILC Articles on State Responsibility in Investment Treaty Arbitration", and Carlo de Stefano in "Attribution of Conduct to a State in International Investment Law and Arbitration", both to be published in an upcoming Special Issue of the *ICSID Review* on the ARSIWA (2022), were invaluable resources and are highly commended to the reader for insightful and comprehensive commentary. The views expressed in this note, and any predictions made, are offered in the author's personal capacity and should not be construed as official comments on behalf of ICSID.

[1] The text of ARSIWA with commentary is found in the *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[2] For a list of ISDS cases interpreting the ARSIWA between 2001 and 2010, see: James Crawford, "Investment Arbitration and the ILC Articles on State Responsibility" (2010) 25(1) *ICSID Review* 127, 134–97 ["Crawford 2010"]. For a list of ISDS cases interpreting the ARSIWA between 2011 and 2020, see: Esmé Shirlow and Kabir Duggal, "The ILC Articles on State Responsibility in Investment Treaty Arbitration" (2022) 37 *ICSID Review*, forthcoming ["Shirlow and Duggal"].

[3] Crawford 2010 (n 2) 125–6; Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020) ["de Stefano 2020"] 101. See also, Art. 12 ARSIWA (n 1): "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."

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Although the ARSIWA are not primary investment law rules, the decisions of ISDS tribunals interpreting and applying ARSIWA have become one of the most extensive resources on the draft articles. More than half of all available decisions on ARSIWA emanate from ISDS tribunals.[4] While this likely was not contemplated by the ARSIWA drafters, it is not surprising. IIAs offering ISDS have increased more than sixfold in the last 30 years, and the number of cases based on IIAs have increased at a similar rate.[5] In his study of ISDS cases addressing ARSIWA up to 2010, Judge Crawford identified more than 55 cases.[6] An update of that survey from 2010 to the present by Professors Shirlow and Duggal identified more than 125 such cases, a vast increase in the number of ISDS authorities on the topic.[7] Few questions of international law draw on this magnitude of jurisprudence.

The increase in ISDS cases interpreting and applying ARSIWA also reflects the fact that most IIAs do not contain detailed rules on topics such as circumstances precluding wrongfulness, reparation and compensation, or interest on awards. Few IIAs address attribution of State responsibility,[8] yet attribution is frequently a debated issue in ISDS proceedings, and so the ARSIWA are a logical source of guidance on this topic. ISDS cases applying ARSIWA have clearly recognised that while attribution of State conduct is not dispositive of substantive liability under the relevant investment instrument, there can be no liability for conduct that is not attributable to the respondent government.[9] While a determination on attribution might be decided as a preliminary question under provisions such as ICSID Arbitration Rule 41(5), the facts relevant to attribution are often related to the substantive merits of the case and can be complex, and hence attribution is usually addressed as part of the merits of the case or as a jurisdictional objection.[10]

[4] See, for example, the compilations of ARSIWA cases by the UN Secretary-General in 2007, 2010, 2013, 2016, 2017 and 2019, reflecting an increasing concentration of ISDS cases on the topic over the years: Report of the Secretary-General, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies (23 April 2019), UN Doc. A/74/83, https://undocs.org/A/74/83.

[5] United Nations Conference on Trade and Development (UNCTAD), *The Changing IIA Landscape: New Treaties and Recent Policy Developments* (IIA Issues Note, Issue 1, July 2020) 1; UNCTAD, *Investor–State Dispute Settlement Cases Pass the 1,000 Mark* (IIA Issues Note, Issue 2, July 2020) 1. See also ICSID Secretariat, "ICSID Caseload – Statistics (Issue 2021-1)", https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf.

[6] Crawford 2010 (n 2) 126 and Appendix.

[7] Shirlow and Duggal (n 2) update the Appendix to Crawford 2010 (n 2) on use of ARSIWA in ISDS cases and include a detailed empirical analysis on the number and breadth of references in the last 10 years.

[8] Carlo de Stefano, "Attribution of Conduct to a State in International Investment Law and Arbitration" (2022) 37 *ICSID Review*, forthcoming ["de Stefano 2022"]. See also *RWE Innogy GmbH and RWE Innogy Aersa SAU* v. *Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Quantum (30 December 2019) para. 399.

[9] See, for example, *Interocean Oil Development Company and Interocean Oil Exploration Company* v. *Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award (6 October 2020) para. 176; *AMF Aircraftleasing Meier & Fischer GmbH & Co. KG* v. *Czech Republic*, PCA Case No. 2017-15, Final Award (11 May 2020) para. 508; *Consutel Group SpA in liquidazione* v. *People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award (3 February 2020) paras. 313–20.

[10] *Nissan Motor Co. Ltd (Japan)* v. *Republic of India*, PCA Case 2017-37, Decision on Jurisdiction (29 April 2019) para. 284; *Tulip Real Estate Investment and Development Netherlands BV* v. *Republic of*

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ISDS cases on attribution invariably begin with the (undisputed) observation that the attribution portions of ARSIWA are a codification of customary international law.[11] As a result, one might have expected that ISDS cases interpreting ARSIWA would be considered and perhaps applied in fora other than ISDS arbitration. To date, however, ISDS jurisprudence has infrequently "crossed over" to become an authoritative source of general international law or practice in other international courts or tribunals, and this remains true with respect to the ISDS ARSIWA case law on attribution.[12]

The cases applying the ARSIWA to ISDS have examined new economic sectors upon which to test the effect of the attribution rules. ISDS cases invariably arise in an economic setting and deal with commercial entities structured to achieve economic goals. As a result, these cases have applied ARSIWA to a number of economic actors who are rarely named in the jurisprudence of the ICJ, ICTY or ITLOS, other courts with a track record of ARSIWA interpretation. For example, ISDS tribunals have addressed whether the conduct of universities,[13] bankruptcy trustees,[14] product marketing boards,[15] joint stock entities with State ownership,[16] airport corporations,[17] state-owned enterprises[18] and private banks[19] might trigger attribution of State liability.

Turkey, ICSID Case No. ARB/11/28, Award (10 March 2014) 20 ICSID Rep 220 paras. 276–80; *Tulip Real Estate Investment and Development Netherlands BV* v. *Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) para. 98; *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) 19 ICSID Rep 446 paras. 405–7; *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Dissenting Opinion of Makhdoom Ali Khan (23 October 2012) paras. 128–31 (noting attribution need not have been addressed as it would have no impact on the final conclusions in the case); *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) 20 ICSID Rep 164 paras. 140–6.

[11] De Stefano 2022 (n 8); Crawford 2010 (n 2) 133; Jürgen Kurtz, "The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor–State Arbitration" (2010) 25(1) *ICSID Review* 171, 178; *RWE* v. *Spain* (n 8) para. 398; *Tulip Real Estate* v. *Turkey*, Award (n 10) para. 281; *Electrabel SA* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para. 7.60.

[12] See James Devaney, "On the Contribution of Investment Arbitration to Issues of Evidence and Procedure Before Other International Courts and Tribunals" GCILS Working Paper Series, No. 4 (September 2020), https://gcils.org/wp-content/uploads/2020/10/GCILS-WP-4-Devaney.pdf. Devaney comments that ISDS cases should more frequently be considered a source of relevant jurisprudence for inter-State courts or tribunals, and cites several examples of such cross-fertilisation, including with respect to the use of remote technology for witness examination, and the standard for setting aside of arbitral awards on the grounds of failure to state reasons.

[13] *Bosh International, Inc. and B & P Ltd and Foreign Investments Enterprise* v. *Ukraine*, ICSID Case No. ARB/8/11, Award (25 October 2012) para. 164.

[14] *Oostergetel and Laurentius* v. *Slovak Republic*, UNCITRAL, Final Award (23 April 2012) paras. 153–5; *Yukos Universal Limited (Isle of Man)* v. *Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014) 18 ICSID Rep 331 para. 1480.

[15] *Hamester* v. *Ghana* (n 10) paras. 182ff.

[16] *Tulip Real Estate* v. *Turkey*, Award (n 10) paras. 282–90.

[17] *Flemingo DutyFree Shop Private Limited* v. *Republic of Poland*, UNCITRAL, Award (12 August 2016) 20 ICSID Rep 326 paras. 418ff.

[18] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) 20 ICSID Rep 267 paras. 357 and 364–5; *Al-Bahloul* v. *Republic of Tajikistan*, SCC Case No. V064-2008, Partial Award on Jurisdiction and Liability (2 September 2009) paras. 164–74.

[19] *MNSS BV and Recupero Credito Acciaio NV* v. *Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) 19 ICSID Rep 749 para. 299.

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II. CRITIQUES OF ISDS AWARDS INVOKING ARSIWA

Some of the early scholarship questioned whether the quantity of ARSIWA case law from ISDS tribunals outshone its quality.[20] In his 2010 article, Professor Crawford likened the reference to ARSIWA by some ISDS tribunals to the way "a drowning man might grab a stick at sea in the hope of having certainty". Further, he expressed concern that ARSIWA might be cited in ISDS more as "wallpaper or the furniture rather than the architecture or structure of the decisions".[21] Similarly, in 2010 Professor Jürgen Kurtz labelled the use of ARSIWA by ISDS tribunals as "paradoxical", and stressed methodological lapses, in particular the failure to analyse the conditions under which the external norms of ARSIWA could validly be incorporated into the investment treaty context.[22]

This critique of ARSIWA decisions by ISDS tribunals extended to the very invocation of the ILC articles in investor–State disputes. Drafted in an era when international law was primarily applied to inter-State disputes, the ARSIWA do not expressly state whether they were intended to apply to ISDS and, if so, how they might apply to investors, who are usually private persons or juridical entities. The answer to this question must be divined from the content of the different provisions in the ARSIWA. Part One is a general chapter outlining the basic conditions for State responsibility. It governs breach by States but does not apply to breach by non-State actors such as international organisations or private entities. However, it is uniformly agreed that Part One is applicable to determine attribution to a State in ISDS disputes.[23] Similarly, Part Four contains general provisions, mainly confirming the scope of the ARSIWA, and it applies comfortably in the ISDS context.

By contrast, Part Two and Part Three of ARSIWA cover the legal consequences of responsibility for the State, for example with respect to reparation (Arts. 31, 34–8) or the ability to take countermeasures (Arts. 49–54).[24] Some of these provisions deal with matters that are inherently related to States and not to conduct by private actors (e.g. Art. 21 on self-defence). Others expressly apply to conduct as between "two or more States" (e.g. Art. 16 on assisting another State in commission of a wrongful act or Art. 18 on coercion of another State). As a result, they are not always apt in the investor–State context. At the same time, it would be incorrect to assert that Parts Two and Three are never relevant to ISDS. As de Stefano concludes, "the application of the international law of State responsibility does not assume exclusively a model of inter-State litigation, consistently with ARSIWA Article 33.2".[25] Further, as an authoritative and careful expression of

[20] Shirlow and Duggal (n 2); Crawford 2010 (n 2); de Stefano 2022 (n 8).
[21] Crawford 2010 (n 2) 126; see also 128, 130 and 133. [22] Kurtz (n 11) 172–3 and 187–8.
[23] Shirlow and Duggal (n 2); Crawford 2010 (n 2) 126–8; Kaj Hobér, "State Responsibility and Attribution" in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 552–3.
[24] Crawford 2010 (n 2) 126–9.
[25] See de Stefano 2022 (n 8). Art. 33(2) of ARSIWA (n 1) states: "This part [Part Two] is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."

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general principles by international scholars, one would expect the principles in Parts Two and Three to be used as guidance, if not direct authority, on the issues they address. This only underlines the point that the ARSIWA have a distinct role to play in ISDS cases, but that a careful analysis as to how to incorporate them is required in each case.

Commentators have been less critical of ISDS jurisprudence applying the attribution portions of ARSIWA. Indeed, recent articles have concluded that the ARSIWA attribution rules "have been regularly applied by ICSID tribunals to investment treaty claims, in most cases without great difficulty".[26] The application of the ARSIWA attribution provisions in ISDS has been characterised as "a justifiable use" of ARSIWA,[27] and it has been concluded that "the contribution by ISDS tribunals [on attribution] is meaningful".[28]

The ARSIWA chapter on attribution is Chapter II of Part One, "Attribution of conduct to a State". It consists of Articles 4–11, although Article 4 ("Conduct of organs of a State"), Article 5 ("Conduct of persons or entities exercising elements of governmental authority") and Article 8 ("Conduct directed or controlled by a State") have been the provisions most often examined and applied by investment tribunals.

The requirements for attribution under each of Articles 4, 5 and 8 are distinct. While some commentators believe that the distinction between Articles 4, 5 and 8 of ARSIWA has not been drawn clearly enough in ISDS decisions,[29] recent cases very methodically address the different elements of these provisions and recognise the different factual foundations needed to attribute responsibility under any one of them.[30] Some ISDS tribunals examining Articles 4, 5 and 8 of ARSIWA have pragmatically concluded that at least one of these bases triggered State attribution in the case, and have not definitively decided which is the relevant basis (usually as between Articles 4 and 5). The fact that such tribunals may be satisfied with a finding of attribution under either Articles 4 or 5 should not be taken as a lack of understanding of the difference between the two provisions.[31] Rather, it is an

[26] James Crawford and Paul Mertenskötter, "The Use of the ILC's Attribution Rules in Investment Arbitration" in Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernandes Torres and Mairee Uran Bidegain (eds.), *Building International Investment Law – The First 50 Years of ICSID* (Kluwer Law International 2016) ["Crawford and Mertenskötter 2016"] 27.

[27] Crawford 2010 (n 2) 130. [28] De Stefano 2022 (n 8); see also Crawford 2010 (n 2) 133.

[29] Kurtz (n 11) 172; de Stefano 2020 (n 3) 119–90.

[30] See, for example, *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020) paras. 312–54; *Almås and Almås* v. *Republic of Poland*, PCA Case No. 2015-13, Award (27 June 2016) 20 ICSID Rep 294 paras. 207–72; *Hamester* v. *Ghana* (n 10) paras. 171–82; *InterTrade Holding GmbH* v. *Czech Republic*, PCA Case No. 2009-12, Award (29 May 2012) para. 177 ("If the Claimant's analysis were to be accepted, i.e. that a State is automatically responsible for all the acts of its separate public entities, this would completely blur the distinction between Article 4 and 5, and the provision of two distinct bases of responsibility."). See also, *InterTrade Holding GmbH* v. *Czech Republic*, PCA Case No. 2009-12, Separate Opinion of Henri Alvarez (29 May 2012) paras. 7–17.

[31] See, for example, *AMF Aircraftleasing* v. *Czech Republic* (n 9) para. 545, where the Tribunal found it did not need to resolve the question of whether a trustee was a *de jure* organ of the State for purposes of Article 4 ARSIWA (which involved the interpretation of complex matters under Czech law) or

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example of a pragmatic approach to finding a resolution, typical of ISDS and indeed of many domestic judiciaries.

In applying Article 4 of ARSIWA, tribunals ask whether the relevant entity is an organ of State, either *de jure* or *de facto*. In so doing, they look first at domestic law, but not exclusively.[32] They will then consider other relevant evidence that demonstrates whether the entity is a part of the State. Under Article 4, it is irrelevant whether an entity performs in a commercial (*de jure gestionis*) or governmental (*de jure imperii*) capacity, so long as it is part of the structure of the State itself.[33]

In applying Article 5 of ARSIWA, tribunals clearly enumerate the relevant considerations. Under Article 5, the conduct of an entity that is not a State organ under Article 4 is attributable to the State when the entity exercises governmental authority in performing that conduct. Article 5 has two elements: the act must be carried out by an entity empowered to exercise governmental authority, and the act itself must involve the exercise of that governmental authority.[34] It requires an extensive review of the facts to determine if the two elements are met.[35]

III. ARSIWA CASES AS A STUDY ON COHERENCE IN ISDS JURISPRUDENCE

The application of the ARSIWA attribution provisions in ISDS presents a good case study on the mechanics of developing ISDS jurisprudence in general, and illustrates several trends that have materialised in the last three decades. In assessing the corpus of ISDS cases, it must be remembered that ISDS is still a very new discipline and that "case law" has coalesced only recently. Indeed, counsel in the NAFTA Chapter 11 and Argentine BIT cases from the late 1990s and early 2000s recount how little "hard law" existed on the interpretation of investment obligations and ISDS procedure in those days. The same cannot be said today. While the creation of a case law is still under development, it is increasingly important in ISDS decision-making. Studies have noted the growing tendency of ISDS tribunals to quote and apply or distinguish past ISDS cases, leading to a body of ISDS case law that can fairly be termed a nascent "sui generis" ISDS jurisprudence.[36]

whether the trustee's conduct was attributable to the State under Article 5 ARSIWA. See also, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC* v. *Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) 20 ICSID Rep 406 para. 146; *Staur* v. *Latvia* (n 30) para. 308; *Flemingo DutyFree* v. *Poland* (n 17) paras. 418–48.

[32] *Staur* v. *Latvia* (n 30) paras. 313–36; *Almås* v. *Poland* (n 30) para. 20.

[33] *Hamester* v. *Ghana* (n 10) para. 182; *Yukos* v. *Russia* (n 14) para. 1479; *Deutsche Bank AG* v. *Sri Lanka* (n 10) para. 405; *Almås* v. *Poland* (n 30) paras. 207–14.

[34] *Almås* v. *Poland* (n 30) paras. 215–17.

[35] *Almås* v. *Poland* (n 30) paras. 218–67; *UAB E energija* v. *Republic of Latvia*, ICSID Case No. ARB/12/33, Award (22 December 2017) 18 ICSID Rep 631 paras. 807–22.

[36] Stephan W. Schill, "Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law" in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 1095–115, concluding

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As noted above, the ARSIWA ISDS cases have been critiqued by some as lacking in content or reasoning, or alternately as inconsistent. This concern about consistency of case law has been raised in other ISDS contexts (e.g. definition of investment, procedural MFN, or the right to costs, to name a few). In turn, this has fostered increasingly detailed treaties, as well as reform proposals for standing tribunals and appellate bodies. Commentators differ immensely on the extent to which the lack of consistency remains a real concern, or at least whether it is disproportionate to inconsistency in other decision-making bodies.[37] Certainly, the desire for consistency in ISDS, or perhaps more accurately the desire for coherence, is a "motherhood issue". At the same time, observers should consider that each case is based on an individual treaty with varying textual provisions and negotiated in varying contexts that can be outcome-determinative.

Equally important, but often unaccounted for in the discussion on coherence, is the significance of the factual record in ISDS. Facts in ISDS arbitration are established through written records (as in most international processes) but are also tested by cross-examination and reply examination that whittles down what may be "found as fact" in each case. Tribunals do not simply apply "the law" writ large or based on a common documentary record, but rather apply the law to the facts (as argued and proved) on the record. Very similar cases can be argued very differently and must be decided on the record presented to the tribunal.

The ARSIWA cases provide an excellent illustration of the extent to which ISDS arbitration is ultimately a pragmatic and fact-based endeavour. In most cases, the statement of the law is relatively short, while the factual record establishing the necessary conditions for attribution is quite detailed, and usually outcome-determinative. Consider, for example, *Almås* v. *Poland*,[38] or *Hamester* v. *Ghana*,[39] where each Tribunal carefully but succinctly set out the law on attribution, then applied a very complex and extensive factual record to that law.

ISDS practice has addressed the concerns about consistency and coherence in several ways, showing the ability of the system to "self-correct" over time. Two notable developments should be highlighted in this respect. The first is the

at 1108 that "[t]ribunal decisions, while *de iure* non-binding beyond the individual case, *de facto* determine how investment treaties are interpreted and investment disputes decided".

[37] On consistency in ISDS jurisprudence, there are numerous articles and books. See, for example, Julian Arato, Yas Banifatemi, Chester Brown, Diane Desierto, Fabien Gélinas, Csongor István Nagy and Federico Ortino, "Academic Forum Concept Paper on Issues of ISDS Reform, Working Group No. 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues Preliminary Draft" (30 January 2019), https://cids-dev.nimeo.io/images/Documents/Academic-Forum/3_Inconsistency_-_WG3.pdf; Mark Feldman, "Responding to Incorrect ISDS Decision-Making: Policy Options" (*EJIL: Talk!*, 5 April 2019), www.ejiltalk.org/responding-to-incorrect-isds-decision-making-policy-options/; International Bar Association, "Consistency, Efficiency and Transparency in Investment Treaty Arbitration" (November 2018), https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf; Yas Banifatemi, "Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?" in Roberto Echandi and Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013) 200–27; Stanimir A. Alexandrov, "On Perceived Inconsistency in Investor–State Jurisprudence" in José E. Alvarez and Karl P. Sauvant (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011).

[38] *Almås* v. *Poland* (n 30) paras. 215–67.

[39] *Hamester* v. *Ghana* (n 10).

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evolution of a doctrine of *jurisprudence constante*. This is the recognition (virtually universal today) that while the ISDS system is not strictly hierarchical and cannot accommodate a classic doctrine of "stare decisis", there is a systemic value in coherence and consistency.[40] As a result, most tribunals agree with and quote the *Saipem* v. *Bangladesh* dicta:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[41]

This approach has been adopted in ARSIWA cases, again, almost universally.[42]

The second development in ISDS practice is the increase in transparency, and in particular, the greater availability of orders, decisions and Awards. To state the obvious, it is rather difficult to foster coherence when one does not have access to other rulings that address the same topic. Increased transparency has been a substantial contributor to creating a cohesive body of ISDS jurisprudence. The movement to a more transparent system began in the early 2000s, in response to critiques by some governments and civil society organisations. The 2006 transparency amendments of the ICSID Convention Arbitration Rules ("Rules") set the new direction and were applicable to all cases where parties consented to apply the 2006 Rules. These Rules allowed public hearings unless a party objected (Rule 32(3)), submissions by non-disputing parties (Rule 37(2)), and publication of Awards with consent of the parties. If a party refuses consent to publication, the ICSID Secretariat has a mandatory obligation to publish excerpts of the legal reasoning of the case (Rule 48(4))).[43] The next significant step in increasing transparency was the UNCITRAL Rules on Transparency. These came into effect

[40] For a more detailed discussion, see Patrick M. Norton, "The Role of Precedent in the Development of International Investment Law" (2018) 33(1) *ICSID Review* 280; Gabrielle Kaufmann-Kohler, "Is Consistency a Myth?" in Emmanuel Gaillard and Yas Banifatemi (eds.), *Precedent in International Arbitration* (Juris Publishing 2008); Andrea K. Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*" in Colin B. Picker, Isabella D. Bunn and Douglas W. Arner (eds.), *International Economic Law: The State and Future of the Discipline* (Hart 2008). See also, for example, *Tulip Real Estate* v. *Turkey*, Decision on Bifurcated Jurisdictional Issue (n 10) paras. 45–7.

[41] *Saipem SpA* v. *People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (30 June 2009) para. 90.

[42] See e.g. *Muszynianka spółka z ograniczoną odpowiedzialnością* v. *Slovak Republic*, PCA Case No. 2017-08, Award (7 October 2020) para. 116, where the Tribunal reiterated the *Saipem* principle of *jurisprudence constante*. The dissenting arbitrator noted his view that ISDS Awards should be consistent with the corpus of public international law: *Muszynianka spółka z ograniczoną odpowiedzialnością* v. *Slovak Republic*, PCA Case No. 2017-08, Partial Dissenting Opinion of Professor Robert G. Volterra (7 October 2020) paras. 4–14.

[43] The ICSID Convention Arbitration Rules are found at https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules. Further documents on the 2006 amendment process are available at https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations.

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in 2014, providing a comprehensive transparency regime in treaty-based cases under the UNCITRAL Rules, including for publication of orders, decisions and Awards (Rule 3).[44] The Mauritius Convention extended use of the UNCITRAL Rules provisions on transparency: it came into force in 2017, allowing States to apply the UNCITRAL Transparency Rules to treaties entered into before 2014.[45] Finally, the current proposals to amend the ICSID Arbitration Rules propose further transparency, in particular with respect to the release of orders, decisions and Awards.[46] All of these will foster the development of an increasingly sophisticated and accurate jurisprudence in ISDS generally, addressing ARSIWA and other issues.

IV. WHAT'S NEXT?

The next decade of ISDS jurisprudence on ARSIWA will continue to address some of the more difficult questions that have arisen in past cases. These include the interaction of ARSIWA and umbrella clauses,[47] and the effect of corruption on the application of Article 7 ARSIWA.[48] They will also grapple with new issues, many of which reflect developments in ISDS more broadly. For example, we have seen that Regional Economic Integration Organizations ("REIOs") (in particular the European Union) have begun to sign investment treaties in their own name. The question of how the ARSIWA apply to conduct of the REIO will certainly arise. Can the REIO be seen as a State organ, or an entity empowered to exercise elements of governmental authority for the purposes of attribution? Could the conduct of an REIO member State official in excess of their authority affect attribution of responsibility to the REIO? The *Electrabel* v. *Hungary* case gave a hint as to how such questions are likely to be analysed, finding that, "[w]hilst the European Union is not a State under international law, . . . it may yet by analogy be so regarded as a Contracting Party to the [Energy Charter Treaty], for the purpose of applying Article 6 of the ILC Articles in the present case".[49] One may expect that further aspects of the intersection between the ARSIWA and REIO conduct will arise in future cases.

The effect of new, or "next generation", treaties could also have an impact on attribution in ISDS. There has been a trend to negotiate more detailed ISDS treaties that may well pose new questions about the application of ARSIWA issues. For

[44] UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf.

[45] United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) ["Mauritius Convention on Transparency"], https://uncitral.un.org/en/texts/arbitration/conventions/transparency. As of 1 July 2021, 23 States had signed the Mauritius Convention and seven States had ratified the Convention: see, https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status.

[46] ICSID Secretariat, "Proposals for Amendment of the ICSID Rules" (Working Paper #4, volume 1, 28 February 2020) ch. X on publication of orders, decisions and Awards, https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf.

[47] Crawford and Mertenskötter 2016 (n 26) 30–5; Hobér (n 23) 571–7.

[48] Crawford and Mertenskötter 2016 (n 26) 35.

[49] *Electrabel* v. *Hungary* (n 11) para. 6.76.

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example, the 2015 India Model BIT[50] has several provisions that may affect the application of ARSIWA in cases under that model. Among these are Article 5.4 establishing that "an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect", and Article 2.4(i) excluding the conduct of local governments from the purview of the treaty. Again, the text of ARSIWA and recent case law give a hint as to how this may be addressed. Articles 55–6 of ARSIWA ensure that the ARSIWA are given residual application, and are applied "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" (Art. 55). Further, Article 56 states that "the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles". Case law to date has clearly recognised the pre-eminence of *lex specialis* over ARSIWA, and the extent of application of treaty-specific clauses will likely be a feature of future ARSIWA cases.[51] No doubt, cases will also present new types of entities that must be analysed against the tests for attribution under ARSIWA. Fortunately, the basics of the analysis have been well established in jurisprudence to date, and future ISDS cases applying ARISWA should be on a sound footing.

[50] 2015 India Model BIT, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf. See also de Stefano 2022 (n 8).
[51] See e.g. *Al Tamimi* v. *Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015) para. 344. See also, Crawford 2010 (n 2) 129–30; Kurtz (n 11) 177–8; de Stefano 2020 (n 3) 106–9.

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