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Revisiting the Availability of Countermeasures in Investment Arbitration

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1 Introduction

The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) were intended as the International Law Commission's (ILC) 'permanent contribution to general international law'.[1] As such, the provisions enshrined therein, including the 'circumstances precluding wrongfulness' under Part I, Chapter 5, are in principle binding on, and applicable to, all States[2] (generality *ratione personae*) and apply to the whole field of international obligations of States,[3] regardless of their content or source[4] (generality *ratione materiae*). This chapter discusses whether, despite this *prima facie* general applicability, a responding State may be precluded from invoking the customary defence of

[1] ILC, 'Summary Record of the 2587th Meeting' (15 June 1999) UN Doc A/CN.4/SR.2587 [46]. *Contra* see, eg D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857; R Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447, 452–3; M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 BYBIL 264, 318. The present chapter embarks on the assumption that such defences are indeed of a customary nature and does not engage further with this criticism.

[2] B Cheng, 'Some Remarks on the Constituent Element(s) of General (or So-Called Customary) International Law' in A Anghie & G Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer 1998) 379–80; A Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 993, 1010 ff. See also ILC, 'Draft Articles on the Law of Treaties with Commentaries' (4 May–19 July 1966) UN Doc A/CN.4/191, reproduced in [1966/II] YBILC 187, 246 [5].

[3] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 31 (ARSIWA Commentary), general commentary [5]; see also, J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 879.

[4] See similarly F Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) 16 fn 58.

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countermeasures in the context of an investment dispute. It identifies and assesses four factors potentially affecting the availability of countermeasures in investment arbitration: the jurisdictional constraints of the arbitral tribunal, limitations in the law applicable to the dispute, the interpretation of the investment protection treaty in question, and potential limitations to the scope of application of the defence under customary international law.

The jurisdiction of an arbitral tribunal and the law applicable to the dispute are defined by the claim and the treaty in question. The tribunal's jurisdiction extends only to rulings on the matters raised by the claimant (*non ultra petita*), based on interpretation and application of the treaty at hand.[5] Nonetheless, many investment treaties authorise the tribunal to decide the issues in dispute, not only on the basis of the treaty itself, but also of 'applicable rules of international law'.[6]

The first task for the tribunal is to determine whether countermeasures are such 'applicable rules'. This is an interpretative task. The tribunal through interpretation of the investment treaty in question will need to ascertain whether countermeasures as a defence are, explicitly or implicitly, displaced in the context of disputes arising thereunder. For example, the treaty in question may contain rules that constitute *lex*

[5] Clauses on the settlement of disputes between an investor and a host State in BITs usually read '[t]his Article shall apply to … a dispute … arising out of an alleged breach of an obligation … under … this Treaty' or '[d]isputes with regard to an investment which arise within the terms of this Agreement …'; see eg, India, 'Model Text for the Indian Bilateral Investment Treaty' (*Indian Ministry of Finance*, 14 January 2016) Art 14 <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 1 June 2022; Canada, '2004 Model Agreement for the Promotion and Protection of Investments' (*Canadian Government*, 2004) Art 22 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download> accessed 1 June 2022 (hereinafter 'Canada Model BIT'); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (UK & Argentina) (adopted 11 December 1990, entered into force 19 February 1993) Art 8.

[6] It is not uncommon in international law to have a court or tribunal vested with limited jurisdiction, whilst having no limits on the rules of international law that it may apply in settling disputes properly brought before it. See eg United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, Arts 288(1) & 293(1) (UNCLOS); North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289, Arts 1116–17, 1120 & 1131(1); Art 14.D.3,14.D.9 Agreement between the United States of America, the United Mexican States, and Canada (adopted 10 December 2019, entered into force 1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 1 June 2022 (USMCA).

specialis to the defence of countermeasures under general international law. In such cases, the special provisions prevail over the general, to the extent that they regulate the same subject matter in a different manner.[7] Moreover, it has been argued that the conferral of substantive, direct rights to investors through investment protection treaties implies the non-applicability of the defence of countermeasures. If countermeasures are taken in response to a prior internationally wrongful act of the investor's home State, then the defence can only preclude the wrongfulness of a temporary non-performance of obligations owed to such State and not of obligations owed directly to the investor, which would, essentially, be a third party to such dispute. In this context, the tribunal shall also take into consideration any relevant rules of international law applicable between the parties,[8] such as the rules under customary international law on the protection of aliens and the institution of diplomatic protection, which may inform the content of relevant treaty provisions.

If the defence is, following this interpretative exercise, found to be applicable to an investment dispute, then the arbitral tribunal is further faced with two jurisdictional considerations. Firstly, the application of countermeasures may require examination of rights and obligations that fall, *prima facie*, outside its subject matter jurisdiction as established in that dispute, or even outside its jurisdictional field in general.[9] The tribunal would have to determine whether a prior internationally wrongful act has been committed, which would probably constitute a breach of an obligation outside the investment treaty under consideration, and thus, outside the jurisdictional limits of the arbitral tribunal. Secondly, the prior internationally wrongful act would be committed by the State of nationality of the investor and not the investor itself. This raises a *Monetary Gold*-like[10]

[7] See rule codified in ARSIWA, Art 55.

[8] See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 31(3)(c).

[9] ie, the general class of cases in respect of which a court exercises and is entitled to exercise its functions, G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals' (1952) 29 BYBIL 1, 40–2. Also known as 'foundational jurisdiction' or outer limits/jurisdictional boundaries of the court or tribunal, see Y Shany, 'Jurisdiction and Admissibility' in C Romano, K Alter & Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 782; A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1973) 136 RDC 333, 351.

[10] *Case of the Monetary Gold Removed from Rome in 1943* (Preliminary Question) [1954] ICJ Rep 19 (Monetary Gold) 32; A Grotto, 'Monetary Gold Arbitration and Case' [2008] MPEPIL 175. For the applicability of the principle in investment arbitration see *Larsen v Hawaiian Kingdom* (Award of 5 February 2001) UNCITRAL, 119 ILR 566, 588 [11.8–11.24].

consideration regarding the personal jurisdiction of the arbitral tribunal, as the author of the act would not be a party to the proceedings.

This chapter addresses the considerations above in two substantive sections. Section 2 provides an overview of the tribunals' reasoning and the parties' arguments in the relevant investment case law. All tribunals that have been seized of this matter rejected the arguments of the respondent on the defence of countermeasures but diverged significantly in terms of reasoning. Thus, arbitral tribunals so far have not provided a definite and consistent answer to the applicability of the defence. Section 3 critically assesses the approach of the tribunals to the application of the *lex specialis* principle, to the nature of investors' rights under investment protection treaties and to the limits of their jurisdiction *ratione materiae* and *personae*. This chapter argues that the defence of countermeasures under customary international law is indeed applicable in the context of investment disputes and that arbitral tribunals have the power to examine all the requirements of the defence in order to rule on its applicability in a given case.

2 Countermeasures in Investment Case Law: The US–Mexico Sugar War and the Ambivalent Arbitral Practice

The defence of countermeasures in the context of investment arbitration was primarily discussed in three North American Free Trade Agreement (NAFTA)-based[11] disputes: *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico* (*ADM*), *Corn Products International, Inc v Mexico (CPI)* and *Cargill, Inc v Mexico* (*Cargill*).[12] All three disputes arose in the context of the same broader situation of tension between the US and Mexico, which involved proceedings not only before these arbitral tribunals, discussed in this chapter, but also before the WTO Dispute Settlement System[13] and NAFTA.[14]

[11] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (NAFTA).

[12] *ADM v Mexico* (Award of 21 November 2007) ICSID Case No ARB/(AF)/04/5 [110–80] (*ADM*); *Corn Products v Mexico* (Decision on Responsibility of 15 January 2008) ICSID Case No ARB/(AF)/04/1 [144–91] (*CPI*); *Cargill, Inc v Mexico* (Award of 18 September 2009) ICSID Case No ARB(AF)/05/2 (*Cargill*).

[13] WTO, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup from the United States – Report of the Panel* (28 January 2000) WT/DS132/R; WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages – Report of the Panel* (7 October 2005) WT/DS308/R; WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages – Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R (*Mexico – Soft Drinks*).

[14] For an overview of the dispute settlement proceedings see JJ Losari & M Ewing-Chow, 'Legitimate Countermeasures in International Trade Law and Their Illegality in

The disagreement started with the US imposing measures, which restricted the access of Mexico's surplus sugar produce to the US market. It further escalated by the subsequent failure of the US to take part in the NAFTA dispute settlement proceedings initiated by Mexico with respect to the market restrictions, by blocking the appointment of panelists contrary to NAFTA Chapter Twenty. Mexico proceeded with a series of measures aiming to protect its domestic sugar industry, including a 20% tax on soft drinks using sweeteners which were primarily used by US companies. In response to the US claims that the tax was in breach of its NAFTA obligations, Mexico invoked the defence of countermeasures under general international law, claiming that the tax was lawfully introduced in response to prior violations by the US of its NAFTA obligations regarding the access of Mexican-produced sugar to the US market and dispute settlement proceedings. Three (redacted) awards were issued on this matter by tribunals constituted under the NAFTA dispute settlement provisions.

Even though all three disputes were based on the same factual matrix and the same legal instrument, the three awards have significant differences in terms of reasoning. The proceedings for all three cases took place largely in parallel. The Tribunals in *ADM* and *CPI* were unaware of each other's findings and there are no cross-references between the two awards or engagement with each other's reasoning. The Tribunal in *Cargill* received the *ADM* award during its deliberations along with comments from both sides.[15] Thus, the *Cargill* Tribunal had the opportunity to take into consideration the reasoning of the Tribunal in *ADM* and engage with its findings on the defence of countermeasures.[16]

All disputes were submitted to arbitration pursuant to NAFTA Chapter Eleven,[17] for alleged violations of, *inter alia*, the national treatment and expropriation provisions of NAFTA by Mexico.[18] The kind of claims that may be submitted to investor-State arbitration under Article 1120 NAFTA are specified in Articles 1116 and 1117, which accordingly, along with the application of the claimant, establish the scope of jurisdiction of

International Investment Law' in P Pazartzis & M Gavouneli (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Bloomsbury 2016) 413 ff; J Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking' (2006) 9 JIEL 197, 198–9.

[15] *Cargill* [45–51].

[16] *Cargill* [380, 410–19].

[17] NAFTA, Art 1120.

[18] NAFTA, arts 1102 & 1110.

the arbitral tribunals.[19] Moreover, the tribunals were constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). Under Article 42(1) ICSID Convention, a tribunal should 'decide a dispute in accordance with such rules of law as may be agreed by the parties.'[20] In turn, Article 1131(1) NAFTA provides that '[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.' Thus, the parties to NAFTA have agreed that general international law is, in principle, within the law that a NAFTA tribunal may apply in the determination of a dispute before it. The provisions on jurisdiction and applicable law were relevant to the discussion of the tribunals regarding the availability of countermeasures to investment arbitration and their power to examine the customary requirements of the defence.

The present section discusses the relevant analysis of the tribunals in the cases of *ADM*, *CPI* and *Cargill*. It outlines the tribunals' approach to the application of the *lex specialis* principle, the customary requirements for successful invocation of countermeasures, the nature of investors' rights under investment treaties and the limits of their jurisdiction *ratione materiae* and *ratione personae*.

2.1 *Countermeasures under General International Law and the* lex specialis *Principle*

An arbitral tribunal would, first of all, have to decide whether the customary defence of countermeasures is an '*applicable* rule … of international law' within the meaning of Article 1131(1) NAFTA. Even if NAFTA empowers, in principle, arbitral tribunals to apply rules of international law that are not explicitly included in the text of NAFTA itself, tribunals must still investigate whether NAFTA contains any rules that constitute *lex specialis*, and thus, apply to the exclusion of the relevant rules under general international law. The challenge is, first, to identify whether there is indeed a relationship of *lex specialis/lex generalis* between the two rules and, second, to determine the extent to which the two rules are co-extensive and mutually exclusive. According to the ILC, for the *lex specialis* to displace the relevant *lex generalis*, it is not enough that the same subject matter is covered by the two rules, but there must be an actual inconsistency

[19] NAFTA, Art 1120.

[20] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, Art 42(1).

between the two rules – a genuine conflict of norms.[21] The general rule is displaced only to the extent of the inconsistency with the treaty specific rule, whilst other aspects continue to operate in a residual fashion.[22] The tribunal in *ADM* was the only one of the three that discussed the NAFTA applicable law clause, explored the interaction of the defence of countermeasures under general international law with the NAFTA provisions and examined the application of the *lex specialis* principle in order to discern whether countermeasures can be invoked in the context of a NAFTA Chapter Eleven dispute.

The Tribunal began its analysis by reference to Article 1131(1) NAFTA. Although this provision pertains to the law applicable to the dispute, the Tribunal examined its content to determine whether it has '*jurisdiction* to decide on the validity of the defense'.[23] This shows the close relationship between the jurisdiction of an adjudicative body and the law that it may apply in the exercise of such jurisdiction. The Tribunal confirmed that Article 1131(1) NAFTA 'includes the application of rules of customary international law with respect to claimed breaches [of NAFTA provisions]'.[24] This finding confirms that the Tribunal has, indeed, the power to examine and apply customary international law, including the defences under the general international law on State responsibility, but only in the context of deciding the specific claims of breaches that are properly brought before it on the basis of the relevant jurisdictional clause.

Having established that customary defences are *prima facie* applicable to the dispute at hand in accordance with the NAFTA applicable law clause, the Tribunal proceeded to examine whether NAFTA otherwise excludes the application of countermeasures. The claimants have argued that NAFTA includes certain provisions that constitute *lex specialis* to the customary defence of countermeasures, which is, therefore, excluded in accordance with Article 55 ARSIWA.

According to the claimants, NAFTA

> Chapters Nineteen and Twenty establish the regime for dispute resolution that governs the 'existence of an internationally wrongful act' and the 'content' of the international responsibility of the Parties in the event of a

[21] ARSIWA, Art 55, commentary [4]; ILC, 'Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Finalised by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 [23–5] (Fragmentation Report).

[22] ARSIWA, Art 55, commentary [2].

[23] *ADM* [111] (emphasis added).

[24] ibid.

> breach of their obligations under the NAFTA … In other words, by signing the NAFTA, the Parties have deliberately forgone the residual right to take countermeasures under customary law.[25]

In response to this argument, the Tribunal acknowledged that the NAFTA indeed offers a form of *lex specialis* to supplement the standards of customary international law on a number of issues such as the treatment of aliens and diplomatic protection.[26] This '*express* content'[27] of the NAFTA, which clearly deviates from – or rather, goes beyond – the relevant rules of customary international law, constitutes *lex specialis* and is applicable to the exclusion of the relevant customary rules. However, according to the Tribunal, customary international law 'continues to govern all matters not covered' by the NAFTA provisions. To this end, it found that 'Chapter Eleven [NAFTA] neither provides nor specifically prohibits the use of countermeasures. Therefore, the question of whether the countermeasures defence is available to the Respondent is not a question of *lex specialis*, but of customary international law.'[28] The Tribunal confirmed that the only reference to countermeasures in the NAFTA was as a means of penalty for non-compliance with a decision rendered in a Chapter Twenty State-to-State arbitration.[29] In that case, no such decision has been rendered. Accordingly, it found that countermeasures can be invoked as a defence in a Chapter Eleven dispute subject to the conditions specified in general international law.[30] In other words, the silence of Chapter Eleven on the issue of countermeasures was interpreted as implicit acceptance of the relevant rules of general international law.

2.2 The Nature of Investors' Rights under Investment Protection Treaties

The arbitral tribunals were faced with an additional question in deciding the applicability of the customary defence of countermeasures to disputes under Chapter Eleven NAFTA. A responding State would invoke the defence of countermeasure as a response to a prior internationally wrongful act by the State of nationality of the investor. Nonetheless, that State is not a party to the dispute. It is rather the investor, a private individual, that

[25] *ADM* [114].
[26] *ADM* [117–18].
[27] *ADM* [119] (emphasis added).
[28] *ADM* [120].
[29] *ADM* [122]; cf NAFTA, Art 2019.
[30] *ADM* [123].

takes part in the proceedings under Chapter Eleven. The tribunals discussed the nature of investors' rights under Chapter Eleven and whether such nature affects the applicability of the defence of countermeasures under general international law to investor-State disputes.

The claimants argued that investors under Chapter Eleven NAFTA

> are vested with *direct independent* rights and … are immune from the legal relationship between the Member States. The investor's cause of action is grounded upon substantive investment obligations which are owed to it directly. A breach of these obligations does not therefore amount to a breach of an inter-state obligation; thus the general rules of state responsibility – including those regarding the circumstances precluding wrongfulness – cannot be presumed.[31]

In other words, countermeasures cannot be invoked as a defence to justify non-performance of obligations under Chapter Eleven, because such obligations are owed to the investors directly and not their State of nationality. According to this argument, the investor is a third party to the dispute between its State of nationality and the responding host State.

Mexico, on the other hand, argued that obligations under NAFTA, including Chapter Eleven, are owed only to the State of the investors' nationality. According to this line of argument, investors are either 'stepping into the shoes and asserting the rights of their home State' when initiating arbitration (derivative theory) or are 'vested only with an exceptional procedural right to claim State responsibility' (intermediate theory).[32] The relevant substantive obligations remain always inter-State, and thus, the defence of countermeasures can be properly invoked against the State of nationality for prior internationally wrongful acts that it has committed.

Indeed, under customary international law, countermeasures 'must be directed against' a State which is the author of the internationally wrongful act.[33] Accordingly, the wrongfulness of an act taken as countermeasure is precluded only with respect to obligations owed to the responsible State and not obligations owed to another party.[34] On the other hand, as stipulated in the ILC Commentary to Article 49 ARSIWA, a countermeasure can affect the interests of third parties as an 'indirect or collateral effect'.[35]

[31] *ADM* [162] (emphasis added).
[32] *ADM* [163].
[33] ARSIWA, Art 49 & commentary [4]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 (*Gabčikovo-Nagymaros*) [83]; *CPI* [163].
[34] ibid.
[35] *CPI* [164]; ARSIWA, commentary to Art 49 [5]

Thus, it must be determined whether an investor under NAFTA 'has rights of its own, distinct from those of the State of its nationality, or merely interests.'[36]

In *ADM*, the Tribunal sided with the view that investment rights are derivative and thus countermeasures can indeed be invoked as a defence by the responding State as they do not affect 'individual substantive rights'.[37] It found that

> the proper interpretation of the NAFTA does not substantiate that investors have individual rights as alleged by the Claimants. Nor is the nature of investors' rights under Chapter Eleven comparable with the protections conferred by human rights treaties. Chapter Eleven may share … with human rights treaties the possibility of granting to non-State actors a procedural right to invoke the responsibility of a sovereign State before an international dispute settlement body. But the fundamental difference between Chapter Eleven of the NAFTA and human rights treaties in this regard is … that Chapter Eleven *does not provide individual substantive rights for investors*, but rather complements the promotion and protection standards of the rules regarding the protection of aliens under customary international law.[38]

According to the Tribunal, the substantive obligations under Chapter Eleven remain inter-State providing the standards by which the conduct of the NAFTA Party towards the investor will be assessed in the arbitration.[39] These substantive obligations cannot be waived by the investors.[40] They are binding by virtue of the agreement between the State parties to the treaty. Moreover, according to the Tribunal, these obligations are complemented by customary international law to the extent that it is not displaced by the *lex specialis* of the treaty.[41] On the contrary, the right of investors to trigger arbitration against the host State is a purely procedural one.[42] Investors are given the 'exceptional right of action through arbitration that would not otherwise exist under international law'[43] and

[36] *CPI* [165].
[37] *ADM* [127, 173–9]; cf *ADM v Mexico* (Concurring Opinion of Arthur W Rovine of 20 September 2007) ICSID Case No ARB(AF)/04/05, who strongly supported that Chapter Eleven NAFTA investor rights belong to the investor and cannot be suspended or eliminated by countermeasures taken against the investor's home State.
[38] *ADM* [171] (emphasis added).
[39] *ADM* [173].
[40] *ADM* [174].
[41] ibid.
[42] *ADM* [173].
[43] ibid.

it is a right that they may choose to exercise or waive, at their own discretion. When an investor files a request for arbitration, it accepts a standing offer by the host State and creates a direct legal relationship in the form of an arbitration agreement.[44] This is the only direct relationship under international law. The relationship between the State of nationality and the host State remains unchanged.

By contrast, the tribunals in *CPI* and *Cargill* took a very different approach to this issue. They found that rights under Chapter Eleven NAFTA are not merely procedural.[45] Rather 'NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals.'[46] The Tribunal in *CPI* put emphasis on the interpretation of the relevant treaty provisions. It held that individuals and corporations can also hold rights under international law and that when such rights are said to be derived from a treaty 'the question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.'[47] In the case of NAFTA, the Tribunal found that the parties' intention was to confer substantive rights directly upon investors.[48] This was, according to the Tribunal, evident from the language of the treaty and from the fact that procedural rights are also conferred upon the investors.[49] The Tribunal observed that '[t]he notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive.'[50]

Further to this textual interpretation of NAFTA, the Tribunal in *CPI* referred to the rights of aliens under customary international law. It argued that 'the notion that in diplomatic protection cases the State was asserting a right of its own' was just a fiction, which was only necessary because procedurally individuals could not bring an international claim.[51] It further argued that this fiction did not reflect the substantive reality, something that is evident 'not only in the juristic writing but also in various rules of law surrounding diplomatic protection claims' such as the rule on exhaustion

[44] *ADM* [174].
[45] *Cargill* [424].
[46] *CPI* [167].
[47] *CPI* [168].
[48] *CPI* [168–9].
[49] *CPI* [169].
[50] ibid.
[51] *CPI* [170].

of local remedies and the doctrine of continuing nationality.[52] According to the Tribunal, if the rights were rights of the State itself, then there wouldn't be a requirement to bring a case first before domestic courts, as is the case with other international obligations owed directly to the State. Similarly, if an injury to the national is a violation of the rights of the State, then the victim's nationality after the date of the injury would not be of legal relevance. Thus, the Tribunal implies that even under customary international law, the substantive rights of investors are essentially direct. Accordingly, the investor 'is a third party in any dispute between its own State and another NAFTA Party and a countermeasure taken by that other State against the State of nationality of the investor cannot deprive that investor of its rights.'[53]

The Tribunal in *Cargill* provided a different reasoning in support of its finding that investors' rights under NAFTA are substantive. It drew a distinction between those rights and diplomatic protection under general international law. According to the Tribunal, 'in the case of diplomatic espousal … the claim is *owned* by the espousing State and the espousing State *is the named party*. Moreover, the operative paragraph of the resulting award reciting the decision of the tribunal names the espousing State, and not the national'.[54] Conversely, in the case of investment arbitration under NAFTA Chapter Eleven, the investor *itself* initiates proceedings, is the named party to such proceedings and is named in the dispositive of the award.[55] The Tribunal held that the origin of the rights should not be confused with the holder of the rights: 'That the origin of individual rights may be found in the act of a sovereign, or in the joint act of sovereigns, does not negate the existence of the rights conferred'.[56] It thus concluded that countermeasures cannot afford a defence in respect of a claim asserted under Chapter Eleven by a national of the allegedly offending State.[57]

2.3 *The Customary Requirements for a Lawful Countermeasure and the Jurisdictional Limits of Arbitral Tribunals*

The tribunals in their analysis regarded Articles 22 and 49–53 ARSIWA 'as an authoritative statement of customary international law on countermeasures'.[58] Article 49 ARSIWA provides that an injured State may take

[52] *CPI* [170–3].
[53] *CPI* [176].
[54] ibid.
[55] *Cargill* [425].
[56] *Cargill* [426].
[57] *Cargill* [429–30].
[58] *ADM* [125–6]; *CPI* [145–9].

countermeasures, in the form of limited and temporary non-performance of international obligations, against a State which is responsible for an internationally wrongful act, in order to induce compliance of that State with its international obligations. Article 51 ARSIWA further provides the requirement of proportionality, ie, that the effects of the countermeasure must be commensurate with the injury suffered taking into account the gravity of the internationally wrongful act and the rights in question. The tribunals also referred to the findings of the International Court of Justice (ICJ) in *Gabčikovo-Nagymaros*,[59] which establishes the same criteria as those codified by the ILC.[60] The analysis of the tribunals implies acceptance of these criteria as part of the customary law on countermeasures.[61]

The first requirement under customary international law, ie the existence of a prior internationally wrongful act, is also the most interesting in the context of investor-State dispute settlement (ISDS). The arbitral tribunals would have to determine whether such a prior breach has taken place in order to rule on the applicability of the defence. This raises important jurisdictional questions in cases where this prior breach is outside the limits of the tribunal's subject matter jurisdiction.

First of all, as confirmed by the Tribunal in *CPI*, 'the requirement of a prior violation of international law is an absolute precondition of the right to take countermeasures'.[62] Mexico had argued that to succeed in its countermeasures defence under customary international law, it did not need to prove that the US had indeed violated its obligations but rather that at the time of taking the countermeasure and while it was in place, it had 'a genuine belief that it had a reasonable prospect of succeeding in establishing that the United States was in breach, should that question

[59] *Gabčikovo-Nagymaros* [82 ff].

[60] Note the feedback loop (inter-temporal twist) between the work of the ILC and the findings of the ICJ. The ICJ in *Gabčikovo-Nagymaros* relies, among others, upon the work of the ILC and the rules on countermeasures as were codified in Articles 47 to 50 of the Draft Articles on State Responsibility (1996), see *Gabčikovo-Nagymaros* [83]. A few years later, the ILC refers back to the findings of the Court in *Gabčikovo-Nagymaros* in its commentary to the relevant articles to support its conclusions codified therein, see commentary to Art 49 [2]; commentary to Art 51 [4]; see on this matter eg Sloane (n 1) 452–3; Paparinskis (n 1) 318. The Tribunal in *ADM*, oddly, refers to both sources, as separate authorities, in order to lay down the requirements for a lawful countermeasure under customary international law.

[61] It is interesting to note that neither the parties nor the tribunals referred to the procedural requirements of countermeasures enshrined in Art 52 ARSIWA.

[62] *CPI* [185].

come before a competent tribunal.'[63] Accordingly, the Tribunal would not need exceed the limits of its jurisdiction as it could decide on whether Mexico had such genuine belief without examination of the actions of the US *per se*. The Tribunal rejected this argument as an attempt by Mexico to 'square the circle', confirming that the jurisdictional concern cannot be easily avoided.[64]

The Tribunal in *ADM* found on this matter that it 'has no jurisdiction to decide whether the United States breached any of its international obligations under Chapter Three or Chapter Twenty of the NAFTA.'[65] The Tribunal recalled that it was established under Chapter Eleven for the settlement of an investment dispute, comprising allegations of violations by the respondent of Articles 1102, 1106 and 1110 NAFTA. Thus, it had no jurisdiction to decide whether the US breached any of its international obligations complained by Mexico, since those were prescribed under NAFTA Chapters Three, Seven and Twenty.[66] Mexico argued that the jurisdiction of the Tribunal entailed the power to examine its argument on countermeasures as this was invoked as a defence precluding its international responsibility,[67] but the Tribunal rejected this line of reasoning.

Interestingly, the Tribunal found that it had jurisdiction to examine the rest of the customary requirements of countermeasures. It stipulated that '[b]oth parties agree that the Tribunal has jurisdiction to decide any defense under Chapter Eleven, including a countermeasures defense'.[68] Thus, the Tribunal acknowledged the nature of countermeasures as a defence and its jurisdiction to rule on applicable defences but still found that its power does not extend to *all* the customary requirements of such defence. Accordingly, the Tribunal proceeded to examine whether Mexico's tax measure was taken in response to the alleged US violations, aimed at inducing the US to comply with the NAFTA obligations that it has allegedly breached and was proportionate to such aim, without first establishing that a prior internationally wrongful act has taken place. It found that Mexico's measure did not meet these requirements and rejected the countermeasures defence on that basis, thereby circumventing the jurisdictional considerations.

[63] *CPI* [184].
[64] *CPI* [185].
[65] *ADM* [128].
[66] *ADM* [127–9].
[67] *ADM* [129–30].
[68] *ADM* [132].

The Tribunal in *CPI* reached a similar conclusion regarding the limits of its jurisdiction. In an *obiter dictum*,[69] it held that it would not have the jurisdiction to determine whether Mexico's allegations against the US were well-founded or not, because 'the United States is not a party to these proceedings and the Tribunal does not have jurisdiction to determine whether any provision of the NAFTA falling outside Chapter XI has been violated'.[70] The Tribunal here raises not only the issue of jurisdiction *ratione materiae*, discussed in *ADM*, but also a concern regarding the limits of its personal jurisdiction. It makes a *Monetary Gold*-like argument,[71] implying that it may not determine the legal interests of a non-party to the dispute (the US) without its consent.[72]

3 Evaluating the Tribunals' Approach: Treaty Interpretation, Customary Law and General Principles of International Adjudication

It becomes evident from the analysis above that tribunals have adopted opposing views on issues crucial to the applicability of the customary defence of countermeasures to investor-State disputes. Despite the inconsistencies, through their reasoning and analysis we can identify the main questions and opposing arguments regarding the applicability of defence. This section evaluates the tribunals' reasoning and discusses the availability of countermeasures to responding States in ISDS in view of the customary rules of treaty interpretation, the *lex specialis* principle and general principles of international adjudication.

3.1 The Lex Specialis *Principle: Revisiting the Interaction of Countermeasures with Investment Protection Treaties*

As discussed in Section 2, only the Tribunal in *ADM* examined how the defence of countermeasures under customary international law interacts with the NAFTA provisions and whether it is displaced by a *lex specialis*. The

[69] The Tribunal had already rejected the applicability of the defence of countermeasures on the basis that investors' rights are direct and independent but still proceeded to discuss whether it would have jurisdiction to examine the prior internationally wrongful act as it was 'a matter which was the subject of much debate … on which it is necessary to say something' see *CPI* [180].

[70] *CPI* [182].

[71] See fn 11.

[72] Paparinskis (n 1) 337–8.

analysis in *ADM* confirms, in the first place, the applicability by default of the general international law on State responsibility, including the circumstances precluding wrongfulness, to treaty-based claims. The Tribunal's analysis on the issue of *lex specialis* suggests that the absence of *explicit* derogation must be regarded as a continuation, or rather, an implicit acceptance of the existing rules under general international law. The silence of NAFTA on the issue of countermeasures as a defence was interpreted as implicit acceptance of its applicability to disputes arising thereunder.

This approach is in line with the general 'presumption against normative conflict' in international law.[73] As explained by the Arbitral Tribunal in the *Georges Pinson* case:

> Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente.[74]

The ICJ has also adopted the same approach on the applicability of general international law to treaty claims. In the case of *ELSI*, the ICJ Chamber discussed whether the customary rule of exhaustion of local remedies for the exercise of diplomatic protection was applicable, even though the compromissory clause in question made no reference to such prerequisite for submission of a dispute to the Court. It held that it was 'unable to accept that an important principle of customary international law should be held to have been *tacitly* dispensed with, *in the absence of any words making clear an intention to do so*'.[75] Nonetheless, the Court admitted that the parties could indeed deviate from the customary rule. As Sir Frank Berman points out '[a]s a matter of abstract logic, it is perfectly conceivable that a pair of Contracting States might wish to displace the general law in their mutual relations; very often that is the whole purpose of a bilateral treaty.'[76] The Court suggested, however, through its reasoning, that this should be clearly discernible from the text of the treaty and cannot be presumed. The Tribunal in *ADM* seems to adopt the same approach. General international law, including the defence of countermeasures,

[73] ILC, 'Fragmentation Report' (n 21) [37–8].

[74] *Georges Pinson* case (*France/United Mexican States*) (Award of 13 April 1928) 5 UNRIAA 329, 422, which translates as follows: 'Every international convention must be deemed tacitly to refer to the common international law for all the questions which it does not itself resolve in express terms and in a different way'.

[75] *Elettronica Sicula SpA (ELSI)* (*USA v Italy*) (Judgment) [1989] ICJ Rep 15 [50] (emphasis added).

[76] F Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 YaleJIntlL 291, 319.

applies by default to all international disputes, subject to the application of the *lex specialis* principle, which dictates that a special provision shall prevail, to the extent that it clearly derogates from general international law. Thus, the premise of the Tribunal's reasoning in *ADM* is consistent with the customary rules of interpretation and the *lex specialis* principle. Chapter Eleven NAFTA does not seem to preclude the applicability of countermeasures to disputes arising thereunder.

Nevertheless, Chapter Twenty NAFTA establishes a *lex specialis* that displaces at least some countermeasures: those in response to violations of NAFTA itself. As evidenced also by the Tribunal's reasoning in *ADM*, countermeasures in international law have a 'dual' character, which is already reflected in their double appearance in both Articles 22 and 49 to 54 ARSIWA: they constitute a means of implementing international responsibility and at the same time a defence against a claim of breach.[77] NAFTA indeed specifies the means by which international responsibility may be implemented for breaches of its own provisions by one of its parties. In such cases the parties may resort to the dispute settlement provisions of the NAFTA as well as the provisions on suspension of benefits ('countermeasures' under NAFTA aiming to induce compliance with a panel decision).[78] These provisions constitute *lex specialis* with respect to *some* countermeasures: those in response to a prior breach of the same treaty. The do not, however, preclude *all* countermeasures.[79] If, for example, the respondent argued that non-performance of its NAFTA obligations was in response to prior violations of another State party in the field of human rights or environmental protection, this scenario would not be covered by the dispute settlement or the suspension of benefits provisions of the NAFTA, and thus, it wouldn't be governed by the *lex specialis*. *Lex specialis* prevails over the relevant *lex generalis* only to the extent that the two rules are co-extensive and in genuine conflict.[80] Aspects of the *lex generalis* that are not derogated from continue to apply by default in the relations between the parties.

[77] Countermeasures as a 'sword' (invocation of responsibility for breaches of the investment protection regime) and as a 'shield' (defence against a claim of breach), see Paparinskis (n 1) 270.

[78] NAFTA, Arts 2004 & 2019.

[79] Similarly, in the case of the WTO, Arts. 22 and 23 of the Dispute Settlement Understanding (DSU) provide for WTO-mandated suspension of concessions and the obligation to have recourse to the DSU instead of taking unilateral action in order to seek redress for any alleged breach. These provisions – in and of themselves – exclude the application of some countermeasures under general international law (unilateral countermeasures as far as breaches of the WTO Agreements themselves are concerned) but not others.

[80] See (n 21).

The Tribunal referred to the provisions on countermeasures under Chapter Twenty and stipulated that since there has been no panel decision under Chapter Twenty the provisions on suspension of benefits were inapplicable. But it did not acknowledge that the dispute settlement arrangements under Article 2004 NAFTA establish a *compulsory* procedure that displaces other unilateral means for the implementation of responsibility with respect to NAFTA violations. Article 2004 provides that 'the dispute settlement provisions of this Chapter *shall* apply with respect to the avoidance or settlement of *all* disputes between the Parties regarding the interpretation or application of this Agreement or *wherever* a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement …'.[81] Unilateral countermeasures in the form of suspension of obligations under another NAFTA chapter in order to induce compliance with NAFTA Chapter Twenty are incompatible with this provision.

In *ADM*, Mexico invoked the defence of countermeasures under general international law with respect to the US breaches of NAFTA itself. In principle, this situation would indeed be regulated by the *lex specialis*, ie, the NAFTA provisions on State-to-State dispute settlement. The Tribunal introduced an artificial distinction between different chapters of the same instrument and stipulated that only in Chapter Twenty we find any reference to countermeasures, whilst the dispute at hand was brought before it under Chapter Eleven.[82] However, this argument, on its own, is not convincing. In principle, any grievances against the State of nationality of the investor for alleged breaches of the NAFTA are subject to the dispute settlement provisions of Chapter Twenty and cannot be presented before a Chapter Eleven tribunal through the defence of countermeasures. This approach is in line with the principle of effective interpretation:[83] the tribunal should not read a treaty in a manner that leads its provisions (in this case, the dispute settlement provisions under Chapter Twenty) to redundancy or inefficiency.[84]

[81] NAFTA, Art 2004 (emphasis added).

[82] See *ADM* [123]: 'Countermeasures may serve as a defence under a Chapter Eleven case, as this is a matter not specifically addressed in Chapter Eleven'.

[83] See, eg, *Corfu Channel* (*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 24; *Dispute Regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (Judgment) [2009] ICJ Rep 213 [52]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*) (Preliminary Objections) [2011] ICJ Rep 70 [133–4].

[84] ILC (n 2) 219, commentary to Arts 27–8 [6].

The Tribunal's findings in *ADM* were probably motivated, albeit implicitly, by another factual aspect of the dispute. As the respondent submitted before the Tribunal, the means described in NAFTA Chapter Twenty for implementing the international responsibility of the US were not available to Mexico, as the US had blocked Mexico's access to a NAFTA panel.[85] This very fact constituted one of the breaches of NAFTA complained of by Mexico. Therefore, neither the dispute settlement nor the countermeasures' provisions under NAFTA were *actually* available to Mexico in that case. In the words of Mexico, 'a State party cannot be bound by a *lex specialis* that has proved impossible to invoke'.[86] The Tribunal, through its findings, seems to implicitly side with this argument. This approach can also be justified on the basis of general principles of international law. The principle of law expressed in the maxim *ex iniuria jus non oritur* dictates that unlawful conduct cannot modify the law applicable in the relations between the parties, or, in other words, that States should not benefit from their own wrong.[87]

3.2 *The Question of Independent Rights: Revisiting the Power of Host States to Suspend Investors' Rights in Response to Conduct of Their Home State*

Regarding the nature of the rights of investors, the analysis of the tribunals, discussed above, is twofold. In the first instance it seems that they interpret the NAFTA to discern whether the rights enshrined therein are directly ascribed to the investor or derivative of the inter-State relationship. Through this first limb of analysis, they seem to suggest that the issue of the nature of investors' rights is not a theoretical question to be determined *in abstracto*. As it has been pointed out by Paparinskis,

> the nature of the rights is not an abstract and irrebutable *a priori* proposition, and as a rule of *jus dispositivum* is open to amendment or reinterpretation, in particular through subsequent agreement and practice. … The nature of investors' rights may at least in principle differ in different investment treaty rules, having important consequences for the applicability of countermeasures.[88]

However, the second part of their reasoning traces the nature of investors' rights back to customary international law. For example, the analysis

[85] *ADM* [115].
[86] ibid.
[87] *Gabčíkovo-Nagymaros* [133]; *Jadhav* (*India v Pakistan*) (Judgment) [2019] ICJ Rep 418 [64].
[88] Paparinskis (n 1) 335.

in *ADM* suggests that investment treaties are simply an extension of the customary rules regarding the protection of aliens, which are already binding on all States. According to the Tribunal, although the institution of diplomatic protection is displaced by the establishment of a different dispute settlement mechanism for the implementation of responsibility under investment treaties, the nature of the substantive obligations regarding the protection of aliens, that already existed under customary international law, remains unaffected by the addition of further obligations in investment treaties. Although the Tribunal did not expressly characterise it as such, its reasoning was in essence an interpretation of the obligations under NAFTA in view of relevant rules of customary international law. The Tribunal in *CPI*, although it reached a different conclusion, followed a similar approach. First, it offered an interpretation of the NAFTA and argued that it confers direct rights to the investors. Then, it further buttressed this argument by recourse to customary international law. According to the Tribunal, evidence suggests that even under the traditional institution of diplomatic protection, where the State is the one bringing the investor's claim to the international plane, the rights are in reality owned by the investor. Accordingly, the NAFTA provisions, read in light of customary international law, suggest that investors' rights are independent from their home State. In *Cargill*, the Tribunal had recourse to the customary law on diplomatic protection in the context of an *a contrario* argument. It argued that diplomatic protection is diametrically different to contemporary investment arbitration and that such differences lead to the conclusion that today investors' rights under investment treaties are direct, whereas under customary international law and the rule on diplomatic protection, they remained tied to the State of nationality.

It emerges from the above that all three tribunals are using the same evidence relating to the protection of aliens and the institution of diplomatic protection under customary international law, but reach very different interpretative results. It becomes evident that there is a lack of methodology in the deductive reasoning of tribunals which leads to conflicting conclusions and inconsistencies in terms of reasoning.

In evaluating the evidence and arguments raised in the three cases above, there is nothing to suggest that the rights of investors are detached from their State of nationality. The default applicability of customary international law, discussed in the previous sub-section, suggests that substantive obligations assumed by States under investment treaties are simply in addition to the existing customary obligations and they do not alter their scope and nature if such change is not explicitly provided for. Thus, only

the procedural aspects of implementation of international responsibility are affected by current investment treaties that provide for investor-State arbitration without the involvement of the State of nationality.

Moreover, under customary international law, obligations assumed by States which have individuals are beneficiaries and are considered non-derogable are listed in Article 50 ARSIWA as obligations that cannot be affected by countermeasures. The tribunals failed to provide evidence that such list under customary international law has been expanded and also failed to take this list into consideration in interpreting the provisions of the investment treaty in question.

Lastly, other provisions that are typically included in investment protection treaties further suggest that the protection of investors is not immune from changes in the relationship between the host State and the State of nationality. Most pertinently, the 'security exception', which is included in a number of bilateral and multilateral investment protection treaties, including NAFTA,[89] often stipulates, among others, that nothing in the text of the agreement should be construed 'to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations'.[90] It becomes evident that under this clause, an emergency in the relations between the home State of the investor and the host State would justify the taking of measures that are *prima facie* incompatible with the obligations of the host State under the investment agreement. In other words, through no fault of its own, the investor may have to suffer the consequences of the deterioration of the relations between the two States to the extent that the essential security interests of the host state are at risk. Countermeasures taken in response to a prior internationally

[89] See on national security, NAFTA, Art 2102.

[90] (emphasis added) see, eg, The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, Art 24; Canada Model BIT (n 5); Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment (Japan & Korea) (adopted 22 March 2002, entered into force 1 January 2003) Art 16; Agreement Between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment (Japan & Vietnam) (adopted 14 November 2003, entered into force 19 December 2004) Art 15; Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership (Japan & Chile) (adopted 27 March 2007, entered into force 3 September 2007) Art 193; Agreement Between New Zealand and Singapore on a Closer Economic Partnership (New Zealand & Singapore) (adopted 14 November 2000, entered into force 1 January 2001) Art 76; Agreement Between Japan and the Republic of the Philippines for an Economic Partnership (Japan & Philippines) (adopted 9 September 2006, entered into force 11 December 2008) Art 99.

wrongful act of the State of nationality of an investor may affect the interests of the latter in a similar fashion.

3.3 Countermeasures as a Response to a Prior Internationally Wrongful Act: Revisiting the Limits of Arbitral Tribunals' Subject Matter and Personal Jurisdiction

As seen in the analysis of the case law above, the arbitral tribunals that have been seized with the issue of the applicability of countermeasures in investment disputes so far have taken a restrictive approach to the limits of their subject matter and personal jurisdiction. They require that the indispensable incidental matter which arises in the context of an applicable defence, ie, the existence of a prior internationally wrongful act in the case of countermeasures, would also fall within their scope of jurisdiction if it was brought before them as an independent claim, in order to proceed to its examination. This essentially means that very few countermeasures, if any at all, could properly be examined by an arbitral tribunal: those that consist of the non-performance of obligations arising under the same investment treaty.

The WTO adjudicative bodies have also taken a similar approach to this issue. In the case of *Mexico – Soft Drinks*, which was adjudicated in the context of the same broader US-Mexico dispute, the panel and Appellate Body argued that their jurisdiction *ratione materiae* does not entail the power to examine a prior internationally wrongful act that constitutes violation of rules other than the WTO covered agreements. According to the AB, WTO adjudicative bodies cannot 'become adjudicators of non-WTO disputes', as this is not their function as intended by the DSU.[91]

This approach introduces a *Monetary Gold*-like consideration with regards to jurisdiction *ratione materiae*.[92] The arbitral tribunals examined above, as well as the WTO adjudicative bodies, seem to suggest that 'to adjudicate upon the international responsibility of [a State] without its consent [on that particular matter] would run counter to a well-established

[91] *Mexico – Soft Drinks* [56, 78].

[92] See pertinently P Tzeng, 'The Doctrine of Indispensable Issues: Mauritius v United Kingdom, Philippines v China, Ukraine v Russia, and Beyond' (*EJIL:Talk!*, 14 October 2016) <www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/> accessed 1 June 2022; P Tzeng, 'Investments on Disputed Territory: Indispensable Parties and Indispensable Issues' (2017) 14 Braz J Int Law 121.

principle of international law … namely, that [an adjudicative body] can only exercise jurisdiction over a State with its consent.'[93]

In the case of ISDS, we are also faced with a more traditional *Monetary Gold*-like consideration: the investor's State of nationality, who is the author of the alleged internationally wrongful act, is absent from the proceedings. This raises a problem regarding the scope of the arbitral tribunal's jurisdiction *ratione personae*, as it is called to discuss the international responsibility of a non-participating State.

3.3.1 The Case for an Expansive Approach to the Jurisdiction of Arbitral Tribunals: The Approach of the ICJ

In its 2020 International Civil Aviation Organisation (ICAO) Council judgments,[94] the ICJ expressly endorsed an expansive approach to the jurisdiction of adjudicative bodies in the context of applicable defences. The applicants (Saudi Arabia, Bahrain, United Arab Emirates and Egypt, also known as 'the Quartet') challenged the decision of the ICAO Council to uphold its jurisdiction over Qatar's claims relating to the Quartet's aviation restrictions against Qatar-registered aircrafts. The Quartet had argued that the 'ICAO Council lacked jurisdiction under the Chicago Convention since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterised as lawful countermeasures under international law'.[95] The Council rejected this preliminary objection. The respondents instituted an appeal from the Council's decision on jurisdiction before the ICJ under Article 84 of the Chicago Convention. The ICJ, in its judgment, found that the ICAO Council did not err in rejecting the Quartet's assertion and rejected the applicant's grounds of appeal.

In its judgment, the Court stipulated that 'the integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the *exclusive* purpose of deciding a dispute which falls *within* its jurisdiction … Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of

[93] *Monetary Gold*, 32 (paraphrased).

[94] *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v Qatar)* (Judgment) [2020] ICJ Rep 172; *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)* (Judgment) [2020] ICJ Rep 81 (hereinafter *2020 ICAO Council Judgments*)

[95] *2020 ICAO Council Judgments* [24].

the Chicago Convention *solely* in order to settle a disagreement relating to the interpretation or application of the Chicago Convention would not render the application submitting that disagreement to it inadmissible.'[96] In other words, the ICJ confirmed that the ICAO Council's jurisdiction entails the power to decide an indispensable incidental matter in the context of the defence of countermeasures in order to discharge its function under the Chicago Convention.

The findings of the Court in 2020 are in line with previous jurisprudence. The PCIJ, already in 1927, famously pronounced in *Factory at Chorzów* that 'reparation … is the indispensable complement of a failure to apply a convention … Differences relating to reparations … are consequently differences relating to its application'.[97] The power of an adjudicative body to examine a defence along with all issues indispensable to determine its applicability in the case before it follows from the 'principle that jurisdiction to determine a breach implies jurisdiction to award compensation',[98] or more generally, to rule on the content of a State's international responsibility. The applicability of a defence under the law of State responsibility determines whether the responding State bears international responsibility and the ensuing consequences. Thus, incidental findings in the context of a respondent's defence are indispensable for the adjudicative body to exercise its function.

This approach is also in line with the principle elaborated by the ICJ in the *Nuclear Tests* case. The Court confirmed that an adjudicative body 'is fully empowered to make whatever findings may be necessary' in order 'to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated' and 'to provide for the orderly settlement of all matters in dispute'.[99] Accordingly, the competence of an adjudicative body to examine all indispensable incidental issues in the context of an applicable defence is part of its inherent powers deriving from its 'mere existence … as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.'[100]

Importantly, the approach of the ICJ suggests that the limited or specialised jurisdictional field of an adjudicative body, ie, the general class of cases in respect of which it exercises and is entitled to exercise

[96] ibid [61] (emphasis added).
[97] *Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Ser A No 9, 21.
[98] J Crawford, *State Responsibility – The General Part* (CUP 2013) 599.
[99] *Nuclear Tests Case* (*Australia* v *France*) (Judgment) [1974] ICJ Rep 253 [23].
[100] ibid.

its functions,[101] does not affect the power to rule on such indispensable incidental issues in the context of defences. The function of an international adjudicative body, regardless of its character as general (such as the ICJ, which may, in principle and subject to the parties' consent, exercise jurisdiction over *all* issues of international law, as outlined in Article 36 its Statute) or specialised (such as an investment arbitral tribunal or the WTO panels and Appellate Body), is to decide the case that is brought before it in accordance with its statute and rules of procedure. To discharge this function, it may need to examine rights and obligations that are necessarily implicated by the main claim before it. The findings of the ICJ in the *2020 ICAO Council* case discussed above clearly support this argument. The ICJ confirmed that the ICAO Council, a specialised dispute settlement body, has the power to examine indispensable incidental issues for the purpose of deciding a case properly brought before it.[102]

Moreover, the argument that courts of general competence can have an expansive understanding of their jurisdiction whereas specialised courts should exercise self-restraint seems to imply, essentially, a difference in the competency, adequacy or suitability of such court to determine a wider spectrum of issues under international law. Naturally, the competency of the court can only be assessed by reference to its members. In other words, this argument seems to imply that the judges (and not the court) are in one case more 'competent' to determine all issues of international law than in the other. In international dispute settlement, as we know it today, this assumption cannot be easily substantiated. Although the professional and academic backgrounds of arbitrators vary, we cannot disregard the fact that several of them are highly specialised in general public international law and have even served as judges in other international adjudicative *fora*.[103] When broader matters of international law are implicated in the dispute in question, the arbitral panel should comprise

[101] See (n 9).

[102] *2020 ICAO Council Judgments* [61] (emphasis added).

[103] Eg, many judges of the International Court of Justice have participated ('moonlighted') as arbitrators in international investment disputes or as members of ICSID annulment committees, until ICJ's decision to restrict the practice of allowing members to serve in arbitral tribunals. ICJ members have decided that they 'will not normally accept to participate in international arbitration' and, 'in particular, they will not participate in investor–state arbitration or in commercial arbitration', see ICJ, 'Speech by HE Mr Abdulqawi A Yusuf, President of the International Court of Justice, on the occasion of the Seventy-Third Session of the United Nations General Assembly' (Statements by the President, 25 October 2018) <www.icj-cij.org/public/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> accessed 1 June 2022.

individuals that possess the necessary knowledge. This is a matter that relates to the selection of arbitrators in any given case.

3.3.2 Countermeasures *vs* Counterclaims

The tribunals' narrow approach to jurisdiction *ratione materiae* brings to mind the requirements for the admissibility of counter-claims.[104] Article 46 of the ICSID Convention provides that 'except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject matter of the dispute provided that they are *within the scope of the consent* of the parties *and are otherwise within the jurisdiction of the Centre*.'

Indeed, there is a reasonable analogy to be drawn between the requirements on the admissibility of a counterclaim and an adjudicative body's jurisdiction to examine the defence of countermeasures. Given that countermeasures are a lawful reaction to a prior internationally wrongful act, a responding State can always claim that its action was in response to the wrongful act of the applicant regardless of whether the court or tribunal would be able to rule on the wrongfulness of such act as an independent claim or counterclaim. This could constitute a back door for entertaining claims that would otherwise be inadmissible.

However, in the case of countermeasures, the respondent will not have an independent verdict on the actions of the applicant. The court's finding of a prior breach will only constitute part of its reasoning to determine the case brought before it by the applicant. This was clearly stipulated by the ICJ in the *2020 ICAO Council* judgment: incidental findings are made by an adjudicative body 'for the *exclusive* purpose of deciding a dispute which falls *within* its jurisdiction'.[105] As Judge Higgins conceded in her, otherwise very critical, separate opinion to the *Oil Platforms* judgment, the *non ultra petita* rule 'does not operate to preclude the Court from dealing with certain other matters "in the reasoning of its Judgment, should it deem this necessary or desirable"'.[106]

[104] *Oil Platforms (Iran v USA)* (Counter-Claim, Order of 10 March 1998) [1998] ICJ Rep 203 [33]; *Armed Activities on the Territory of the Congo* (*Congo v Uganda)* (Counter-Claims, Order of 29 November 2001) [2001] ICJ Rep 678 [35]; *Jurisdictional Immunities of the State* (*Germany v Italy*) (Counter-Claim, Order of 6 July 2010) [2010] ICJ Rep 310 [14].

[105] *2020 ICAO Council Judgments* [61].

[106] *Oil Platforms (Iran v USA)* (Merits) [2003] ICJ Rep 161, Separate Opinion of Judge Higgins 225 [14], citing *Arrest Warrant of 11 April 2000* (*Congo v Belgium*) (Judgment) [2002] ICJ Rep 3, 19 [43].

Moreover, an incidental finding would normally not appear in the judgment's *dispositif*.[107] The findings of an adjudicative body may still be an authoritative affirmation of the applicant's wrongdoing but incidental findings dependent on the principal claim in the dispute cannot generate any rights to remedies. This is a key difference which suggests that *Monetary Gold*-like considerations and analogies with the rules on counterclaims are misplaced.

4 Concluding Remarks

Economic restrictions, or the threat thereof, have always been a core foreign policy tool,[108] used to enforce international rules, react to illegality, prevent conflict, respond to emerging or current crises or exert pressure towards a change in policy or activity. To the extent that such restrictions are, *prima facie*, inconsistent with a State's international obligations, and not lawful (yet unfriendly) acts of retorsion, their imposition must be justified on the basis of an applicable defence, or it will prompt the consequences of international responsibility.[109] It is thus essential to clarify whether and under what conditions, restrictions that affect the rights of foreign investors are allowed under the provisions of current investment protection treaties and customary international law.

Given the importance of foreign investment for both the destination and the origin State in terms of economic growth and productivity, and the prime role of investment protection commitments in the bilateral relations of States, the imposition of restrictions affecting the rights of foreign investors can be a powerful tool for the enforcement of the international rule of law. The defence of countermeasures under customary international law recognises the right of States to react to a breach of international obligations by temporarily suspending its own obligations towards the responsible State in order to induce compliance with international law. This chapter discussed whether this customary defence can be invoked in the context of relevant arbitral proceedings in order to

[107] cf *Oil Platforms* where the finding on applicable defence was included in the judgment's *dispositif*. See relevantly *Oil Platforms* (Merits) Declaration of Judge Koroma 223 [4], Dissenting Opinion of Judge Al-Khasawneh 266 [9].

[108] D Cohen & Z Goldman, 'Like It or Not, Unilateral Sanctions Are Here to Stay' (2019) 113 AJIL Unbound 146, 147.

[109] See A Tzanakopoulos, 'We Who Are Not as Others: Sanctions and (Global) Security Governance' in R Geiß & N Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP 2021) 779.

preclude the wrongfulness of restrictions that are *prima facie* contrary to a State's investment protection obligations. In other words, it aimed to clarify whether suspension of investment protection can be used as a tool to exert pressure on a State that violates international law.

This chapter demonstrated that the defence of countermeasures under general international law is applicable by default to investment disputes, unless interpretation of the investment treaty in question suggests otherwise. On the nature of investors' rights, on which much ink has been spilled in the academic literature, it was argued that they are not detached from the inter-State relations of the home and the host State. Customary international law on the protection of aliens and the institution of diplomatic protection informs the content of current investment treaties and suggests that the protections enshrined therein are an extension of such customary law, complemented by a procedural right to initiate proceedings without the involvement of the State of nationality. The text and context of investment treaties provides further support to this argument. Lastly, this chapter demonstrated that the power of an adjudicative body to rule on all indispensable incidental matters that arise in the context of an applicable defence is inherent. Findings on such incidental matters form part of the reasoning of the tribunal and have no independent legal force. Thus, the limited scope of an arbitral tribunal's subject matter jurisdiction and the absence of the State of nationality of the investor from the proceedings do not preclude the examination of the defence of countermeasures.

In view of the above, this chapter concludes that the customary defence of countermeasures is indeed available to responding States in international investment proceedings. A host State is entitled under general international law to react to another State's breach of an international obligation by temporarily suspending its protection of the latter's investors within its territory, in accordance with the requirements for a lawful countermeasure under customary international law. Such countermeasures can be a powerful arrow in the quiver of States that can be used to ensure the effective implementation of international responsibility.