Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law

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I. INTRODUCTION

The Study Group of the ILC has noted that 'the reality and importance of fragmentation, both in its legislative and institutional form, cannot be doubted'.[1] It is less obvious that the quantitative increase in the fragmented rules and regimes and the proliferation of international adjudicators[2] always raises qualitatively new challenges. Substantive and procedural innovations on the spectrum between fragmentation and integration were well known in classical international law. In substantive terms, starting from the three bilateral treaties that created the Westphalian System,[3] 'international law has always been diverse, has always had the capacity to fragment'.[4] Indeed, in its very first contentious case the Permanent Court of International Justice (PCIJ) needed to grapple with the interpretative implications[5] of conflicting obligations[6] against

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[1] ILC, 'Report of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law' UN Doc A/CN.4/L.682, para 9.

[2] Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford, Oxford University Press, 2003) 3-10.

[3] J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325, 349-352.

[4] J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 817.

[5] *Case of the S.S. Wimbledon* PCIJ Rep Series A No 1 16, 25-30.

[6] Ibid Dissenting Opinion of Judge Schücking 43.

the background of 'complexity of interstate relations'.[7] A few years later, the same Court was nearly unanimous in accepting the argument of systemic integration[8] that '*[a]ucune disposition du droit écrit n'est placée dans l'espace vide. … C'est également le droit général international … qui seul peut fournir les points de vue nécessaires'*.[9] In procedural terms, it is questionable whether any recent adjudicator has faced challenges similar to 1903-1905 Venezuelan arbitrations: arbitrating *pari materia* disputes against the same respondent in 11 parallel commissions[10] against the background of a controversial use of force,[11] expressly disagreeing about the most sensitive legal issue of the era,[12] and using different imaginative arguments to harmonise the case law.[13] Against this background, some caution is necessary before assuming that challenges of fragmentation and proliferation are conceptually new; often they may be traced to established classical authorities.[14] Still, one possibly new wrinkle of the debate could be provided by considering the impact of *lex specialis* secondary rules of State responsibility on primary multi-sourced equivalent norms (MSEN). The contours of this legal relationship will be examined on the basis of a case study of countermeasures in WTO and investment protection law.

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[7] Ibid Dissenting Opinion of Judges Anzilotti and Huber 35 para 3.

[8] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series A No 7 21.

[9] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series C No 11 167 (German pleadings by Kaufmann).

[10] Venezuela-US, Belgium, Great Britain (1903-1905) 9 RIAA 111-533; Venezuela-France, Germany, Italy, Mexico, the Netherlands, Spain, Sweden, Norway (1903-1905) 10 RIAA 1-770.

[11] *The Venezuelan Preferential Case (Germany, Great Britain, Italy, Venezuela et al)* (1904) 9 RIAA 99.

[12] The attribution of State responsibility for the conduct of revolutionaries was perhaps the chief normative concern underlying the Calvo Doctrine, C Calvo, 'La non-responsabilité des États a raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles' (1869) 1 *Revue de droit international* 417; C Calvo, *Le Droit International Théorique et Pratique* 6é edn (Volume III, Paris, A. Rousseau, 1888) 137. Some Commissions attributed the conduct of revolutionaries to the State, *Kummerrow and others (Germany v Venezuela)* (1903) 10 RIAA 369, 390-341; cases referred to in *Acquatella, Bianchi et al. (France v Venezuela)* (1903-1905) 10 RIAA 5, 6; while other Commissions rejected the attribution, *Aroa Mines (Limited) Claim – Supplementary Claim (Great Britain v Venezuela)* (1903) 9 RIAA 402, 438-441; *Sambiaggio Case (Italy v Venezuela)* (1902) 10 *RIAA* 499, 516-517; *J.N. Henriquez Case (Netherlands v Venezuela)* (1903) 10 RIAA 713, 715-717; *Padrón Case (Spain v Venezuela)* 10 RIAA 741.

[13] Commissions considered the relevance of most-favoured-nation (MFN) clauses, *Sambiaggio*, above (n 12), 522-23; third party *pari materia* treaties, *Kummerow*, above (n 12), 373, 376; *Henriquez*, above (n 12), 716-17; differences in applicable law, *Guastini Case (Italy v Venezuela)* (1902) 10 RIAA 561, 578; correctness of the earlier awards, *Aroa Mines*, above (n 12), 443.

[14] Shany, above (n 2), 230-34, 239-42, 247-48; Crawford 'Continuity', above (n 4), 802, 816-17.

Classical international law accepted the permissibility of otherwise wrongful acts taken for the purpose of inducing a State to comply with its obligations under the law of State responsibility.[15] The proposition that wrongfulness of breaching primary rules may be precluded in this manner remains valid in the contemporary legal order,[16] even if the legal and policy implications and limits of the entitlement to breach international obligations are contested.[17] Countermeasures may also be applied to MSENs, rules binding the same subjects and providing similar content while having been created through different law-making processes.[18] If the theoretical model is supplemented by *lex specialis* secondary rules on countermeasures and separate adjudicators charged with interpreting each of the MSENs, untangling the normative 'spaghetti bowl' may become quite challenging.[19] Equivalent primary rules may require similar or identical conduct, differential secondary rules may preclude wrongfulness for the breach of some but not other equivalent primary rules, and adjudicators approaching the dispute from different jurisdictional perspectives may reach different conclusions about the prevailing rules and regimes.

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[15] Ф Мартенс, *Современное международное право цивилизованных народов* (Том II, Санктпетербург, Типография А. Бенке, 1905) (F Martens, *Contemporary International Law of Civilised Nations* (Volume II, St. Petersburg, Typography A. Benke, 1905)) 506-509; GS Baker (ed), *Halleck's International Law* 4th edn (Volume 1, London, Kegan Paul, Trench, Trubner & Co. Ltd., 1908) 505-07; AP Higgins (ed), *Hall's Treatise on International Law* 8th edn (Oxford, Clarendon Press, 1924) 433-36; *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)* (1928) 2 RIAA 1011, 1025-1028; A Verdross, 'Règles générales du droit international de la paix' (1929) 30 *Recueil des Cours de l'Académie de Droit International* 271, 491-93; 'Régime des représailles en temps de paix' in *Résolutions de l'Institut de Droit International: 1873-1956* (Bâle, Editions juridiques et sociologiques S.A., 1957) 167.

[16] *Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) 18 RIAA 417, paras 80-98; *Gabčíkovo-Nagymaros Project (Hungary / Slovakia)* [1997] ICJ Rep 7, paras 83-87; ILC, '2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' in *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No.10* UN Doc A/56/10 20, arts 22, 49-54.

[17] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal of International Law* 874, 882-85; ME O'Connell, 'Controlling Countermeasures' in M Ragazzi (ed), *International Responsibility Today: Essays in Honour of Oscar Schachter* (Leiden, Brill, 2005); T Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 *American Journal of International Law* 715.

[18] See Introduction ##-----.

[19] J Pauwelyn, 'Adding Sweeteners to Softwood Lumber: the WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9 *Journal of International Economic Law* 197.

The considerable overlap of the substantive obligations[20] and procedural mechanisms in multilateral trade law and bilateral investment protection law provides an opportunity to study this dynamic as it plays out in practice.[21] Throughout the second half of the last century, law-making in international trade and investment law proceeded in markedly different ways, even though starting the normative journey from the same form of treaty bilateralism.[22] The law of free trade decisively moved towards treaty multilateralism,[23] while investment law first experimented half-heartedly with the creation of multilateral treaty rules and customary law protecting foreign investment, and finally returned to treaty bilateralism.[24] At the same time, while being adopted in different law-making contexts and addressing different issues, due to the real-life overlap of trade and investment activities, trade and investment rules may also bear on the same or similar situations.[25]

This chapter does not tackle the theoretical concept of MSEN. It rather assumes that when a conduct attributable to the State under international law constitutes a breach of international obligations simultaneously under an investment treaty and WTO obligations, one is faced with an MSEN situation.[26] On the basis of a number of case studies, it will be considered how primary rules that 'point' in the same direction[27] are affected by the secondary rules of State

[20] N DiMascio and J Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart of Two Sides of the Same Coin?' (2008) 102 *American Journal of International Law* 48, 49-50; F Weiss, 'Trade and Investment' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008); R Neufeld, 'Trade and Investment' in D Bethlehem, D McRae, R Neufeld and I van Damme (eds), *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009).
[21] G Verhoosel, 'The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 *Journal of International Economic Law* 493; Pauwelyn 'Sweeteners', above (n 19); J Pauwelyn, 'Trade and Investment Disputes: Complement or Conflict?' in F Ortino and S Ripinsky (eds), *WTO Law and Process* (London, BIICL, 2007) 313-19; G Verhoosel, 'Trade and Investment Disputes: Complement or Conflict?' in ibid 304-08.
[22] RR Wilson, *U.S. Commercial Treaties and International Law* (New Orleans, Hauser Press, 1960) 6-7.
[23] DiMascio and Pauwelyn, above (n 20), 51-53.
[24] M Paparinskis, '*Barcelona Traction*: A Friend of Investment Protection Law' (2008) 8 *Baltic Yearbook of International Law* 105, 105-33.
[25] Above (nn 20-21).
[26] 2001 ILC Articles, above (n 16), art 2.
[27] Report of the Study Group, above (n 1), para 15.

responsibility that *prima facie* reflect precisely the systemic and harmonising perspective of the international legal order.[28]

The argument is made in three steps. First of all, the role of countermeasures in WTO and investment protection is sketched. Secondly, the implications of a WTO-authorised countermeasure potentially breaching the injured State's investment obligations are considered generally. Specifically, the WTO-authorised suspension of TRIPS concessions[29] that may breach investment obligations regarding IP rights is used as a case study.[30] Thirdly, the converse scenario of countermeasures applied against investment protection obligations that might also breach WTO rules is addressed, using the US-Mexico soft drinks disputes in NAFTA[31] and the WTO as a case study.[32] The combination of MSEN primary rules and different perceptions of invocation and implementation of responsibility for their breach through different adjudicators make clear and certain solutions unlikely. Despite the sophistication of the dispute settlement regimes created by trade and investment treaties, their focus on systemic strengthening may come at the cost of complicating the relationship and the resolution of conflicts with extra-systemic primary and secondary rules. Still, it is suggested that the existing practice permits the formulation of a framework within which States and other participants could operate.

II. COUNTERMEASURES IN WTO AND INVESTMENT PROTECTION LAW

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[28] B Simma and D Pulkowski, 'Of Planets and Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

[29] WTO, *EC-Regime for the Importation, Sale and Distribution of Bananas*, Article 22.6 Arbitration Decision (24 March 2000) WT/DS27/ARB/ECU, paras 65-165; WTO, *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Article 22.6 Arbitration Decision (21 December 2007) WT/DS285/ARB, paras 4.1-4.119, 5.1-5.13; WTO, *US-Subsidies on Upland Cotton*, Article 22.6 and Article 4.11 / Article 7.10 of SCM Agreement Arbitration Decision (31 August 2009) WT/DS267/ARB/1, WT/DS267/ARB/2, paras 5.224, 5.230-5.233.

[30] See the special issue on IP rights in investment law, 'The Protection of Intellectual Property Rights through International Investment Agreements' (2009) 6 (2) *Transnational Dispute Management* (online subscription e-journal).

[31] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v Mexico,* ICSID AF Case no ARB/(AF)/04/5, Award, November 21, 2007, paras 110-84 (*ADM*); Concurring Opinion of Arbitrator Rovine; *Corn Products International, Inc. v Mexico*, ICSID AF Case no ARB/(AF)/04/1, Decision on Responsibility, January 15, 2008, paras 144-91; Separate Opinion of Arbitrator Lowenfeld.

[32] WTO, *Mexico-Tax Measures on Soft Drinks and Other Beverages,* Panel Report (7 October 2005) WT/DS308/R, paras 8.168-8.204; WTO, *Mexico-Tax Measures on Soft Drinks and Other Beverages,* Appellate Body Report (24 March 2006) WT/DS308/AB/R, paras 66-80.

The most recent and authoritative statement on the law of countermeasures is given in the 2001 ILC Articles on State Responsibility for Internationally Wrongful Acts (2001 ILC Articles).[33] The 2001 ILC Articles address countermeasures in two places, in Article 22 under the rubric of circumstances precluding wrongfulness, and in Articles 49-54 under the rubric of implementation of the international responsibility of the State. This approach accurately captures the dual context *vis-à-vis* a specific primary rule that countermeasures may occupy: both to preclude the wrongfulness of the breach of that primary rule, and as a measure undertaken to induce the State to comply with its obligations under the law of State responsibility. Countermeasures are not automatic in their application, but are rather voluntarily adopted as a reaction to wrongful acts. In general international law, countermeasures are adopted unilaterally and not through any institutionalised setting.[34] Countermeasures have to conform to certain procedural and substantive rules: adoption in response to an earlier wrongful act by the particular State;[35] inapplicability to obligations not affected by countermeasures;[36] an initial call upon the wrongdoing State to comply with its obligations and an offer to negotiate;[37] and proportionality of the measure.[38]

The ILC's project 'to superimpose procedural values of rectitude and transparency on state's assessments of countermeasures options' operates in investment protection law similarly as in other areas of law.[39] Even though the role of diplomatic protection in foreign investment law has 'somewhat faded' in

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[33] 2001 ILC Articles, above (n 16); cf. above (nn 15-16). The ICJ has approvingly referred to the 1996 first reading version of the 2001 ILC Articles but has not had the chance to pronounce on the second reading, *Gabčíkovo-Nagymaros Project,* above (n 16), para 83. The rules on countermeasures did not substantially change between 1996 and 2001, except regarding the use of binding dispute settlement procedures by the injured State before resorting to countermeasures. The first but not the second reading required it, cf. 1996 Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading art 48(2) untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf accessed 12 January 2010; 2001 ILC Articles, above (n 16), art 52.

[34] JL Brierly, 'Sanctions' (1932) 17 *Transactions of the Grotius Society* 67, 68.

[35] 2001 ILC Articles, above (n 16), art 49.

[36] Ibid art 50.

[37] Ibid art 52.

[38] Ibid art 51.

[39] DJ Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 819.

factual terms,[40] the investor's home State is still entitled to take countermeasures to induce the host State to comply with its obligations under the law of responsibility for the breach of investment rules. Apart from cases of express suspension of diplomatic protection through treaty law,[41] the State's right to protect its investors *inter alia* through the taking of countermeasures is neither affected by the conduct of investor-State arbitrations and the invocation by the investor of State responsibility nor excluded by the *lex specialis* of investment protection law.[42] Consequently, home States would be in principle entitled to protect their investors, reflecting the individualistic interplay between customary law and particular treaty law requirements of negotiations and dispute settlement.

It is less clear whether and in what circumstances the wrongfulness of countermeasures taken by a host State in breach of investment protection obligations would be precluded. Limitations for applying countermeasures to particular rules may be expressed in a number of ways, relying respectively on *lex specialis* rules, obligations not affected by countermeasures, the structure of the obligations or the limits of countermeasures. The silence of investment protection treaties, just as the silence of treaties more generally, may be read either as permitting or excluding the application of countermeasures.[43] Most authorities support the view that circumstances precluding wrongfulness are not implicitly excluded.[44] The cases dealing with necessity and non-precluded-

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[40] *Case Concerning Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep para 88 www.icj-cij.org/docket/files/103/13856.pdf accessed 12 January 2010.

[41] Such as during ICSID arbitrations, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1066) 575 UNTS 159 art 27(1); M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *British Yearbook of International Law* 264, 309-17; C Schreuer with others, *The ICSID Convention: A Commentary* 2nd edn (Cambridge, Cambridge University Press, 2009) 414-32; during all investor-State arbitrations, 1994 Chile Model BIT art 8(6); 1998 Mongolia Model BIT art 8(6); Bolivia Model BIT, *International Investment Instruments: A Compendium* (Volume X, New York, United Nations, 2002) 275 art 10(3); 2003 Kenya Model BIT art 10(d); 2003 Italy Model BIT art X(5).

[42] Paparinskis 'Countermeasures' above (n 41), 281-96.

[43] Simma and Pulkowski, above (n 28), 505.

[44] Regarding countermeasures, expressly in *ADM*, above (n 31), paras 116-123; implicitly in *Corn Products*, above (n 31), paras 161-179; cf. Paparinskis 'Countermeasures', above (n 41), 345-349. Regarding necessity, *CMS Gas Transmission Company v Argentina,* ICSID Case no ARB/01/08, Decision of the *ad hoc* Committee on the Application for Annulment, September 25, 2007, para 134; *Continental Casualty v Argentina,* ICSID Case no ARB/03/9, Award, September 5, 2008, paras 164-168; *National Grid P.L.C. v Argentina,* UNCITRAL Case, Award, November 3, 2008, para 255; C Binder, 'Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and

measure (NPM) clauses may have muddled the intellectual waters a little bit, forming a spectrum between making a clear distinction between primary and secondary rules[45] to reading the treaty as a *lex specialis* secondary rule[46] or even a reference to the general secondary rule.[47] Still, none of the Tribunals have thought that circumstances precluding wrongfulness were irrelevant: the controversy was about whether necessity had been given too much effect. The rules reflected in Article 50 of the 2001 ILC Articles on obligations not affected by countermeasures do not directly apply to investment obligations.[48] Countermeasures cannot be excluded by reasons of the substantive nature of investment law. The impermissibility of countermeasures regarding multilateral obligations is also inapplicable to investment law[49] that even when expressed in multilateral form remains of a bilateralisable nature.[50]

Even though the host State may in principle apply countermeasures to investment obligations, their effect and limits depend on the nature of the investors' rights. Countermeasures may not be adopted otherwise than in response to a prior breach of international law by the entity to which the obligation is owed.[51] Investors are structurally incapable of committing such a

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the Law of State Responsibility with a Special Focus on the Argentine Crisis' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 628-630. The *BG* Tribunal left the issue open, *BG Plc. v Argentina,* UNCITRAL arbitration, Final Award, December 24, 2007, paras 407-412.

[45] *CMS* annulment, above (n 44); *Continental Casualty*, above (n 44).

[46] *LG & E v Argentina*, ICSID Case no ARB/02/1, Decision on Liability, October 3, 2006, paras 245-261; *Patrick Mitchell v DRC,* ICSID Case no ARB/99/7, Decision of the *ad hoc* Committee on the Application for Annulment, November 1, 2006, para 55.

[47] *CMS Gas Transmission Company v Argentina,* ICSID Case no ARB/01/08, Final Award, May 12, 2005, paras 315-382; *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, ICSID Case no ARB/01/3, Award, May 22, 2007, para 334; *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Award, September 28, 2007, paras 376, 378.

[48] *Corn Products*, above (n 31), para 149; Paparinskis 'Countermeasures', above (n 41), 317-45.

[49] PM Dupuy, 'A General Stocktaking of the Connections between the Multilateral Obligations and the Codification of the Law of Responsibility' (2003) 13 *European Journal of International Law* 1053, fn 64.

[50] O Schachter, 'Entangled Treaty and Custom' in Y Dinstein and M Tabory (eds)*, International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne* (Dordrecht, M Nijhoff, 1998) 735; C Carmody, 'WTO Obligations as Collective' (2006) 17 *European Journal of International Law* 419, 443; T Waelde, 'International Investment Law: An Overview of Key Concepts and Methodologies' (2007) 4 *Transnational Dispute Management* 48-49 fn 104.

[51] 2001 ILC Articles, above (n 16), art 49(1); cf. ILC, 'Draft Articles on Responsibility of International Organizations' in *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No.10* UN Doc A/64/10 19, art 50(1). Third-party countermeasures raise different issues, below (nn 148-149).

breach of international law[52]. *Ergo,* if investment obligations are owed directly to investors, countermeasures can never preclude wrongfulness for their breach

[52] To say that investors cannot breach international obligations owed to the State in a way that justifies countermeasures is not to dismiss or minimise the different important ways in which an investor's liability may be intertwined with State responsibility. The investor's liability under domestic law may lead the Tribunal to dismiss its claim at the jurisdictional stage because of the lack of the State's consent, *Inceysa Vallisoletana S.L. v El Salvador,* ICSID Case no ARB/03/26, Award, August 2, 2006, paras 208-257, or because the investments are not 'in accordance with' domestic law, *Fraport AG Frankfurt Airport Services Worldwide v Philippines,* ICSID Case no ARB/03/25, Award, August 16, 2007, paras 334-404, or require the rejection of the claim on the merits, *Plama Consortium Limited v Bulgaria,* ICSID Case no ARB/03/24, Award, August 27, 2008, paras 130-146. In these cases, the investor's liability is used to interpret the scope or content of the primary rule and not to preclude the wrongfulness of its breach. Conversely, the US Alien Torts Statute seems to determine the existence of a domestic cause of action by reference to the content of international law, *Sosa v Alvarez-Machain* (03-339) 542 US 692, text at fn 20 (2004). Whatever its proper legal rationale, ATS is about liability to individuals and not to States. Even when investors enter into direct legal relations with States, investor-State contracts are not treaties, *Anglo-Iranian Oil Co. Case (UK v Iran)* (Jurisdiction) [1952] ICJ Rep 93, 112, and do not create international obligations *per se*. The State may incur international responsibility by breaching such a contract through an arbitrary use of its public powers*, Waste Management v US (II),* ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, April 30, 2004, paras 146-55, or if a treaty-based *pacta sunt servanda* clause transforms responsibility under applicable law to responsibility under international law, *Noble Ventures v Romania,* ICSID Arbitration no ARB/01/11, Award, October 12, 2005, paras 53-55. However, the converse is not the case: a breach of a contract by the investor does not breach international law and does not trigger international law remedies but only entitles the State to respond in accordance with the law applicable to contract.

Secondly, the operation of State-controlled investors, particularly Sovereign Wealth Funds, may raise different questions under different treaty rules. Under ICSID Convention, above (n 41), art 25, it has been suggested that a State-controlled investor could make a claim 'unless it is acting as an agent for the government or is discharging an essentially governmental function', A Broches, 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 *Recueil des Cours de l'Académie de Droit International* 331, 355; *Ceskoslovenska Obchodni Banka, a.s. v Slovak Republic,* ICSID Case no ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, para 17, Schreuer, above (n 41), 161-162. However, this exclusion of certain investors from the protective scope relates only to the definition of 'investor' in the particular rule and does not necessarily apply more generally. A minority of treaties accept that States may also be investors (for example 2004 US Model BIT art 1). Even though such an investor could breach obligations owed to the host State, it would not constitute an exception to the original proposition because of the simultaneous investor/State status of the particular entity. More broadly, in the absence of specific treaty rules, the fact that an investor exercises functions of or is directed or controlled by the home State may be relevant for the purpose of attribution of responsibility to that State, 2001 ILC Articles, above (n 16), arts 5 and 8, but it does not mean that any obligations are owed by the investor itself. In other words, even if the State-owned or controlled investor engages in conduct that breaches the obligation, it is only the home State that is bound by this obligation, incurs international responsibility and against which countermeasures may be applied.

Thirdly, it not inconceivable that such concepts as *jus cogens*, criminal responsibility and human rights obligations of non-State actors could *de lege ferenda* complicate this picture. One Tribunal has remarked that 'nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs,' *Phoenix Action, Ltd. v Czech Republic*, ICSID Case no ARB/06/5, Award, April 15, 2009, para 78. Three lines of inquiry will be indicated without pursuing them further here. Even though *prima facie* this proposition relates only to a purposive interpretation of particular treaty rules, it may be important that the first three examples also occur in the ILC analysis of the

vis-à-vis investors.[53] If investment obligations are owed only to the home State, wrongfulness may be precluded provided that other substantive and procedural requirements are complied with.[54] If the latter approach is adopted, no compensation has to be paid by the host State. Even though Article 27(b) of the 2001 ILC Articles provides a 'without prejudice' clause regarding the effect of circumstances precluding wrongfulness on compensation, State practice, case law and ILC debates confirm that countermeasures (and self-defence) do not require compensation.[55]

Douglas has authoritatively drawn the distinction between the perceptions of investors' rights as direct (with investment obligations owed to the investor

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impact of peremptory norms on State responsibility, 2001 ILC Articles, above (n 16), art 26 Commentaries 5-6, art 40 Commentaries 4-5. Alternatively, the passage may be read as restricting investment protection when the conduct gives rise to international criminal responsibility. The idea of holding corporations directly responsible under international law is controversial, and criminal responsibility more generally is usually not conceptualised as an obligation that an individual owes to particular States (and to the breach of which these States could respond by countermeasures). Still, the apparent lack of such practice may be explained in purely descriptive terms: individuals usually do not hold such direct international rights against States that could be subject to countermeasures, and obligations owed to individuals under human rights law cannot be suspended because of their multilateral nature. The passage may also be hinting at possible human rights obligations of corporations. The proposition that international law *de lege lata* imposes direct human rights obligations on non-State actors is controversial. There does not seem to be any host State pleading or other practice in favour of the view that investors owe such obligations both to individuals and States, and that host States could respond to the breach of these obligations by in turn breaching their investment obligations. It remains to be seen whether and how future State practice and possible creation of new rules along these lines could affect the situation *de lege ferenda.*

[53] *Corn Products*, above (n 31), paras 153-91; *ADM* concurring opinion Rovine, above (n 31).

[54] *ADM*, above (n 31), paras 110-80.

[55] The leading *Air Service Agreement* award accepted the countermeasures argument without any mention of compensation, above (n 16). The precursor of Article 27, Article 35 of 1996 ILC Articles, dealt with countermeasures and self-defence as with prejudice to compensation, above (n 33). Crawford agreed that '[i]t is clear that Article 35 should not apply to self-defence or countermeasures, since those circumstances depend upon and relate to prior wrongful conduct of the "target" State, and there is no basis to compensate it for the consequences of its own wrongful conduct', J Crawford, 'Second Report on State Responsibility' UN Doc A/CN.4/498/Add.2, para 342, generally paras 213, 229, 336-347. The ILC debate showed some uncertainty about both how the apparent acknowledgment of liability for non-wrongful acts could fit within the State responsibility project premised on wrongfulness, *Yearbook of the ILC 1999,* Volume I UN Doc A/CN.4/SER.A/1999 174 para 44 (Lukashuk), and whether the compensable circumstances should be those that operated as excuses and not justifications or those where the target State had not committed wrongful acts, ibid para 48 (Simma). In any event, nobody argued for compensation for countermeasures, instead emphasising cases of *force majeure*, ibid para 50 (Hafner), necessity, ibid para 45 (Crawford), and innocent third party beneficiaries, ibid para 47 (Economides), ibid 176 para 68 (Crawford), or the particular circumstances of individual cases, ibid 174 para 54 (Pellet). None of the States commenting on the issue suggested compensation for countermeasures to the wrongdoing State, ILC, 'Comments and Observations Received from Governments' UN Doc A/CN.4/488 79-80 (UK), 89 (Germany); ILC, 'Comments and Observations Received from Governments' UN Doc A/CN.4/515 34 (Japan, the Netherlands).

itself) and derivative (with obligations owed only to the home State). The same point may also be made in terminologically perhaps slightly more accurate terms by distinguishing between investors as beneficiaries and investors as agents. Douglas has argued for the former approach of direct (beneficiary) rights in light of the qualitative differences between investor-State arbitration and diplomatic protection.[56] Such a reading is certainly more natural[57] than the contrary one that would see an investment treaty as an agreement between the home State and the host State to authorise the investor to exercise diplomatic protection with considerably modified content.[58] Still, the ILC did not take a position on this matter,[59] and there is no theoretical obstacle for States to confirm their intent to deal with investors only as agents through clear treaty language or through subsequent practice[60] or agreement, or even treaty amendments. While it is questionable whether this approach is in the long-term interest of traditional home States,[61] it enjoys some limited support.[62]

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[56] Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 167-84; Z Douglas, *The International Law of Investment Claims* (Cambridge, Cambridge University Press, 2009) 1-38.

[57] *Corn Products,* above (n 31), para 169.

[58] Agency of exercise of diplomatic protection was recognised in the classical law, E Borchard, *Diplomatic Protection of Citizens Abroad* (New York, The Banks Law Publishing Co., 1915) 471-475; AP Sereni, 'La represéntation en droit international' (1948) 73 *Recueil des Cours de l'Académie de Droit International* 69, 112-17.

[59] Crawford 'Retrospect', above (n 17), 888; *Wintershall Aktiengesellschaft v Argentina,* ICSID Case no ARB/04/14, Award, December 8, 2008, para 112.

[60] The *ADM* Tribunal found such subsequent pleading practice regarding NAFTA, above (n 31), paras 176.

[61] The argument of derivative rights had a powerful short-term attraction for traditional home States that found themselves in the position of host States, enabling them to rely on restrictive rules from customary law of diplomatic protection, M Mendelson, 'Runaway Train: The "Continuous Nationality" Rule from the *Panavezys-Saldutiskis Railway* case to *Loewen*' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London, Cameron May, 2005) 124-43. One negative long-term implication of general acceptance of the argument is that it legitimises host State's countermeasures with precluded wrongfulness and no compensation for the investor because the only obligation is owed to the home State. Another and more challenging question relates to the normative and law-making influence of the investor's practice. If the investor invokes responsibility on behalf of the home State, and if agents in general are able to change the legal relations of the principal 'as if [acts] had been personally performed by the latter', AP Sereni, 'Agency in International Law' (1940) 34 *American Journal of International Law* 638, 655, should not one - within these procedural limits - also count the investors' pleadings for the establishment of custom and subsequent practice as if they 'had been personally performed' by the home State?

[62] *Loewen v US,* ICSID Case no ARB(AF)/98/3, Final Award, June 26, 2003, para 233; *ADM*, above (n 31), paras 176-179; *Société Générale v Dominican Republic,* LCIA Case no UN 7927, Award on Preliminary Objections to Jurisdiction, September 19, 2008, paras 108-109.

The WTO's rules on suspension of concessions are significantly different from the general rules on countermeasures applicable in the investment law context. The WTO Dispute Settlement Understanding (DSU) embeds the taking of countermeasures within an institutional impartial decision-making context (approved in the Dispute Settlement Body (DSB) by the *de facto* automatic negative consensus).[63] It provides detailed rules for the determination of inconsistency of measures adopted to comply,[64] the nature and degree of the authorized countermeasures[65] and the manner, including by reference to an arbitrator, in which the subsequent suspension of concessions is determined.[66] The absence of traditional auto-determination has led to WTO-authorized suspension of concessions being characterised as centralised countermeasures.[67] The reliance by the Appellate Body on provisions on countermeasures from 2001 ILC Articles to confirm interpretation of WTO rules on suspension of concessions suggests that the latter are *lex specialis* of the former.[68] Further analysis will proceed on the assumption that the rules on suspension of concessions are *lex specialis* countermeasures.[69] Article 23 DSU expressly sets out rules for States

[63] In general Y Guohua, B Mercurio and L Yongjie, *WTO Dispute Settlement Understanding: a Detailed Interpretation* (The Hague, Kluwer Law International, 2005) 251-79; P Eeckhout, 'Remedies and Compliance' in D Bethlehem, D McRae, R Neufeld and I van Damme (eds), *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 440-42, 452-54.

[64] DSU art 21.5.

[65] Ibid arts 22.3-22.5.

[66] Ibid arts 22.2, 22.6-22.9.

[67] H Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale* (Paris, L.G.D.J., 2007) 454-61.

[68] WTO, *US-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, Report of the Appellate Body* (5 November 2001) WT/DS192/AB/R, para 120; WTO, *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, *Report of the Appellate Body* (8 March 2002) WT/DS202/AB/R, para 259; WTO, *US/Canada-Continued Suspension of Obligations in the EC-Hormones Dispute*, *Report of the Appellate Body* (14 November 2008) WT/DS320/AB/R, WT/DS321/AB/R, para 382; cf. 2001 ILC Articles, above (n 16), art 50 Commentary 10; S Shadikhodjaev, *Retaliation in the WTO Dispute Settlement System* (The Netherlands, Walter Kluwer Law and Business, 2009) 26-47.

[69] To treat the suspension of concessions as *lex specialis* countermeasures is not to dismiss the difficult questions whether its function and purpose is to induce compliance similarly to the *lex generalis*, J Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335, 337 fn 14; J Pauwelyn, 'The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations?' in CP Bown and J Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge, Cambridge University Press, 2010).

> seeking redress of a violation of the covered agreements. Article 23 restricts WTO Members' conduct in two respects. First, Article 23.1 establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes and requires adherence to the rules of the DSU. Secondly, Article 23.2 prohibits certain unilateral action by a WTO Member. Thus, a Member cannot unilaterally: (i) determine that a violation has occurred, benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded; (ii) determine the duration of the reasonable period of time for implementation; or (iii) decide to suspend concessions and determine the level thereof.[70]

Even though the application of countermeasures for the breach of primary WTO rules is elaborated in the detailed rules of the DSU, the converse situation of application of countermeasures for the breach of other (non-WTO) primary rules to WTO rules is not expressly dealt with, and therefore would be likely to give rise to greater interpretative uncertainty.

III. WTO COUNTERMEASURES IN INVESTMENT PROTECTION LAW

WTO arbitrators have sometimes authorised the application of countermeasures regarding IP obligations included in TRIPS when countermeasures against GATT and GATS obligations would not be practicable and effective.[71] IP rights are protected from the trade-law perspective in TRIPS,[72] and from the investment law perspective in investment protection treaties, providing for IP rights as investments that cannot be treated unfairly, discriminated or expropriated without compensation.[73] There seems to be some overlap in the substantive coverage of the obligations under TRIPS and the investment protection rules.[74] One decision authorising the suspension of TRIPS was taken in *US-Measures*

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[70] *US/Canada-Continued Suspension* AB, above (n 68), para 371. See below (nn 90-91) regarding the implications for the taking of countermeasures.
[71] DSU art 22.3.
[72] CM Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford, Oxford University Press, 2007); RC Dreyfuss, 'Intellectual Property Law and the World Trading System' in A Lowenfeld, *International Economic Law* 2nd edn (Oxford, Oxford University Press, 2008).
[73] CM Correa, 'Bilateral Investment Agreements: Agents of New International Standards for the Protection of Intellectual Property Rights?' (2004) 1 (4) *Transnational Dispute Management*.
[74] L Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' (2009) 6 (2) *Transnational Dispute Management*; J Mendenhall, 'Fair Treatment of Intellectual Property Rights under Bilateral Investment Treaties' ibid.

Affecting the Cross-Border Supply of Gambling and Betting Services dispute, and this case with slightly modified facts will be used as a case study.[75] It will be assumed that Antigua and Barbuda (Antigua) suspends TRIPS *vis-à-vis* US and authorise the production and sale of pirated music and software.[76] The US has no BIT with Antigua, but for the sake of analysis it will be assumed that a hypothetical US-Antigua BIT exists that includes IP rights among protected investments and requires States not to expropriate them without compensation and to treat them fairly and equitably and without discrimination.[77] In these circumstances, could a US investor with an investment affected by this conduct make a successful investor-State claim against Antigua?[78] The analysis is made in three steps, considering the situation in WTO law, the link between WTO law and investment protection law, and the situation in investment protection law.

First of all, the suspension of obligations that may be requested from the DSB and determined by the arbitrator under Article 22.6 of the DSU relates to obligations 'under the covered agreements'. An equivalent obligation formulated in a different and unrelated rule of international law is not one 'under the covered agreements', and therefore authorisation of the DSB does not apply to such obligations. The fact that other obligations require conduct similar to the WTO covered agreements that the State is authorised to breach does not affect this conclusion. The scope of authorisation is identified by reference to the regime within which the obligations are expressed; it does not automatically apply to *pari materia* obligations. Even if norms expressed in different rules of

[75] *US-Gambling*, above (n 29); cf. HG Ruse-Khan, 'A Pirate of the Caribbean – The Attractions of Suspending TRIPS Obligations' (2008) 11 *Journal of International Economic Law* 313.

[76] According to the information available at the WTO website, Antigua has not requested authorisation to suspend concessions from the DSB in accordance with Article 22.7 of the DSU, www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm accessed 12 January 2010.

[77] A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague, Walter Kluwer Law and Business, 2009) ch4, 6 and 7.

[78] There is no US-Antigua BIT therefore an actual US investor could not make an investor-State claim. However, Antigua has concluded BITs with Germany and the UK, so a German or a UK investor could argue that these measures breached the relevant treaties (for example as a shareholder of the US investor or as a co-shareholder of the Antigua investment vehicle of the US investor), cf. interpretation of the Germany-Argentina BIT as covering indirect shareholding, *Siemens A.G. v Argentina*, ICSID Case no ARB/02/8, Decision on Jurisdiction, August 3, 2004, paras 136-144. To gain access to investor-State arbitration, the US investor could invest in Antigua through a UK shell company since Article 1(d)(i) of the UK-Antigua BIT does not require any additional link with UK apart from incorporation, cf. approval of 'BIT-shopping', *Aguas del Tunari S.A. v Bolivia,* ICSID Case no ARB/02/03, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, para 330.

international law have similar or identical content, they may have different conditions of creation, application or termination and different institutions and mechanisms that ensure their implementation.[79] The permissibility of conduct under one rule therefore does not necessarily mean its permissibility under another one.

IP treaties incorporated by TRIPS and thus binding as WTO law[80] still continue to exist as separate treaties, and a similar question has been raised whether WTO-authorised suspension would not still breach the obligations under those treaties.[81] However, the TRIPS situation is importantly different: express incorporation of IP treaties in TRIPS and the express authorisation to suspend TRIPS in Article 22.3(g)(iii) DSU seem to suggest that WTO parties, even though they remain bound by those treaties, have agreed *inter se* on *lex specialis* countermeasures to the extent of incorporation. There is no such incorporation or reference by WTO law to investment obligations, and therefore the WTO-authorised breach of IP rights does not authorise breach of obligations expressed in different rules of international law.

The impact of the application of WTO rules on investment protection rules may also be addressed from the opposite perspective of investment protection law. The variety of possible approaches may be illustrated on the basis of model BITs and multilateral investment treaties. Most model BITs include IP rights among protected investments without any attempt of coordination with TRIPS and WTO DSU, both in models adopted before[82] and importantly after TRIPS came into force.[83] A few treaties make limited attempts of coordination, defining

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[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, para 178.

[80] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994 entered into force 1 January 1995) 1869 UNTS 299 arts 2(1), 9 (TRIPS); WTO, *US-Section 211 Omnibus Appropriation Act of 1998*, *Report of the Appellate Body* (1 February 2002) WT/DS176/AB/R, para 238.

[81] RL Okediji, 'WIPO-WTO Relations and the Future of Global Intellectual Property Norms' (2008) 39 *Netherlands Yearbook of International Law* 69, 103.

[82] 1991 UK Model BIT art 1(a)(iv); 1991 Germany Model BIT art 1(1)(d); 1994 China Model BIT art 1(1)(d); 1994 Chile Model BIT art 1(2)(d); 1995 Switzerland Model BIT art 1(2)(d).

[83] 1997 Netherlands Model BIT art 1(a)(iv); 1998 Mongolia Model BIT art 1(2)(d); 1998 Malaysia Model BIT art 1(a)(iv); 1998 Croatia Model BIT art 1(1)(d); 1998 South Africa Model BIT art 1; 1998 Germany Model BIT art 1(1)(d); 1999 France Model BIT art 1(1)(d); 2000 Denmark Model BIT art 1(1)(d); 2000 Peru Model BIT art 1(1)(d); 2000 Turkey Model BIT art 1(2)(d); 2001 Greece Model BIT art 1(1)(d); 2001 Finland Model BIT art 1(1)(d); 2002 Mauritius Model BIT art 1(1)(A)(iv); 2002 Burundi Model BIT art 1(4)(d); 2002 Benin Model BIT art 1(1)(d); 2002

the scope of some investment protection obligations by reference to the applicability of[84] or compliance with WIPO or TRIPS rules[85] or WTO law,[86] or do not apply some obligations to IP rights.[87] This treaty practice suggests that while States recognise the possibility of an MSEN situation between investment and WTO rules on IP rights, coordination is limited in number and in scope, in most cases suggesting the existence of a problem rather than fully resolving it.

The situation would be relatively uncontroversial if the only *lex specialis* aspect of WTO rules was the judicial determination of breach and the general rules were otherwise applicable. If a State is entitled to take countermeasures regarding a particular rule, then it would also be likely to be entitled to take countermeasures regarding MSEN rules.[88] Since there is no requirement for

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Sweden Model BIT art 1(1)(d); 2002 Thailand Model BIT art 1(1)(d); 2003 India Model BIT art 1(b)(iv); 2006 France Model BIT art 1(1)(d); 2008 Germany Model BIT art 1(1)(d).

[84] National treatment and MFN treatment obligations do not apply to WIPO procedures relating to acquisition and maintenance of IP rights, 1994 US Model BIT art II(2)(b); 1994 US Model BIT (1998 revised) art II(2)(b); North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 612 arts 1108(5), 1703(3). National treatment and MFN treatment do not apply to exceptions covered by TRIPS arts 3-5, 2009 ASEAN Comprehensive Investment Agreement art 9(5) www.aseansec.org/documents/FINAL-SIGNED-ACIA.pdf accessed 12 January 2010.

[85] Rules on expropriation do not apply to IP rights to the extent that the conduct complies with TRIPS, 2004 US Model BIT art 6(5); on performance requirements ibid art 8(3)(b)(i); 2007 Norway Model BIT (abandoned) art 8(1)(vi)(b).

[86] States may derogate from rules on national treatment and MFN treatment in a manner consistent with WTO Agreement, 2004 Canada Model BIT art 9(4).

[87] National treatment and MFN treatment do not apply to IP rights, Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 art 10(10).

[88] Different dispute settlement rules, structure of obligations and possibly considerations of proportionality may influence the applicability of countermeasures to MSEN rules. Countermeasures may not be taken or have to be suspended if the dispute is pending before a court or tribunal which has authority to make decision binding on the parties, 2001 ILC Articles, above (n 16), art 52(3)(b). If the responsible State starts such proceedings regarding one MSEN rule, the injured State would only be entitled to take countermeasures regarding the other one. Countermeasures would not preclude wrongfulness if the obligations are not bilateralisable but interdependent or integral, on the distinction see L-A Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *European Journal of International Law* 1127, 1127-145; J Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *European Journal of International Law* 907. For example, the wrongfulness of judicial mistreatment of property of aliens could be precluded regarding the bilateralisable customary obligations of treatment of aliens, R Phillimore, *Commentaries upon International Law* 3rd edn (Volume 3, London, Butterworths, 1885) 19, 31; Мартенс, above (n 15), 508; L Oppenheim, *International Law* (Volume 2, London, Longmans, Green, and Co., 1905) 38; *Halleck's International Law*, above (n 15), 505; P Fauchille, *Traité de droit international public* (Paris, Librairie Arthur Rouseau, 1926) 692; D Bowett, 'Economic Coercion and Reprisals by States' (1972) 13 *Virginia Journal of International Law* 1, 10. Wrongfulness of similar or even identical conduct could not be precluded regarding *erga omnes partes* human rights treaty obligations of fair trial, Dupuy, above (n 49, fn 64. Finally, it is unclear whether the cumulative effect of measures on content-identical

countermeasures to be reciprocal, after the determination of wrongfulness the State could *mutatis mutandis* apply countermeasures to MSEN rules.[89] If the DSU excluded only those responses to the breach of WTO law that are themselves in breach of WTO law, leaving the right to adopt countermeasures against non-WTO law unaffected, the injured State could suspend the investment treaty in accordance with its general international law rights. However, WTO rules exclude all unilateral countermeasures for the breach of WTO rules not approved in accordance with the DSU,[90] possibly extending the exclusion even to unilateral retorsions.[91] Since the scope of authorisation granted by the DSB under Article 22 DSU is *ratione materiae* limited to 'covered agreements', considerations of effectiveness cannot extend this scope to unrelated rules of non-covered agreements. Consequently, while the wrongfulness of the suspending State's conduct regarding WTO rules would be *a priori* precluded, it would still remain bound by investment protection rules. In practical terms, a law authorising the production of pirated music and computer programmes would not breach TRIPS rules on IP rights as falling within the authorised suspension of concessions, but would breach BIT obligations regarding discrimination and expropriation and therefore could not be adopted without incurring international responsibility. To the extent that another legal argument cannot be employed to justify non-compliance with investment protection law or preclude wrongfulness for its breach, the State would not be entitled to exercise its WTO-authorised countermeasures.

Secondly, the situation where WTO-authorised conduct cannot be exercised due to investment protection obligations suggests the possible presence of a conflict. The concept of conflict of rules in international law may be read at least in two ways. More narrowly, a conflict applies to mutually exclusive

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obligations arising from different sources should be additionally taken into account in assessing the proportionality of countermeasures.

[89] 2001 ILC Articles, above (n 16), 129 Commentary 5.

[90] WTO, *US-Sections 301-310 of the Trade Act of 1974, Panel Report* (27 January 2000) WT/DS152/R, para 7.59; WTO, *US-Certain EC Products*, *Panel Report* (17 July 2000) WT/DS165/R, paras 6.34-35, 6.87 (the particular point was not appealed by US and was approved by AB, WTO, *US-Certain EC Products*, *Report of the Appellate Body* (10 January 2001) WT/DS165/AB/R, para 58); WTO, *US/Canada-Continued Suspension* AB, above (n 69), para 382; Lesaffre, above (n 67), 469-472; A Lowenfeld, *International Economic Law* 2nd edn (Oxford, Oxford University Press, 2008) 195-211.

[91] WTO, *EC-Measures Affecting Trade in Commercial Vessels*, *Panel Report* (20 June 2005) WT/DS301/R, paras 7.187-7.207.

obligations.[92] There is no conflict in this sense: States can simultaneously comply with their WTO and investment protection obligations, simply by electing not to exercise the authorised right to act in breach of WTO obligations. More broadly, a conflict may be seen 'as a situation where two rules or principles suggest different ways of dealing with a problem'.[93] If this perspective is adopted, it could be possible to identify an obligation (to comply with rules regarding the treatment of IP rights as investments under BIT) and an exceptional right (to deny IP treatment under WTO rules) that 'seem to point in different directions in their application by a party'.[94]

If the broader approach to the definition of conflict is adopted, the role of the distinction between primary and secondary rules needs to be considered. The theoretical model elaborated by Roberto Ago[95] and accepted by the ILC in the 2001 ILC Articles distinguishes primary rules imposing legal obligations and 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.[96] The existence of a conflict between primary rules is conceptually uncontroversial. Conflict between general and special rules of State responsibility is also conceptually uncontroversial, even if its resolution may be complicated.[97] The present situation seems different from the *inter se* breaches of primary and secondary rules, since rules 'point[ing] in different directions' are primary obligations to engage in certain conduct and secondary rule-based entitlements to breach other primary obligations (that are MSEN to the former primary obligations) with precluded wrongfulness. In other words, the conflict is

[92] W Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, 451; G Marceau, 'Conflict of Norms and Conflict of Jurisdictions: the Relationship between WTO Law and Agreements and Other Treaties' (2001) 35 *Journal of World Trade* 1081, 1082-1086; G Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753, 791-94.

[93] Report of the Study Group, above (n 1) para 25; J Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge, Cambridge University Press, 2003) 184-187; E Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 *European Journal of International Law* 395; E Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford, Oxford University Press, 2009) Part I.

[94] Report of the Study Group, above (n 1), para 23.

[95] R Ago, 'Le délit international' (1939) 68 *Recueil des Cours* 419; R Ago, 'Second Report on State Responsibility' in *Yearbook of the ILC 1970, Volume II* UN Doc A/CN.4/SER.A/1970/Add.1 177, 179 para 11.

[96] 2001 ILC Articles, above (n 16), 31 Commentary 1.

[97] Simma and Pulkowski, above (n 28).

not between two primary rules, or between two secondary rules arising out of the breach of the same primary rule, but between a primary rule and a secondary rule arising out of the breach of another primary rule. Even though both primary and secondary rules impose international obligations,[98] non-compliance with secondary rules would not create separate new regimes of secondary rules, being limited to reparations for the breach of original primary rule that cannot be extended to punitive sanctions.[99]

The effect of the rules of State responsibility on the resolution on normative conflicts may be considered in the broader context of the debate about changing perceptions about the role of responsibility in the interpretation and application of international law. On the one hand, primary rules on obligations and secondary rules on circumstances precluding wrongfulness for breaches of different primary rules may be perceived as operating on analytically separate levels and therefore being logically unable of being in a situation of normative conflict. The distinction between primary and secondary rules is often given direct interpretative significance which may support such an approach.[100] On the other hand, the importance of the distinction has also been minimised to convenience of classification without additional normative significance,[101] particularly regarding rules created at the time when the form and content of Ago's project were uncertain.[102] Indeed, the internal consistency of the concept of circumstances precluding wrongfulness has been questioned in light of the ambiguous 'difference between an act which was justified, an act which was excused and an act for which responsibility did not exist'.[103]

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[98] J Crawford, 'Third Report on State Responsibility' UN Doc A/CN.4/507, para 7.
[99] H Kelsen, *General Theory of Law and State* (New York, Russel & Russel, 1961) 357-58.
[100] *CMS* annulment, above (n 44), para 134; *Continental Casualty*, above (n 44), paras 164-68; Binder, above (n 44).
[101] *Renta 4 S.V.S.A. and Others v Russia,* SCC V 24/2007, Award on Preliminary Objections, March 20, 2009, paras 99-100.
[102] JE Alvarez and K Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' (2008-2009) 1 *Yearbook of International Investment Law and Policy* 379, 427-40; see the early criticism, RR Baxter, 'Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens' (1964-1965) 16 *Syracuse Law Review* 745, 745-61; MS McDougal, HD Lasswell and L-C Chen, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 *American Journal of International Law* 432, 454-56.
[103] ILC 1999 I, above (n 55), 174 para 48 (Simma); V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 *European Journal of International Law* 406; T

Since the notion of countermeasures in multilateral trade may be traced to the 1947 GATT, the second perspective may have some attractiveness in the particular context.[104] In the long run, one suspects that State practice and case law will increasingly adopt the vernacular of the 2001 ILC Articles in explaining obligations, whatever the theoretical perception at the time of their creation,[105] similarly to the other grand exposition of meta-rules of international law in the Vienna Convention on the Law of Treaties (VCLT). Despite the controversy at the Vienna Conference about the rules of interpretation[106] and the importance attributed to the non-retroactivity of the exposition,[107] the familiarity of contemporary interpreters with the textual expression of the rules[108] has proved irresistible in applying them to even nineteenth-century treaties.[109]

Assuming that the argument overcomes the two hurdles by adopting a broader approach to conflicts and being able to find a conflict between a primary rule and a secondary rule related to another primary rule, how can the conflict between the BIT obligation to protect IP rights and the WTO authorization to act in breach of IP rights be resolved? The application of Article 30 of VCLT and the principle of *lex posterior* would raise familiar questions about its

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Christakis, 'Les "circonstances excluant l'illicéités": une illusion optique?' in *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles, Bruylant, 2007).

[104] Lesaffre, above (n 67), 454; Shadikhodjaev, above (n 68), 49-62.

[105] The ICJ summarily concluded that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide did not refer to criminal responsibility of States since such a concept did not exist, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Judgment) [2007] ICJ Rep para 170 www.icj-cij.org/docket/files/91/13685.pdf accessed 12 January 2010, even though it had been used in the drafting process of the Convention, ibid paras 176-78, and was prominent in the post-War theoretical debates, JHH Weiler and others (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin, Walter de Gruyter, 1989).

[106] MS McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*' (1967) 61 *American Journal of International Law* 992; MS McDougal (1968) 62 *American Journal of International Law* 1021.

[107] S Rosenne, 'Temporal Application of the Vienna Convention on the Law of Treaties' (1970-1971) 4 *Cornell International Law Journal* 1, 5-12.

[108] D Greig, 'The Time of Conclusion and the Time of Application of Treaties as Points of Reference in the Interpretative Process' in M Craven, M Fitzmaurice and M Vogiatzi (eds), *Time, History and International Law* (Leiden, Martinus Nijhoff Publishers, 2007) 207-15.

[109] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium / the Netherlands)* (2005) 10 RIAA 33, para 45. As one *ad hoc* annulment committee noted, 'the Vienna Convention *qua* treaty does not apply to the BIT (*see* Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force Jan. 27, 1980) 1155 UNTS 331 art 4 (VCLT).). But since the norms of interpretation would apply in any event this point is without incidence so far as the Award is concerned', *MTD Equity Sdn. Bhv. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Decision on Annulment, March 21, 2007, fn 69.

appropriateness in the context of multilateral treaties.[110] The perspective of *lex specialis* also does not give a clear answer as to whether trade or investment rules are more special, and it is uncertain whether the *lex specialis* nature of WTO secondary rules is relevant if the other rule in conflict is a primary rule.

If the relevant investment obligations were to prevail through their speciality or subsequence in time, they would not conflict with the TRIPS rules pointing in the same direction but with the DSU rules authorising the suspension of concessions. Since it is questionable whether Article 41(1)(b) of VCLT would permit an *inter se* modification of DSU rules in light of their structural importance, it may be permissible to have recourse to the interpretative presumption against conflict of Article 31(3)(c) VCLT.[111] If the conflict still exists, it is not clear how it can be resolved. Conversely, if WTO rules were to prevail, the application of countermeasures would not be a unilateral attempt at implementing WTO obligations, but a WTO-authorised countermeasure that prevails over other conflicting rules.

Thirdly, assuming that a conflict exists and may be resolved in favour of the WTO rules, the consequences of this solution would need to be considered. The procedural setting most likely would be before the investor-State Tribunal hearing the claim of the American investor (and having accepted the chain of arguments leading to the resolution of the conflict in favour of the WTO entitlement to breach IP rights). On the one hand, and less persuasively, the Tribunal could treat WTO entitlement as primary rules that prevail over the contrary obligations under investment law, concluding that due to the modified content of the obligations no wrongful act was committed in the first place. To reach that conclusion, the Tribunal would have to treat its applicable law clause[112] as permitting it to rely on other rules of international law prevailing

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[110] J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535, 545-47.

[111] The German argument failed to persuade the PCIJ in its first contentious case, above (nn 5-7), but did not face any objections 46 years later at the Vienna Conference on the Law of Treaties, United Nations Conference on the Law of Treaties, Second Session UN Doc A/CONF.39/11/Add.1 57 (Fleischhauer).

[112] At least in the ICSID context, the breadth of Article 42 of the ICSID Convention, above (n 41), as interpreted in the recent case law, would probably permit such a reading, E Gaillard and Y Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 *ICSID Review – Foreign Investment Law Journal* 375; *MTD* annulment, above (n 109), paras 72-75; *CMS*

over the particular rules it has jurisdiction to interpret.[113] If this approach is adopted, then the situation would be similar to such primary investment rules as denial of benefit clauses[114] and NPM clauses, denying protection available under the other substantive rules.[115] Since no breach has taken place, the nature of the investor's rights is irrelevant: to paraphrase Crawford's views about human rights, 'conduct inconsistent with [investment] obligations may ... be justified or excused ... to the extent provided for by the applicable regime of [investment law] itself'.[116]

On the other hand, and more persuasively, the WTO-authorised *lex specialis* countermeasure could operate on the same conceptual level of secondary rules precluding wrongfulness. The Tribunal would first have to respond to a *Monetary Gold* challenge that it cannot decide on rights and obligations of States that have not consented to its jurisdiction: the anterior wrongfulness of the US conduct is the first criterion for the successful argument of countermeasures.[117] However, even assuming that the *Monetary Gold* doctrine is not limited to ICJ procedure but represents a general principle of international adjudication applicable also to individual-State arbitrations,[118] the DSB authorisation could be treated as an authoritative determination of wrongfulness that the Tribunal may take as a given.[119]

The impact of WTO countermeasures may again be differentiated between primary and secondary rules. One of the criteria taken into in account in

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annulment, above (n 44), paras 81-85; *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Decision on the Application of Annulment, September 1, 2009, paras 157-77.

[113] Cf. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK)* (Provisional Measures) [1992] ICJ Rep 3, para 39.

[114] Denial of benefit clauses entitle the host State to deny protection to shell companies. There is some controversy whether the effect can be retrospective, KJ Vandevelde, *United States Investment Treaties: Policy and Practice* (Boston, Kluwer 1992) 53, 55-57; AC Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 *ICSID Review – Foreign Investment Law Journal* 357, 385-88; Douglas *Investment Claims*, above n 56, 470-472, or only prospective, *Plama Consortium Limited v Bulgaria,* ICSID Case no ARB/03/24, Decision on Jurisdiction, February 8, 2005, paras 152-65.

[115] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits*)* [1986] ICJ Rep 14, Dissenting opinion of Judge Sir Robert Jennings 528, 541; *CMS* annulment, above (n 44), para 134; *Continental Casualty*, above (n 44), paras 164-68.

[116] J Crawford, 'Third Report on State Responsibility' A/CN.4/507 Add.3, paras 312d, 349.

[117] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Questions)* [1954] ICJ Rep 19, 31-33.

[118] *Larsen v Hawaiian Kingdom,* UNCITRAL Arbitration, Award, February 5, 2001, (2002) 119 ILR 566, paras 11.8-11.24.

[119] Ibid para 11.24; Paparinskis 'Countermeasures', above (n 41), 338-39.

interpreting investment obligations such as fair and equitable treatment and indirect expropriation is the reasonableness of the investor's expectations, considered against the benchmark of 'pre-existing laws and regulations'.[120] If obligations under human rights law[121] and European Community law could be counted as part of these 'laws and regulations',[122] conduct pursuant to them would arguably not frustrate reasonable expectations. Indeed, when a trader who suffered damages due to WTO countermeasures adopted by the US against the EC brought a non-contractual damage claim against the latter, the ECJ rejected it because the economic operator exporting goods should have been aware about the WTO regime of countermeasures.[123]

The possibility of analogy from Community law has to be taken with a grain of salt: apart from the very specific cases regarding UN SC sanctions,[124] the ECJ has so far for different reasons rejected all claims about violations of the right of property.[125] There is a qualitative difference between a fluctuating market share in the ECJ case and investments made in a country protected under specific rules precluding not only frustration of expectations but also arbitrariness of decision-making.[126] As the treaty practice suggests, States sometimes coordinate the scope of content of protection of IP rights in investment and trade law but mostly do not.[127] It is unclear whether in the latter case the possibility that States could

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[120] *Gami Investments, Inc. v Mexico,* 15 November 2004, UNCITRAL arbitration, Final Award, November 15, 2004, para 94; C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2007) 235-37, 302-04; R Dolzer and CH Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008) 104-06, 133-40; Newcombe and Paradell, above (n 77), 279-89, 350-51.

[121] U Kriebaum, 'Privatizing Human Rights: The Interface between International Investment Protection and Human Rights' (2006) 3 *Transnational Dispute Management* 8-22; B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 705.

[122] T Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 *Common Market Law Review* 383, 415-18; M Burgstaller, 'European Law and Investment Treaties' (2009) 26 *Journal of International Arbitration* 181, 193-96.

[123] Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies v Council and Commission* [2008] ECR I-6513, para 186, also para 185.

[124] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, paras 354-371; Case T-318/01 *Othman v Council and Commission* [2009] Judgment of 11 June 2009, paras 91-92.

[125] T Tridimas, *The General Principles of EU Law* 2nd edn (Oxford, Oxford University Press, 2006) 315.

[126] *Saluka Investment BV v Czech Republic*, UNCITRAL Arbitration, Partial Award, March 17, 2006, para 307.

[127] Above nn (82-87).

engage in conduct under another regime that would breach the particular rules should necessarily influence their interpretation, or rather simply indicate that States have wished to provide broader protection in the particular context. In any event, rules on *de jure* discrimination and direct expropriation triggered by countermeasures do not attribute such importance to expected developments and could therefore be breached.

Assuming that a breach of investment protection obligations has taken place, the impact of countermeasures would depend on the way in which investors' treaty rights are conceptualised. If the *ADM* Tribunal's approach is preferred, the host State's obligations are owed only to the home State, and can therefore be suspended with precluded wrongfulness as a countermeasure; the investor's claim fails *in limine*.[128] If the *Corn Products* Tribunal's approach is preferred, the host State's obligations are owed also to the investor, and due to its structural incapability to trigger the precondition of breaching an obligation owed to the State the countermeasures argument fails; the investor's claim succeeds.[129] The fragmentation and proliferation of rules, regimes and theories leads to a rather paradoxical conclusion: despite the sophistication and elegance of the WTO rules and procedures, it is precisely the focus on *lex specialis* rules intended to strengthen the multilateral system that makes it easier for non-WTO, MSEN regimes to undercut their effect. For the State to be able to lawfully exercise its WTO-authorised countermeasures in the presence of investment obligations, it has to overcome a number of complicated hurdles: showing a conflict, persuading the Tribunal of its competence to consider it, resolving it in favour of WTO rules, and either having no breach of primary rules or treating the investor only as an agent of its home State. The untangling of normative strands works in favour of the investor who – assuming that a breach of the BIT can be shown – can hope to persuade the Tribunal that the rules it has jurisdiction to interpret and apply prevail in the particular dispute.

IV. INVESTMENT PROTECTION LAW COUNTERMEASURES IN WTO LAW

[128] *ADM*, above (n 31), para 176.
[129] *Corn Products*, above (n 31), paras 161-65.

The analysis of countermeasures and MSEN primary rules may also start from the opposite perspective of investment protection law. In the multi-faceted US-Mexican soft drinks dispute, Mexico introduced tax laws *de facto* discriminating against US products, allegedly as countermeasures against US breaches of NAFTA. The countermeasures triggered the prohibitions of discriminatory conduct both in NAFTA and WTO, and led to claims against Mexico in NAFTA investor-State arbitrations[130] and the WTO respectively.[131] Mexican invocation of countermeasures to respectively preclude wrongfulness and interpret the primary WTO rules was rejected in both fora. These proceedings will be taken as the basis for the case study. The argument will be made in two steps, considering in turn the situation in investment protection law and WTO law.

First of all, reliance on countermeasures in investor-State proceedings raises important structural challenges. As was suggested above, if the dispute comes before an investor-State Tribunal, it would be put squarely before the *Monetary Gold* problem: the very subject matter of its decision about lawfulness of host State's countermeasures is the prior wrongful conduct of the home State that is not a party to the proceedings.[132] Unlike the case of WTO countermeasures, there would be no authoritative third-party determination about the wrongfulness.[133]

A Tribunal could respond to the argument in four ways.[134] The *ADM* Tribunal *arguendo* assumed that a breach had taken place, rejecting the countermeasures argument because of non-compliance with substantive and procedural requirements.[135] Assuming wrongfulness seems perilously close to deciding upon the legal right of absent States – precisely what *Monetary Gold* was supposed to preclude – and would be ultimately unhelpful if the substantive and procedural requirements were complied with and the existence or non-existence of prior wrongfulness would be decisive. The *Corn Products* Tribunal *obiter*

[130] Above (n 31).
[131] Above (n 32).
[132] Above (nn 117-118); cf. F Latty, 'Arbitrage transnational et droit international général (2008)' (2008) 54 Annuaire français de droit international 467, 495.
[133] Above (n 119.
[134] Paparinskis 'Countermeasures', above (n 41) 337-42.
[135] *ADM,* above (n 31), paras 134-60.

dictum suggested that Mexico had not proven the existence of the breach.[136] However, wrongfulness is a matter of legal characterisation of conduct and not a question of whether the conduct has actually taken place. The decisive legal issue is the nature of the investor's rights: if the investor is a beneficiary of the rights, then the *Corn Products* Tribunal is correct in concluding that countermeasures are *a priori* inapplicable;[137] if the investor is only an agent of its home State, the dilemma between the necessity to decide upon anterior wrongfulness and the jurisdictional inability to do so may lead to a finding of inadmissibility. Whatever approach is chosen, even if the investor-State Tribunal succeeds in deciding its case by evading the issue of countermeasures, it would be unlikely to produce a decision exhaustively examining and conclusively accepting or rejecting the lawfulness of countermeasures. The argument of countermeasures is different in this sense from the argument of necessity: even though the case law about necessity in the Argentinean crisis provided divergent interpretations of both facts and law,[138] the investor-State procedural setting did not affect the possibility of Tribunals to decide the argument because in the law of necessity only 'interests' and not 'rights' of third parties have to be considered.[139]

Secondly, it remains to be seen what the effect of countermeasures taken for the breach of NAFTA – and lacking third-party determination regarding their lawfulness – would be in the WTO dispute settlement proceedings. For the purpose of convenience, a distinction will be drawn between primary and secondary rules of WTO law. At the level of primary rules, Mexico argued that its countermeasures fell under the general exception of Article XX(d) of GATT regarding measures 'necessary to secure compliance with laws and regulations'. The Appellate Body rejected this argument both because international law in general and NAFTA in particular were not 'laws and regulations' and because deciding upon it

> would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations. We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO

[136] *Corn Products*, above (n 31), paras 189-91.
[137] Ibid paras 161-65.
[138] Above (nn 45-47).
[139] 2001 ILC Articles, above (n 16), art 25(1)(b).

> disputes. ... Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements.[140]

While this passage has been criticised as being inconsistent with the earlier practice of reliance on non-WTO rules,[141] most of this practice may be explained in traditional terms of interpretation of generic concepts[142] or incorporation or reference by WTO rules themselves.[143] *A contrario,* Article XX(d) does not incorporate the whole international law of countermeasures.[144]

Alternatively, it has been suggested that the Panel could have 'merely ... decid[ed] whether Mexico *prima facie* had a strong case'[145] or 'ma[d]e a determination for its own purposes as to whether the US was acting consistently with NAFTA [as] a preliminary step in making a WTO ruling'.[146] The approach of minimising the importance of the legal argument is not entirely persuasive. The fact that the interpreter also interprets other rules of international law after making the finding of wrongfulness makes the finding no less important or conclusive. Moreover, '[a]n injured State may only take countermeasures against a State which is *responsible* for an internationally wrongful act', and to replace this criterion with *prima facie* perceptions would constitute a retrogressive development away from the 'objective standard of taking of countermeasures'.[147] While in the case of auto-determination the State taking countermeasures will determine for itself the wrongfulness of the other State's conduct, the situation is

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[140] *Mexico-Soft Drinks* AB, above (n 32), para 56.
[141] R Howse, 'The Use and Abuse of International Law in WTO Trade/Environment Litigation' in ME Janow and others (eds), *The WTO: Governance, Dispute Settlement, and Developing Countries* (New York, Juris Publishing, Inc., 2008) 659-60.
[142] WTO, *US: Import Prohibition of Certain Shrimps and Shrimp Products*, *Report of the Appellate Body* (November 6, 1998) WT/DS58/AB/R, para 130.
[143] TRIPS and IP treaties, above (n 80); WTO, Lomé waiver, *EC-Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body* (25 September 1997) WT/DS27/AB/R, paras 167-78.
[144] Howse, above (n 141), 660-61. Interpretation of secondary rules would mean interpretation of all the primary rules of international law, J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) 10.
[145] P-J Kuijper, 'Does the World Trade Organization Prohibit Retorsions and Reprisals? Legitimate "Contracting Out" or "Clinical Isolation" Again?' in ME Janow and others (eds), *The WTO: Governance, Dispute Settlement, and Developing Countries* (New York, Juris Publishing, Inc., 2008) 707.
[146] WJ Davy and A Sapir, 'The *Soft Drinks* Case: The WTO and Regional Agreements' (2009) 8 *World Trade Review* 5, 18.
[147] 2001 ILC Articles, above (n 16), art 49(1) (emphasis added), Commentary 3.

different for the adjudicator who has to decide upon the lawfulness of countermeasures on an objective basis. The Appellate Body's unwillingness to accept the possibility of a determination of wrongfulness *en passant* seems understandable in the light of the implications of this argument. Since countermeasures do not have to be reciprocal,[148] examination of the alleged anterior breach may even require the Panel to examine sensitive aspects of *jus ad bellum, jus in bello* or human rights, particularly if one goes further than the 2001 ILC Articles[149] and accepts the permissibility of third-State countermeasures *de lege lata*.[150]

Whatever the impact of countermeasures as a matter of primary rules of WTO law – and *Mexico-Soft Drinks* case suggests that at least in terms of Article XX(d) of GATT there is none – their role as a matter of secondary rules still needs to be considered. *Mexico-Soft Drinks* case leaves the issue open since Mexico curiously did not rely on the fall-back argument of countermeasures as a circumstance precluding wrongfulness in case if its initial argument of countermeasures as an interpretative criterion for the primary rule got rejected.[151] Whether or not primary rules additionally prescribe certain consequences from the conduct amounting to countermeasures, countermeasures would in principle always (also) operate at the level of secondary rules.[152] The jurisdiction to interpret and apply secondary rules would come from the jurisdiction regarding primary rules. Undoubtedly, to accept that countermeasures for breach of non-WTO rules could

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[148] Ibid 129 Commentary 5.
[149] Ibid art 54.
[150] S Villalpando, *L'emergence de la communauté internationale dans la responsabilité des Etats* (Paris, Presses Universitaires de France, 2005) 371-78; M Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' (2006) 77 *British Yearbook of International Law* 333. State practice in relation to third-party countermeasures has in practice raised issues of multilateral trade, for example regarding Uganda, South Africa, Poland, Argentina, Iraq, Burundi, Portugal, Israel and Nicaragua, cf. 2001 ILC Articles, above (n 16), art 53, Commentary 3; J Fernández Pons, 'Self-Help and the World Trade Organisation' in P Mengozzi (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (Milano, Dott. A. Giuffrè Editore, 1999) 99; Dawidowicz ibid 352-54, 356-58, 368-74, 376-83, 384-86, 389-90, 399-402; E Katselli, 'Countermeasures: Concept and Substance in the Protection of Collective Interests' in KH Kaikobad and M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Leiden / Boston, Martinus Nijhoff Publishers, 2009) 401, 426-427.
[151] Kuijper, above (n 145), 703-06.
[152] States sometimes create primary rules with content close or identical to that of secondary rules, for example regarding distress, 2001 ILC Articles, above (n 16), art 24 Commentary 5; possibly necessity, above (nn 45-47); self-defence is both a primary rule of *jus ad bellum* and a secondary circumstance precluding wrongfulness, 2001 ILC Articles, above (n 16), art 21.

preclude wrongfulness for the breach of WTO rules would lead to significant problems in the dispute settlement process, as suggested in the previous paragraph. Still, the issue is not WTO-specific and would cause precisely the same problems for any adjudicator addressing non-reciprocal countermeasures and having jurisdiction only to interpret the rule breached by countermeasures.[153] If the argument is accepted, Panels and Appellate Body would have to consider countermeasures as a potential circumstance precluding wrongfulness, leaving open the question about whether and how the earlier wrongfulness could be determined.

The argument against the application of countermeasures could be made at least in two ways, relying either on the structure or *lex specialis* nature of the rules. The exclusion cannot be justified in structural terms. Trade obligations are not among the obligations not affected by countermeasures.[154] It seems possible to conceptualise WTO obligations as bilateralisable,[155] and therefore permitting countermeasures; and in any event the existence of *lex specialis* countermeasures suggests that there is no structural impossibility in subjecting these rules to countermeasures. The argument of *lex specialis* could also be used in a different way, to suggest that States have limited not only the right to take countermeasures as a reaction to the breach of WTO law but also the right to take countermeasures against WTO rules in general, in the sense of 'renounc[ing] the possibility of countermeasures being taken [not only] for its breach, [but also] in relation to its subject matter'.[156]

The silence of the DSU and the contradictory State practice may be read in a number of ways. On the one hand, the teleology of strengthening the multilateral system through its 'system of enforcement'[157] may support excluding disruptions

[153] In the leading cases, either countermeasures are reciprocal, *Air Service Agreement*, above (n 16); *Gabčíkovo-Nagymaros*, above (n 16); or the adjudicators have jurisdiction to interpret both rules allegedly breached, *Naulilaa*, above (n 15), 1016; *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne)* (1930) 2 RIAA 1035, 1039-1040.
[154] 2001 ILC Articles, above (n 16), art 50.
[155] Schachter, above (n 50), 735; Pauwelyn 'Typology', above (n 91); *contra* Carmody, above (n 50).
[156] 2001 ILC Articles, above (n 16), art 50 Commentary 10.
[157] Ibid.

originating even (or *a fortiori*) from external sources.[158] 'Subsequent practice' may be sought in the increasing unwillingness of States in the later GATT years to justify their conduct as countermeasures, instead relying on even strained treaty-law arguments.[159] *Travaux préparatoires* show that an Indian proposal to expressly include retaliatory action in Article XX was rejected.[160] On the other hand, the practice is at best uncertain, and the preparatory materials do not explain the reason for the rejection of the Indian proposal.[161]

Whatever conclusions one may draw from the pre-WTO practice, the detailed rules that are expressly spelled out in the DSU suggest that by the Uruguay Round States knew quite well how to exclude countermeasures from applying to WTO rules. However, they chose to limit the scope of exclusion only to countermeasures adopted in response to breaches of WTO rules and not to all rules of international law. The implication of the *a contrario* argument seems inescapable. Against this background, the apparent unwillingness to confirm in express terms the even *arguendo* existing consensus excluding countermeasures in pre-WTO law suggests treating the relevance of earlier practice with a grain of salt. The AB report in *Mexico-Soft Drinks* may be read as following the same line of thinking when it criticised the implication of the Mexican argument as permitting

> WTO Members to adopt WTO-inconsistent measures based upon a *unilateral* determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994.[162]

The AB language suggests a concern about bypassing the set of procedures created by the DSU and not about the broader teleology of a strong multilateral

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[158] Marceau appears to take this view, suggesting that 'Article 23 of the DSU ... prohibits trade restrictions or any remedy being taken outside the framework of the DSU', Marceau 'Conflicts', above (n 95), 1122.

[159] L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353, 396-402.

[160] *Mexico-Soft Drinks* AB, above (n 32), fn 175.

[161] Fernández Pons, above (n 154), 94-104; A Bianchi and L Gradoni, 'Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law' (2008) ICSTD Project on Dispute Settlement, Series Issue Paper no 5 28-40 ictsd.net/downloads/2009/02/reinterpreting_dsu1.pdf last accessed 12 January 2010.

[162] *Mexico-Soft Drinks* AB, above (n 32), para 77 (emphasis in the original).

system requiring the exclusion of 'outside' countermeasures *in limine*. At the very least, the DSU and *Mexico-Soft Drinks* show that countermeasures are not *clearly* excluded, and at this point of analysis the presumption against an implicit waiver of rules of State responsibility could become relevant, suggesting that the legal right to take countermeasures still exists.[163]

Even if the right to take countermeasures against WTO rules for breach of other rules in principle exists, it remains to be considered whether the MSEN perspective affects this conclusion. It has been suggested that States are entitled to take general international law countermeasures against investment protection rules (even if due to the procedural context the correctness of this auto-determination would not be conclusively confirmed) but not entitled to take countermeasures for the breach of WTO law against MSEN trade rules other than in accordance with the WTO procedure. Similarly to the earlier analysis, it may be questioned whether the distinction between primary and secondary rules permits identifying a conflict, since the relevant rules are both secondary in nature and relate to different primary rules.[164] If it is possible to identify a conflict, then a *lex specialis* secondary rule prohibiting discriminatory taxes (or rather subjecting the introduction of such taxes to a particular procedure) and a secondary rule allowing the introduction of discriminatory taxes may be said to 'pull in different directions', even if their underlying primary rules created through different law-making processes point in the same direction (prohibiting discriminatory taxes).

If the conflict exists, its resolution would depend on the interplay of the particular treaty and customary rules on the issue. NAFTA incorporates the national treatment rule from Article III of GATT and any successor agreement,[165] provides a priority rule for NAFTA over GATT (but at least expressly not over

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[163] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15, para 50; above (n 44). Speaking in the somewhat different context of interpretation and general principles, two Panels have taken the view that '[c]ustomary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO agreements do not 'contract out' from it', WTO, *Korea-Measures Affecting Government Procurement, Panel Report* (19 June 2000) WT/DS163/R, para 7.96; WTO, *US/Canada-Continued Suspension of Obligations in the EC-Hormones Dispute*, *Panel Report* (31 March 2008) WT/DS321/R, para 7.336. Appellate Body mentioned the argument but did not criticise it, possibly indicating an implicit approval, *US/Canada-Continued Suspension* AB, above (n 68), para 278.

[164] See discussion above (nn 95-103).

[165] NAFTA, above (n 84), art 301.

any successor agreement),[166] and gives the States a choice of settling disputes 'regarding any matter arising under both' NAFTA and GATT (and any successor agreements) in either forum.[167] The complex relationship between WTO rules and procedures and NAFTA rules and (at the moment non-functioning) Chapter 20 procedures is beyond the scope of this chapter.[168] If the conflict is resolved in favour of NAFTA rules then the general proposition about applicability of countermeasures would remain valid.

If the contrary reading is correct, or in the absence of specific rules dealing with treaty conflict, a teleological reading of WTO rules could suggest that they should prevail. In light of the importance attributed in the Uruguay Round to the creation of the DSU and the abandonment of unilateral countermeasures in favour of a strong and institutionalised dispute settlement system,[169] to permit the application of countermeasures to MSENs would effectively disrupt the bargain through the normative backdoor. Reading WTO rules in a purposive light, it could be suggested that when States create a particular procedure for applying countermeasures against a particular rule, they do not escape the exclusion simply by creating an MSEN rule *inter se* and applying a unilateral countermeasure against it in a way that the dispute settlement body under the former rule would not be able to adjudicate. The *lex specialis* of WTO countermeasures would take priority over the *lex generalis* of countermeasures regarding MSEN rules, and the countermeasures could be carried out only when the more stringent WTO procedures would be complied with. If this argument is accepted, then – assuming that NAFTA did not have conflict rules – the Mexican argument should have been rejected not because Mexico had waived its customary law right to apply countermeasures to WTO rules for breaches of other rules of international law but because it could not escape the restrictions of DSU by purporting to breach an MSEN rule.

Conversely, the teleological reasoning could be said to lead to an absurd result. States willing to apply non-reciprocal countermeasures for the breach of

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[166] Ibid art 103.
[167] Ibid art 2005(1).
[168] FM Abott, 'The North American Integration Regime and its Implications for the World Trading System' in JHH Weiler (ed), *The EU, The WTO and the NAFTA* (Oxford, Oxford University Press, 2000) 177-89; Pauwelyn 'Adding Sweeteners', above (n 19).
[169] Above (nn 70, 90-91).

non-trade rules to WTO rules would be unable to do so unless they exhausted the WTO procedures first, which in turn they may be unable to do if the target State has breached only the non-WTO and not WTO obligations. A common sense compromise position would perhaps narrow the scope of the definition of conflict to reciprocal countermeasures where both the original breach and countermeasure relate to MSEN rules. However, it would effectively move the perspective away from the conflict between secondary rules to the relationship between MSEN primary rules which is outside the scope of the present chapter. Consequently, even when the teleology of integrated dispute settlement is supplemented by MSEN considerations, the implications of these arguments make successful restriction of countermeasures questionable.

V. Conclusion

To explain the impact of secondary rules on MSEN primary rules, this chapter considers two case studies of countermeasures in WTO and investment protection law. In the first case study, to apply WTO-authorised countermeasures to MSEN primary rules of investment protection, one has to overcome a number of intellectual and legal hurdles. The strengthening of the multilateral trade dispute settlement system comes at a cost of complicating the identification of relationship and the resolution of conflicts with primary rules of investment protection law and secondary rules of general international law. To be able to exercise its WTO authorisation without breaching its investment protection obligations, the State faces an uphill battle: it has to demonstrate the existence of a conflict; persuade the investor-State Tribunal of its authority to consider the conflict and resolve it in favour of WTO regime (and against its own regime); succeed in showing how WTO entitlement should prevail over primary investment obligations; alternatively, persuade the Tribunal that the investor is only an agent of the other BIT party. The case study shows the complexity of turning the MSEN primary rules and secondary rules in the same direction when one set of secondary rules exclusively focuses on the internal dynamic of ensuring the efficiency of its own regime.

Countermeasures breaching investment obligations and MSEN WTO rules pose the opposite challenges. Due to the absence of a *ratione personae* and *ratione materiae* overlap between investor-State dispute settlement and State-State countermeasures, investor-State Tribunals are unlikely to bring adjudicative clarity to the auto-determination of countermeasures. The sophistication of WTO law is similarly unhelpful, since despite the detailed rules regarding countermeasures *for* breaches of WTO law, the DSU is silent regarding other breaches *of* WTO law. One is left with two equally unattractive solutions: either constructing a waiver out of the teleology of effectiveness of WTO law (despite the *a contrario* textual indication that States knew how to limit countermeasures and chose not to draft a general waiver); or permitting the application of countermeasures with all the procedural challenges that non-reciprocal countermeasures bring to adjudicators with limited jurisdiction. Even the concept of MSEN rules is unlikely to be helpful, leaving the harmonisation of the WTO *lex specialis* regime and non-reciprocal countermeasures problematic.

As was suggested in the introduction, one should not lightly assume that modern challenges are qualitatively different from the classic ones, and the proliferated adjudicators may simply be drawing attention to problems and conflicts that have latently existed for a long time. Still, the interplay of secondary rules with MSEN primary rules shows at the very least a quantitatively impressive 'spaghetti bowl' of conceptual challenges, from general issues of fragmentation, proliferation and conflicts, to more particular aspects of theory of State responsibility, role of circumstances precluding wrongfulness in different substantive and procedural settings and the multiplicity of participants in the legal process. More broadly, the case studies show the paradoxical impact that the law of State responsibility may have at different levels of analysis. The treatment of all breaches of international law as giving rise to a single regime of secondary rules is a powerful normative expression of the unity of the international legal order. At the same time, when the unity is expressed already at the level of primary rules of MSEN nature, the law of State responsibility may have the effect of turning their application in opposite directions. The pragmatic lesson may be that there is no pre-determined impact and that both unity and divergences can be expressed at the level of primary and secondary rules,

leading to different interplays both *inter se* and between the categories. It may be tentatively suggested that a clearer appreciation of the contours of and linkages within the customary and treaty strata of the normative framework would be helpful to enable all the participants to engage in law-making and law-application in a creative, experimental and proliferating manner, while fully understanding the legal benchmark against which their conduct will be judged.