

iaï series on international arbitration n° 4



# State Entities in International Arbitration

---

Emmanuel Gaillard and Jennifer Younan editors

General Editor: Emmanuel Gaillard

This book may be cited as:

STATE ENTITIES IN INTERNATIONAL ARBITRATION, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 4 (E. Gaillard and J. Younan eds., Juris Publishing, 2008)

© 2008 JurisNet LLC and International Arbitration Institute (IAI)

# **Are States Liable for the Conduct of Their Instrumentalities?**

## **ICC Case Law**

*Eduardo Silva Romero*\*

Professor Emmanuel Gaillard has posed the question at this Seminar: are States liable for the conduct of their instrumentalities? This article examines whether ICC case law provides any response to this question.

First, it should be noted that none of the ICC awards rendered on the basis of a Bilateral Investment Treaty (“BIT”) is helpful in terms of answering the question posed by Professor Gaillard. An analysis of ICC arbitration awards rendered between 1990 and 2005 involving State parties reveals that only three out of the 300-odd awards reviewed were made in cases filed on the basis of a BIT.<sup>1</sup> Two of those ICC awards were partial / interim awards that dealt with jurisdictional objections raised by the Respondent State and resolved issues relating to the definitions of “investor” and “investment.”

---

\* Partner, Dechert LLP, Paris. Former Deputy Secretary-General of the ICC International Court of Arbitration. The author thanks José Joaquín Caicedo Demoulin for his collaboration in the research leading to this paper.

<sup>1</sup> Regarding ICC arbitration cases based on provisions of a BIT, see Eduardo Silva Romero, *Arbitrage institutionnel et investissements internationaux*, REVISTA DE ARBITRAGEM E MEDIAÇÃO, Year 2, No. 4, at 120 (Jan.-Mar. 2005).

The third award was a final award which dealt with the Respondent State's liability for the conduct of its judicial organ.<sup>2</sup> However, at least under ICC case law,<sup>3</sup> an "organ" of the State cannot be characterized as an "instrumentality" of that State. Thus, none of the ICC awards rendered on the basis of a BIT address the treatment of instrumentalities.

---

<sup>2</sup> According to Article 4 of the UN General Assembly Resolution 56/83 of Dec. 12, 2001, U.N. Doc. A/RES/56/83, adopting the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State." Excerpts of the Articles are reproduced in this volume as Annex 1.

<sup>3</sup> ICC Case No. 7245, *European company v. Municipality of X*, Jan. 28, 1994 Interim Award, unpublished, at 24; ICC Case No. 6775, *Company B v. Département de commercialisation d'une matière première de la Présidence de l'Etat*, Jan. 28, 1998 Final Award, unpublished, at 25; ICC Case No. 7472, *European Company v. State X, Ministry of Industry of State X, Ministry of Defence of State X and State X establishment*, Jan. 16, 1995 Interim Award, unpublished, at 11 ("the existence of the legal personality of defendants 2 to 4 prevents them from being considered as organs of the State").

More broadly (outside the context of a BIT), ICC case law<sup>4</sup> seems to establish that the conduct of an organ<sup>5</sup> of the State will always engage the State's liability. In other words, one should make no distinction between the State and its organs for the purposes of determining the State's liability. Thus, the question

---

<sup>4</sup> ICC Case No. 7304, Ministry of Defence and support for armed forces of [State X] v. German corporation, Mar. 31, 1994 Partial Award, unpublished, ¶ 25 (contracts concluded by the Ministry of Defence are, without any hesitation, qualified as a "State contract"); ICC Case No. 7701, State X owned enterprise v. Government of State B, Nov. 15, 1994 Final Award, at 18 (when a Ministry signs a contract, the "State [is] acting through its executive branch, the Government"), partially published in 8(2) ICC BULL. 66 (1997); ICC Case No. 9762, Contractor A (Luxembourg) v. Ministry of Agriculture and Water Management of Republic Z, State Fund for Development of Agriculture of Republic Z and Government of Republic Z, Dec. 22, 2001 Award, XXIX Y.B. COM. ARB. 26, ¶ 51–52, at 40–41 (2004) (excerpts) (an organ is an entity not separate from the State, like a ministry, "whose acts are undoubtedly performed on behalf and in the interest of the State . . . [e]ven if the Ministry is a legal person, as it certainly is" because it is in charge of carrying out the policy of the government of the State in question and is directed by the highest authorities of the State. Undoubtedly, the universal rule is that ministries "[represent] the State, within its competence, and the State is bound by [their] acts"); ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 10 (contracts concluded with a Ministry); ICC Case No. 6725, Feb. 14, 1991 Award, unpublished, at 7–8 (the contract concluded by the Governor of the Central Bank could, in principle, be done in the name of the Presidency, the latter being, according to that State's constitution, an official organ of the Republic).

<sup>5</sup> Examples of organs include: the Government of Egypt (ICC Case No. 3493, SPP (Middle East) Ltd. v. The Arab Republic of Egypt, Feb. 16, 1983 Award, 22 I.L.M. 752 (1983)); the Governor of a Central Bank (ICC Case No. 6725, Feb. 14, 1991 Award, *supra* note 4); a Ministry (ICC Case No. 9762, Dec. 22, 2001 Award, *supra* note 4); ICC Case No. 7304, Mar. 31, 1994 Partial Award, *supra* note 4); a colonel acting as primary government official (ICC Case No. 8646, French corporation v. Ministry of Defense of State X, June 22, 1998 Award, 15(2) ICC BULL. 109 (2004) (excerpts)); a Prime Minister (ICC Case No. 6474, Supplier [European company] v. Republic of Y, Apr. 22, 1992 Final Award, XXV Y.B. COM. ARB. 279 (2000)).

“Are States Liable for the Conduct of Their Organs?” would be a tautology.<sup>6</sup>

By contrast, the notion of “instrumentality” is far more problematic as far as the determination of a State’s liability is concerned. The main difficulty is in determining the exact meaning of the term “instrumentality” or, in French, “*emanation*.”

These expressions are not defined, nor even used, in the rules governing the attribution of internationally wrongful acts to States, as codified by the International Law Commission (“ILC”). In the ILC’s 337-page Commentaries on its Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”), the term “instrumentality” is used only once.<sup>7</sup> However, the ILC Articles do make a fundamental distinction (*summa divisio*) between State organs (Article 4) and “persons or entities exercising elements of governmental authority” (Article 5).<sup>8</sup>

---

<sup>6</sup> What is more, one ICC arbitral tribunal pointed out that State organs do not have an existence “which is independent or extraneous to the existence of the State of X” (ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 11–12).

<sup>7</sup> Commenting on what the term “State” has been accepted to mean under public international law, the Commission recalled the principle of indivisibility or unity of the State as a subject of international law and concluded: “The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.” *See* Report of the International Law Commission, Fifty-third session, U.N. Doc. A/56/10 (2001), at 83.

<sup>8</sup> “Article 5 – Conduct of persons or entities exercising elements of governmental authority – The conduct of a person or entity which is not an 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 an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

Thus, it appears that, in public international law, the mere “paternity” of the State is not a sufficient basis on which to attribute to it the acts of the State’s instrumentalities. The organic link (*i.e.*, its existence as part of the State’s broad apparatus) is only sufficient for *de jure* organs.<sup>9</sup> If the State instrumentality is not a *de jure* organ, the act of the instrumentality can only be attributed to the State if it is shown that the entity in question exercises elements of governmental authority or is controlled and directed by the State. Any other view would be inconsistent with the principles of international law and would necessarily be based on different rules.

The concept of “instrumentalities” or “*émanations*,” therefore, does not originate in the law governing international responsibility. Actually, at least in France, the idea of “*émanations de l’Etat*” was first used in the 1970s, after a series of nationalizations, with a specific aim: to affirm that any State-owned enterprise or administrative agency was, regardless of its separate legal personality, an instrument of the State. This concept allowed those affected by the nationalizations to pierce the corporate veil and to recover appropriate compensation from the State. The organic link among these different entities (State organs, administrative entities and State-owned enterprises) and the State was viewed as sufficient to make each one liable for the others’ contractual debts or breaches of contract.<sup>10</sup> French jurisprudence shows that in practice an instrumentality is defined as an entity which is created by the State and which, while it may have its own legal personality, lacks real (financial, managerial, etc.) autonomy in relation to the State. French tribunals have cited

---

<sup>9</sup> See *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, Oct. 12, 2005, ¶¶ 69 *et seq.*, reproduced in this volume as Annex 4 (also available at <http://ita.law.uvic.ca/documents/Noble.pdf>).

<sup>10</sup> Paul Lagarde, *Une notion ambivalente : l’« émanation » de l’Etat nationalisant*, in *DROITS ET LIBERTÉS À LA FIN DU XXE SIÈCLE—ÉTUDES OFFERTES À CLAUDE-ALBERT COLLIARD* 539 (Pedone, 1984).

such a lack of autonomy in authorizing the seizure of an instrumentality's property in order to satisfy a debt of its parent State.<sup>11</sup>

According to ICC case law,<sup>12</sup> an “instrumentality” can be defined as an entity of the State which: (1) has its own legal personality; (2) was created by the State with a specific purpose (such as regulating the State's oil resources); and (3) is controlled by the State. A clear definition of a State “instrumentality” is included in ICC Award No. 6465 of 1991, which states that:

[The State entity] by its purpose and through its operations almost totally served as a vehicle to meet the needs and requirements of the X Government, in particular its military forces. [The State entity] was almost completely controlled by and dependent on the X Government's decisions, and the Government exercised its powers to such a degree that [the State entity] must be seen as an instrumentality of, or agent for, the X Government.<sup>13</sup>

ICC arbitral tribunals have used the “instrumentality” concept for three main purposes: (1) to apply to a State an

---

<sup>11</sup> CA Paris, Jan. 22, 2004, *Winslow Bank & Trust Company Limited v. Société nationale des hydrocarbures*, Case No. 2002/20287, unpublished, reproduced in this volume as Annex 6.

<sup>12</sup> ICC Case No. 6465, *Defense Industry of State X v. European Company*, Aug. 15, 1991 Interim Award, unpublished, at 6–7; ICC Case No. 7245, Jan. 28, 1994 Interim Award, *supra* note 3, ¶ 5, point 1 (“the fact that the fourth defendant is the property of the State and controlled by the State – which is not disputed – in no way implies that the establishment does not have legal personality”); ICC Case No. 7373, *European State company v. Middle-East State company*, Feb. 3, 1997 Final Award, unpublished, ¶ 14.

<sup>13</sup> ICC Case No. 6465, Aug. 15, 1991 Interim Award, *supra* note 12, at 29; *see also* ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 9 *et seq.*

arbitration clause entered into by a State entity;<sup>14</sup> (2) to attribute the acts of a State entity to its parent State;<sup>15</sup> and (3) to reject claims by a State entity that its non-performance of a contract was caused by a government decision constituting *force majeure*.<sup>16</sup>

In ICC case law, the issue of whether the State entity is an “organ” or an “instrumentality” seems to be determined in accordance with the internal law of the State.<sup>17</sup> ICC arbitral tribunals have not applied Article 4(2) of the ILC Articles,<sup>18</sup> but rather have relied on the private international law notion of “*statut personnel*.” The difference between these two approaches is set

---

<sup>14</sup> ICC Case No. 8035, Party to an oil concession agreement v. State, 1995 Award, 124 J.D.I. 1041 (1997) (note by D. Hascher) (because the State company was not a mere instrumentality, the Tribunal refused to extend the arbitration clause to the State). *See also* Philippe Leboulanger, *Some Issues in ICC Awards Relating to State Contracts*, 15(2) ICC BULL. 93, 96 (2004).

<sup>15</sup> *See infra* Section I.

<sup>16</sup> ICC Case No. 3093/3100 of 1979, in COLLECTION OF ICC ARBITRAL AWARDS 1974–1985, at 365 (Y. Derains and S. Jarvin eds., 1990); ICC Case No. 6465, Aug. 15, 1991 Interim Award, *supra* note 12, at 29 (the governmental decision or directive to discontinue the project agreed upon by the foreign contracting party and an instrumentality is not a circumstance beyond the control of the parties).

<sup>17</sup> ICC Case No. 6465, Aug. 15, 1991 Interim Award, *supra* note 12, at 25 (“The Tribunal is satisfied that [the State entity] was established and is existing under applicable [domestic] law as a separate legal entity with its legal personality separate from the X Government”); ICC Case No. 7245, Jan. 28, 1994 Interim Award, *supra* note 3, at 24 (“the determination of the legal status of public law entities is a matter of the internal law of the State to which they are connected” (“*le statut juridique des personnes morales de droit public est du domaine du droit de l’État auquel elles sont rattachées*”)); ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 10 (“the status as an organ of the State (*la qualité d’organe d’État*) is determined in accordance with the internal law of that State”); ICC Case No. 6775, Jan. 28, 1998 Final Award, *supra* note 3, at 12.

<sup>18</sup> “An organ includes any person or entity which has that status in accordance with the internal law of the State.”

out in an ICC award concerning the standing of a State enterprise which replaced the original contracting party (another State enterprise) following the creation of a newly independent State formed from two predecessor States.<sup>19</sup> The State argued that the transfer of rights, duties, property and assets from one State entity to another was an expression of its sovereignty. However, the Tribunal held that the status of the State enterprise as successor was “not a question of sovereignty of the State . . . but simply a question of legality,” namely the status of that entity under its domestic law.

The great majority of ICC awards involving State parties were rendered in arbitrations filed on the basis of State contracts,<sup>20</sup> often investment contracts, entered into between a private company and a State entity.<sup>21</sup> Many of these ICC awards

---

<sup>19</sup> ICC Case No. 6789, *State X Corporation v. European Company*, Aug. 16, 1999 Partial Award, unpublished, ¶ 44.

<sup>20</sup> “State Contract. Contract concluded between a sovereign State and a foreign entity governed by private law. See internationalization (3rd meaning)” (“*Contrat d’Etat. Contrat conclu entre un Etat souverain et une personne privée. V. internationalisation (sens 3)*”) (GÉRARD CORNU, *VOCABULAIRE JURIDIQUE – ASSOCIATION HENRI CAPITANT 223* (PUF (Collection Quadrige), 3rd ed. 2002)). “Internationalization. 3. Submission to (public) international law of a State contract, aiming at removing it from the domestic law of the said State.” (“*Internationalisation. 3 Soumission au droit international (public) d’un contrat d’Etat, destiné à soustraire celui-ci à l’ordre juridique interne de cet Etat.*”) (*Id.* at 485). Pierre Mayer distinguishes the “State contract *stricto sensu*” and the “State contract *lato sensu*” (“*contrat d’Etat stricto sensu*” and “*contrat d’Etat au sens large*”) (See Pierre Mayer, *La neutralisation du pouvoir normatif de l’Etat en matière de contrats d’Etat*, 113 *J.D.I.* 5 (1986)). The former relates to contracts concluded between a sovereign State and a foreign corporation, while the latter relates to contracts concluded between a State instrumentality (“*émanation de l’Etat*”) and a foreign corporation. In the present paper, references to State contracts are to State contracts *lato sensu*.

<sup>21</sup> See, e.g., ICC Case No. 12913, *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co. v. Maharashtra Power Development Corp. Ltd., Maharashtra State Electricity Board and the State of Maharashtra*, Apr. 27,

addressed the issue of whether a State should be liable for the conduct of one of its instrumentalities.

Because of the case-by-case approach of ICC arbitral tribunals towards these issues, it is difficult to demonstrate the existence of “ICC case law” or “ICC arbitral jurisprudence”<sup>22</sup>

---

2005 Final Award, 20(5) INT’L ARB. REP. C-1 (2005). Along with General Electric and Enron, Bechtel had partnered to develop Dabhol Power Corporation (“DPC”). DPC was to build two power plants which would supply electricity, under the terms of an exclusive Power Purchase Agreement (“PPA”), to a State electricity board set up in the Indian province of Maharashtra. At issue in this particular ICC arbitration were claims by Bechtel’s subsidiary Energy Enterprises Mauritius Company (“EEMC”) and General Electric’s subsidiary Capital India Power Mauritius I that various Indian entities were liable under the DPC Shareholders Agreement for breach of contract and associated damages. It was argued that the cumulative breaches by the Indian Province and its instrumentalities operated as a total expropriation of the Claimant’s investment in the Project. On the notion of investment contracts, see Charles Leben, *L’évolution de la notion de contrat d’Etat – Les Etats dans le contentieux économique international, I. Le contentieux arbitral*, 2003 REV. ARB. 629, 633–34.

<sup>22</sup> A recent award rendered by an ICSID arbitral tribunal requires that care be taken in relation to the use of the terms “case law” and “jurisprudence.” Paragraph 97 of the Award states that: “This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v. Pakistan* Tribunal. The ICSID Convention provides only that awards rendered under it are ‘binding on the parties’ (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal’s view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or

regarding a State's liability for the conduct of its instrumentalities. However, it can be said that the legal reasoning used in these ICC decisions to establish the State's liability for the conduct of its instrumentalities is generally aimed at demonstrating either that the purported instrumentality is actually an organ of the State and therefore that the State is directly liable (I), or that the State is, by law or contract, indirectly liable for the conduct of its instrumentalities (II). In sum, the State, like any other entity or person, may be liable either directly or indirectly.<sup>23</sup>

A finding by an ICC arbitral tribunal that a State is liable for the conduct of an instrumentality presupposes that the State is a party to the ICC arbitral proceeding. In many ICC cases, the State contract has been signed only by a private company and a State entity or instrumentality. Accordingly, many of these cases involve a jurisdictional phase dealing with the possible extension of the arbitration agreement to the non-signatory State. This

---

*jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.” (*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction, Jan. 29, 2004, 8 ICSID REP. 518, ¶ 97, at 544–45 (2005); 19(2) INT’L ARB. REP. C-1 (2004); ICSID website).

<sup>23</sup> According to the very elegant formula embodied in Article 1382 of the French Civil Code, “[a]ny act by a person which causes injury to another requires the person whose fault caused the injury to provide compensation” (direct liability). (“*Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*”) This principle is followed by Article 1384 of the same Code: “Persons are responsible not only for the injuries they cause by their own acts, but also for those caused by the acts of persons for whom they are responsible, or by things in their care” (indirect liability). (“*On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde*”).

issue,<sup>24</sup> however, will not be addressed here as it is beyond the scope of this paper.

Another point which will not be addressed here is the direct liability of the State for interference with a contractual relationship entered into by one of its instrumentalities or *émanations*. In this context, the State—usually the government—induces or causes its instrumentality to breach the contract and is held to be directly liable for that breach. Such direct liability is recognized in various civil law<sup>25</sup> and common law<sup>26</sup> jurisdictions. It will not be

---

<sup>24</sup> In this respect, see Eduardo Silva Romero, *The Dialectic of International Arbitration Involving State Parties*, 15(2) ICC BULL. 79 (2004); Eduardo Silva Romero, *ICC Arbitration and State Contracts*, 13(1) ICC BULL. 34 (2002).

<sup>25</sup> In Germany, inducing breach of contract (“*Verleitung zum Vertragsbruch*”) constitutes a tort under §826 of the Civil Code, where it is established that a general form of tortious responsibility is applicable for the intentional infliction of harm *contra bonos mores* (“*sittenwidrig*”). A third party’s interference with a contractual relationship is tortious only when the third party shows a special degree of wanton or reckless behavior (“*Rücksichtslosigkeit*”) towards the contracting party who is prejudiced by the breach of contract that occurs. In France, “*la responsabilité du tiers complice*” is governed by Articles 1382 and 1383 of the Civil Code. Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict as regards the victim of the breach on the basis of the general duty not to harm others. See James Crawford, *Second report on State responsibility – Addendum No. 3. Annex – Interference with contractual rights: a brief review of the comparative law experience*, Apr. 1, 1999, U.N. Doc. A/CN.4/498/Add.3, at 3–6.

<sup>26</sup> In the United States, the RESTATEMENT (SECOND) OF TORTS §766 (1977) provides that: “One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting from the failure of the third person to perform the contract.” Under English law, “[i]t is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.’ The tort is described variously as inducing or procuring breach of contract, actionable

discussed, however, as these cases belong to the realm of tort law, rather than the law of contracts, and arbitrators' jurisdiction *ratione materiae* is generally restricted to disputes between contracting partners concerning their contractual relationship.<sup>27</sup> In addition, and perhaps most importantly, such circumstances invoke the State's responsibility for its own acts and not for those of its instrumentalities. It should nevertheless be noted that there is one instance within the jurisdiction of ICC arbitral tribunals<sup>28</sup> where a State's interference may be deemed to prevent the performance of the contract, that being where there is an issue of *force majeure*.

## I. DIRECT LIABILITY OF STATES FOR THE CONDUCT OF THEIR INSTRUMENTALITIES IN ICC CASE LAW

Where a private company seeks to establish the direct liability of a State for the conduct of its instrumentality, that private company must ultimately prove that the instrumentality is in fact an organ of the State. A review of ICC case law shows that

---

interference with contractual rights or 'the principle in *Lumley v. Gye*.' See Crawford, *supra* note 25, at 1–3.

<sup>27</sup> In ICC Case No. 6233 of 1992, an African State invoked the Arbitral Tribunal's lack of jurisdiction to decide a tax dispute: the contracting party's compensation for the State's breach of contract was reduced to cover the amount due by him to the African State's Treasury. The Tribunal recalled that it "has jurisdiction to decide all contractual matters falling within the scope of the arbitration clause." It held that the dispute was essentially contractual, even if its decision could have effects concerning the tax claims (*Lebanese company v. African State*, Feb. 12, 1992 Final Award, XX Y.B. COM. ARB. 58, at 58–59 (1995)). See also ICC Case No. 6465, Aug. 15, 1991 Interim Award, *supra* note 12, at 14 (any counterclaim which does not qualify as a dispute arising out of the contract itself is outside the arbitral tribunal's jurisdiction).

<sup>28</sup> ICC Case No. 6490, *Company X v. State Company of State B*, Apr. 23, 1993 Award, unpublished, ¶ 8.6, at 54; ICC Case No. 7472, *European Company v. Ministry of Industry of State X, Ministry of Defence of State X and State X establishment*, Feb. 6, 1996 Partial Award, unpublished, at 25–26; Leboulanger, *supra* note 14.

private companies have principally used three legal arguments to persuade ICC arbitral tribunals that an instrumentality of the State is actually one of its organs.

**A. *Recourse to Customary Public International Law***

First, private companies have relied on customary public international law—as embodied in the ILC Articles<sup>29</sup>—to argue that any instrumentality of the State should be treated as an organ of that State in the international arena. In other words, these private companies base their position on the theory of the “indivisibility of the State.”<sup>30</sup>

In ICC Case No. 10623, the Arbitral Tribunal stated:

From the perspective of an international arbitral tribunal in this context, the state must be regarded as one entity. When the state seeks to renege upon an arbitration agreement or to frustrate its fulfillment by resorting to its own courts it is, in effect, unilaterally reneging upon or frustrating that agreement . . . .

This conclusion is supported by reference to public international law, which treats the organs of a state as the state itself for the purposes of determining state responsibility, irrespective of whether or not those organs are independent or separate for the purposes of a state’s internal law.

---

<sup>29</sup> See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY – INTRODUCTION, TEXT AND COMMENTARIES* (Cambridge University Press, 2002).

<sup>30</sup> ICC Case No. 7640, *American corporation v. W (State-owned company), X (State-owned company), Y (State-owned company) and Z (State-owned company)*, Sept. 9, 1999 Award, unpublished, ¶ 60.

This principle is frequently declared in the context of determining state responsibility for wrongful (in the general sense of tortious) acts. The International Law Commission has recently adopted new draft articles approving this principle in this context. See the draft articles regarding the ‘*Responsibility of States for Internationally Wrongful Acts*’, Article 4.<sup>31</sup>

This approach, however, represents an exception in the ICC case law. In most ICC arbitration cases,<sup>32</sup> the arbitral tribunal decides the dispute in accordance with the *lex contractus*, that is, in accordance with the national law chosen by the parties to govern their contract and, in a few cases, the arbitration agreement itself. One ICC arbitral tribunal has even stated that customary public international law should not be applied to a dispute arising from the breach of a State contract since such a breach does not in principle constitute a “breach of an international obligation by the

---

<sup>31</sup> ICC Case No. 10623, *Salini Costruttori S.p.A. v. Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Sept. 7, 2001 Award Regarding the Suspension of the Proceedings and Jurisdiction, 21(1) ASA BULL. 59, ¶¶ 168–70, at 96 (2003); also published in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION, IAI SERIES ON INTERNATIONAL ARBITRATION No. 3, at 227 (E. Gaillard ed., 2005).

<sup>32</sup> ICC Case No. 4629, *Contractor (European Country) and Contractor (Middle Eastern Country) v. Owner (Middle Eastern Country)*, 1989 Final Award, in COLLECTION OF ICC ARBITRAL AWARDS 1991–1995, at 152 (J.-J. Arnaldez, Y. Derains, D. Hascher eds., 1997); ICC Case No. 6789, Aug. 16, 1999 Partial Award, *supra* note 19, ¶ 45 (“In this contention, it must also be borne in mind throughout that the contract in this dispute is governed by the law of the state of X and that it is accordingly the Tribunal’s duty to decide the issues in the same way as they would be decided if they arose before the [state X] courts”); ICC Case No. 6474, Apr. 22, 1992 Final Award, *supra* note 5, ¶ 134, at 306; ICC Case No. 8646, June 22, 1998 Award, *supra* note 5, ¶ 10.1.3.3; ICC Case No. 12913, Apr. 27, 2005 Final Award, *supra* note 21, at C-12 (holding that “the coordinated course of conduct . . . are all in violation of the Shareholders Agreement, the law of the State of New York which governs [the] contract, and the applicable standards of international law”).

State”<sup>33</sup> and could not be characterized as an internationally wrongful act of that State.

The ICC’s general approach therefore seems to correspond in this respect to the traditional view in international law.<sup>34</sup> However, this traditional view has been criticized as overly theoretical for various reasons,<sup>35</sup> including on the basis that State contracts—a category in which commercial contracts have an ambiguous position<sup>36</sup>—are internationalized.<sup>37</sup> Nevertheless, the

---

<sup>33</sup> ICC Case No. 7640, Sept. 9, 1999 Award, *supra* note 30, ¶¶ 70–75. See also ICC Case No. 3327, French company A v. African State B, 1981 Award, in COLLECTION OF ICC ARBITRAL AWARDS 1974–1985, at 433–34 (Y. Derains and S. Jarvin eds., 1990) (the contracts concluded by a State and foreign private entities are not governed by public international law, even if they can be governed by the general principles of law referred to by Article 38 of the ICJ Statute).

<sup>34</sup> In 1952, the International Court of Justice held without any hesitation that individuals, or groups without international personality, cannot be parties to an international instrument such as a treaty (Anglo-Iranian Oil Co. (United Kingdom v. Iran), Jurisdiction, Judgment of July 22, 1952, 1952 I.C.J. REPORTS 93, at 111–12).

<sup>35</sup> See Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EURO. J. INT’L L. 287 (1998).

<sup>36</sup> These contracts usually concern investment operations, but F.A. Mann, who coined the expression “State contracts” in 1944, used the term for certain types of loan agreements in which the parties chose international law as the governing law. See F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 179 *et seq.* (Clarendon Press, 1973) (“The Law Governing State Contracts”).

<sup>37</sup> In favour of the “internationalization” of these contracts, see Prosper Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 128, Year 1969, Pt. III, at 95. But see François Rigaux, *Des dieux et des héros – Réflexions sur une sentence arbitrale*, 1978 REV. CRIT. DIP 435; Derek William Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. INT’L L. 49, 51–52 (1988).

latest works of the ILC,<sup>38</sup> as well as recent ICSID awards,<sup>39</sup> do not conclude that the mere breach of a State contract entails the international responsibility of the State. A non-commercial act of a State, *i.e.*, the use of its sovereign authority in an arbitrary way, is simply a violation of the rules governing the State's duties towards foreigners in its territory (denial of justice, discriminatory measures, etc.),<sup>40</sup> rather than a breach of any international obligation.

In ICSID case law,<sup>41</sup> it is recognized that a breach of a State investment contract may amount to a breach of an international

---

<sup>38</sup> The ILC's commentary to Article 4 is crystal-clear in that sense: "Of course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act." CRAWFORD, *supra* note 29, at 96.

<sup>39</sup> "In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (*'puissance publique'*), and not as a contracting party, may breach the obligations assumed under the BIT." *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, Apr. 22, 2005, 12 ICSID REP. 245, ¶ 260, at 297 (2007); ICSID website; reproduced in this volume as Annex 3.

<sup>40</sup> See STEVEN SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW* 431–33 (Grotius/Cambridge University Press, 1994).

<sup>41</sup> *SGS Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, Aug. 6, 2003, 8 ICSID REP. 406 (2005); 18 ICSID REV. 307 (2003); 42 I.L.M. 1290 (2003); 18(9) INT'L ARB. REP. A-1 (2003); excerpts in French in 131 J.D.I. 258 (2004); *SGS v. Philippines*, *supra* note 22; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, Nov. 29, 2004, 20 ICSID REV. 148 (2005); 44 I.L.M. 569 (2005); ICSID website; excerpts in French in 132 J.D.I. 182 (2005); see also *Silva Romero*, *supra* note 1.

obligation by virtue of the inclusion in a BIT of a so-called “umbrella clause.” However, to the best of my knowledge, there is no ICC arbitration case in which a State company has sought to apply customary public international law through an umbrella clause in a BIT.

It has also been established that a State can be held liable for both breach of contract under the *lex contractus* and for an internationally wrongful act under customary public international law.<sup>42</sup>

In most cases, ICC arbitral tribunals have followed a private international law approach, applying the national law chosen by the parties and treating the dispute as a mere breach of contract. This is perhaps not surprising, given that the purpose of the ICC arbitration system is to resolve “business disputes,”<sup>43</sup> although the precise meaning of that term is not always clear.

The practical difference between the two methods is that the public international law approach rests on the violation of an international obligation, while the private international law approach rests on the notion of prejudice or damage (“*préjudice*”).

It is the opinion of this author that only two sets of circumstances would warrant recourse to the approach based on customary public international law.

---

<sup>42</sup> This refers to the distinction between contract and treaty claims. *See mutatis mutandis*, ICC Case No. 7472, Feb. 6, 1996 Partial Award, *supra* note 28, at 28–29 (“In the actual fact, the issue is to know what impact the [act of State X] which the United Nations stated was unlawful and triggered X’s international liability [sic] may have had on the contracts. The Arbitral tribunal does not have jurisdiction to examine liability other than contractual”).

<sup>43</sup> *See* Article 1(1) of the ICC Rules of Arbitration.

First, reliance on the ILC Articles might be appropriate where the parties have chosen as their *lex contractus* international law or the general principles of international law. Examples of this scenario can be found in the series of well-known arbitrations which arose from various oil concessions in the 1970s and 1980s.<sup>44</sup>

Second, it may be argued that the binding character of any international contract, including State contracts, arises from international law. A consequence of this view is that a national law chosen by the parties as the *lex contractus* has only a contractual value and should always be subordinated to mandatory provisions of international law. To my knowledge, this approach has never been expressly followed by an ICC arbitral tribunal. Rather than running the risk of relying on abstract theories,<sup>45</sup> ICC arbitral tribunals are much more inclined to examine the economic reality behind the State contract.

---

<sup>44</sup> B.P. Exploration Co. (Libya) v. The Government of the Libyan Arab Republic, Award on the Merits, Oct. 10, 1973, 53 I.L.R. 297 (1979); V Y.B. COM. ARB. 143 (1980); excerpts in French in 1980 REV. ARB. 117; Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, Award on the Merits, Jan. 19, 1977, 17 I.L.M. 3 (1978); excerpts of French original text in 104 J.D.I. 350 (1977); Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic, *ad hoc* Award, Apr. 12, 1977, 20 I.L.M. 1 (1981); VI Y.B. COM. ARB. 89 (1981); for a French translation, see 1980 REV. ARB. 132; Government of the State of Kuwait v. The American Independent Oil Co. (Aminoil), Award, Mar. 24, 1982, 21 I.L.M. 976 (1982); IX Y.B. COM. ARB. 71 (1984); excerpts in French in 109 J.D.I. 869 (1982).

<sup>45</sup> The argument would be based on the notion of “*Grundlegung*” which has been extensively criticized by Pierre Mayer, *Le mythe de l’« ordre juridique de base »* (ou *Grundlegung*), in LE DROIT DES RELATIONS ÉCONOMIQUES – ETUDES OFFERTES À BERTHOLD GOLDMAN 199 (Litec, 1982).

**B. *The State and its “Instrumentality” are the Same Entity in Economic Terms***

ICC case law also shows that private companies have tried to demonstrate that an instrumentality of the State is actually one of its organs by pointing to the economic reality behind the State contract and showing that, in economic terms, the State and its purported “instrumentality” are actually the same entity.<sup>46</sup>

In ICC Award No. 12913 of 2005, for instance, the Arbitral Tribunal held as follows:

[T]he state had authority to control the MSEB board by appointing its members, removing them at pleasure, setting and directing its policies, and totally controlling its funding. The commitments made by MSEB in the PPA were, therefore, entirely dependent on the willingness of SOM [the State of Maharashtra] . . . . There is no doubt that in buying and holding the DPC stock, and in its actions as a shareholder of DPC, MPDCL has acted wholly as an instrumentality of MSEB and SOM. For one thing, all the references made by either SOM or MSEB to MPDCL make clear their absolute control of the entity as a holding company for the shares . . . . All the individual holders of nominal interests in MPDCL gave powers of attorney to

---

<sup>46</sup> ICC Case No. 6789, Aug. 16, 1999 Partial Award, *supra* note 19, ¶ 42; ICC Case No. 7071, Ministry of Defence of [State A] v. XX [State corporation] and State B, July 23, 1993 Award, unpublished, ¶¶ 82, 83, 90–94; ICC Case No. 7640, Sept. 9, 1999 Award, *supra* note 30, ¶ 60; ICC Case No. 9151, Joint-Yashlar and Bidas SAPIC v. Government of Turkmenistan (or Turkmenistan or the State of Turkmenistan and/or the Ministry of Oil of Turkmenistan), June 8, 1999 Interim Award, full text available at <http://www.mealeys.com>.

MSEB endowing it with “absolute discretion” to exercise their rights as directors and shareholders of MPDCL.<sup>47</sup>

To support such holdings, some ICC arbitral tribunals<sup>48</sup> have relied on the theory of the *alter ego*. In their awards, these tribunals concluded that, although the signatory to the agreement was a legally separate entity distinct from the State, it had acted for the State, which was the signatory’s disclosed or undisclosed principal. It must be stressed, however, that domestic judges have refused to enforce awards which merge a State enterprise and its parent State too liberally.<sup>49</sup>

**C. *The “Instrumentality” is a Representative of the State***

Finally, private companies in ICC cases have sought to establish the State’s liability by arguing that its instrumentality was representing the State when negotiating, executing and performing the contract at issue.<sup>50</sup>

As one ICC arbitral tribunal noted:

[A]s a matter of principle, it is accepted that what the claimant states is correct, namely that one corporate entity

---

<sup>47</sup> ICC Case No. 12913, Apr. 27, 2005 Final Award, *supra* note 21, at C-8-C-10; *but see* ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 17–18.

<sup>48</sup> ICC Case No. 9151, June 8, 1999 Interim Award, *supra* note 46, ¶¶ 564–69; *but see* ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 18.

<sup>49</sup> *See, e.g.*, *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003); also available at <http://caselaw.lp.findlaw.com/data2/circs/5th/0220929cv0p.pdf>.

<sup>50</sup> ICC Case No. 7472, *European Company v. Ministry of Industry of State X, Ministry of Defence of State X and State X establishment*, Jan. 15, 1998 Final Award, unpublished, at 10–15.

can act on behalf of another corporate entity. However, if this is correct, it is for the claimant to show that this in fact occurred.<sup>51</sup>

In ICC Case No. 6406, the respondent (a foreign corporation) argued that the purported claimant, a State enterprise, could not initiate arbitral proceedings to recover a sum of money, as the relevant contracts were concluded, by their own terms, with “the Government of [State X] represented by [the State enterprise].” The Tribunal found that the proper party was not the State enterprise, but was in fact the State.<sup>52</sup> However, other arbitral awards have found that a contract was signed by an entity simultaneously acting “as both a public company and as an agent of the governmental authorities,”<sup>53</sup> thereby creating a dual responsibility.

It must be noted that, in some cases, it is difficult to determine whether the instrumentality’s representative was acting on behalf of the State or on behalf of the instrumentality. In ICC Case No. 8035 of 1995, for instance, the Arbitral Tribunal held:

In accordance with the concept of dual functions, M.A. signed the contract in a double capacity: first in the name of respondent No. 2, second in the name of the State, in each case for different reasons. The first signature committed respondent No. 2 under the Interruption Agreement. The purpose of the second signature, which appeared under the notation “approved and endorsed”, was to demonstrate that respondent No. 2 was acting within the framework of . . . the

---

<sup>51</sup> ICC Case No. 7472, Jan. 16, 1995 Interim Award, *supra* note 3, at 19.

<sup>52</sup> ICC Case No. 6406, *State X Helicopter Industries v. American company No. 1 and American company No. 2*, July 29, 1991 Interim Award, unpublished, at 7–8.

<sup>53</sup> Arbitration Chamber of Paris Case No. 9392, Jan. 16, 1998 Final Award, ¶ 3, available at [http://www.arbitrage.org/fr/publications/sentences\\_us/Failure\\_of\\_delivery.pdf](http://www.arbitrage.org/fr/publications/sentences_us/Failure_of_delivery.pdf).

Interruption Agreement, including the responsibility which respondent No. 2 could incur in this regard, such as the recognition of the finality of the results of arbitration.<sup>54</sup>

ICC case law also demonstrates that the State may be indirectly liable for the conduct of its instrumentalities.

## II. INDIRECT LIABILITY OF STATES FOR THE CONDUCT OF THEIR INSTRUMENTALITIES IN ICC CASE LAW

In ICC arbitration, private parties have generally put forward three arguments that a State is indirectly liable for the conduct of its instrumentalities.

### A. *The State's Culpa in Vigilando*

First, private companies have argued that, because the State has an obligation to control or supervise its instrumentalities, the State should be liable for the conduct of an instrumentality when the latter breaches a State contract as a result of the State's failure to adequately control or supervise. This scenario corresponds to the well-known principle of "*culpa in vigilando*" recognized in civil law legal systems.

---

<sup>54</sup> ICC Case No. 8035, 1995 Award, *supra* note 14. ("Conformément au concept de dédoublement fonctionnel, M. A. a signé le contrat en une double capacité : premièrement au nom de la défenderesse 2, deuxièmement au nom de l'Etat, dans chaque cas pour des raisons différentes. La première signature engageait la défenderesse 2 au titre de l'Accord d'interruption. La seconde signature, qui apparaît sous la mention « approved and endorsed », avait pour but de démontrer que la défenderesse 2 agissait dans le cadre de . . . l'Accord d'interruption, y compris la responsabilité que la défenderesse 2 pourrait encourir à cet égard comme la reconnaissance du caractère définitif du résultat de l'arbitrage").

In ICC Case No. 6375, for instance, the Arbitral Tribunal held a State organ (a Ministry) liable because its omission, by allowing interference by third parties, caused or contributed to delays by the contractor in the performance of its contractual obligations.<sup>55</sup> In ICC Case No. 8646 of 1998, the Arbitral Tribunal held that the actions of a State-owned company, the actions of recalcitrant farmers controlling areas where the private contractor had to deliver goods, and the unauthorized entry and movement of nomads were all “factors . . . attributable to the Defendant (Ministry of Defense of State X).” The prejudice caused to the foreign contractor, in the form of additional costs, was thereby attributed to the State’s omissions.<sup>56</sup>

***B. The State Acting as a Guarantor of its Instrumentality’s Contract***

Parties have also argued that the State is liable for the conduct of one of its instrumentalities where that State has contractually agreed to guarantee the instrumentality’s obligations under a contract that the instrumentality entered into with a private company.<sup>57</sup>

In ICC Case No. 8357 of 1997, for instance, the Arbitral Tribunal stated that:

[T]he ratification of the contract by law has the only legal effect to assure . . . full and stronger protection of the contractual rights of foreign entities, such as the rights of at

---

<sup>55</sup> ICC Case No. 6375, X Gas company v. Société nationale des produits pétroliers [State X], Feb. 8, 1992 Award, unpublished, at 43–50.

<sup>56</sup> ICC Case No. 8646, June 22, 1998 Award, *supra* note 5, ¶ 10.1.4.3.f, at 20–21.

<sup>57</sup> ICC Case No. 6262, Two European companies v. African State, June 24, 1992 Partial Award, unpublished, ¶ 92.

least two of the three members of the Consortium. As the employer was a State legal entity when the contract was signed, the ratification of the contract by statute was aimed mainly at assuring the foreign contracting parties that the obligations arising out of the contract would be respected and duly performed by the State.<sup>58</sup>

**C. *The State as Successor to a Liquidated State Entity***

Lastly, where a State entity enters liquidation, the State is by law liable for the debts of the liquidated State entity. Conversely, a new State entity, created to replace the original party to a contract, is entitled to invoke the contracting partner's liability under the contract.<sup>59</sup>

In ICC Case No. 7245 of 1994,<sup>60</sup> for instance, the Government reorganized its municipalities and thereby terminated the existence of the municipality that was a party to the contract at issue. The Arbitral Tribunal, however, held that by doing so the State had assumed the obligations of the municipality. According to the Tribunal, the State was the "universal successor" to dissolved territorial and administrative entities, and therefore the arbitral clause was transferred:

since [the State] succeeded to the rights and obligations of the 'Comité Populaire' of Municipality [X], which it replaces as a party to the present arbitration automatically and without the need for any modification of the terms of

---

<sup>58</sup> ICC Case No. 8357, Consortium of two foreign companies and a national company v. Public corporation of State X, June 14, 1997 Final Award, unpublished, ¶ 1.3.

<sup>59</sup> ICC Case No. 7237, National company (State X) v. European company, June 1, 1993 Partial Award, unpublished, at 8–9.

<sup>60</sup> ICC Case No. 7245, Jan. 28, 1994 Interim Award, *supra* note 3, at 43.

reference, which bind the State based on the sole fact of the aforementioned succession.<sup>61</sup>

In conclusion, the different bases of liability described above are by no means new since they also exist in cases arising between private parties where private law is applicable to the merits of the dispute. However, the analysis of ICC case law above does, in my view, shed new light on the conflict of legal methods and theories available in private and public international law to determine a State's liability for a breach by one of its instrumentalities of a State investment contract. It would seem preferable to adopt one uniform method, that is, a method common to both public and private international law—perhaps even a new “international legal order”—for arbitral tribunals to use in addressing issues relating to States' liability for their instrumentalities' breaches of State investment contracts.

---

<sup>61</sup> “[V]u que [l’Etat] a succédé aux droits et obligations du Comité Populaire de la Municipalité de [X] qu’elle remplace comme partie au présent arbitrage et ce d’office et sans besoin de modification de l’acte de mission qui la lie du seul fait de la succession précitée.”