BOOK REVIEW

ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION

BY CARLO DE STEFANO

by A. Barrier / A. Subedi

I. INTRODUCTION

The attribution of acts to the State is at the core of the international law on State responsibility. Attribution requires determining, before any finding of liability, whether a person or entity's specific conduct can be attributed to the State. It is a key precondition. This concept often raises issues in the context of investment arbitration. Most international investment agreements (IIAs) do not contain specific rules on attribution. Attribution is therefore one of the instances where investment arbitration tribunals must look beyond the underlying treaty, to customary international law.

Carlo de Stefano's book, Attribution in International Law and Arbitration, [1] meritoriously explores the development of the concept of attribution from a pure public international law perspective. Further, it surveys the drafting and application of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The book offers insightful comments and critiques by the author as well as an erudite account of judicial practice from a wide range of contexts such as: the World Trade Organization, the International Court of Justice (ICJ), the Iran-US Claims Tribunal, and investment arbitration.

II. THE BOOK

In his introduction, de Stefano recalls the tension within the rules of attribution. It is a fundamental tenet of international law that a state cannot be held responsible for the conduct of private individuals or entities. Yet, at the same time, it is necessary to ensure State accountability for "State" conduct. Determining whether an act is of the State therefore becomes a critical exercise.

[1] CARLO DE STEFANO, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION (2020).

The author sets his goal: to identify objective features of acts and omissions of States under the principle of attribution in order to improve consistency in what we may recognize the "State" to be, i.e., its organs, instrumentalities, and sometimes even private parties.

In the first chapter, de Stefano explains the essence of attribution, namely aligning State responsibility with the concept of the "State" as a non-physical entity acting through its "agents." The rules of attribution comprise various tests seeking to achieve this alignment with respect to specified conduct.

As specified by ARSIWA Article 2, "attribution is a requisite (or pre-requisite)" for the finding of a wrongful act under international law.[2] There must be both a breach of international law, and this breach must be attributable to the State. While considered the "subjective" element in the finding of a wrongful act, attribution does not engage typical legal principles that indicate responsibility, such as intention or causation. Further, the paradox with the rules of attribution is that while they are classified as subjective, they are based on objective elements (such as the institutional status of State organs, conferral of governmental authority, or the degree of control of a private entity by the State).[3] De Stefano suggests that this paradox gives the rules a "trans-substantive," or preliminary, character.[4] Additionally, he highlights that domestic law, one objective criterion among others to be taken into account in determining attribution, does not prevail over what is an otherwise "autonomous normative process."[5] The possibility of divergence between domestic laws and international law is therefore very real.

The process of determining attribution, embodied in particular by ARSIWA Articles 4, 5, 7 and 8, does not have the binding force of a treaty. It has, however, reached a customary status in public international law, as confirmed on multiple occasions by scholars and international tribunals. In any event, it is accepted that ARSIWA codifies customary international law.

According to de Stefano, attribution is a question of merits; attributability, or lack thereof, does not affect an international court or tribunal's power to adjudicate a dispute.

[2] *Id.* at 6.

[3] *Id.* at 9.

[4] *Id.*

[5] *Id.* at 11.

However, he acknowledges that States are nevertheless free to agree that attributability is a jurisdictional prerequisite.

De Stefano additionally compares and distinguishes the concepts of attribution and sovereign immunity. Though they share an initial purpose, which is to bridge the gap between State instrumentalities and the State, they lack synergy. The author highlights the potential for lacunae between the regimes of (domestic) immunity and (international) attribution and advocates for greater coordination between the domestic and international judiciary.

In Chapter 2, de Stefano explores the application of attribution rules in international law, as codified by ARSIWA. Among other points, he examines the categorization of de jure State organs and de facto State organs (ARSIWA Article 4), private entities conferred with governmental authority (ARSIWA Article 5), and individuals acting under the direction and control of the State (ARSIWA Article 8). De Stefano also examines the doctrines of patientia and receptus, as well as the rejection of the doctrine of complicity.

In particular, de Stefano explores the role of private State-controlled or State-owned enterprises (SOEs). Due to the general principle of separateness of corporate entities from the State, mere legal control by the State as a shareholder is insufficient to establish attribution. There must be a form of public interference, such as specific and formal instructions, or a level of direction or control, which renders the individuals or SOEs completely dependent. The author examines these points in light of international jurisprudence, dedicating several pages to an analysis of the International Criminal Tribunal for the former Yugoslavia's (ICTY) judgment in the Tadić case, and refuting the idea of its alleged conflict with ICJ case law.

In Chapter 3, de Stefano considers how the rules of attribution are applied in investment arbitration. Throughout the chapter, he focuses on the attributability of acts of SOEs, which is often discussed in investment disputes. As few IIAs contain specific rules of attribution, most investment tribunals resort to customary international law, and particularly ARSIWA. The author criticizes the confusion under which certain tribunals apply attribution tests, notably ARSIWA Articles 4, 5, and 8. As these rules apply to radically different types of relationships between persons and the State, they must not be conflated.

De Stefano also analyzes the difficulties faced by tribunals with regard to umbrella clauses and determining whether the author of contractual violations was the State,

specifically in the context of contracts with SOEs. He emphasizes that the rules of attribution are of no assistance when determining contractual responsibility.

De Stefano then turns to investment arbitration case law on attribution under ARSIWA Article 4, with specific emphasis on those organs exercising "any other functions"[6] and the doctrine of de facto State organs.[7] He likewise considers the application of the so-called functional test by tribunals applying ARSIWA Article 5. De Stefano provides a very user-friendly list of "symptoms" of governmental control, as identified by various investment tribunals.[8] More generally, with regard to SOEs, he states that the approach should be the so-called "private contractor" test,[9] i.e., whether a SOE would rationally have taken a specific action, like any other competitor in the market, without the benefit of State ownership. As for ARSIWA Article 8 (attribution based on instruction, direction, or control), the author shows that investment arbitration tribunals have applied a demanding test of effective control.

Attribution in International Law and Arbitration concludes with de Stefano's message to the legal community: an invitation to arbitrators, but also to domestic courts, to consider the fundamental specificity and independence of each rule of attribution. De Stefano advocates for the proper and consistent application of these rules, which would enable judicial bodies to better apprehend the intervention of the State in the economy and at all levels of society.

III. CONCLUSION

Attribution in International Law and Arbitration brings the necessary academic depth and clarity to the notion of attribution, which all too often lacks substance when wielded in the context of investment arbitration. Carlo de Stefano elects to speak directly to the investment arbitration community by conducting a thorough analysis of case law, flaws in application, and remedial advice. His book also serves as an important reminder of the role

[6] *Id.* at 178.

[7] These cases include, for example, *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001 (para 327) and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007 (para 391), ICJ Reports 2007, 43, 201.

[8] *Id.* at 154-157.

[9] *Id.* at 178.

customary international law should play in investment arbitration. As such, it is a most welcome contribution.

AUGUSTIN BARRIER is an associate at LALIVE. His main area of practice is international arbitration, including commercial and investment treaty arbitration, in a wide array of business sectors, including the construction, energy and mining industries, mainly in Europe and Africa. He has acted as counsel in numerous international arbitral proceedings under the aegis of various institutions, as well as ad hoc proceedings governed by a range of substantive and procedural laws, both common and civil law, and international law.
Before joining LALIVE, he practiced international arbitration at leading international firms in Paris, where he also practiced commercial litigation.

ANITA SUBEDI is an associate at LALIVE. Her main area of practice is international arbitration, specialising in commercial disputes in a range of business sectors, including construction, mining and airlines, mainly in Europe, the Middle East and Asia. Before joining LALIVE, she completed her qualifying traineeship with a US firm in London where she gained experience advising on international commercial disputes.