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What is the Role of Countermeasures in ISDS in the Context of the War in Ukraine?

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Much has been written on countermeasures enacted by States against Russia (e.g., here, here, here), but to the extent that States' measures in response to Russia's breaches of international law have violated the protections owed to *Russian private investors*, can States still claim that these measures are lawful countermeasures? And, if and when these Russian investors claim their investment protections have been violated before an arbitral tribunal, can the sanctioning States raise that claim before the tribunal successfully? Moreover, can Russia resort to countermeasures against States that have supposedly violated investment protections owed to Russian investors and vice versa? Conversely, can other States resort to countermeasures to defend rights of investors that are the subject of arbitral proceedings?

We have recently considered the relevance of countermeasures in the contemporary framework of investor-State dispute settlement (ISDS) in a journal article. We concluded that States are precluded – for the most part – from resorting to countermeasures to enforce protections owed to investors that are pursuing ISDS under ICSID, and possibly under other investment regimes. We also concluded that it may be possible for States to argue that violations of foreign investors' rights are – in fact – lawful countermeasures against their home state. Our article, which appeared in a Special Issue of the ICSID Review for the 20th Anniversary of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of the International Law Commission (ILC), was written before the conflict in Ukraine broke out. The conflict, now in its second year, provides an opportunity to test our conclusions, something we also touched upon on Jus Cogens – The International Law Podcast.

Two situations are of particular relevance. The first looks at using countermeasures as a '**sword**' by the home State to enforce the protections owed to investors in the host State. In the other scenario, the host State is '**shielding**' its violation of investors' rights by claiming that its acts are, in fact, lawful countermeasures in response to a prior violation of international law by the home State of the investor.

Countermeasures as a 'sword'

Can a home State wield its 'sword' – i.e., resort to countermeasures – in order to uphold

investment standards owed to its nationals by a host State? For example, can it freeze the assets of the host State or suspended its trade rights, in response? Or does contemporary international law preclude such self-help measures?

When using countermeasures as a 'sword', it is important to bear in mind that the application of the ARSIWA in general, including countermeasures, is residual. The particular legal regime, the *lex specialis*, determines "where and to the extent" the ARSIWA apply (art. 55).

There are three possible legal scenarios for the applicability of countermeasures to protect investors' rights. The *first* is in proceedings under ICSID. Russia is a signatory but not a party to the ICSID Convention, and only a few of its 66 bilateral investment treaties (BITs) in force – such as with Japan – contain clauses consenting to arbitration under the ICSID Convention or Additional Facility Rules. The ICSID Convention Article 27 curtails the home State's capacity to assert diplomatic protection. Invoking the responsibility of another State for violations of investor rights, in turn, is dependent on the capacity to assert diplomatic protection over those violations (ILC Commentaries to ARSIWA, article 52, para. 8, fn. 791). Thus, absent that ability, the possibility of enforcing those rights through countermeasures cannot subsist. The bar on resort to countermeasures is not absolute: until investors and host States have consented to arbitration (i.e., when a specific arbitration is initiated), countermeasures remain, in principle, available. Additionally, the right to exercise diplomatic protection – and therefore countermeasures – on behalf of investors can 'revive' when the host State has failed to abide by and comply with an award. But while an investor pursues ICSID proceedings, its home State is precluded from taking countermeasures in response to rights that are at issue in the ISDS proceedings.

The *second* scenario concerns non-ICSID proceedings. Most of Russia's BITs – such as with France, Germany and the UK – are of this nature. Even absent the rule limiting resort to countermeasures in Article 27 of the ICSID Convention, a strong argument can be made that a similar rule should apply in non-ICSID proceedings: like with ICSID, other arbitral frameworks grant access to ISDS resulting in binding decisions. They are similar in their reasonable effectiveness, including the ability to enforce them without the intervention of the investor's home State. This was the approach taken in the Italy v Cuba case (para. 65), in which the Tribunal (independently of Article 27 of the ICSID Convention) noted that once the investor had commenced arbitral proceedings, its home State was precluded from exercising diplomatic protection — and even more so, could not resort to countermeasures.

Both scenarios concern the availability of countermeasures to protect a specific investor initiating arbitration. Given the effective enforcement mechanisms of the investment regime, when considering the application of countermeasures to protect the rights of all of the home State's investors more broadly, the same rationales may imply that resort to countermeasures should generally be excluded from the regime, at least until the host State fails to comply with an award. Some support is found in the decision of a World Trade Organization (WTO) Panel in the Section 301 case, which concluded that having established the Dispute Settlement mechanism, States could no longer take unilateral measures against other States, to enforce their WTO rights (7.35–7.46).

Finally, the *third* scenario, such as between Russia and the US, is where no agreement establishing ISDS mechanisms are available to investors. In such circumstances, there is nothing to bar the home State from taking countermeasures to induce compliance with investor protections under customary international law or under treaties not containing effective dispute resolution mechanisms open to investors.

Countermeasures as a 'shield'

When it comes to the availability of resort to countermeasures as a 'shield', considerations of effectiveness of ISDS mechanisms to the exclusion of countermeasures are irrelevant, as the countermeasure enacted is not intended to safeguard investment protections. However, since countermeasures can only be enacted against the State responsible for the breach, are countermeasures relevant in the relationship between the host State and third parties, i.e., the home State's investors?

The question has come up in three NAFTA arbitrations that concerned the effects of a Mexican tax on soft drinks with high-fructose corn syrup. US producers argued that the tax hurt their investment in Mexican companies. Mexico argued that the tax was a lawful countermeasure against the US for illegally blocking Mexican sugar producers from US markets. In other words, Mexico invoked countermeasures as a shield, with negative effect on American investors.

The Tribunals' response focused on whether the treaty rights were solely State rights, or if NAFTA created independent rights for the investors. In Corn Products and Cargill, the Tribunals found that investors enjoy rights separate of those of their home State. Therefore, Mexican countermeasures against the US cannot excuse the violation of the third-party rights of private investors. In ADM, in contrast, the Tribunal found that investors have certain procedural rights, such as initiating arbitration, but the substantive protections of NAFTA are exclusively State rights. Therefore, Mexico can resort to countermeasures at the expense of the investors, though, the Tribunal found that, in this case, the conditions for a lawful countermeasure were not met.

In our article, we suggested that instead of focusing on to *whom* the rights belonged, it may be prudent to focus on the *scope of the rights or protections* afforded to the investors, within the triangular relationship between the two States establishing the rights in a treaty and investors. Whether investors enjoy separate rights or not, as third-party beneficiaries of the treaty between the States creating these rights, the content of the rights is confined to the scope and limits of the rights of the States granting them.

Unless explicitly excluded in the treaty, State parties retain the right to resort to any measures under customary international law, including countermeasures. In the same vein, their rights are also susceptible to possible countermeasures from the other treaty party. This nature of the rights does not change even if the rights also benefit third parties, i.e., the investors. If the latter approach or that of ADM are correct, and countermeasures are, in principle, a tool available to States in ISDS, then States can argue that the wrongfulness of violations of protections owed to Russian investors are precluded as lawful countermeasures.

Such an approach, however, presents practical difficulties for arbitral tribunals. As the application of lawful countermeasures is dependent on such measures being in response to a prior breach of international law by the home State, which is not a party to the proceedings, determining that such a breach occurred is therefore necessary and raises issues of indispensable third parties and subject matter jurisdiction. The ADM Tribunal opined that since it did not have jurisdiction to assess the legality of the original alleged breach by the US, had Mexico met all of the other conditions for lawful countermeasures, a stay in the proceedings may have been called for (para. 133). Conversely, a tribunal may consider that as it cannot pronounce on the underlying breach, it must

issue an award without prejudice to the application of countermeasures. Another scenario, though questionable, would be a situation in which a tribunal may decide that it can assess the legality of the underlying breach as an incidental matter.

Finally a tribunal may take the view that the illegality of the underlying act is not really controversial, either because the investor has not asserted as much or, as a matter of fact. In the Ukraine context, for example, it could be that, even if raised by the host State, certain Russian investors will choose not to challenge the assertion that Russia's use of force is illegal (or perhaps Russia will urge them not to tempt the tribunal with adjudicating that assertion). Or, a tribunal may assert that Russia's use of force is clearly illegal, basing itself on such statements adopted by a wide majority in the UN General Assembly for example (ES?11/1; ES?11/4). While this latter approach can be questioned, it could be said to follow the approach adopted by the Special Chamber of ITLOS in Mauritius v Maldives, which concluded, basing itself on an ICJ advisory opinion, that the sovereignty of the Chagos was not in dispute.

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As these final considerations suggest, the role of countermeasures may depend not the least on a tribunal's (or court's) understanding of its mandate. But this assumes that, in principle, outside situations such as that envisaged in Article 27 of the ICSID Convention, countermeasures retain some role in the world of ISDS. This premise (developed in the above-mentioned article), we submit, is potentially significant for debates about countermeasures and ISDS in relation to the on-going aggression against Ukraine.

This entry was posted on Thursday, May 11th, 2023 at 8:00 am and is filed under Armed Conflict, Russia, State Responsibility, Ukraine
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