Sanctions, Countermeasures and Human Rights

Event Report

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Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- Dr Danae Azaria, University College London
- Dr Kate Parlett, Freshfields Bruckhaus Deringer
- Professor Antonios Tzanakopoulos, University of Oxford

Chair:

- Dr Jansen Calamita, British Institute of International and Comparative Law (BIICL)

Background

To discuss the latest developments in international law relating to sanctions, countermeasures and human rights, the British Institute of International and Comparative Law (BIICL) held a seminar with an expert panel from both academia and practice, convened by Kristin Hausler (BIICL).
Professor Tzanakopoulos initiated the debate by giving an overview of the key elements and framework relating to sanctions and countermeasures and the interplay between human rights at the international level. In doing so, he started off by discussing what the principal terms mean, because in reality they can be used interchangeably quite frequently, yet they are very different.

A countermeasure is an internationally wrongful act whose wrongfulness is precluded due to it being taken in response to a previous violation by the target state injuring the reacting state. A countermeasure is therefore a unilateral measure from one state against another state. This is in counter distinction to sanctions, which the International Law Commission (ILC) has said is a term to be reserved for measures taken by international organisations against their members. Whenever we talk about a countermeasure we talk about the unilateral act of a state, or even a multilateral response of states taking countermeasures at the same time, but that is not a collective response. A collective response is in the context of an international organisation against its own members, which is a sanction. The prime example of sanctions is in the context of the United Nations (UN), where sanctions are employed by the UN Security Council (UNSC) under Chapter VII of the UN Charter. The interesting point in relation to this context is that the UN Charter doesn’t mention sanctions at all. Article 41 talks about measures that do not involve the use of armed force.

This distinction excludes, in any event, retorsion. This term will not be discussed any further since it is an act that is perfectly lawful but ‘impolite’ or ‘unfriendly’. The reason it being excluded is that it is not an unlawful act that needs to be justified (eg as a countermeasure). It is also not a response by an international organisation against its members in a collective setting. Common examples of retorsion are withdrawal of voluntary aid or the breaking up of diplomatic relations. The heart of the concept is that the reacting state is not in any way breaching an international obligation it owes the target state. Antonios’ favourite example of a retorsion has been provided by Glasgow, where he used to teach. In that case the Glasgow City Council during apartheid decided to take action against the South African consulate in the city by renaming the square where the consulate was placed. The square was renamed ‘Nelson Mandela Square’. The is a good example of a retorsion because the action was attributable to the state, as Glasgow City Council is an organ of the state, yet it is not in breach of international law because the Council did not do anything illegal, such as breach the obligation to respect the inviolability of diplomatic and consular premises. Despite this, South Africa, and the consular officers having to cross Nelson Mandela Square to go to work every morning, would have found this behaviour ‘unfriendly’, and that was precisely what was intended.

Having sought to clarify the terms, Antonios moved to discuss the impact of sanctions and countermeasures on human rights. In this connection he noted Human Rights Council (HRC) resolution 24/14, which tasked the Office of the High Commissioner for Human rights (OHCHR) with conducting a study on the impact of unilateral coercive measures on the enjoyment of human rights, especially the human rights of women and children. In that context the Office of the High Commissioner organised a workshop at the end of May 2014 in Geneva, where the delegations present make statements that were ‘shockingly wrong in terms of law’. Although they were obviously trying to make a political point, there was complete confusion between countermeasures and sanctions and as to the applicable legal regime. Some state delegations were not be able to tell apart whether the particular state had been the target of a unilateral countermeasure by another state, or whether it had been the target of sanctions by the UN. The second matter was that the states were completely wrong in their legal evaluations of countermeasures, as they said that all countermeasures were in violation of the UN Charter and an intervention in the domestic affairs of another state.

There is no doubt that countermeasures do impact upon the enjoyment of human rights. But that is not necessarily unlawful, nor does it render the countermeasure unlawful. There are specific conditions for a breach of international law to be justified as a countermeasure. The most crucial condition is that the measure sought to be justified as a countermeasure is a response to a previous breach by the target
state which is taken by the injured state. Assuming that this is the case, there are further both procedural and substantive requirements, which the particular countermeasure needs to fulfil in order to have the wrongfulness of the act precluded.

According to the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts, “[c]ountermeasures shall not affect … obligations for the protection of fundamental human rights” (Article 50(1)(b)). What this means is that the reacting state (the state taking the countermeasure) is not meant to violate its own human rights obligations when taking that countermeasure. Effectively states cannot ‘suspend’ or violate human rights obligations and seek to justify the violation as a countermeasure. I.e. a state cannot say that another state has violated this rule of international law, so therefore I am going to torture everyone within my jurisdiction, not provide fair trials, etc.

However, none of the countermeasures that the HRC is dealing with (the ones that have a serious impact on human rights) constitute violations by the reacting state of its own obligations for the protection of human rights. The point is that the reacting state is affecting the enjoyment of human rights in the target state (e.g. by restricting aid that affects the capability of the target state to comply with its human rights obligations and also the ability of the people in that state to enjoy their own human rights). Any type of financial countermeasures tends to fall into this category because of the economic impact, for example any countermeasure restricting trade or imposing an embargo. The problem here is that there exists no obligation on one state to enable another state to comply with its human rights obligations. Therefore, the limitation that exists in the ILC Articles on State Responsibility, which states that countermeasures may not violate human rights obligations is not helpful. It would be helpful only if the human rights obligations of state A (the reacting state) were applicable in the territory of state B. But for this to happen state A needs to establish jurisdiction over at the very least part of that territory or over specific persons (whose rights are being violated). By merely imposing a countermeasure a state does not exercise jurisdiction in the territory of another state and therefore has no obligations to protect human rights in that area. Consequently, the only practical limitation that remains is one of proportionality (Article 51). This limitation under the ILC Articles highlights that the countermeasure must be ‘commensurate with the injury suffered’ by the reacting state. As an extreme example, state A cannot say that because state B breached obligations under a bilateral air services agreement all state A trade with state B shall cease (if that is violation of international obligations of state A to engage in trade with state B).

One can say that countermeasures affecting the enjoyment of human rights in the target state could be disproportionate in certain circumstances. The issue here is the ‘causal link’ and the problem of proof. It would be incredibly difficult to say that whatever difficulties came about in relation to the enjoyment of human rights in the target state were due to the countermeasure of the reacting state. Obviously the point of economic countermeasure is to cause financial hardship, which will undoubtedly affect the target state’s capabilities of complying with its human rights obligations to some extent, as the state is strained for money and resources.

At the UN meeting in Geneva in May states were arguing this exact line of reasoning, as they claimed that states targeted by countermeasures were unable to perform in line with their human rights obligations. This argument is problematic because conflicting evidence by other states was put forward, which contended that the ‘governing elite’ of the state could very easily divert resources that should have gone towards ensuring the enjoyment of human rights by the population, to protecting themselves, buying more weapons etc. A state cannot say people in this jurisdiction cannot enjoy human rights because of the countermeasure being imposed. You could equally argue that individuals cannot enjoy their human rights because the government is diverting resources from areas that provide for the enjoyment of human rights to other purposes. The above points highlight the principal issues and the legal regime in relation to countermeasures.
Moving on to sanctions, the regime will be examined with the respect to the legality of sanctions and will highlight problems that are similar to those in the countermeasures regime. The focus of this part of the discussion will be on the UNSC, as it is the only collective security system that the international community has and because there is an abundance of practice with respect to UNSC sanctions since the 1990s. This is because of the ‘revival’ of the UNSC after the Cold War. The legal issues in this area are extremely complex.

Prior to 1990 the UNSC had used sanctions only twice, against South Africa and against Southern Rhodesia. After 1990 the UNSC started using sanctions to a great extent. At the outset the sanctions were very blunt, as they were comprehensive; the sanctions on Iraq imposed by resolution 687 included a complete embargo on Iraq. This caused very significant hardship to the population of Iraq, ranging from lack of medical equipment to problems with food supplies. This eventually caused public outcry of the Iraqi sanctions. Public opinion began condemning the hardship caused by the comprehensive sanctions and this forced the UNSC to re-evaluate its position. From this point on the UNSC started targeting its sanctions so that they were more specific, and it also started adopting humanitarian exemptions to deal with unintended consequences on the population of the target state. There were no more impositions of comprehensive sanctions: instead particular goods that were crucial to the economy of the target state, or crucial to fuelling the conflict, were targeted. This could take the form of an oil or arms embargo to a diamond or timber embargo. On top of this the UNSC targeted its sanctions towards the ‘elite’ individuals governing the state, rather than imposing blanket sanctions on the state, which had a disproportionate effect on the civilian population. This became its own problem because by targeting the sanctions too much, effectively what started happening was that individual human rights of those targeted were affected. This has a lesser effect on the general enjoyment of human rights of the population, as there was now access to food, medicine etc. But targeted sanctions have the potential to violate the individual rights of the targeted persons. The issue here is that the targeted sanctions regime started expanding to the extent that there are sanctions being imposed on factions, like the Taliban, that are not part of any state, and also individuals who are suspected to be affiliated with the likes of Al-Qaida and terrorism, but not limited to any state.

The process by which these sanctions were being imposed at the outset was ‘completely and utterly crazy’. It would basically be the fifteen members of the UNSC sitting around the table (as the relevant Sanctions Committee) and agreeing to list a particular ‘individual’ simply at the suggestion of one of the members, with little or no evidence as to what that individual had done to deserve the heavy sanction of asset freezes and travel bans. An anecdotal story may help illustrate the ease with which the UNSC imposed such targeted individual sanctions: an unnamed functionary of INTERPOL conveys how INTERPOL was asked by the UNSC to issue ‘red notices’ on every person in the (then) UNSC resolution 1267(1999) sanctions list. In humouring the UNSC, INTERPOL sought to do so, but then reverted to the UNSC with the pointed question ‘which Mohammed Mohammed out of the approximately 100,000 individuals so named around the world would you like us to issue the notice on?’ This is a very real example that highlights that the information contained in these sanctions lists is lacking to a great extent, sometimes to the point where all there will be on the list is a name. These lists were originally prepared without any evidence, without hearings and without justification as to why individuals were put on the list. The worst part of this process was that there existed no way for an individual or entity to be taken off the list.

Therefore, very early on individuals began to challenge the fact that their names had been placed on these lists. However, they could not challenge these measures before the UNSC directly. Instead an individual could only turn to the state of nationality (or residence) for protection, yet at the time only Sweden would openly afford this type of ‘diplomatic’ protection for Swedish nationals listed by the UNSC. Because of this seemingly impossible situation for listed individuals, these individuals sought to attack the domestic measures adopted by states to implement the UNSC sanctions in the relevant
domestic courts. At first these types of cases were summarily thrown out, domestic courts refusing to exercise jurisdiction over domestic acts that were merely implementing the will of the UN: they felt that this would amount to asserting jurisdiction over the UN and its Security Council. Over time, however, this state of affairs progressed to the extent where it became clear that these types of sanctions would remain for many years, therefore courts started reacting. Taking what has been described as a ‘radical dualist’ approach, courts no longer accepted that domestic implementing acts were immune from their jurisdiction on account of merely ‘transposing’ UNSC resolutions in their domestic legal orders. Instead, they started reviewing these domestic implementing measures under ostensibly domestic law. It should be noted however that the ‘domestic law’ referred to is mainly law on the protection of fundamental human rights, such as the right to a fair trial and the right to a remedy, which finds equivalent in internationally protected human rights. The most prominent case of this sort to date is the Kadi case before the courts of the European Union, but the Ahmed case before the UK Supreme Court is another excellent example.

Striking down domestic measures implementing UN sanctions led to domestic courts forcing their states to disobey the UNSC sanctions. Once the court struck down the implementing measures, the state could no longer comply. It would have then to either adopt a new measures (which was liable to being struck down again), or to approach the UN and re-negotiate the sanctions, or to risk being in violation of Article 25 of the UN Charter, according to which the UN member states ‘agree to accept and carry out the decisions’ of the UNSC. The build-up of this over time had a very significant effect on the sanctions regimes, in particular the Al-Qaeda sanctions regimes, since the UNSC progressively introduced a ‘Focal Point’ where individuals could go themselves and ask to be de-listed. When domestic courts found this process lacking, stressing that it offered no ‘guarantees of judicial protection’, the creation of an ‘Office of the Ombudsperson’ came about in 2009. Domestic courts were still not satisfied, noting that the UNSC could still ignore the recommendations of the Ombudsperson. This increase of pressure led the UNSC to reforming the Ombudsperson procedure, so that whatever the Ombudsperson recommended would be followed the UNSC, unless the UNSC decided by consensus not to follow up on the recommendation. This makes it far harder for the UNSC to simply disregard the recommendation.

What can be taken from all this is that this type of reaction to UNSC sanctions has been successful in creating an unprecedented centralised process for controlling UNSC sanctions decisions; however no such process exists with respect to countermeasures. The only way in which countermeasures can be controlled for compliance with human rights obligations is through decentralized control by states, in the same way that states (subsequently through their courts) reacted to allegedly wrongful UN sanctions. For example, every year there is a resolution adopted by the UN General Assembly that condemns the US embargo on Cuba, but what state has taken the step of stating that the US is imposing a countermeasure on Cuba that is illegal on a number of levels, and then acting on such statement? The US embargo is not responding to a previous wrongful act (at least not anymore), and even if it is, it has a disproportionate effect, which is evident in the enjoyment of human rights within the territory of Cuba. It could be claimed that the US embargo is then a violation of an obligation erga omnes, so that third states could impose countermeasure on the US in response (assuming that Article 48 states can take countermeasures, which is something the ILC has left open: see Article 54 ILC Articles on State Responsibility). Therefore, the only way to limit the effect of countermeasures on the enjoyment of human rights is through decentralised control and solidarity through countermeasures ‘in the general interest’ against wrongful countermeasures. The HRC is currently considering some sort of monitoring mechanism to aid this state of affairs, but one thing that should be kept in mind is that subjection of countermeasures to third party dispute settlement has been rejected by both the ILC and the states.
Dr Azaria examined countermeasures and their relationship with human rights, in the context of energy, trade and transit. This context is important because of the issues surrounding countermeasures taken in the form of suspending compliance with obligations not to restrict export or transit of energy and whether they can effectively achieve the goal of countermeasures, which is to induce compliance of the target state to comply with its secondary obligations to cease the internationally wrongful act and make reparation. This is because the importance of energy for states in relation to their economies and the wellbeing of their populations. At the same time, countermeasures taken in this form will inevitably have significant effects on human populations in the targeted states.

The relationship between countermeasures and human rights is twofold: countermeasures may be taken in the form of suspending obligations concerning exports, imports, or transit of energy in response to breaches of human rights obligations. Whether and to whom countermeasures would be available will depend on the classification of states as injured states and states other than the injured state, as well as whether human rights treaties provide lex specialis means for the implementation of responsibility that exclude countermeasures under international law. This issue does not form the focus of this presentation.

Rather the focus of the presentation was the second aspect of this relationship. One of the conditions of lawfulness of countermeasures is that they shall not affect obligations for the protection of human rights. The presentation will show that the number of limitations on this rule entails that suspensions of obligations concerning energy exports and transit are unlikely to be prohibited under this rule. But, they are more likely to be prohibited because they would not meet the requirement of proportionality.

If individuals are deprived of sufficient heating, water, lighting, sanitation, the use of medical equipment, due to interruptions of electricity, oil or gas, there may be loss of life. Individuals may be subject to inhumane treatment or their health may be put at risk. The right to life, the right not to be subject to inhumane treatment and the right not to be subject to the risk of one’s health come into play. This is far from an academic discussion.

During the 2009 gas crises in Europe that was caused because of the interruption of transit by the Ukraine out of the dispute with Russia, deaths were reported in both Poland and Bulgaria. Another example is the humanitarian crisis that was caused in South Ossetia in early 2009 during a very harsh winter, when South Ossetia was occupied by Russia and Georgia the supply of gas was interrupted.

In order for countermeasures to be lawful a number of conditions have to be fulfilled, these are listed in Article 49-53 of the ILC Articles on State Responsibility. One of the specific conditions under Article 50 is that countermeasures shall not affect the obligations to protect fundamental human rights; this includes both treaty and customary international law. This rule covers two very different situations: firstly, where the reacting state suspends compliance with its human rights obligations per se. Secondly, where the reacting state, by suspending compliance with other obligations, affects its human rights obligations. It is this second situation that relates to the restrictions of export and transfer of energy as a countermeasure. There are three limitations to this prohibition of countermeasure not affecting human rights obligations:

1. The human rights that are included in the prohibition.
2. The extra-territorial scope of the application of human rights obligations.
3. The link between the countermeasure and the effect on human rights.

Coming to the term ‘fundamental’ human rights, it implies a smaller group of obligations within human rights generally, yet it does not have a settled meaning. The term does not only mean rights that constitute jus cogens norms as this would be superfluous since the requirement that countermeasures do not affect obligations jus cogens is a separate condition for lawfulness (ASR Article 50(1)(d)). The
wording ‘fundamental human rights’ was proposed by Special Rapporteur Arangio-Ruiz based on the distinction adopted by authors of the time between ‘core’ or ‘basic’ human rights and ‘other’ human rights. This dichotomy can be quite restrictive, especially if one simply considers that fundamental human rights are civil and political rights and non-fundamental rights are economic, social and cultural rights. For instance, it leaves outside the right to be free from being subjected to risk of one’s health (Article 12 of the Covenant on Economic, Social and Cultural Rights), which has been characterized by the UN Committee on Economic, Social and Cultural Rights as a ‘fundamental human right’. This does not suggest that the meaning attached to the term ‘fundamental human rights’ by the Committee corresponds to the meaning of the term used in the ILC Articles. Rather, that the term the reference to ‘fundamental human rights’ includes economic, social and cultural rights, especially given that the ILC Commentary to the ASR mentions the General Comment No. 8 (1997) of the Committee on Economic, Social and Cultural Rights, and second that the rule as adopted by the ILC in 2001 forces one to make intuitive judgments about what is and what is not a fundamental human right.

In 2011 the ILC Articles on the Responsibility of International Organizations were adopted. They contain the rules on countermeasures, using similar language to Article 50 of the ILC Articles on State Responsibility, but have omitted the word ‘fundamental’. The ILC Commentary suggests that ‘the omission conforms to the tendency not to make a distinction among human rights according to their relative importance’. The change of language overcomes the misconstrued dichotomy between fundamental and non-fundamental human rights in the context of the rule concerning countermeasures. The change of language seems to overcome some misconstrued or not sufficiently explained dichotomy between fundamental and non-fundamental human rights in the context of the rules concerning countermeasures. The correct interpretation would be that the prohibition encircles human rights obligations that bind the reacting state, irrespective of whether they concern civil and political or economic, social and cultural rights. In this respect the right to health, which can be affected by restrictions of energy supplies, would also be included.

The second, and principal, limitation to the rule not to affect human rights when taking a countermeasure, especially in the context of countermeasures in the energy sector, is the scope of application of human rights obligations. Human rights obligations not only apply in the territory of the reacting state but also extraterritorially, where the reacting state exercises jurisdiction. Unlike situations where state organs are present in areas outside of the state’s territory and where the state exercises control over a particular area or individual, interrupting energy supplies as a countermeasure involves conduct of organs of the reacting state in its territory, which produces effects on individuals located in the territory of the targeted state and over whom the reacting state does not exercise control by virtue of its organs’ presence. An interesting example of the interpretation of what jurisdiction would mean for the purpose of establishing the scope of application of human rights obligations is how the European Court of Human Rights (ECtHR) has done so. It has considered that such situations would qualify as falling within the jurisdiction of a state, in circumstances where its organs, whose conduct is at issue, are located within the its territory or where the state exercises effective control, but are in close vicinity to the victims that are located in another state outside the former state’s control and there is a direct and immediate link between that conduct and the effect outside that state’s territory. All the cases that the ECtHR has dealt with in this context has taken on board this type of threshold and are confined to obligations to abstain from interfering with the enjoyment of the right. State organs located in the territory of the state are obliged not to kill, subject individuals to inhumane treatment and not to put at risk the health of persons that are located in the territory of another state.

By contrast, despite the fact that these criteria of close vicinity and immediate link could be fulfilled in extreme cases of complete or almost complete dependence on established energy exports/transit from another state (e.g. Belarus vis-a-vis Russian exports of gas; Kaliningrad vis-a-vis transit flows of gas through Belarus and Lithuania; or Moldova concerning gas transiting through Ukraine and gas exports
from Russia), the obligation to take positive measures to protect the right to life or health by providing energy, food and medicine does not apply in such extraterritorial manner. As a result, the reacting state by suspending exports of energy would not affect its human rights obligations. One the other hand, one could endeavour to overcome the dichotomy between obligations to abstain from interfering with human rights and obligations to protect human rights by embarking upon positive action. This would require either prove that the dichotomy is not doctrinally sound (but the policy reasons are clear and sound, and no case law supports the view that obligations to take positive measures to protect apply extraterritorially), or it could be argued that extreme situations may make the classification of obligations difficult. In situations of absolute dependence on energy coming from a particular exporter or coming through a particular transit state, without any conceivable or reasonable alternative source of energy, which is essential for the life and health of individuals, and on which individuals have relied on over time not on a benevolent basis but rather on contractual arrangements, by interrupting supplies to individuals in another state the exporter or transit state would be violating its obligation not to interfere with the right to life and health. Despite the fact that this argument would be very limited and apply only to exceptional circumstances and it could still be contested. The obligation at issue would still be an obligation to protect or enable the enjoyment of human rights by positive action and it would not apply in any extraterritorial manner. Countermeasures in this respect and even in extreme circumstances would not be prohibited per se, owing to the rule that countermeasures cannot affect human rights. However, such countermeasures in these exceptional circumstances are unlikely to be commensurate to the injuries suffered by the reacting state(s) and would be prohibited as disproportionate under Article 51 of the ILC Articles on State responsibility.

But, even assuming arguendo that the jurisdictional threshold has been met and that these obligations apply in an extraterritorial manner, there would be yet another limitation to this rule. It would have to be proven that the effect on human rights of individuals in the target state is the result of that particular countermeasure. Such a link would depend on the facts of each case. It would be possible to say that the link is discernible in the extreme circumstances where there is energy dependency of the targeted state on the reacting state. Nevertheless, in the scenario the reacting state could be arguing against the existence of such a link or on the basis that the target state has not taken the necessary measures to protect the human rights of individuals within its own territory by mitigating the effects of the crisis, through pre-emptive measures or by making arrangements as soon as the energy crisis commenced.

Hence although the rule in ASR Article 50 seems quite generous to humanitarian considerations and limiting on countermeasures, the limits of extraterritorial application and the required link between the countermeasure and its effects on human rights mean that this rule does not prohibit countermeasures that are bound to have serious effects on human populations. Another consideration in relation to a dependency situation; countermeasures in the form of suspending compliance with export and transit of energy would have serious effects on the ability of the target state to perform its own obligations vis-à-vis individuals within its territory. These include obligations to abstain from interference and to protect human rights by positive action. The problem may be exacerbated in situations where multiple exporters or transit states are suspending compliance with their energy export/transit obligations against an importer at the same time.

There are two ways in approaching this issue. First, to consider that the rule (under Article 50) that countermeasures shall not affect human rights obligations refers to obligations of both the reacting state and the targeted state. The language of and Commentary to Article 50 does not completely exclude such interpretation. Second, and the more plausible interpretation is that such countermeasure would be disproportionate (Article 51).

To sum up, two problems arise in relation to the effects on human rights of countermeasures involving interruptions of established energy flows: First, the scope of extraterritorial application of human rights obligations (under treaties or custom). If the obligations of the reacting state, even in situations of
complete dependence of the targeted state on established energy flows from it, are classified as obligations to protect by positive conduct, such countermeasures would not be prohibited under Article 50, because such obligations do not apply in such extraterritorial manner. Second the link between the countermeasure and the effect on human rights may be either remote (which could be overcome by reference to the humanitarian reasons behind the rule) or the targeted state may not properly have discharged its human rights obligations. In any case, the obligation that countermeasures are proportionate will likely challenge the lawfulness of such countermeasures either because of its effects on individuals in the targeted state that would mean that the countermeasures are punitive rather than instrumental (similar reasoning in ADM v. Mexico), or because they would substantially limit the ability of the targeted state to fulfil its human rights obligations.

Dr Parlett focused her presentation on countermeasures under investment treaties, the rules applicable to countermeasures under general international law, the impact of such countermeasures upon third parties and an examination the decisions of three separate North American Free Trade Agreement (NAFTA) tribunals.

International 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, enshrined in Article 22 of the ICL Article on State Responsibility. Article 49-54 then set out various obligations and limitations upon the taking of countermeasures by an injured state. They also set out the conditions for implementation of countermeasures. Of particular interests are the objects of limitations on countermeasures elaborate in Article 49, in particular paragraph 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.’ Paragraph 2 states: ‘Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.’ And paragraph 3 says that: ‘Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.’

Therefore, Article 49 clarifies that countermeasure must be directed against the state that committed the prior wrongful act, i.e. the responsible state. However, the wrongfulness of the measure taken against a third state is not precluded. This is set out in the ILC’s commentary of Article 49: 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.

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. 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.

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.

The question of the extent to which countermeasures can impact directly on individuals has been the subject of consideration of three NAFTA tribunals. 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, countermeasures were not held to be a valid defence to the claim.

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% tax by Mexico on soft drink bottlers using the sweetener High Fructose Corn Syrup. In its defence, 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. So the question arose whether the fact that the tax was imposed by Mexico as a countermeasure against the US precluded the wrongfulness of the alleged breach of NAFTA vis-à-vis the American agricultural companies. All three NAFTA tribunals rejected the countermeasures pleas.

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, which are 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 of 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. The Tribunal noted that a countermeasure cannot, therefore, ‘extinguish or otherwise affect the rights of a party other than the State responsible for prior wrongdoing’, although it could affect their interests. 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.’ 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 in Cargill v Mexico applied very similar reasoning, finding 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’ 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.’ Mexico argued that the rejection of its countermeasures defence would lead to an absurd result, that countermeasures could preclude the wrongfulness of its act vis-à-vis the US in theory, but those countermeasures would be ‘nullified’ by the fact that they would not have similar effect on the claims of US nationals under Chapter XI. The Tribunal noted that “customary international law itself prohibits certain countermeasures”, and that “[t]here 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”.

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The Tribunal in ADM v Mexico took a different approach. It considered that NAFTA did not confer direct substantive rights on investors, but only provided investors with direct procedural rights to trigger arbitration. Thus the tribunal considered that a countermeasure could, in principle, preclude the wrongfulness of an act which impaired the substantive obligations of treatment under NAFTA, although it could not impair an investor’s procedural right to commence arbitration. However, the tribunal rejected Mexico’s plea of countermeasures on other grounds. 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.

It seems that there is some force in the conclusion of the Cargill and CPI tribunals, to the effect that a countermeasure cannot preclude the wrongfulness of the host State’s conduct vis-a-vis the investor. There remains a live debate as to the extent to which investment treaties confer direct rights on investors and the implications of that question in practice.

Another conclusion that can be drawn is that even if countermeasures may operate in theory as a defence to a claim under an investment treaty, there may be other issues, such as proportionality and other requirements to establish a valid defence. If it were to operate effectively, one could envisage a situation in which an investment tribunal had to decide whether the first measure – i.e. the act of the home State (in the Mexican example, the US) was itself a wrongful act justifying the countermeasure. But the home State will not be a party to the investment arbitration, so there are difficulties which are likely to arise there. The central controversy in the investment cases as to whether investors have direct rights under investment treaties does not appear to be so controversial in respect of human rights. It is generally accepted that human rights are individual rights, and therefore it appears even clearer that countermeasures cannot preclude the wrongfulness of a State’s breach of human rights.

Finally, in this context it is worth noting that these developments may have a significant impact on the utility of countermeasures in practice. Provided that there is a relevant investment treaty in place, any attempt by a victim State to apply a countermeasure against a wrongdoing State might result in the victim State having to compensate nationals of the wrongdoing State for the impact of the countermeasure. There is therefore an open question as to the practical effectiveness of countermeasures.

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