

“A Clash of Treaties – The Legality of Countermeasures in International Trade Law and International Investment Law”

Society of International Economic Law (SIEL) 2014
Bern, July 11th 2014

Junianto James Losari
Research Associate

CIL
Centre for International Law



Independent investor rights

“The State of nationality of the Claimant does not control the conduct of the case [...] The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees.” (Para. 173)

Countermeasure cannot affect independent rights

“[...]CPI, has rights of its own under Chapter XI of the NAFTA [...] Even if the doctrine of countermeasures could operate to preclude the wrongfulness of the HFCS tax vis-à-vis the United States [...], they cannot do so vis-à-vis CPI.” (Para. 176)

(Corn Products International v. Mexico, ICSID, Decision on Liability, 15 January 2008)

Sugar War Disputes

- *Mexico – Antidumping Investigation of HFCS (2000)*
- NAFTA Chapter 19 (2001)
- *Mexico – Soft Drinks (2005)*
- Investor-State Arbitration tribunals:
 - *ADM v. Mexico (2007)*
 - *Corn Products v. Mexico (2008)*
 - *Cargill v. Mexico (2009)*

What's at Issue?

- GVCs result in MNCs investing in chains of production.
- Thus, majority of trade is intra-corporate trade of components and therefore investment in factories are now inextricably linked with trade.
- Int'l Trade Law and Int'l Investment Law have become very much interrelated.

Core Issue

Should a state be liable for a WTO-approved trade countermeasure in Int'l Investment Law?

Countermeasures in Int'l Trade Law

Requirements for Lawful Trade Countermeasures

Art. 22.3(a) DSU	Proper subject
Art. 22.4 DSU	Level of Countermeasures (equivalent)
Art. 3.7 & 19.1 DSU	Non-retroactive remedies
Art. 3.7 & 22.2 DSU	Prior authorization from the DSB

Countermeasures in Int'l Investment Law

- Not provided in most IIAs, but follows CIL.
- Customary Int'l Law – Article 49,51,52 ILC

Articles:

- Existence of an internationally wrongful act
- **Targeted party**
- Offer to negotiate
- **Proportionality**
- Temporary
- Absence of an impending dispute

Analyses by Investment Tribunals

	<i>ADM v. Mexico</i>	<i>Cargill v. Mexico</i>	<i>Corn Products v. Mexico</i>
Availability of Countermeasures under Chapter 11	Yes, under CIL	No	No
Reasons	Art. 1131 (1) NAFTA	Investors have independent rights under Chapter 11	Conferral of procedural rights implies intention to confer substantive rights. Investors have rights.
Finding	Non-proportionate countermeasure ? Inter-state obligations v. obligations to private individuals	Although jurisdiction exists, countermeasures cannot preclude wrongfulness against investors	Countermeasures cannot preclude wrongfulness against investors

Promoting Coherence between the Two Regimes

- 1. Dealing with the existing jurisprudence**
- 2. Legislation**

Promoting Coherence between the Two Regimes

1. Dealing with the existing jurisprudence

- Just because an investor has a direct procedural right to bring a claim , it does not by itself mean that he/she has an independent right.
- In IIAs, investor rights are not independent because:
 - State’s ability to amend or terminate IIAs;
 - IIAs are not equal to human right treaties.

Promoting Coherence between the Two Regimes

2. Legislation

- Joint interpretation
- Amendment (see e.g. *2002 Thailand – Russia BIT, Article 3(5)*)

One further problem...

- Aim of countermeasure: Inducing compliance
 - Proportionality test to be applied to determine:
 - Vindictive action v. resolving conflict with the other state?
 - State takes the measure that is least-damaging to foreign investors?
 - Weighing and balancing test under Article XX of the GATT?

Suggestions...?