
The application of the rules on countermeasures in investment claims

Visions and realities of international law as an
open system

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1 Introduction

When the International Law Commission (ILC) was established in 1948, one of the first topics selected for codification was ‘State responsibility’.¹ At that time it was assumed that the topic would cover the field of international responsibility: it was only in the 1949 Advisory Opinion in the *Reparations* case that it was definitively affirmed that inter-governmental organisations could be subjects of international law.² More than sixty years later, a very different picture of responsibility in the international legal system has emerged. It has long been accepted that international law may regulate relations between States and individuals, individuals and inter-governmental organisations, companies, States and so forth. The international legal system of today is not one concerned with bilateral and multilateral relations between States exclusively: it is rather a plural system, in which many different actors have rights, responsibilities, opportunities to call other actors to account for breach of those rights and responsibilities, and opportunities to be called to account for their own actions. This change reflects the openness of the international legal system about which Professor Crawford spoke in 2002 (and published in his collection of selected essays under the title *International Law as*

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¹ *ILC Yearbook* (1949), 281.

² *Reparations for Injuries Suffered in the Services of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949), 174.

an Open System).³ Nevertheless, for historical reasons it remains the case that it is States on whom ‘most obligations rest and on which the burden of compliance principally lies’.⁴ It is therefore hardly surprising that it is in the context of State responsibility that modalities for invocation and implementation of responsibility are the most highly developed. As noted by Professor Crawford, ‘State responsibility is, so far, the paradigm form of responsibility on the international plane.’⁵

While States remain the predominant *responsible actors* on the international level, States are no longer the predominant *claimants* on the international level. Today, the vast majority of international claims being brought to international tribunals are those in which State responsibility is invoked by a non-State actor. In 2012, no applications were filed with the International Court of Justice (ICJ) (although in 2011, three proceedings were instituted; and as at December 2013, three applications had been filed).⁶ There was one inter-State proceeding commenced pursuant to the UN Convention on the Law of the Sea:⁷ a claim by Argentina against Ghana concerning the *ARA Libertad*.⁸ In contrast, there were fifty new claims by investors registered by the International Centre for the Settlement of Investment Disputes (ICSID)⁹ and some twenty more administered by other institutions.¹⁰ These investment cases involve a natural or legal person as claimant, and a State as respondent.

The extent to which the highly developed rules on State responsibility applicable to inter-State claims also apply to claims brought by non-State actors, and in particular to investment treaty claims, remains an open

³ James Crawford, *International Law as an Open System: Selected Essays* (London: Cameron May, 2002), 17–38.

⁴ James Crawford, ‘The System of International Responsibility’ in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 18.

⁵ *Ibid.*

⁶ See List of Pending Cases before the Court, available at www.icj-cij.org/docket/index.php?p1=3&p2=1.

⁷ United Nations Convention on the Law of the Sea (Montego Bay, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

⁸ See *ARA Libertad case (Argentina v. Ghana)*, ITLOS Case No. 20, available at www.itlos.org/index.php?id=222 and www.pca-cpa.org/showpage.asp?pag_id=1526.

⁹ ICSID, ‘The ICSID Caseload – Statistics’, Issue 2013–1, 22.

¹⁰ See UNCTAD, ‘IIA Issues Note: Recent Developments in Investor–State Dispute Settlement (ISDS)’, May 2013; Arbitration Institute of the Stockholm Chamber of Commerce, ‘The SCC in Numbers – 2012’.

question. The ILC Articles on State Responsibility¹¹ themselves provide some guidance: their provisions on their scope of application are discussed in section 2 below. Those provisions, however, lead one to conclude that it very much depends on the particular rule, and the particular treaty on which the claim is based. One area in which the application of a specific rule of State responsibility – that of a countermeasure as a circumstance precluding wrongfulness – has been examined by several tribunals constituted under the North American Free Trade Agreement (NAFTA), and is discussed in section 3 below. Some conclusions are drawn in section 4.

2 Applicability of the ILC Articles on State Responsibility to investment treaty claims

The ILC Articles themselves address their scope of application. In respect of investment treaty claims, there are two potentially relevant provisions – namely, provisions which might result in the exclusion or modification of the generally applicable rules of State responsibility: first, investment treaty claims could be seen as forming part of a *lex specialis* regime which may be excluded from the general rules; secondly, the rules may be excluded on the basis that the rules governing the invocation of responsibility set out in the ILC Articles on State Responsibility apply only when responsibility is invoked by another State, or the international community of States. Each of these possibilities will be examined in turn.

(a) *Lex Specialis* exclusion

Article 55 of the ILC Articles, entitled *Lex Specialis*, states:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 55 thus specifies that the Articles do not apply where special rules of international law govern the conditions for the existence of a wrongful act, or the content or implementation of international responsibility.

¹¹ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *ILC Yearbook*, 2(2) (2001), 26 (ILC Articles).

The commentary to Article 55 refers to the examples of the World Trade Organization Dispute Settlement Understanding and the European Convention on Human Rights as regimes that displace the rules contained in the ILC Articles.¹² However, Article 55 also makes clear that the Articles have a residual character, and that they apply to the extent that they are not excluded by a special rule.

To the extent that investment treaty arbitration could be said to form part of a *lex specialis* regime of international responsibility, containing separate rules governing State responsibility, according to Article 55, the general rules set out in the ILC Articles do not apply.

Investment treaty arbitration has been described as constituting a *lex specialis* regime in the context of the distinction between investment treaty arbitration from diplomatic protection. The ILC, in its Draft Articles on Diplomatic Protection, concluded that international investment arbitration constitutes a *lex specialis* regime and the rules applicable in the investment treaty context do not govern diplomatic protection claims or contribute to the development of customary rules generally applicable to diplomatic protection claims.¹³ The same point was made by the ICJ in *Diallo* in 2007, distinguishing between direct claims by investors under ICSID and diplomatic protection claims.¹⁴ This has also been acknowledged by investment tribunals and commentators.¹⁵

In general however, insofar as international responsibility is concerned, investment treaties do not prescribe their own rules for invocation of responsibility. Certainly, they do prescribe procedural rules governing the invocation of responsibility. For example, an investment treaty may allow an investor to commence ICSID proceedings, in which the ICSID arbitration rules govern the procedure of the arbitration. However, these

¹² ILC commentary to Art. 55, para 3. For example, the WTO regime prescribes its own rules for the taking of countermeasures. See WTO Dispute Settlement Understanding, Art. 22.3. See generally Yang Guohua, Bryan Mercurio and Li Youngjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (The Hague: Kluwer Law International, 2005), 251–79. See also Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), 97.

¹³ International Law Commission, Report of International Law Commission, 58th Session, UN Doc. A/CN.4/L.684 (2006), Art. 17.

¹⁴ *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections), 24 May 2007, ICJ Reports (2007), para. 88.

¹⁵ See e.g. *Camuzzi International SA v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, para. 145; Cristoph H. Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2nd edn (Cambridge University Press, 2009), 417, paras. 27–9. Cf. Stephen Schwebel, ‘The Influence of Bilateral Investment Treaties on Customary International Law’, *ASIL Proceedings*, 98 (2004), 27.

procedural issues are not matters which are governed by the ILC Articles on State Responsibility. In contrast, investment treaties do not ordinarily specify the basis on which conduct is to be attributable to the respondent State. In the absence of specific rules in the treaty, Article 55 of the ILC Articles would not preclude the application of the rules on attribution set out in the Articles themselves.

If an investment treaty excludes or modifies the general rules of State responsibility, Article 55 preserves the applicability of the special rule set out in the investment treaty as the governing rule. An example may be found in the expropriation provision in a multitude of investment treaties, which provides in practice for the payment of compensation for lawful expropriation. That specific rule would, according to Article 55, apply to the exclusion of the general rule under international law, according to which restitution is a primary remedy.¹⁶

The relevant question is whether and to what extent the applicable bilateral investment treaty (BIT) sets out rules governing responsibility that differ from the generally applicable rules. This will require an examination of the applicable BIT. In the absence of specific rules governing the existence of an internationally wrongful act, or the content or implementation of international responsibility, investment claims cannot be said to form part of a *lex specialis* regime which excludes, pursuant to Article 55, the applicability of the general rules.

(b) Exclusion of application of legal consequences according to Article 33(2)

Part Two of the ILC Articles on State Responsibility addresses the legal consequences for an internationally wrongful act. These include the obligation to make reparation (restitution, compensation, satisfaction) and specific consequences arising from breaches of peremptory norms, such as the obligation not to recognise such a situation as lawful, nor to render aid or assistance in maintaining such situation. Article 33, entitled 'Scope of international obligations set out in this Part' provides:

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and

¹⁶ But see further, below, on the applicability of Part Two of the ILC Articles to investment treaty claims.

content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.¹⁷

Thus Article 33(1) purports to limit the scope of application of the rules governing consequences of an internationally wrongful act to situations in which the obligations of the responsible State are owed to other States or to the international community as a whole; arguably the consequences may be different when the responsible State breaches an obligation owed to other actors.¹⁸ At the same time, Article 33(2) expressly recognises and preserves the possibility of a State's responsibility towards a non-State actor under international law.

Article 33(2) appears clear in its terms: the provisions of Part Two, which include the obligation to make reparation, do not necessarily apply in respect of rights granted to persons or entities other than States. As noted by the commentary, '[t]he articles do not deal with the possibility of the invocation of responsibility by persons and entities other than States, and paragraph 2 makes this clear'.¹⁹ However, this exclusion is not a general one: it applies only to rules governing invocation of responsibility, dealt with in Part Two and in parts of Part Three of the ILC Articles.²⁰

3 Applying the ILC Articles on State Responsibility in practice: the invocation of countermeasures in an investment treaty claim

An interesting practical example of the application of rules governing State responsibility to investment claims concerns the plea of countermeasures,

¹⁷ ILC Articles, Art. 33(2).

¹⁸ See also ILC commentary to Part Three, Chapter I, para. (1), noting that Part Three of the Articles (on the implementation of international responsibility of a State) 'is concerned with . . . the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33(2).'

¹⁹ ILC commentary to Art. 33, para. 4, 210.

²⁰ Part Three of the Articles on The Implementation of the International Responsibility of the State 'giv[es] effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act'.

as a circumstance precluding wrongfulness, in defence to an investment treaty claim.

(a) *Countermeasures as a circumstance precluding wrongfulness*

International law permits an injured State to take non-forcible countermeasures in response to an internationally wrongful act by another State, provided that certain conditions are met. Countermeasures have been described as ‘a feature of a decentralised system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act’.²¹ The origins of countermeasures may be traced to the practice of ‘reprisals’, traditionally used to denote otherwise unlawful measures of self-help.²²

In codifying the rules on non-forcible countermeasures, the ILC Articles on State Responsibility provide that wrongfulness of the measure taken by the injured State is precluded, if and to the extent that it constitutes a countermeasure. This general rule is codified in Article 22:

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.

Chapter II of Part Three (Articles 49–54) of the ILC Articles sets out conditions and limitations on the taking of countermeasures by an injured State and addresses the conditions of the implementation of countermeasures. The objects and limits of countermeasures are elaborated in Article 49, which provides:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

²¹ ILC commentary, 281.

²² See generally Evelyn Speyer Colbert, *Retaliation in International Law* (New York: King’s Crown, 1948), 60–103; and also James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 684–5.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

(b) Countermeasures and third parties

Article 49 makes clear that countermeasures must be directed against the State committing the prior wrongful act – the responsible State. The wrongfulness of a measure taken as against a third State is not precluded. The ILC commentary to Article 49 states:

A second essential element of countermeasures is that they ‘must be directed against’ a State which has committed an internationally wrongful act and which has not complied with its obligations of cessation and reparation under Part Two of the present articles. The word ‘only’ in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of the countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.²³

While this paragraph of the commentary refers only to the rights of third States, the following paragraph elaborates with respect to the effects of countermeasures as against third States and refers in that context to other parties, contemplating that countermeasures may not preclude the wrongfulness of acts taken in violation of rights of third parties other than States:

²³ See ILC commentary to Art. 49, para. 4, 285. This general principle was stated by an arbitral tribunal in 1930, adjudging Germany’s responsibility for damage to certain Portuguese interests before Portugal entered the First World War.

[L]es représailles, consistent en un acte en principe contraire, ne peuvent se justifier qu’autant qu’elles ont été *provoquées* par un autre acte également contraire à ce droit. *Les représailles ne sont admissibles que contre l’État provocateur*. Il se peut, il est vrai, que des représailles légitimes, exercées contre un État offensé, atteignent des ressortissants d’un État innocent. Mais il s’agira là d’une conséquence indirecte, involontaire, que l’État offensé s’efforcera, en pratique, toujours d’éviter ou de limiter autant que possible [Cyne (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered the war) (*Portugal v. Germany*) (1930), Reports of International Arbitral Awards, vol. II, 1035, 1056–7 (original emphasis)].

This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this Chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. Similarly if, as a consequence of the suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.²⁴

The commentary therefore implies that the effect of Article 49(1) is that the wrongfulness of a countermeasure is not precluded as against third parties, where those third parties have *individual rights* which are affected by the measure. That is to say, a countermeasure may affect the position or interests of third parties. However, it may not affect the rights of third parties.

(c) Countermeasures in practice: a trio of NAFTA awards

In three NAFTA cases, Mexico invoked countermeasures as a circumstance precluding the wrongfulness of any breach of its obligations under NAFTA vis-à-vis the investor. In all three cases, Mexico's invocation of countermeasures was rejected.

The facts relevant to the pleas of countermeasures were materially identical in all three cases, as they all concerned the same measure imposed by Mexico. The proceedings were initiated against Mexico by American agricultural companies, relating to the imposition of a 20 per cent tax by Mexico on soft drink bottlers using the sweetener High Fructose Corn Syrup (HFCS). In response to its alleged violation of the national treatment standard in Article 1102 of NAFTA, Mexico argued that it had imposed the tax as a countermeasure against two violations of NAFTA by the United States. The alleged breaches of NAFTA by the US related to access of Mexico's surplus sugar produce to the US market.²⁵ All three NAFTA tribunals have issued redacted awards.²⁶

²⁴ ILC commentary to Art. 49, para. 5, 285.

²⁵ There has been a long-running trade dispute between the US and Mexico covering the same subject-matter: see WTO Panel Report, 'Mexico Tax Measures on Soft Drinks and Other Beverages', 7 October 2005, WTO Doc. WT/DS308/R; WTO Appellate Body, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (Mexico – Taxes on Soft Drinks), WTO Doc. WT/DS308/AB/R, adopted 6 March 2006.

²⁶ *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (Professor Christopher Greenwood (President), Professor Andreas F. Lowenfeld and Licenciado Josh Alfonso Serrano de la Vega)

(i) *ADM v. Mexico*

The tribunal in *ADM v. Mexico* rejected Mexico's countermeasures plea because it concluded that (a) the measure was not adopted to induce compliance with NAFTA by the US and (b) it did not meet the proportionality requirements for a valid countermeasure under customary international law.²⁷ However, the tribunal considered that countermeasures could, in principle, operate as a defence to a Chapter XI claim. In this regard, the tribunal concluded that investors derived only a procedural right to arbitrate from NAFTA and that the remaining rights (including substantive rights of protection) were inter-State rights against which a valid countermeasure could be taken.²⁸

The tribunal noted that there were '[d]ifferent doctrinal theories regarding the nature of investors' rights under international investment agreements'.²⁹ It referred to the derivative theory, according to which obligations of treatment are owed to the investor's national State and, in case of breach of those obligations, 'the investor may bring the host State to an international arbitration in order to request compensation, but the investor will be in reality stepping into the shoes and asserting the rights of the home State'.³⁰ The tribunal also noted that international law may confer direct rights on individuals, who may have a significant role in asserting State responsibility before international dispute settlement bodies.³¹ The tribunal considered that investors did not have substantive rights under investment treaties. It noted that Chapter XI of NAFTA provides two separate sets of obligations: Section A establishes substantive protection obligations regarding investments; and Section B establishes a procedural obligation to submit a dispute to investor-to-State arbitration,

(*CPI Award*); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 (Mr Bernardo M. Cremades (President), Mr Arthur W. Rovine and Mr Eduardo T. Siqueiros) (*ADM Award*); and *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)05/2, Award, 18 September 2009 (Dr Michael C. Pryles (presiding), Professor David D. Caron and Professor Donald M. McRae) (*Cargill Award*).

²⁷ *ADM Award*, para. 180. In an earlier part of its decision, the tribunal addressed the question of whether it had jurisdiction to determine the countermeasures defence, since it would involve determining whether the US had breached NAFTA. The tribunal expressly stated that it had 'no jurisdiction to decide whether the United States committed an internationally wrongful act which justified a countermeasure' (see *ADM Award*, para. 131). As this would be a precondition for a valid countermeasure, it is difficult to see how the tribunal could have concluded that Mexico's countermeasure precluded the wrongfulness of its acts, even if it considered that all other requirements had been met.

²⁸ *ADM Award*, paras. 161 *et seq.* ²⁹ *Ibid.*, 169. ³⁰ *Ibid.* ³¹ *Ibid.*, 170.

in which the host State's conduct will be decided in accordance with the standards set out in Section A. The tribunal considered that obligations imposed in Section A were inter-State obligations. It stated:

In the Tribunal's view, the obligations under Section A remain inter-state, providing the standards by which the conduct of the NAFTA Party towards the investor will be assessed in the arbitration. All investors have under Section B a procedural right to trigger arbitration against the host State. What Section B does is to set up the investor's exceptional right of action through arbitration that would not otherwise exist under international law, when another NAFTA Party has breached the obligations of Section A.³²

In contrast to the obligations in Section A, the tribunal considered that the procedural obligation under Section B of Chapter XI 'is owed directly to the beneficiary of the obligation, in this case the investors'.³³ Thus investors hold a procedural right to bring international arbitral proceedings under Section B. The arbitral tribunal considered that the countermeasures did not impair the claimant's procedural right to bring a claim against Mexico, since the measure was not related to the Respondent's offer to submit the dispute to arbitration.³⁴

(ii) *CPI v. Mexico*

The tribunal in *CPI v. Mexico* concluded that countermeasures as a circumstance precluding wrongfulness are not applicable to Chapter XI claims under NAFTA, because NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals, and countermeasures cannot affect the rights of third parties. It followed that any countermeasure would not preclude the wrongfulness of the measure as against the investor.

Referring to the ILC commentary to Article 49, the tribunal noted that a countermeasure must be directed against the State which committed the prior wrongful act, and if it entailed action inconsistent with obligations owed to 'another party', the countermeasures doctrine does not preclude the wrongfulness of the measure as against that other party.³⁵ The tribunal noted that a countermeasure cannot, therefore, 'extinguish or otherwise affect the *rights* of a party other than the State responsible for prior

³² *Ibid.*, 173. On this point, Arthur W. Rovine disagreed with the tribunal; see Concurring Opinion of Arthur W. Rovine, *Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, paras. 14, 47 and 82–3.

³³ *ADM Award*, para. 177. ³⁴ *Ibid.*, 180. ³⁵ *CPI Award*, para. 163.

wrongdoing', although it could affect their *interests*.³⁶ Thus the tribunal framed the central question as whether an investor within the meaning of Article 1101 of NAFTA 'has rights of its own, distinct from those of the State of its nationality, or merely interests'.³⁷ If an investor has rights, then countermeasures will not preclude the wrongfulness of the act against CPI, even though it might preclude the wrongfulness of acts as against the US.

The tribunal noted that, in the current state of international law, individuals and corporations may possess direct rights. It framed the relevant test as one of intention derived from the text of the treaty.³⁸ It concluded that the intention of the parties to NAFTA was to confer substantive rights directly upon investors:

In the case of Chapter XI of NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The 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.³⁹

Thus the tribunal concluded that a countermeasure taken by Mexico against the US could not deprive a US investor of its rights – what is at stake are the *rights* of the investor, not only its *interests*. Thus '[e]ven if the doctrine of countermeasures could operate to preclude the wrongfulness of the HFCS tax vis-à-vis the United States (and . . . the Tribunal makes no comment on that question), they cannot do so vis-à-vis CPI'.⁴⁰

³⁶ *Ibid.*, 164 (original emphasis). ³⁷ *Ibid.*, 165. ³⁸ *Ibid.*, 168.

³⁹ *Ibid.*, 168–9. In his separate opinion, Andreas Lowenfeld agreed with the tribunal's conclusion on this point but argued that aspects of its discussion 'blur[red] the message' about the essence of investor–State arbitration (see *CPI Award*, Separate Opinion, para. 5).

⁴⁰ *CPI Award*, para.176. The tribunal also noted that it had no jurisdiction to determine breaches of any of the other provisions of the NAFTA (apart from Chapter XI) or to rule on the conduct of the US which was not a party to the proceedings, and that these jurisdictional limits gave rise to 'serious difficulties' in addressing Mexico's defence. It considered that the requirement of a prior violation of international law was an 'absolute precondition' of the right to take countermeasures, and it was not open to the tribunal to dispense with a fundamental prerequisite of this kind. The tribunal therefore concluded that even if countermeasures were applicable to Chapter XI proceedings (which the tribunal did not accept), Mexico's defence would inevitably fail because Mexico could not establish that its countermeasure was taken in response to a prior breach of international law by another State. See *CPI Award*, paras. 181–7. For discussion of the structural

(iii) *Cargill v. Mexico*

In the third decision, the tribunal in *Cargill* also rejected Mexico's countermeasures defence, ostensibly on the basis that investors possess rights under NAFTA against which a countermeasure, directed to an allegedly wrongful act committed by the US, could not be taken. The tribunal noted that 'countermeasures may operate only to preclude the wrongfulness of an act that is not in conformity with an obligation owed to the offending State'⁴¹ and they would 'not necessarily have any such effect in regard to specific obligations owed to *nationals* of the offending State, rather than to the offending State itself'.⁴² The tribunal noted that the parties 'have characterized the issue before the Tribunal as whether NAFTA Chapter XI investors possess not only procedural rights of access, but also substantive rights'.⁴³ The tribunal indicated its view that investors held rights under Chapter XI which were not 'mere procedural rights of access'.⁴⁴

However, the tribunal subsequently rejected the significance of the distinction between substantive and procedural rights, stating:

It is not fruitful, in the Tribunal's view, to characterize the issue as whether the rights conferred upon the investor are substantive or merely procedural. The fact is that it is the investor that institutes the claim, that calls a tribunal into existence, and that is the named party in all respects to the resulting proceedings and award.⁴⁵

Thus the tribunal appears to have disagreed with the way the parties framed the issue – that is, as to whether Chapter XI of NAFTA gives investors substantive and not merely procedural rights. The tribunal rather placed emphasis on procedural characterisations – whether the investor institutes a claim, has functional control of the claim and is the named party in the proceedings and in the award.

The tribunal's apparent emphasis on the importance of the claims process – rather than the substantive rights/obligations – is also reflected in its treatment of Mexico's argument that the rejecting of a countermeasures defence would lead to absurd results. Mexico suggested that the resulting situation would be such that countermeasures could preclude the

problems raised by the defence of countermeasures, and the difficulties in addressing the *Monetary Gold* principle, see Martins Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in Tomer Broude and Yuval Shany (eds.), *Multi-sourced Equivalent Norms in International Law* (Oxford: Hart, 2011).

⁴¹ *Cargill Award*, para. 422. ⁴² *Ibid.* ⁴³ *Ibid.*, para. 423.

⁴⁴ *Ibid.*, paras. 424, 426. ⁴⁵ *Ibid.*, para. 426.

wrongfulness of its act vis-à-vis the US generally, but those countermeasures would be 'nullified' by the fact that they would not have a similar effect on the claims of US nationals under Chapter XI. The tribunal saw no absurdity here, stating:

To the degree that the existence of claims under Chapter 11 would limit the effectiveness of the countermeasures, then it need be recalled that there is always a range of possible countermeasures to be adopted. Moreover, customary international law itself prohibits certain countermeasures. There is no reason that the range of countermeasures might be further limited – either by direct exclusion in a treaty of certain measures or by the creation of a claims process placed directly in the hands of individuals – that limits the effectiveness of certain measures in whole or in part.⁴⁶

Since countermeasures are not directly excluded by NAFTA, the tribunal seems to have characterised the relevant circumstance as being 'the creation of a claims process placed directly in the hands of individuals' – suggesting that an investor's procedural rights would be sufficient to prevent the invocation of a countermeasures defence. The tribunal did not make reference to any authorities on the ambit of application – or disapplication – of the countermeasures defence, and its reasoning on the defence, in merely eleven paragraphs, leaves the reader somewhat confused as to the precise reasoning underlying the tribunal's decision.

This confusion is somewhat exacerbated by the tribunal's statement on the countermeasures defence in its section entitled 'Final Disposition of the Tribunal', in the concluding paragraphs of its award. This states:

The Tribunal finally holds that the wrongfulness of these breaches of Respondent's obligations under NAFTA Chapter 11 is not precluded by Respondent's assertion that its actions were lawful countermeasures. The Tribunal determines that countermeasures operate only to preclude the wrongfulness of an act that is not in conformity with an obligation owed to the offending state, not in regard to obligations owed to a third state nor those, as here, owed to the nationals of the offending state. The Tribunal further determines that, under the NAFTA, investors have both substantive and procedural rights, and investors are therefore protected under Chapter 11 from measures taken by a host state directly against them. This is true even if the same action might constitute valid countermeasures if taken instead against the offending state, and even despite the fact that such valid countermeasures may in fact result in secondary effects on the nationals of the offending state.⁴⁷

⁴⁶ *Ibid.*, para. 428. ⁴⁷ *Ibid.*, para. 553.

Here the tribunal has expressly recorded that NAFTA confers substantive rights on investors, a statement which is not recorded in the earlier reasoning.

Nevertheless, when read as a whole, the tribunal's decision seems to be to the effect that countermeasures could not preclude the wrongfulness of Mexico's acts vis-à-vis investors because those investors derive rights from NAFTA.

(iv) Assessment

All three NAFTA Tribunals referred to the rules governing countermeasures as a circumstance precluding wrongfulness. It appears not to have been argued before any of the three Tribunals that these rules were not applicable to investment treaty claims under NAFTA, either on the basis of the *lex specialis* exclusion in Article 55 or because Parts Two and Three of the ILC Articles, governing the legal consequences of responsibility and implementation of that responsibility, are not applicable to such claims, on the basis of Article 33(2). (It was of course argued that the rules are not applicable where rights of investors are involved.) Although it appears that there is little basis to contend that there is a *lex specialis* rule in NAFTA precluding the application of countermeasures as a defence in an investment treaty claim, Douglas considers that some weight ought to be given to the exclusion of the rule on the basis of the disapplication of Parts Two and Three of the ILC Articles, even though the general rule on countermeasures is codified in Part One, in Article 22. He argues:

[A] measure taken by the host State that causes prejudice to a foreign State might not be internationally wrongful vis-à-vis the national State of the investor because it is a lawful countermeasure directed against a breach of an international obligation by the national State of the investor. The investor might nevertheless argue that the prejudice caused to its private interests by the countermeasures is both justiciable before an ICSID tribunal and liable to attract a remedy in damages. The investor would argue that an investment treaty obligation is owed to the investor directly and any rule precluding wrongfulness as between the host State and the national State of the investor is *res inter alios acta*.⁴⁸

Indeed, the conclusion reached by Douglas is identical to that reached by two of the three tribunals (*CPI* and *Cargill*), but not on the basis

⁴⁸ Zachary Douglas, 'Specific Regimes of Responsibility: Investment Treaty Arbitration' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 821.

of non-applicability of the rules governing countermeasures as a circumstance precluding wrongfulness, but on the basis that the rules themselves did not preclude the wrongfulness of the measure vis-à-vis the investor. Moreover, all three Tribunals considered that the rule governing inter-State responsibility was applicable to an investment treaty claim; all three also concluded that the requisite elements to invoke the circumstance precluding wrongfulness (either proportionality or non-impact on third parties' rights) were not present.

A brief note is warranted concerning the effectiveness of countermeasures. If one accepts the position taken by the Tribunals in *CPI* and *Cargill* that investors derive rights under investment treaties which cannot be affected by countermeasures taken against their State of nationality, a further question arises as to the utility of taking countermeasures at all. An attempt by a victim State to apply a countermeasure against a wrongdoing State, in response to the wrongdoing State's breach of its obligations, may be futile in practice if the victim State is then compelled to compensate nationals of the wrongdoing State for the impact of the countermeasure. This may naturally follow from the opening of the international legal system to a plurality of actors, but there is no immediately obvious answer to it, and one might therefore expect countermeasures to become increasingly ineffective as a means to procure compliance of wrongdoing States with their international obligations.

4 Conclusions

In the modern reality of an international legal system which engages a multiplicity of actors, with a multiplicity of claims being brought by investors invoking the international responsibility of States before international tribunals, in numbers which dwarf inter-State claims concerning State responsibility, it is unsurprising that difficult questions arise concerning the application of rules of responsibility formulated on the assumption that both claimant and respondent in an international claim are States. The ILC Articles on State Responsibility contain two technical rules which shed some light on their scope of application and, in general terms, caution against the wholesale and uncritical application of the rules set out in the Articles to claims brought by non-State actors. Indeed, as a general principle, this approach must be right: an investment tribunal should not uncritically apply all of the rules formulated in the context of inter-State responsibility to a treaty claim brought by an investor against a State. Nevertheless, it is also apparent that a highly individualised subsystem

of rules on State responsibility applicable to investment claims is unwarranted.

The decisions of the NAFTA Tribunals on countermeasures do not contain much analysis of the principled application of the rules on countermeasures to NAFTA claims. Of course, the Tribunals are likely to have been guided by the way in which the arguments were put by the claimants. In any event, for the reasons explained in section 3 above, all three Tribunals rejected Mexico's pleas of countermeasures, on the basis that the requisite elements for invocation of countermeasures were not present. Nevertheless, it is arguable that a more nuanced approach is warranted in applying the ILC Articles on State Responsibility to investment treaty claims.

When Professor Crawford wrote of the 'openness' of the modern international legal system, he also emphasised that the foundations of the system have endured:

[I]n principle, the foundations do not appear to have changed (statehood, treaty, custom, consent, acquiescence . . .). Thus we have the apparent paradox of rapidly expanding horizons and a simple, not to say elemental, set of underpinnings. Our system is one which international lawyers of four generations ago would have no particular difficulty in recognising or working with, once they got over its bulk.⁴⁹

This observation is apt to describe the matters discussed in this chapter; indeed, the occasionally complex issues which investment tribunals must address in the context of determining State responsibility can be usefully informed by the long history of experience which has led to the highly developed rules of State responsibility in the context of inter-State claims. The challenge is in reasoning their application – or disapplication – in the particular circumstances.

⁴⁹ Crawford, *International Law as an Open System*, 17.