A Licence to Breach: Who May Take Countermeasures, and Against Whom?

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Abstract

This paper addresses the law of countermeasures available to an injured State. A countermeasure is conduct by an injured State that would ordinarily breach an obligation owed to the State responsible for a prior internationally wrongful act, but whose wrongfulness is precluded because it responds to that act; the suspension of trade concessions or of treaty-based landing rights are familiar examples. Its purpose is to induce the responsible State to resume compliance rather than to punish it, which is why a countermeasure must be temporary and, so far as possible, reversible. It is therefore distinct both from retorsion, which is unfriendly but lawful conduct requiring no justification, and from enforcement measures authorised by the United Nations Security Council.

After locating countermeasures in the context of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the circumstances precluding wrongfulness, this paper explores the substantive and procedural requirements for a countermeasure that complies with the law. It does so by reference to the seminal International Court of Justice, arbitral jurisprudence and recent academic scholarship. It focuses on the law and practice of countermeasures in investor–State arbitration in the light of the North American Free Trade Agreement (NAFTA) awards in the trilogy of Corn Products, Archer Daniels Midland and Cargill v Mexico. It also addresses the law and practice of countermeasures taken by third States, or by States acting collectively, and in particular the reaction of many States to the Russian Federation's invasion of Ukraine in 2022. Finally, it argues that the law is precise about how a countermeasure may be taken but not about who may take one, or against whom. Every condition set by ARSIWA assumes a bilateral

relationship between an injured State and a responsible State, and where that assumption fails the answer is supplied by a prior classification, of investor rights in the first setting and of Article 54 ARSIWA in the second, rather than by rule. The paper closes with recommendations addressed to tribunals, to States acting in the collective interest and to any future codification.

Introduction

Countermeasures lie at the analytical heart of the international law of State responsibility. In codifying the rules relating to countermeasures in Articles 22 and 49–54 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[1] the International Law Commission confirmed the power of an injured State to suspend temporarily the performance of one or more of its obligations towards a wrongdoer in an effort to induce compliance with international obligations by the State at fault.[2] The historical ancestry of countermeasures can be traced to the seventeenth- and eighteenth-century practice of letters of marque and the eighteenth- and nineteenth-century practice of reprisals. However, its modern formulation, including a workable, five-part test, is crystallised in the International Court of Justice's 1997 decision in *Gabčíkovo-Nagymaros Project*, which summarised nearly a century of practice and arbitral case law in the field.[3] This paper describes the legal regime governing countermeasures available to an injured State and explores their doctrinal and theoretical dimensions in light of the contributions of recent scholarship to the field in general and then focusing on Paddeu and Jackson in particular. It also reflects on whether the framework of general international law is coherent and effective in designating the actors entitled to take countermeasures. This question arises most sharply in two contested areas. The first is international investment arbitration, where countermeasures have featured as an affirmative defence against claims brought against

[1] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, ILC Yearbook 2001, vol II(2) ('ARSIWA'); annexed to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.
[2] ARSIWA, art 22; ILC, 'Commentary to the ARSIWA' (2001) UN Doc A/56/10, art 22, para 1.
[3] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, paras 82–87.

a host State. The second is the exercise of countermeasures by third States, that is, States that are not themselves injured under Article 42 of the ARSIWA, but that are entitled to invoke responsibility under Article 48. Article 48 permits such invocation where the obligation breached is owed to a group of States and protects a collective interest of that group, or where it is owed to the international community as a whole, as the obligations *erga omnes* recognised in *Barcelona Traction* are.[4] That States which are not injured may invoke responsibility on this basis is settled law; whether they may also take countermeasures in the general interest is not.[5] Article 54 of the ARSIWA provides only that the chapter on countermeasures does not prejudice the right of such States to take lawful measures to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached. It therefore reserves the question rather than resolving it, and it is that unresolved extension of the regime which this essay later examines. Measures of this kind are called third-party countermeasures in this paper and are to be distinguished from enforcement measures decided or authorised by the Security Council under Chapter VII of the UN Charter, whose lawfulness derives from the Charter rather than from the law of State responsibility.[6]

The paper proceeds in five parts. Firstly, the paper considers what countermeasures are, and what they are not, with particular reference to Paddeu's reconceptualisation of countermeasures as a *justification* rather than an excuse.[7] Secondly, the authors explain the conditions required for a countermeasure to be lawful, and sets forth the rules of customary international law that emerged from the *Naulilaa*, *Air Services*, *Gabčíkovo-Nagymaros*, and the *Nicaragua*

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[4] ARSIWA (n 1) art 48(1)(a)–(b); ILC Commentary (n 2) art 48, paras 6–10; *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)*, Second Phase [1970] ICJ Rep 3, paras 33–34.

[5] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, paras 68–70. On the position of countermeasures, see ILC Commentary (n 2) art 54, paras 3, 6.

[6] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('UN Charter') arts 25, 39–42, 103; ILC Commentary (n 2) art 22, para 3.

[7] FI Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) 73–112; FI Paddeu, 'Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law' in L Bartels and FI Paddeu (eds), *Exceptions in International Law* (OUP 2020) 235.

judgements, and which were then codified in ARSIWA. Those conditions are well established, and this article examines them not for their own sake but for what they reveal about the research question, since each is framed around the relationship between an injured State and a responsible State. The article then applies the regime of countermeasures to international investment law and the NAFTA tribunals' analysis of Mexico's countermeasure defence in the controversial NAFTA high-fructose corn syrup (HFCS) disputes in *Corn Products*, *Cargill*, and *Archer Daniels Midland v Mexico.* Finally, the authors address the law and practice of third-party countermeasures (measures taken by States that are not themselves injured) and enforcement measures in the light of Jackson and Paddeu's recent work and of the measures taken by States in response to Russia's 2022 invasion of Ukraine. The paper's claim is that general international law is coherent about how a countermeasure may be taken, but not about who may take one, or against whom. The conditions in Articles 49 to 53 of the ARSIWA are of two kinds: procedural conditions, which govern the steps the injured State must take before and while resorting to countermeasures, and substantive conditions, which govern the purpose, form and application of the measure itself. Both kinds presuppose a bilateral relationship between an injured State and a responsible State. Where that presupposition fails, because a private right-holder is interposed or because the reacting State is not itself injured, the outcome is settled by a prior classification of the rights or measures in issue rather than by any rule of the law of countermeasures. That is the gap this paper identifies and then moves on to suggest how it might be closed.

What Countermeasures Are

In essence, a countermeasure is conduct by an injured State that would otherwise be inconsistent with its international obligations towards the responsible State, but whose wrongfulness is precluded, under Article 22 of the ARSIWA, because it is taken in response to

a prior internationally wrongful act of that State.[8] The traditional definition, which the *Naulilaa* tribunal recited in 1928, describes a reprisal as an act of self-help by the injured State in response, after an unsatisfied demand, to an internationally wrongful act on the part of the offending State.[9] The classical notion of reprisal was, however, wider than the modern one: it extended to forcible measures, whereas since the prohibition of the threat or use of force in Article 2(4) of the UN Charter a countermeasure may not involve force.[10] Modern doctrine, as developed by the ad hoc arbitral tribunal in the *Air Services* arbitration between the United States and France,[11] and upheld by the International Court of Justice in *Nicaragua*,[12] is that a countermeasure may only serve the goal of *inducing* the wrongdoing State to resume compliance with its primary obligations, not to punish it.[13] It is this functional limit which distinguishes countermeasures from the measures of collective security, such as sanctions, undertaken under Chapter VII of the UN Charter and from acts of retorsion (unfriendly but essentially lawful acts).[14]

There are two more concepts that are theoretically significant. First, countermeasures are, by their very nature, temporary and reversible.[15] This is established by Article 49, paragraphs (2) and (3), of the ARSIWA, which limit a countermeasure to the non-performance for the time being of obligations owed to the responsible State and require that it be taken, as far as possible, in a way that permits the resumption of performance of those obligations. The International Court linked this feature to the purpose of countermeasures in *Gabčíkovo-Nagymaros*,

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[8] ARSIWA (n 1) art 22; ILC Commentary (n 2) art 22, paras 1, 4–5. Article 22 precludes wrongfulness only 'if and to the extent that' the measure is taken against the responsible State, so that a measure directed at any other State cannot be justified as a countermeasure.

[9] *Naulilaa (Portugal v Germany)* (1928) 2 RIAA 1011, 1026.

[10] UN Charter (n 11) art 2(4); ARSIWA (n 1) art 50(1)(a); ILC Commentary (n 2) art 50, paras 4–6.

[11] *Air Services Agreement of 27 March 1946 (United States v France)* (1978) 54 ILR 303.

[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits* [1986] ICJ Rep 14, paras 248–249.

[13] ARSIWA (n 1) art 49(1).

[14] J Crawford, *State Responsibility: The General Part* (CUP 2013) 685.

[15] ARSIWA (n 1) art 49(2)–(3); ILC Commentary (n 2) art 49, paras 7–9.

reasoning that because a countermeasure must aim to induce compliance, the measure must therefore be reversible; having found the diversion of the Danube disproportionate, the Court did not need to decide the point.[16] Secondly, the prevailing, if relatively recent, doctrinal view of countermeasures is that they are justifications, rather than excuses. The distinction turns on what a defence does to the conduct it covers. A justification renders the conduct lawful, so that in the circumstances there is no breach at all; an excuse leaves the breach intact but relieves its author of responsibility for it. Paddeu, in her monograph *Justification and Excuse in International Law* (2018), argues that the general defences in the ARSIWA can be classified along this line, and that countermeasures, like self-defence, are justifications.[17] This is important because justified acts create no claim to reparation against the victim State, and cannot serve to give rise to the right to terminate the treaty, as stated in Article 60 of the Vienna Convention of the Law of Treaties.[18]

Conditions for a Lawful Countermeasure

There are five requirements for a lawful countermeasure, and they are cumulative: a measure that fails any one of them is not a lawful countermeasure. Each is well established in case law and literature, and this article does not rehearse them for their own sake. Rather, its purpose is to show what they reveal collectively about the question of entitlement. Among the five, only the second is procedural, governing the steps to be taken before and while countermeasures are resorted to; the remaining four are substantive, governing the purpose, form and application of the measure itself. All five requirements are framed around a single relationship: a wrong done to the reacting State, a demand addressed by that State to the wrongdoer, a response proportionate to that State's injury, and the suspension of obligations owed to the wrongdoer

[16] *Gabčíkovo-Nagymaros* (n 3) para 87.
[17] Paddeu, *Justification and Excuse* (n 7) 73–112.
[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 60; ILC Commentary (n 2) Part Three, ch II, introductory commentary, para 4.

and to no one else. The conditions therefore answer the questions who may take a countermeasure, and against whom, only by assuming the answer. The authors will later examine what happens when that assumption fails.

Prior Internationally Wrongful Act

A countermeasure presupposes a prior internationally wrongful act by the targeted State.[19] Merely suffering damage or unfriendly treatment is not sufficient to justify countermeasures: the reacting State must be an injured State within the meaning of Article 42 of the ARSIWA. Article 42 covers three situations. Under paragraph (a), the State is injured because the obligation breached was owed to it individually, as under a bilateral treaty. Under paragraph (b)(i), the obligation was owed to a group of States or to the international community as a whole and the breach specially affects that State. Under paragraph (b)(ii), the breach is of such a character as radically to change the position of all the other States to which the obligation is owed, as with a disarmament treaty whose value to each party depends upon performance by all.[20] The entitlement to take countermeasures thus belongs to the injured State, and not to the wider class of States that Article 48 permits to invoke responsibility; as is later explained, that restriction is the source of the gap which Article 54 leaves open. A State that takes countermeasures therefore does so at its own peril: if the conduct to which it responded turns out not to have been internationally wrongful, its own measure is left without justification, and it will itself be responsible for the obligation it suspended.[21]

Procedural Requirements: Prior Demand, Notification and Offer to Negotiate

Two preliminary steps are required under Article 52(1) of the ARSIWA. First, the injured State must call on the responsible State to carry out its obligations,[22] which is the modern counterpart

[19] ARSIWA (n 1) art 49; ILC Commentary (n 2) art 49, para 3.
[20] ARSIWA (n 1) art 42; ILC Commentary (n 2) art 42, paras 5–15.
[21] ILC Commentary (n 2) art 49, para 3; Crawford (n 14) 685.
[22] ARSIWA (n 1) art 52(1)(a); ILC Commentary (n 2) art 52, para 3; *Naulilaa* (n 9) 1026.

of the classical *sommation* in *Naulilaa*: the formal demand for redress that must be made, and left unsatisfied, before a reprisal may lawfully be taken. Second, the injured State is required to notify the responsible State of its decision to take countermeasures and offer to negotiate them. The two requirements have, in the ILC's formulation, no strict temporal order. The requirements are evidential as much as procedural, since they fix, at the moment the measure is taken, the link between the measure and the prior breach. In *Application of the Interim Accord*, Greece sought to justify its objection to the admission of the former Yugoslav Republic of Macedonia to NATO, which the Court found to breach Article 11(1) of the Accord, as a countermeasure among other grounds. The Court rejected that plea on the facts, because Greece had not shown that its objection was a response to the breaches it alleged, and it therefore did not examine the remaining conditions.[23] Article 52(2) of the ARSIWA nonetheless permits an injured State to take such urgent countermeasures as are necessary to preserve its rights.[24]

Proportionality

Proportionality is the principal substantive limit on countermeasures and the most disputed element of their interpretation. According to Article 51 of the ARSIWA, countermeasures 'must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[25] Clearly, the test does not impose strict reciprocity. The ad hoc arbitral tribunal constituted by the United States and France in the *Air Services* dispute found that this test 'can at best be accomplished by approximation'.[26] Applying that standard, it held that the United States' order suspending Air France's service to Los Angeles, made in response to France's refusal to allow Pan American to change to a smaller aircraft in London on its route to Paris, was not 'clearly disproportionate' to the French

[23] *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* [2011] ICJ Rep 644, paras 161–164.
[24] ARSIWA (n 1) art 52(2).
[25] ARSIWA (n 1) art 51; ILC Commentary (n 2) art 51, para 5.
[26] *Air Services* (n 11) para 83.

measure.[27] Drawing on the Court's formulation in *Gabčíkovo-Nagymaros*, the ILC Commentary treats proportionality as both a quantitative and a qualitative standard: the measure is weighed not only against the material magnitude of the injury suffered but also against the importance of the interest protected by the rule breached and the seriousness of the breach.[28] The Court itself went so far as to find the diversion by Czechoslovakia of some 80 to 90 per cent of the waters of the Danube disproportionate, since it amounted to a unilateral seizure of a shared natural resource and deprived Hungary of its equitable share of it.[29] Cannizzaro and Franck have argued, on the basis of the ILC Commentary and arbitral precedents, that proportionality represents an inherent constraint on the force of unilateral self-help intended to moderate the escalatory spiral of unilateral measures, rather than to guarantee parallelism within sectors of the same activity.[30] Most importantly, proportionality is not self-judging, in the sense that it is not left to the subjective assessment of the State taking the countermeasure but remains open to objective review by a court or tribunal. Two points support this. First, the International Court of Justice (ICJ) in *Gabčíkovo-Nagymaros* did not defer to Czechoslovakia's own assessment of its measure, nor inquire into its good faith, but weighed the effects of the diversion against Hungary's breach and the rights in question before reaching its own conclusion.[31] Second, the ARSIWA Commentary expressly envisages that a disproportionate response gives rise to the responding State's own international responsibility.[32]

Prohibitions: Article 50 ARSIWA

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[27] *Air Services* (n 11) para 83.
[28] ILC Commentary (n 2) art 51, para 6.
[29] *Gabčíkovo-Nagymaros* (n 3) para 85.
[30] E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889, 897; TM Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 AJIL 715, 763.
[31] *Gabčíkovo-Nagymaros* (n 3) paras 85–87.
[32] ILC Commentary (n 2) art 51, para 1.

The obligations not to be affected by countermeasures, according to Article 50 of the ARSIWA, are the obligation of refraining from the threat or use of force, the fundamental human rights obligations, obligations of a humanitarian nature prohibiting reprisals, and the provisions of peremptory norms of general international law.[33] Article 50, paragraph 2, adds two further constraints: the State taking countermeasures is not relieved of its obligations under any dispute settlement procedure applicable between it and the responsible State, nor of its duty to respect the inviolability of diplomatic and consular agents, premises, archives and documents. The rationale of the second is practical as much as principled: these are the very channels through which a dispute must be communicated and settled, so suspending them would defeat the inducement function that justifies the countermeasure in the first place.[34] There is still disagreement about the precise scope of the prohibitions. For instance, the ILC Commentary equates 'the fundamental human rights' exception with the standard set forth in the *Barcelona Traction Case* for 'basic rights of the human person,'[35] which, in the words of Crawford, is limited to *jus cogens* rules prohibiting slavery, racial discrimination, genocide and torture.[36] Decisions applying the limits in Article 50(1) are rare. *Prisoners of War - Eritrea's Claim 17*, decided by the Eritrea-Ethiopia Claims Commission, dealt with the suspension of the repatriation of prisoners of war in the context of an ongoing armed conflict; it is better seen as demonstrating the narrow scope of the exclusion than as a mandate for its broad construction.[37] The Committee on Economic, Social and Cultural Rights has warned that comprehensive economic sanctions can inflict widespread suffering on a civilian population. In General Comment No 8 it distinguishes such blanket measures from those whose effects on the general

[33] ARSIWA (n 1) art 50(1); ILC Commentary (n 2) art 50, paras 1–9.
[34] ARSIWA (n 1) art 50(2); ILC Commentary (n 2) art 50, paras 12–15.
[35] *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain), Second Phase* [1970] ICJ Rep 3, para 34.
[36] Crawford (n 14) 693.
[37] Eritrea-Ethiopia Claims Commission, *Prisoners of War – Eritrea's Claim 17* (Partial Award, 1 July 2003) 135 ILR 199, 247, paras 159–161.

population are narrower and insists that Covenant rights be taken fully into account in the design of any sanctions regime.[38] The distinction suggests that the human rights limit in Article 50(1)(b) bites according to the impact of a measure on protected rights rather than according to its form. The preservation of diplomatic inviolability under Article 50(2)(b) raises a separate issue, recalling the Court's judgment in the *Hostages* case, according to which diplomatic rules constitute a self-contained regime that is not subject to exceptions resulting from countermeasures.[39]

Reversibility and termination

Under Article 49, paragraphs 2 and 3, of the ARSIWA, a countermeasure is confined to the non-performance 'for the time being' of obligations owed to the responsible State, and must, so far as possible, be taken in a way that permits the resumption of performance of the obligation suspended.[40] If the wrongful act has ceased, or in the event that the dispute has been submitted to a court or tribunal with the authority to decide the matter, the countermeasures must be halted (Article 53 of the ARSIWA) or suspended (Article 52(3)(b) of the ARSIWA). Reversibility is a condition of lawfulness rather than a recommendation. A recommendation of that kind would guide the choice of measure without bearing on its lawfulness, whereas a condition of lawfulness qualifies the justification itself, so that a measure taken in disregard of it is not a lawful countermeasure at all. The reason lies in the connection between reversibility and purpose: as the Court indicated in *Gabčíkovo-Nagymaros*, it is because a countermeasure must aim to induce compliance that it must be reversible, and a measure whose effects cannot be undone once the wrongdoer complies does not induce compliance so much as punish.[41] It does not follow that reversibility is absolute. Article 49(3) of the ARSIWA qualifies the duty

[38] CESCR, 'General Comment No 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8, para 1.
[39] *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, para 86.
[40] ARSIWA (n 1) art 49(2); ILC Commentary (n 2) art 49, paras 6-7.
[41] *Gabčíkovo-Nagymaros* (n 3) para 87; ILC Commentary (n 2) art 49, para 9.

by what is possible, which makes it an obligation of conduct rather than one of result. An obligation of result requires the State to achieve a specified outcome; an obligation of conduct requires it only to take the reasonable and available measures directed to that outcome, without guaranteeing that the outcome is achieved, a distinction the International Court applied in *Bosnian Genocide* to the duty to prevent genocide.[42] The acting State must therefore choose a reversible measure where one is reasonably available, but is not required to guarantee that no irreversible consequence will follow. The ordinary example is a temporary suspension of tariff concessions: the concession can be restored the moment compliance is forthcoming, even though the trade diverted and the contracts lost in the interim cannot be. What Article 49(3) forbids is not every irreversible side effect, but the choice of an irreversible measure where a reversible one would have served.[43]

Countermeasures in Investment Treaty Arbitration (HFCS Trilogy)

Now widely regarded as customary law in inter-State practice and ICJ jurisprudence, the ARSIWA regime governing countermeasures has proved far more contested in investor–State arbitration, with serious consequences for the investment treaty system as a whole.[44] Three NAFTA tribunals sitting in parallel, *Corn Products International, Inc v Mexico ('CPI')*,[45] *Archer Daniels Midland Co and Tate & Lyle v Mexico ('ADM')*,[46] and *Cargill, Inc v Mexico,*[47] each grappled with Mexico's argument that its 2002 levy on soft drinks containing High-Fructose Corn Syrup (HFCS) constituted a lawful countermeasure against a breach by the

[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, para 430.
[43] ILC Commentary (n 2) art 49, para 9.
[44] *Gabčíkovo-Nagymaros* (n 3) paras 82–87.
[45] *Corn Products International, Inc v United Mexican States* (Decision on Responsibility) ICSID Case No ARB(AF)/04/01 (15 January 2008) ('*CPI v Mexico*') paras 145–161.
[46] *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas, Inc v United Mexican States* (Award) ICSID Case No ARB(AF)/04/05 (21 November 2007) ('*ADM v Mexico*') paras 110–180.
[47] *Cargill, Inc v United Mexican States* (Award) ICSID Case No ARB(AF)/05/2 (18 September 2009) paras 379–429.

United States of NAFTA. Mexico's grievance concerned trade in goods: it alleged that the United States had denied Mexican sugar the market access for which NAFTA provided, and had frustrated the State-to-State procedure of Chapter Twenty, which governs disputes between the parties themselves, by failing to cooperate in the constitution of a panel.[48] NAFTA is described here in the past tense because it was superseded on 1 July 2020 by the Agreement between the United States of America, the United Mexican States, and Canada.[49] The three cases present a distinctive and highly instructive comparison, as there are three tribunals, identical facts, and three (if overlapping) different analyses.

The *CPI* tribunal conceded that Mexico might have a countermeasure claim against the US *inter se*, but concluded that the countermeasures doctrine could not exclude wrongfulness as a defence in an arbitration brought by an investor under Chapter Eleven.[50] In essence, Chapter Eleven sets out the substantive protections owed to investors, including national treatment and protection against uncompensated expropriation, as well as allowing them to enforce those protections in arbitration against the host State, and conferred rights directly on investors. This meant that Mexico could not invoke an inter-State countermeasure to justify conduct that breached obligations owed independently to the claimant. As the tribunal opined with obvious vigour, 'If the HFCS tax was intended as a countermeasure targeted against the United States, it had to have been crafted in such a way that it bore especially heavily upon US interests, otherwise it would have had no chance of being effective or of being a lawful countermeasure', and the 'pain' of the countermeasure had to fall on the United States, not on private investors.[51] The reasoning is persuasive so far as it goes, but it is incomplete. NAFTA was a treaty between States, and Chapter Twenty preserved a State-to-State track alongside Chapter Eleven; the

[48] *ADM v Mexico* (n 46) paras 110–180.
[49] Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020).
[50] *CPI v Mexico* (n 45) para 161.
[51] *CPI v Mexico* (n 45) para 137.

obligations in issue were therefore owed to the other parties as well as being enforceable by their investors. What *CPI* establishes is not that investment treaties lack reciprocal inter-State obligations, but that where an investor enforces the obligation in its own name, a countermeasure directed at its home State cannot be pleaded against it.

The *ADM* tribunal took a different doctrinal path. It accepted in principle that countermeasures might be used as a defence in investor–State arbitration, characterising investor rights as 'derivative' of those of the home State, in an architecture of 'delegated espousal.' However, on the facts, the tribunal concluded that the HFCS levy failed to satisfy the material requirements of a lawful countermeasure as it was not taken with a view to inducing US compliance, and was disproportionate.[52] The *Cargill* tribunal reached the same outcome as *CPI* (awarding USD 77.3 million in damages) on a marginally narrower ratio, as even assuming that Mexico's tax could qualify as a lawful countermeasure against the US, such countermeasures could not preclude wrongfulness in respect of obligations owed to the investor.[53] Of the two approaches, *CPI* and *Cargill* sit the more comfortably with general international law. Article 49(2) of the ARSIWA confines a countermeasure to the non-performance of obligations owed towards the responsible State, so the decisive question is to whom the obligation runs, not whether the claimant is a State. *ADM* answers that question by analogy with diplomatic protection, an analogy that the investor's capacity to commence, settle and discontinue a claim without its home State's concurrence does not readily support. *ADM* nevertheless identifies the real cost of the position taken by the majority of the three tribunals: a State genuinely injured by a treaty breach is denied the countermeasure that general international law would otherwise allow it and denied it in precisely the sector in which the breach was felt - since Mexico's grievance lay in the sweetener trade and it was in that trade that the claimants had invested. The trilogy

[52] *ADM v Mexico* (n 46) paras 151–180.
[53] *Cargill* (n 47) paras 379–429.

therefore settles the outcome by classifying investor rights rather than by reasoning from the countermeasure's regime itself: the law of countermeasures supplied the question, and a theory of investor rights supplied the answer.

The HFCS trilogy thus constitutes an authoritative body of, albeit relatively recent, jurisprudence with significant doctrinal value. It solidifies the view, reflected in the leading commentaries on investment arbitration, that while countermeasures may be available in bilateral, inter-State relations, they are in practice unavailable as a defence in investor–State arbitration.[54] This is so because investment treaty rights are no longer fully analogous to inter-State rights of diplomatic protection. Once rights are bestowed directly on private investors, the inter-State doctrine of countermeasures is of limited use. As Paddeu and Jackson explain in their article from 2024, '[c]ountermeasures constitute justifications, they are defences that render permissible conduct that would otherwise be unlawful',[55] but 'who' is rendered permissible by the justification is crucial to the analysis, since a justification effective vis-à-vis State A might not be effective vis-à-vis Investor X. None of this denies that investment treaties also create reciprocal obligations between the States parties; they plainly do. The point is the narrower one that a countermeasure justifies non-performance only in the relationship between the State taking it and the State against which it is directed, as Articles 22 and 49(2) of the ARSIWA provide; precluding wrongfulness towards the home State therefore leaves untouched an obligation owed to the investor.[56] That the outcome is settled does not mean the reasoning is: only *CPI* and *Cargill* reached it as a matter of principle, *ADM* having accepted the defence in the abstract and rejected it only on the facts, so a future tribunal persuaded by

[54] K Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (2nd edn, OUP 2018) 793; P Merkouris, A Kulick, JM Álvarez-Zarate and M Żenkiewicz (eds), *Custom and its Interpretation in International Investment Law* (CUP 2024).
[55] M Jackson and FI Paddeu, "The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?" (2024) 118 AJIL 231.
[56] ARSIWA (n 1) arts 22, 49(2); ILC Commentary (n 2) art 22, paras 4–5.

ADM's premise might not be driven to the same conclusion. The question does not appear to have been squarely revisited in a published award since, and the inference drawn here is the author's own rather than one supported by later authority. Three positions should therefore be distinguished. The case law denies the defence, but two of the three tribunals did so as a matter of principle and the third only on the facts. The literature explains that outcome by the nature of investor rights, treating them either as the investor's own or as derivative of the home State's. The position taken here is that neither classification is necessary to the result, which follows from Article 49(2) of the ARSIWA: the decisive question in every case is to whom the obligation breached was owed.

Third-Party and Collaborative Countermeasures

The regime developed thus far by this paper relates to bilateral countermeasures. The new frontier of the doctrine, and therefore the main focus of recent literature, is the legal regime for countermeasures taken by States that are not themselves injured. Article 54 ARSIWA has a 'savings clause' for 'the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach'.[57] The ILC Commentary refers to the practice as 'limited and embryonic' and declines to offer a view about the customary status of such measures, even though State practice has changed decisively since 2001. The lawfulness question can be stated simply: a measure adopted by a non-injured State either breaches an obligation owed to the target State or it does not. Where no obligation is breached, for instance, withdrawing voluntary aid or recalling an ambassador, the measure qualifies as retorsion and needs no justification at all. Where an obligation is breached, however, for instance, suspending treaty-based landing rights or freezing assets protected by treaty or immunity, justification becomes necessary. As Articles

[57] ILC Commentary (n 2) art 54, para 6; ARSIWA (n 1) art 54.

22 and 49 apply only to injured States, the sole available justification under the law of State responsibility is a third-party countermeasure, grounded under the customary rule preserved by Article 54. The wording of Article 54 might suggest otherwise, since 'lawful measures' could be read as covering only measures that are lawful in any event, that is, acts of retorsion. The ILC explained, however, that it chose that phrase rather than 'countermeasures' precisely in order not to prejudice the position on measures taken by non-injured States in the collective interest; and a clause preserving only retorsion would have nothing to preserve, since retorsion falls outside the chapter on countermeasures altogether.[58]

In the 2017 monograph *Third-Party Countermeasures in International Law*, Martin Dawidowicz identifies 21 instances of third-party measures from 1960 to 2016, ranging from the measures taken by West African States against Liberia and Sierra Leone in the 1990s, through the Western and Arab League measures against Syria from 2011, through to the Economic Community of West African States (ECOWAS) measures against Mali in 2012. What unites these episodes is that in each the reacting States were not injured within the meaning of Article 42: they instead responded to grave breaches of obligations owed to the international community as a whole, such as mass atrocity, the unconstitutional overthrow of a government, systematic repression, by suspending trade preferences, aid, landing rights or diplomatic privileges. Whether they fall under Article 54 depends on a prior characterisation, since only a measure that would otherwise be unlawful needs the savings clause at all, and a good deal of the practice surveyed, the withdrawal of voluntary aid, for instance, consisted of lawful acts of retorsion requiring no justification.[59] Dawidowicz argues that the ILC's 2001 caution was unwarranted and that the practice is sufficient to establish a customary right of

[58] ILC Commentary (n 2) art 54, para 7, and Part Three, ch II, introductory commentary, para 3.
[59] M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 1–4, 109–242.

third party countermeasures to address serious breaches of *erga omnes* obligations.[6061] He begins by analysing the main concerns raised by third party measures in the literature and the ILC. He argues that none are supported by the trend in practice. Firstly, he addresses the concern that third party measures would undermine the primary role of the Security Council. He notes that there is no evidence to support this concern. Secondly, he addresses the issue that the collective obligations upon which third party measures can be taken are unclear. He notes that this is not the case and there are examples of African states using third party measures in the form of ECOWAS. Thirdly, he addresses the issue that each state taking third party measures will have to decide for themselves if a serious breach has occurred. Finally, he addresses the issue that third party measures are ineffective. Again, he argues that there is no evidence to support this. Having analysed the main concerns surrounding third party measures, he concludes that third party measures can be taken but only to the extent that it is strictly necessary. The conditions upon which they can be taken are the same conditions upon which injured states can take measures (Articles 49-53 ARSIWA) but with some modifications. This view corresponds with the Institut de Droit International who, in 2005, recognised that if there is a well-recognised serious breach of an *erga omnes* obligation then all states to whom the obligation is owed can take non-forcible measures under similar conditions to a state which is specially affected.[62]

The sceptical position is defended by Hofer, who argues that studies of this kind acknowledge the absence of *opinio juris* and then infer it from practice, when the practice is itself ambiguous: States that impose unilateral sanctions generally present them as policy choices rather than as

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[60] Dawidowicz (n 59) 281–284.

[61] CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 198–251; E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010) 90–209.

[62] Dawidowicz (n 59) 239–282, 285–379; Institut de Droit International, 'Obligations and Rights *Erga Omnes* in International Law' (Krakow Session, 27 August 2005) art 5(c).

legal claims, and rarely say whether a given measure is retorsion, a treaty-based measure or a countermeasure.[63] This position is disputed: the ILC's own reservation reflected a difficulty that has not gone away, namely that of telling genuine countermeasures apart from retorsion. Where a measure is merely unfriendly rather than unlawful it requires no justification under Article 54 at all, and a good deal of the practice surveyed is open to that reading. It is therefore uncertain whether the reacting States acted as third-party countermeasure-takers, as retorsion-takers or under some other label. The terminological slippage is itself significant. 'Third-party measures' is the wider category, covering any response by a State that is not injured; 'third-party countermeasures' denotes the narrow subset that would breach an obligation owed to the target State and so requires a justification. This article uses the second term only in that narrow sense. Lim and Mitchell approach the problem from a different direction again: accepting that the rules of State responsibility do not rule out collective countermeasures in answer to erga omnes violations. They argue that the right to take third-party countermeasures remains an individual one, so that each State decides for itself whether to take part.[64] They invoke the law of neutrality in support of that freedom: the rules, codified principally in the Hague Conventions of 1907, governing the rights and duties of States that are not parties to an armed conflict. Those rules, they argue, tell against an expansive reading of the duty to cooperate in Article 41(1) of the ARSIWA, under which States are to cooperate to bring to an end, through lawful means, any serious breach of a peremptory norm, a duty the ILC itself acknowledged might reflect progressive development rather than existing law.[65]

The Russian Federation's 2022 invasion of Ukraine has made this debate especially pressing. The UN General Assembly voted against the Russian aggression by 141 votes;[66] the European

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[63] A Hofer, 'Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?' (2025) 74 ICLQ 287.
[64] CL Lim and R Martínez Mitchell, *'Neutral Rights and Collective Countermeasures for Erga Omnes Violations'* (2023) 72 ICLQ 361, 361–362, 386–391.
[65] ARSIWA (n 1) art 41(1); ILC Commentary (n 2) art 41, para 3.
[66] UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1.

Union, UK, US, Canada, Japan and others imposed unprecedented sanctions on virtually all sectors of the Russian economy and Russian Central Bank's reserves.[67] Many of these measures, taken by States that are not injured, must be justified as third party countermeasures if they contravene obligations otherwise owed to Russia, such as under bilateral investment treaties or the customary immunity of State property.[68] The lawfulness of confiscating frozen Russian sovereign assets outright, or transferring them to Ukraine, as opposed to merely freezing them, remains particularly contested. A freeze is by its nature reversible and so sits comfortably within Article 49(3), whereas confiscation is not, and would have to be justified on some other basis.

In a recent article on 'The Countermeasures of Others', Jackson and Paddeu add an important conceptual point: while the law may allow a State entitled to invoke responsibility under Article 48 to take third-party countermeasures of its own, they argue it does not generally allow States to collaborate in the exercise of another State's countermeasures.[69] Article 54 is in truth a savings clause rather than a grant of authority: it preserves the right of such States to take 'lawful measures' without settling whether measures that would otherwise be unlawful are among them, a non-injured State's response therefore qualifies as a countermeasure only if that reservation has since hardened into a positive entitlement, which is precisely what remains contested. Jackson and Paddeu discuss five different types of collaboration, including independent but coordinated action, secondment of units to another State's system, joint conduct in a single operation, assistance by another State to its countermeasure, and a State taking a countermeasure on behalf of another, 'principal' State, and argue that none of them

[67] Council Regulation (EU) No 833/2014 of 31 July 2014, as repeatedly amended since 24 February 2022.

[68] A Hofer, 'The «Curiouser and Curiouser» Legal Nature of Non-UN Sanctions: The Case of the US Sanctions Against Russia' (2023) 28 JCSL 75; A Moiseienko, 'Trading with a Friend's Enemy' (2022) 116 AJIL 720, 727–730.

[69] A Hofer, 'The "Curiouser and Curiouser" Legal Nature of Non-UN Sanctions: The Case of the US Sanctions Against Russia' (2018) 23 JCSL 75; A Moiseienko, 'Trading with a Friend's Enemy' (2022) 116 AJIL 720, 727–730.

allows a State to rely on another State's entitlement to take countermeasures.[70] They argue that instead, each State must find its own justification for its conduct, satisfy the criteria of justification for itself, and assume independent responsibility if it fails to meet those criteria.[71] In particular, they cast doubt on the lawfulness of proxy countermeasures in which a State acts on behalf of an injured State as its agent: they argue that the justification which the law of countermeasures affords is personal to the injured State and cannot be delegated, and that a State which assists another's unlawful countermeasure may itself be responsible for aiding or assisting under Article 16 of the ARSIWA.[72] It follows that solidarity sanctions, meaning measures taken by third States in support of a victim such as Ukraine, cannot rest on the victim's injury alone. Each participating State must establish an entitlement of its own, whether by way of retorsion, a treaty-based authorisation or, if it exists, the entitlement reserved by Article 54 of the ARSIWA. That conclusion invites a question the authors leave open: does so restrictive a rule leave the law able to answer serious breaches of jus cogens, and in particular aggression by a permanent member shielded from Security Council action by its own veto? Two replies are available. The first is that retorsion carries much of the load, since the bulk of the 2022 measures, such as trade bans, freezes on private assets, exclusion from voluntary arrangements, breached no obligation owed to Russia and needed no justification at all, so the entitlement question arises only at the margin. The second is that the margin is where the hardest cases sit, and there the individual entitlement Jackson and Paddeu require may simply be unavailable to States with no relevant treaty relationship to the aggressor. The requirement of an individual entitlement, which is the approach Jackson and Paddeu defend, is on balance sounder than the alternative of allowing one State to act upon another's entitlement, because it keeps each justification tied to a right that the acting State itself holds. Its apparent cost in

[70] Jackson and Paddeu (n 55) 239–246.
[71] Jackson and Paddeu (n 55) 246–249.
[72] Jackson and Paddeu (n 55) 252–254.

enforcement capacity is also smaller than it first appears. Where the obligation breached is owed to the international community as a whole, as the prohibition of aggression is, every State holds a right corresponding to it, which is why Article 48(1)(b) allows every State to invoke responsibility; a State responding to aggression therefore need not borrow the victim's entitlement. The real difficulty lies in the mismatch between the two remedial entitlements in the ARSIWA: the right to invoke responsibility belongs to every State to which the obligation is owed, while the right to take countermeasures belongs only to the State that is injured. Article 54 sits in the gap between them, preserving a right whose existence it does not confirm.[73]

Conclusion

The countermeasures of an injured State are foundational yet highly circumscribed. The injured State may suspend performance of obligations to the responsible State in response to a wrongful act, following a call for cessation, for the purpose of inducing compliance, and only in proportion to the injury, without breaching the Article 50 ARSIWA obligations. The framework, as crystallised in *Gabčíkovo-Nagymaros* and confirmed in subsequent ICJ practice, is now firmly part of customary international law, and the ARSIWA provisions reflect accurately customary norms. On the question of which subjects are entitled to take countermeasures, and against whom those measures operate, the framework has been tested, both in investment arbitration and in third-party enforcement alike. Countermeasures may not have a direct impact on rights conferred on investors by investment agreements, as the HFCS cases show, and the sanctions practice following 2022 illustrates the uncertainty as to whether third-party countermeasures are justified in pursuit of the community interest, under customary international law. This article returns to its opening question, the answer is accordingly a qualified negative: general international law states the conditions of a lawful countermeasure

[73] Jackson and Paddeu (n 55) 256.

with considerable precision, but it does not coherently designate the actors entitled to take one, and in both contested areas the gap is filled by classification rather than by rule. In investment arbitration, whether a countermeasure may be pleaded against a claimant depends upon whether investor rights are classified as the investor's own or as derivative of the home State's, a question the law of countermeasures does not answer. In the practice of non-injured States, the lawfulness of a measure depends upon whether it is classified as retorsion or as a countermeasure, and upon whether the lawful measures preserved by Article 54 are read as including countermeasures at all. In each case the result turns on a classification made outside the law of countermeasures, because the conditions of a lawful countermeasure presuppose a bilateral relationship that is no longer present. By way of an extensive and systematic engagement, Paddeu and Jackson have addressed both the nature of countermeasures as an international wrong-avoiding justification, and the boundaries on countermeasures by non-injured States and on proxy countermeasures.[74] Three recommendations follow. First, a tribunal faced with a countermeasures defence should ask to whom the particular obligation breached was owed, rather than classifying investor rights in the abstract; and a State that wishes to preserve countermeasures as a defence against investors should provide for it in the treaty, as Article 55 of the ARSIWA permits. Secondly, States taking measures in the collective interest should say what they are doing, identifying the obligation suspended, the party to whom it is owed and the basis relied upon, whether retorsion, a treaty exception or a third-party countermeasure, and preferring reversible measures such as asset freezes to irreversible ones such as confiscation. Practice articulated in those terms would supply the *opinio juris* whose absence presently prevents the emergence of a customary rule. Thirdly, any future codification should close the gap between Articles 48 and 49 by recognising, for serious breaches of peremptory norms, an entitlement of States other than the injured State that is individual rather

[74] Paddeu, *Justification and Excuse* (n 7) 367–425.

than delegated, with proportionality measured against the gravity of the breach and a duty of coordination where several States act.[75] As a result, the current law on countermeasures constitutes a regime of self-help that is, in 2026, both more sharply theorised and more politically charged than at any point in the post-ARSIWA era. Countermeasures of injured States may be more restricted than the common invocation of sanctions might suggest, but they are also more robust than is often recognised if properly deployed.

[75] ILC, 'Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading' (2000) UN Doc A/CN.4/L.600, art 54, replaced by the saving clause in 2001.