

HELPING STATES HELP THEMSELVES: RETHINKING THE DOCTRINE OF COUNTERMEASURES

*Are countermeasures an effective means of
resolving disputes between states?*

ELIZA FITZGERALD*

The international law doctrine of countermeasures was formulated by international jurists to provide a lawful means by which states could respond to violations of their rights without provoking retribution or resorting to external means of enforcement. This paper critically analyses the theoretical value of countermeasures in safeguarding international peace and stability in light of the lukewarm responses to the doctrine by states. It examines the sparse precedent of states invoking the doctrine, as well as comments from various governments upon the International Law Commission's attempts to codify the doctrine, and subsequently identifies a number of key failings that problematise the use of countermeasures. This paper concludes that countermeasures, as presently formulated, suffer from being both overly restrictive and too uncertain in their application, leaving states unwilling to risk committing a prima facie wrongful act. Attempts to remedy this by either further codifying the doctrine's elements or giving their application greater flexibility seem unlikely without more discourse in the international legal community about the failings of the doctrine, which prevent it from effectively serving as a self-help tool of peaceful enforcement for states.

Perhaps the most common criticism lobbed at international law, and the rules and organisations that comprise it, is that its effects are felt primarily in the realms of academia and bureaucracy, and are divorced from the real actions and reactions of states. The state responsibility doctrine of countermeasures is a particularly good illustration of this criticism. This doctrine allows a state which has had its rights breached by another to temporarily derogate from its international obligations in order to compel the other state's compliance. Formulated by jurists and the International Law Commission ('ILC') in order to allow states to protect their international rights without escalating the conflict or resorting to external assistance, countermeasures appear on paper to have an immense potential to contribute to international peace and stability as a coercive force and a state self-help mechanism. Yet in reality, countermeasures appear to have failed to fulfil this potential. Despite existing in a relatively consistent form for at least fifty years, the instances in which the doctrine has been invoked by states are few, and only one of these invocations was successful: the *Air Service Agreement of 27 March 1946 (United States of America v France)*.¹ Since that arbitration, the elements of countermeasures have been defined by the ILC and applied by the International Court of

* BA (Macq), LLB (Hons) (Macq). This article was originally submitted as an Advanced Legal Research Project under the supervision of Professor Natalie Klein.

¹(*Awards*) (1978) 18 R Int Arb Awards 417 ('*Air Service*').

Justice (*ICJ*).² It is clear that countermeasures are a settled, authoritative legal doctrine. However, the increased certainty provided by codification has not resulted in a corresponding increase in use.³ Clearly, there is a disjuncture between the theoretical purpose of countermeasures and the practical reality of interstate relations. This paper will critically examine the elements of countermeasures in an attempt to identify the factors which collectively account for the failure of the widespread use of the doctrine. It will posit that the utility of countermeasures is extremely limited, despite their theoretical value for the maintenance of rights and obligations of states in the decentralised international legal system. The elements of countermeasures must be reconceived if they are to have any ongoing relevance in international relations and live up to their promise of facilitating state self-help and avoiding conflict.

This paper is structured in four sections. Firstly, it will outline the historical emergence of the doctrine of countermeasures from the law of state responsibility, and explain how its elements were formulated with the primary rationale of creating a self-help mechanism for states to defend and enforce their international rights. Secondly, it will examine the most significant decisions by international courts and tribunals concerning invocations of the doctrine, as well as the separate World Trade Organization form of countermeasures, and subsequently identify why the United States in the *Air Service* arbitration succeeded in making out the elements of countermeasures where other states have failed. Thirdly, it will propose several key reasons that may explain why countermeasures have failed to effectively meet the needs of states, and analyse them to provide a picture of the flaws inherent in the doctrine. Finally, this paper will present a revised concept of how countermeasures can realistically contribute to international relations, which will include an explanation of what must be altered in order to address the doctrine's flaws and maintain its viability in international law.

This analysis has a positivist theoretical underpinning, adopting the conception of law as deriving its validity from accepted rules of recognition.⁴ Specifically, this paper adopts a soft positivist conception which recognises that normative or policy factors may determine validity so long as those factors are prescribed by a rule of recognition.⁵ Further, this paper accepts the positivist 'Separation Thesis': that the questions of what law is and what law ought to be are separate. That countermeasures as prescribed by the ILC are valid law is not at issue; the focus of this paper is rather to assess the effectiveness of the doctrine and hence make proposals for reform.⁶ The effectiveness of countermeasures will be measured against the standard of Oppenheim's positivist goals of international law, as outlined by Kingsbury: specifically, how well the doctrine contributes to the peaceful settlement of international disputes.⁷

² International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('RSIWA'); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 55–7 [82]–[87] ('*Gabčíkovo-Nagymaros*').

³ Mary Ellen O'Connell, 'New International Legal Process' (1999) 93 *American Journal of International Law* 334, 349.

⁴ Tai-Heng Cheng, 'Making International Law Without Agreeing What It Is' (2011) 10 *Washington University Global Studies Law Review* 1, 21–2.

⁵ *Ibid* 23.

⁶ *Ibid*.

⁷ Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401, 430–31.

I HISTORY AND ELEMENTS OF COUNTERMEASURES

Countermeasures are defined as the non-performance of State A's international obligations towards State B, where State B is responsible for a prior internationally wrongful act, for the purpose of inducing State B to again comply with its international obligations.⁸ Thus, they are one of several doctrines, including self-defence, necessity and consent, which may give lawful justification for what would otherwise be a breach of international law.⁹ The current law on countermeasures derives from two recent and authoritative sources: the ILC's *Articles on Responsibility of States for Internationally Wrongful Acts (RSIWA)*, adopted by the General Assembly in 2001, and the 1997 *Gabčíkovo-Nagymaros* case. Together, they present a consistent and definitive picture of the elements of the doctrine. Indeed, they have a reciprocal relationship – the ILC's commentary on the *RSIWA* cites the relevant section of *Gabčíkovo-Nagymaros*,¹⁰ and the ICJ referred to an earlier version of the *RSIWA* that is substantively identical to the final provisions.¹¹ However, the doctrine is not a recent invention. It developed from other unilateral forms of coercion that gained traction after the use of force, as a means of redressing wrongs and enforcing laws in the international legal system, was banned in the UN Charter.¹² In particular, the concept of non-armed reprisals bears a degree of resemblance to countermeasures, as it is also a victim state's temporary non-performance of an international obligation towards an oppressor state.¹³ The doctrine of countermeasures is distinguished from these previous remedies because of its purely coercive, rather than punitive, purpose and its strict, clearly-defined elements. As a preliminary to these elements, it should be noted that the ILC and ICJ conceptions of countermeasures are confined to interactions between states, and that countermeasures cannot operate to justify breaches of *jus cogens* norms, including the prohibition on the use of force. Thus, countermeasures in their current form are essentially unilateral and non-violent.

Because countermeasures are, by definition, an otherwise wrongful act rendered lawful, there were concerns that they would be open to abuse by states seeking to flaunt international law without consequence.¹⁴ Hence, countermeasures were developed with strict procedural and substantive conditions which must be met. In drafting Chapter II of the *RSIWA*, the ILC was concerned with ensuring that countermeasures were clearly restricted so as to remain 'within generally acceptable bounds'.¹⁵ Accordingly, in order for an act to constitute a lawful countermeasure, it must satisfy five conditions, both procedural and substantive. Firstly, it must be in response to an internationally wrongful act.¹⁶ Therefore, the wrongful act must be attributable to a state. Secondly, before taking the countermeasure, a state must first have attempted to resolve the dispute through

⁸ See, eg, *RSIWA*, UN Doc A/RES/56/83, art 49.

⁹ Omer Yousif Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford University Press, 1988) 3; *RSIWA*, UN Doc A/RES/56/83, arts [21], [25], [20].

¹⁰ 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001] II(2) *Yearbook of the International Law Commission* 31, 130–1, 134–6 ('*ILC commentaries*').

¹¹ *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 55 [83].

¹² Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational Publishers Inc, 1984) 4–5; *Charter of the United Nations* art 2(4).

¹³ Zoller, above n 12, 35–46, citing *Naulilaa Arbitration (Portugal v Germany) (Judgement)* (1928) 2 UNRIIA 1011, 1026 ('*Naulilaa*').

¹⁴ *ILC commentaries*, above n 10, 129.

¹⁵ *Ibid* 128.

¹⁶ *RSIWA*, UN Doc A/RES/56/83, art 49(1).

offering to negotiate in good faith.¹⁷ As a part of this process, the invoking state must explicitly call upon the wrongful state to discontinue its wrongful conduct, or to make appropriate reparations.¹⁸ Thirdly, the countermeasure must be proportionate to the harm suffered as a result of the wrongful act to which it is addressed.¹⁹ An assessment of proportionality is a measure of both the quantitative and qualitative. It involves the weighing-up of the injury from the initial wrongful act with the injury from the countermeasures, as well as consideration of ‘the rights in question’ — a broad concept which encompasses the importance of the principle that is threatened by the wrongful act, and the effect of the wrong upon the rights of all affected states — a much more intangible form of harm.²⁰ Fourthly, the express purpose of the countermeasure must be to induce another state to comply with its international obligations.²¹ Fifthly, the countermeasure must be reversible.²² This requirement ensures that countermeasures do not have a lasting effect upon international obligations, because they do not operate to terminate them; rather they operate to temporarily suspend the obligation to perform.²³ Thus, the doctrine has been formulated in order to ensure that it promotes international peace and stability.

A *Purposes of Countermeasures*

The body of scholarship on countermeasures presents a relative consensus on the key function which the doctrine is intended to serve: the self-help of states.²⁴ Countermeasures are sometimes characterised as a form of reparation, but they are more accurately defined as an international law enforcement mechanism.²⁵ The need for effective coercion is pressing in a system where there is no compulsory judicial settlement of disputes and use of force except in self-defence is prohibited; discussions of this issue stem back to the dawn of the modern international law system itself.²⁶ Unlike municipal law systems, international society lacks an organised, systematic agent of enforcement.²⁷ It is incorrect to suggest that international law does not have any vertical mechanisms of enforcement, given that states can seek measures such as collective sanctions and security regimes facilitated by authoritative international bodies such as the UN Security Council. But these mechanisms are flawed in ways that horizontal enforcement mechanisms undertaken unilaterally by states are not. For one, initiating actions under, for example, Chapter VII of the UN Charter is usually subject to time-consuming, highly political, and restrictive procedures.²⁸ In contrast, unilateral actions by states are not subject to veto or potential modifications as a result of negotiations with other states whose interests or sympathies may be in conflict with

¹⁷ Ibid art 52(1).

¹⁸ Ibid.

¹⁹ Ibid art 51.

²⁰ *ILC commentaries*, above n 10, 135; *Air Service*, (1978) 18 R Int Arb Awards 417, 443–44 [83]; *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 56 [85]–[86].

²¹ *RSIWA*, UN Doc A/RES/56/83, art 49.

²² Ibid art 49(3).

²³ *ILC commentaries*, above n 10, 71.

²⁴ See, eg, Zoller, above n 12; David J Bederman, ‘Counterintuiting Countermeasures’ (2002) 96 *American Journal of International Law* 817, 818; David E Pozen, ‘Self-Help and the Separation of Powers’ (2014) 124 *Yale Law Journal* 2, 54.

²⁵ Zoller, above n 12, 95.

²⁶ Ibid xi–xiii.

²⁷ Ibid xii.

²⁸ Bederman, above n 24, 831.

those of the injured state.²⁹ Interventionism is not undertaken lightly; other states and intra-state organisations may well be unwilling to interfere in a dispute that directly concerns only a few states, risking repercussions for their own position. This is not to suggest that these enforcement mechanisms are ineffective and should be abandoned, but that they alone cannot compel respect for international law and the rights of states.³⁰ Countermeasures were developed in response to this need for horizontal enforcement mechanisms, especially where the dispute does not rise to the level of seriousness required to invoke violent reprisals. The ILC developed the articles on countermeasures with a view to their use in situations where a state has been injured but does not have guaranteed access to an impartial and just dispute settlement process. This can occur through the lack of an international court or tribunal with the necessary jurisdiction and authority to effectively protect the state's rights, or through the wrongful state's refusal to submit to the process in good faith.³¹ Art 52 specifies that dispute resolution procedures displace the need for countermeasures, thereby illustrating this aim. Thus, countermeasures affirm state sovereignty, allowing a state to take unilateral action to protect and enforce its international rights through legitimate coercion.

It is clear that countermeasures have the potential to carry non-violent coercive power by restoring equality of position between the parties.³² A state that derogates from its obligations towards another state is presumably acting in self-interest, as a result of considering the advantages and disadvantages of the wrongful act. Thus, it has a more pressing incentive to commit the wrong than to comply with international law. Because the injured state is the only one being significantly disadvantaged from the wrong, it may be the only one making real efforts to negotiate a solution or to submit the dispute to arbitration.³³ The wrongful state, having made a choice to commit the wrong in the first place, likely has insufficient incentive to resolve the dispute. Apart from a desire to maintain amicable relations, there is little to motivate a state to submit to dispute resolution processes if there is no real risk of injury.³⁴ International arbitration and other dispute resolution mechanisms cost money and time, and the risk of an adverse judgement could cost even more — both in terms of money and the state's pride or reputation.³⁵ Countermeasures allow the injured state to restore the balance so that the resumption of compliance with international obligations is in the best interests of both states. They constitute an explicit demonstration that, unless the wrongful state resumes compliance, it will not have its own rights respected and will suffer loss accordingly. Indeed, the mere existence of countermeasures as a potential consequence of derogation from international rules can be coercive, restraining the conduct of states that would otherwise breach international obligations with impunity.³⁶

Yet to permit states to derogate from their international obligations whenever they judge that they have been wronged is to open the door to a chaotic and unstable international society. The goal of countermeasures is not merely to give states another weapon for

²⁹ Laurence Boisson de Chazournes, 'Economic Countermeasures in an Interdependent World' (1995) 89 *Proceedings of the Annual Meeting, American Society of International Law* 337.

³⁰ Bederman, above n 24, 818.

³¹ *ILC commentaries*, above n 10, 136 [2].

³² Zoller, above n 12, 47.

³³ Lori Fisler Damrosch, 'Retaliation or Arbitration — or Both? The 1978 United States–France Aviation Dispute' (1980) 74 *American Journal of International Law* 785, 798.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Bederman, above n 24, 824.

asserting their rights, but to contribute to international peace and stability — creating what Bederman calls a ‘polite international society’.³⁷ The strict conditions attached to the use of countermeasures are to ensure that their use remains consistent with this overarching purpose. The obligations to notify and negotiate about the countermeasures with the wrongful state before taking them, and to ensure that the countermeasures are reversible and proportionate, ensure that any damage done to the relations between states through the exercise of countermeasures is limited. Countermeasures were not formulated to provide an excuse for any bad behaviour; they attempt to ensure as far as possible that, even where a state’s wrongful acts are justified as a measure of enforcement of international rights, these acts do not themselves become sources of strife. The fact that the ILC does not permit the invocation of countermeasures to justify the suspension of performance of obligations pertaining to dispute resolution proceedings between the invoking and wrongful states underlines that countermeasures are intended to be inherently a dispute resolution tool.³⁸ If countermeasures could be used to subvert other international dispute resolution processes, they would destabilise established modes of negotiation and arbitration, causing less regulation and compliance overall. However, this requirement appears to be based upon the treaty law rule that dispute settlement provisions within a treaty remain in force even if the treaty’s validity or effectiveness itself is in dispute.³⁹ It could therefore be argued that this requirement speaks only of the ILC’s concern in maintaining consistency between the *RSIWA* and other relevant international law rules. Nonetheless, it evidences that, in the development of the *RSIWA*, a high regard was placed upon the principle of the peaceful and effective resolution of disputes. Thus, it is apparent that countermeasures have both a specific and a broad purpose. First and foremost, countermeasures are understood as a horizontal law enforcement mechanism that can be used by individual states to protect their international rights; in brief, they have a self-help purpose.⁴⁰ As a result of this primary purpose, they contribute — on paper — to the effective resolution of international disputes, and therefore to a peaceful international society in which states generally afford respect to each other’s rights. However, this secondary purpose has caused several restraints to be placed upon their use in order to prevent interference with other international dispute resolution mechanisms.

II PRECEDENT OF INVOCATIONS OF COUNTERMEASURES

A *The Air Service Arbitration*

An examination of the sole case where countermeasures have been successfully invoked reveals their potential effectiveness in facilitating the quick resolution of disputes, and that the concept of proportionality cannot realistically be applied inflexibly. The *Air Service* arbitration concerned a reciprocal agreement between the United States and France that granted each state the right to conduct certain air services in the other state’s air space.⁴¹ The dispute arose when Pan Am, a US carrier, decided to schedule a switch in

³⁷ Bederman, above n 24, 819.

³⁸ *ILC commentaries*, above n 10, 133[11]; *RSIWA*, UN Doc A/RES/56/83, art 50(2)(a).

³⁹ *ILC commentaries*, above n 10, 133[13], citing *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan) (Judgment)* [1972] ICJ Rep 46, 53.

⁴⁰ Enzo Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) 12 *European Journal of International Law* 889, 893.

⁴¹ Christopher Greenwood, ‘The US–French Air Services Arbitration’ (1979) 38 *Cambridge Law Journal* 233, 233–234.

the model of aircraft used — known as a ‘change of gauge’ — at the London stopover on the West Coast–Paris route. Whilst the 1946 agreement permitted changes of gauge to be done in either the US or France, it was silent on changes in third party states. France objected to Pan Am’s proposed change of gauge, alleging that it was unlawful because it was not permitted by the Agreement. When Pan Am proceeded to conduct the change of gauge regardless, French *gendarmes* surrounded a Pan Am plane on the runway and refused to allow its passengers or freight to be disembarked.⁴² Pan Am’s flights under the Agreement were subsequently suspended.⁴³ This action taken by France in blocking Pan Am from flying the agreed routes constitutes the initial wrongful act. In response, amid negotiations about having recourse to arbitration, the US Civil Aeronautics Board ordered that Air France was to be prevented from operating its thrice-weekly flights along the Los Angeles–Montreal–Paris route for the period during which Pan Am was barred from operating its West Coast–London–Paris flights.⁴⁴ It is this order that forms the substance of the US’s countermeasures. However, the order was never carried out, as a *Compromis* of arbitration was written and signed by the parties on 11 July 1978 — one day before the order was to take effect.⁴⁵ It was a term of the *Compromis* that Pan Am be permitted to operate the West Coast–London–Paris flights with the change of gauge until such time as the Tribunal issued alternative orders.⁴⁶

The Tribunal, constituted by a representative from each party and a third, impartial president — Dutch scholar Willem Riphagen — was convened to determine two questions: whether the London change of gauge was permitted under the 1946 agreement, and whether the US had a right to issue the order.⁴⁷ The first question was answered in the affirmative, although the French arbitrator, Paul Reuter, dissented.⁴⁸ However, the question of the lawfulness of the US’s response was answered unanimously.⁴⁹ In Question B, the Tribunal considered arguments made by France and the US pertaining to issues which are now recognisable as codified elements of lawful countermeasures under *Gabčíkovo-Nagymaros* and the *RSIWA*. One major point of dispute between the parties was whether the US’s suspension was proportionate to France’s alleged breach. Facts which France claimed pointed to disproportionality were that the denial of a right to commence a new service is different in value to the interruption of an existing undisputed service, and that each act would have had different economic consequences.⁵⁰ However, the Tribunal’s reasoning makes it clear that proportionality does not mean equivalence. Instead, they stated that any calculation of proportionality of countermeasures must not merely account for the injuries suffered by each party, but ‘also the importance of the questions of principle arising from the alleged breach.’⁵¹ Given that the change of gauge issue was a significant part of the United States’ air transport policy, and accordingly of a large number of international agreements with other countries, any disruption or challenge to the status quo of one such agreement could have ramifications far beyond the 1946 Agreement.⁵² This

⁴² *Air Service*, (1978) 18 R Int Arb Awards 417, 420 [4].

⁴³ *Ibid.*

⁴⁴ *Ibid* 421 [8].

⁴⁵ *Ibid* 421–2 [9].

⁴⁶ *Ibid* 422.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* 447–8.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 427–8 [17].

⁵¹ *Air Service*, (1978) 18 R Int Arb Awards 417, 443–4 [83].

⁵² *Ibid*; Damrosch, above n 33, 792.

consideration overrode the disproportionate factors to which France pointed. The Tribunal's decision makes it clear that all the circumstances of the case must be taken into account when assessing proportionality, and that states invoking countermeasures do not have to establish perfect proportionality, where the effects of the measures correspond directly and precisely to those of the breach. It also situates the taking of unilateral countermeasures in a wider context of state relations, by establishing that considerations of principle are given further weight when the actions of non-party states could be affected.⁵³ Thus, in *Air Service*, countermeasures were characterised as having the ability to safeguard the observance of legal principles among all states that subscribe to them — not merely between the two states directly concerned. The case provides an example of the invocation of countermeasures in a bilateral dispute being used to promote international stability more broadly.

The Tribunal also considered France's arguments that the US did not have the right to take countermeasures whilst negotiations about arbitral procedures were ongoing — an argument that evokes the duty to negotiate before taking countermeasures in art 52(1) of the ILC *RSIWA*. It found that the presence of an arbitration clause in the agreement did not preclude the taking of countermeasures before the Tribunal was constituted and in a position to give measures of protection.⁵⁴ It reasoned that countermeasures may facilitate resolution of disputes through arbitral or judicial settlement procedures by 'balancing the scales' of damage suffered, giving the wrongdoing state a real interest in the quick resolution of the dispute, and hence in cooperating in dispute resolution procedures.⁵⁵ However, the Tribunal made a distinction between potential arbitral or judicial proceedings, and proceedings that will remove the justification for countermeasures by giving states recourse to alternative modes of international enforcement.⁵⁶ The Tribunal must be in a position to act on the dispute, in the form of prescribing appropriate interim protective measures, before the state's right to take countermeasures is excluded.⁵⁷ This finding is now codified in art 52(3)(b), which provides that countermeasures must be abandoned once judicial proceedings are pending in a forum that has binding authority over the parties. Thus, so long as a state is not in a position where an external mechanism can take action to protect the state's threatened rights, it is still entitled to protect itself through countermeasures. In this respect, the Tribunal demonstrated a clear understanding of the value of countermeasures in encouraging the resolution of disputes, and elucidated the relationship between them and other international dispute resolution proceedings. The picture painted of the doctrine by the *Air Service* arbitration is of a useful means of encouraging cooperative, quick and effective negotiation and arbitration.

B *The Gabčíkovo-Nagymaros Dams Case and Other Unsuccessful Invocations*

Analysing the unsuccessful invocations of the countermeasures doctrine reveals which elements have been the most difficult to make out, as well as further subtleties in how states view the doctrine. Arguably the most significant invocation, given that it gave the ICJ its best opportunity to date to examine and apply the doctrine, is the *Gabčíkovo-*

⁵³ Damrosch, above n 33, 792.

⁵⁴ *Air Service*, (1978) 18 R Int Arb Awards 417, 443 [80], 444 [84]–[99].

⁵⁵ *Ibid* 444 [95]; Damrosch, above n 33, 800.

⁵⁶ *Air Service*, (1978) 18 R Int Arb Awards 417, 444 [94].

⁵⁷ *Ibid* 444 [95]–[96].

Nagyymaros Dams case in 1998. Hungary and Slovakia were engaged in a dispute over Hungary's breach of a treaty (originally concluded with Czechoslovakia and succeeded to by Slovakia upon the dissolution of that state) that governed the construction of a joint hydroelectric project on a part of the river Danube shared by both nations. That Hungary had *prima facie* breached the treaty in suspending and later abandoning work on the project was not in dispute. Slovakia claimed that Czechoslovakia's acts of diverting the Danube and constructing alternative works — known as 'Variant C' — were valid countermeasures in response to Hungary's breach. Whilst Slovakia originally tried to argue that Variant C was lawful, when the Court concluded that these actions were *prima facie* unlawful, countermeasures were raised as an alternative argument.⁵⁸ Thus, Variant C does not appear to have been deliberately taken as a countermeasure; rather, the alternative argument structure suggests that the invocation of countermeasures was a result of Slovakia searching for some legal justification for the conduct after the fact.

The countermeasures passed the first two elements easily; it was 'clear' that Variant C was in response to Hungary's internationally wrongful act of violating the treaty,⁵⁹ and Czechoslovakia had requested Hungary's resumption of its treaty obligations 'on many occasions', to no effect, before Variant C was implemented.⁶⁰ The point on which Slovakia failed was proportionality.⁶¹ The Court defined the proportionality assessment as a comparison between the effects of the countermeasure and the initial injury, 'taking account of the rights in question'.⁶² Unlike the *Air Service* Tribunal, the Court did not specifically mention the relevance of the principle at stake. The Court found that the Danube was a natural resource to which Hungary had a right to have an equitable and reasonable share. Czechoslovakia's unilateral diversion of the Danube deprived Hungary of this rightful share. Furthermore, the diversion had ongoing effects upon the ecology of Hungarian land.⁶³ By the Court's calculus, these effects outweighed Czechoslovakia's losses from Hungary's failure to complete construction of the project. However, Judge Vereschetin dissented on this point, criticising the Court for not 'compar[ing] like with like'.⁶⁴ By this, he meant that the Court should have weighed equivalent consequences of the breach and the countermeasure against each other, considering the financial consequences, environmental consequences, and the effects upon each state's right to equitable use of the shared watercourse separately.⁶⁵ It has been argued that the Court failed to give the proportionality analysis the depth of reasoning it required by conflating these different consequences.⁶⁶

The Court did not consider the reversibility requirement, having already found that the proportionality element was not met. However, the Court's mention of the 'continuing' ecological effects of the Danube's diversion, as well as the separate opinion of Judge Bedjaoui that the measure was 'neither provisional nor deterrent',⁶⁷ indicates that Slovakia would have struggled to succeed on this point. The measure had tangible effects

⁵⁸ *Gabčíkovo-Nagyymaros*, [1997] ICJ Rep 7, 54 [78].

⁵⁹ *Ibid* 55–56 [83].

⁶⁰ *Ibid* 56 [84].

⁶¹ *Ibid* 56–57 [87].

⁶² *Ibid* 56 [85].

⁶³ *Ibid*.

⁶⁴ *Ibid* 244 (Judge Vereschetin).

⁶⁵ René Lefeber, 'Case Analysis: The Gabčíkovo-Nagyymaros Project and the Law of State Responsibility' (1998) 11 *Leiden Journal of International Law* 609, 618.

⁶⁶ *Ibid*.

⁶⁷ *Gabčíkovo-Nagyymaros*, [1997] ICJ Rep 7, 131 [52] (Judge Bedjaoui).

upon a natural environment, the value of which is not easily measured in monetary terms or easily repaired once damaged. This illustrates the difficulty involved in taking countermeasures; if they have any effect beyond economic loss or the rights of the state that directly correspond to the rights infringed by the initial wrong, then both proportionality and reversibility are difficult to meet.

The other primary international cases that are usually cited as relevant precedent for countermeasures actually concerned belligerent reprisals. In the 1930 *Portuguese Colonies Award*,⁶⁸ known as the *Cysne* case, Germany used armed force to attack a Portuguese ship in retaliation against Great Britain's breach.⁶⁹ *Cysne* is cited by the ILC as evidence for the requirement that countermeasures must be directed against the responsible state, although injury to the rights of nationals of third states may be unavoidable. Germany failed to defend its actions as lawful because it impermissibly directed its reprisal against a third state, and not against Great Britain.⁷⁰ Similarly, the *Naulilaa* arbitration between Germany and Portugal concerned armed reprisals, but nonetheless established several essential requirements of lawful reprisals that were later applied to countermeasures: that they must be directed against a prior internationally wrongful act, that they must be preceded by a demand for compliance and/or reparation, and that they must be proportionate to the wrong.⁷¹ Germany failed to establish all three of these elements. Finally, the United States unsuccessfully attempted to raise countermeasures as a defence to its actions in supporting insurgents within Nicaragua in the *Military and Paramilitary Activities in and against Nicaragua* case.⁷² Again, these actions clearly did not constitute countermeasures because they involved the use of force and were in response to Nicaragua's unlawful conduct against El Salvador, not against the United States.⁷³

Additionally, there have been several unsuccessful invocations in the context of international investment law.⁷⁴ Notably, the case of *Corn Products International Inc v The United Mexican States* concerned a tax imposed by Mexico on High Fructose Corn Syrup products that were flooding the market and affecting the Mexican sugar industry.⁷⁵ When Corn Products International sued Mexico, Mexico claimed that the tax constituted a countermeasure. This argument failed because it was found that the countermeasure was directed against an investor, and not against a state, thus violating art 49 of the *RSIWA*.⁷⁶ This case further restricted the scope of countermeasures, because the Tribunal interpreted the ILC's commentary that countermeasures do not

⁶⁸ *Execution of German-Portuguese Arbitral Award of June 30th, 1930 (Germany v Portugal) (Award)* (1933) 3 UNRIAA 1371.

⁶⁹ Junianto James Losari and Michael Ewing-Chow, 'A Clash of Treaties: The Legality of Countermeasures in International Trade Law and International Investment Law' (Paper presented at the Fourth Biennial Global Conference of the Society of International Economic Law, World Trade Institute, University of Bern, 10–12 July 2014) 4.

⁷⁰ *ILC commentaries*, above n 10, 76.

⁷¹ *Naulilaa*, (1928) 2 UNRIAA 1011.

⁷² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*').

⁷³ *Ibid* 127 [248]-[249].

⁷⁴ *Cargill Inc. v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/5, 21 November 2007).

⁷⁵ (*Decision on Responsibility*) (ICSID Arbitral Tribunal, Case No ARB(AF)/04/1, 15 January 2008) ('*Corn Products Case*'); Losari and Ewing-Chow, above n 69, 12-13.

⁷⁶ *Corn Products Case*, ICSID Arbitral Tribunal, Case No ARB(AF)/04/1.

justify the violation of a third state's rights as applying to the rights of all third parties.⁷⁷ Clearly, the unsuccessful invocations of countermeasures outnumber the single successful *Air Service* arbitration.

C Why Are WTO Countermeasures Relatively Successful?

It must be noted that there is one area of international law where countermeasures are successfully used with some regularity, namely, disputes that arise under World Trade Organization ('WTO') agreements.⁷⁸ However, these countermeasures are a specialised form that operates under a distinct legal regime, and examining their characteristics elucidates why they are more appealing to states than the broader 'ILC Countermeasures' that are the main focus of this paper. There are numerous examples of countermeasures being employed under the *lex specialis* of the WTO Dispute Settlement Understanding.⁷⁹ For example, in *US – Upland Cotton*,⁸⁰ the United States breached a trade agreement with Brazil by placing subsidies on cotton. In response, Brazil was authorised to impose additional customs duties upon medical products, food and arms.⁸¹ In another case, *US – Gambling*,⁸² the US imposed limitations on market access to gambling and betting services that were not specified in its General Agreement on Trade in Services (GATS) Schedule. As a result, the WTO Dispute Settlement Board ('DSB') authorized Antigua to impose a countermeasure in the form of suspending its protection of intellectual property rights towards US nationals.⁸³ In both cases, the parties subsequently arrived at an agreement that resolved the dispute; in *US – Upland Cotton*, it included the paying of reparations by the US. There are several other cases where WTO countermeasures have been used, many of which have been decided after 2000.⁸⁴ They exemplify the creative and effective ways in which countermeasures can facilitate cooperation and resolve disputes; but they cannot be used as demonstrative of the success of the broad ILC doctrine.

The most striking difference is that WTO countermeasures must be first authorised by the WTO DSB, and are subject to review from that body.⁸⁵ Thus, they are not purely horizontal measures of self-help, as they require the state to submit to vertical authority. Further, the WTO panel's 2000 report on the *United States – Import Measures on Certain Products from the European Communities* dispute, it was stated that

⁷⁷ Ibid 76–77 [163]–[164].

⁷⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

⁷⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('DSU').

⁸⁰ Recourse to Article 22.6 Arbitration Report, *United States – Subsidies on Upland Cotton*, WTO Doc WT/DS267/ARB/2 (31 August 2009) ('*US – Upland Cotton*').

⁸¹ Ibid.

⁸² Decision of the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/ARB (21 December 2007) ('*US – Gambling*').

⁸³ Ibid.

⁸⁴ See, eg, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) (Report of the Panel); *European Communities – Measures Affecting Trade in Commercial Vessels*, WTO Doc WT/DS301/R (22 April 2005) (Report of the Panel); Decision of the Arbitrator, *United States – Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/ARB (20 August 2002).

⁸⁵ DSU arts 3.7, 22.2.

countermeasures authorised by the DSB were ‘essentially retaliatory in nature’.⁸⁶ This is in stark contrast to the ILC’s emphasis on the essentially *coercive* nature of countermeasures.⁸⁷ Indeed, the Disputes Settlement Understanding (DSU) specifies elements of WTO countermeasures that override the *RSIWA* as *lex specialis*. For example, under the DSU the injured state must first seek to suspend performance of its obligations within the same sectors as the initial wrong.⁸⁸ If this is not practicable, then obligations under different sectors or agreements can be considered.⁸⁹ The *RSIWA*, by contrast, do not give any specifications about which obligations ought to make up the substance of countermeasures. The more specific nature of these elements, combined with the aforementioned vertical authorisation of the measures, gives WTO countermeasures a significant degree of certainty that cannot be achieved by ILC countermeasures. The state taking countermeasures is assured, before they breach their legal obligations, that they are acting within their rights and will not subsequently be found responsible for an internationally wrongful act.⁹⁰ Further, they are not solely responsible for determining the type and extent of the countermeasures, but are co-authors with the DSB.⁹¹ States have enthusiastically adopted WTO countermeasures because they have little to lose in seeking authorisation from the DSB, and much to gain. Because the highly regulated status of trade disputes transforms them into vertical measures with a high degree of certainty, WTO countermeasures are a different beast to the general doctrine. Their overwhelming success relative to the ILC form is suggestive of the aspects of ILC countermeasures that are unattractive to states — namely, the uncertainty of whether their application will expose the state to responsibility for an international wrong.

III FAILINGS OF COUNTERMEASURES

As the cases discussed above illustrate, it cannot be said that countermeasures are currently contributing to the peaceful settlement of international disputes by facilitating state self-help, for the simple reason that states are not invoking them. This ineffectiveness can be explained by the identification of several consistent factors that separate the successful *Air Service* arbitration and WTO regime from the *RSIWA* and unsuccessful invocations. In brief, the dominant flaws in the doctrine are its strict procedural requirements, the uncertainty of proportionality assessments, its lack of clear applicability to multilateral or non-state actor disputes, its a priori wrongfulness, and the inherent risk it carries of escalating disputes. As will be discussed in this section, there is evidence that each of these flaws has to some extent affected how states perceive the doctrine.

A *Strict Procedural Requirements*

The strict formalism of the *RSIWA* is an antithesis to the reality of how states act in international relations. Whilst each condition imposed upon the invocation of countermeasures has a clear justification that is in line with the goals of international

⁸⁶ *United States — Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) (Report of the Panel) 6.106.

⁸⁷ *ILC commentaries*, above n 10, 130.

⁸⁸ *DSU* art 22.3(a).

⁸⁹ *Ibid* art 22.3(b), (c).

⁹⁰ *DSU* art 22.3; Losari and Ewing-Chow, above n 69, 6.

⁹¹ Ranieri Lima Resende, ‘Normative Heterogeneity and International Responsibility: Another View on the World Trade Organization and its System of Countermeasures’ (2011) 3 *Goettingen Journal of International Law* 643, 672.

peace and stability, together they present a restrictive, complicated regime that is unattractive to states, as compared with the flexibility of diplomatic negotiation. The ILC, along with numerous states and the UN General Assembly, was concerned with the doctrine's potential for abuse, particularly by strong states.⁹² In the past, reprisals — an unrestricted predecessor to countermeasures — were frequently used to compel obedience to a strong state's will, rather than to international obligations.⁹³ Even with the limitations imposed upon countermeasures, there remained concerns that their unilateral character permitted exploitation by stronger states that were less susceptible to damage.⁹⁴ However, these legitimate concerns may have hamstrung the doctrine's usefulness by imposing the conditions of prior notification, negotiation, and reversibility, which are either impractical or interfere with the coercive function of the measures.

The requirement that has been subject to particularly vehement criticism from some states is that states must attempt to engage in negotiation prior to taking countermeasures.⁹⁵ Japan raised the point that responsible states are likely to accept an offer to negotiate, which would stymie the countermeasures before they are taken.⁹⁶ In some cases, such as *Air Service*, this may well be a positive result; but it is also possible that this could cause two states of unequal bargaining power to negotiate with an unjust outcome, where if countermeasures had been taken the states would have been on a more balanced footing. On that note, the United States made the point that allowing countermeasures whilst negotiations were taking place had the advantage of preventing the wrongful state from controlling the duration of the negotiations.⁹⁷ Whilst these points may be countered by art 52's specification that the negotiations must be in good faith, which would prevent the wrongful state from exerting undue control over the process, the United Kingdom argued that this is 'wholly inadequate' because bad faith may not be definitively established for a significant amount of time, during which countermeasures could not be used.⁹⁸ Nonetheless, it has been pointed out that negotiations between disputant states are hardly so uncommon as to render this requirement inconvenient or burdensome;⁹⁹ indeed, several members of the ILC did not consider that the negotiation requirement was necessary to include because it was so inconceivable that an injured state would ever resort to countermeasures without prior negotiations except in the most extreme circumstances.¹⁰⁰ It is striking that the three states that are so strenuously opposed to the restrictiveness of the *RSIWA* — with the UK even going so far as to call the countermeasures provisions 'wholly unacceptable'¹⁰¹ — are all 'strong' states that have more financial and political power than the vast majority of

⁹² See, eg, International Law Commission, 48th sess, 2454th mtg, UN Doc A/CN.4/SER.A/1996 (5 July 1996) 155–160 ('*ILC 2454th mtg*'); International Law Commission, 48th sess, 2455th mtg, UN Doc A/CN.4/SER.A/1996 (9 July 1996) 160–166 ('*ILC 2455th mtg*'); *Comments and Observations Received from Governments*, 53rd sess, UN Doc A/CN.4/515 and Add.1–3 (28 June 2001) 84 (Denmark, on behalf of Norway, Sweden, Iceland and Finland), 86 (Japan), 82 (Argentina) ('*2001 Comments and Observations from Governments*'); Pozen, above n 24, 58.

⁹³ *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 160 [6]–[8].

⁹⁴ International Law Commission, 46th sess, 2366th mtg, UN Doc A/CN.4/SER.A/1994 (13 July 1994) 265[46] ('*ILC 2366th mtg*'); Bederman, above n 24, 831.

⁹⁵ *RSIWA*, UN Doc A/RES/56/83, art 52.

⁹⁶ *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3 88.

⁹⁷ *Ibid* 89.

⁹⁸ *Ibid* 88–89.

⁹⁹ *ILC commentaries*, above n 10, 136 [4].

¹⁰⁰ *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 161 [14].

¹⁰¹ *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 88.

other states. This suggests that the negotiation requirement is having the precise intended effect of limiting the ability of powerful states to abuse the doctrine. Nonetheless, these points are legitimate: countermeasures could better ensure compliance with dispute resolution procedures if they were allowed to remain in force during negotiations.

The reversability requirement of art 49(3) is flawed because it suffers from uncertainty. It is difficult to discern how states can ensure that countermeasures do not have irreversible effects; because whilst the measures themselves may be reversible, they are likely to have, at the very least, ongoing economic effects. It is unclear whether Slovakia would have successfully argued that the diversion of the Danube was reversible in *Gabčíkovo-Nagymaros*, because the court did not consider that element upon finding that they had failed on the proportionality element. It may well be possible that the Danube could be re-diverted to its original course – but it seems unlikely that this could be accomplished without ongoing effects upon the environment, and therefore on Hungary's rights. It is unclear to what extent reversibility requires the state taking countermeasures to address the effects of the countermeasures prior to invoking them.

Furthermore, the responsibility to notify the wrongdoing state of the decision to take countermeasures in art 52(1)(b) does not appear to line up with state practice, because states may not explicitly recognise their actions as specific legal remedies until after the fact. Slovakia's failed invocation in the *Gabčíkovo-Nagymaros* case demonstrates that states will only turn to such legalistic doctrines once they have already submitted to international judicial authority. Czechoslovakia – whose conduct in diverting the Danube was succeeded to by Slovakia after the country split – did not explicitly identify the diversion of the Danube and the alternate works as countermeasures before they took them, although it is apparent from the facts that it was motivated by Hungary's failure to participate in the joint construction of works. Instead, the doctrine was raised in their submissions to the ICJ as a defence to Hungary's accusations of breach of their obligations under the treaty. It seems that Slovakia only sought to claim that the diversion of the river was a countermeasure retrospectively. This presents a picture, not of a state knowingly utilising the doctrine to coerce another state into resuming performance of its international obligations, but of a state committing a wrongful act with some notion of lawful reprisals and reciprocity, and only later seeking to apply a definitive rule that would allow it to escape legal consequences for its wrongfulness. Clearly, Slovakia's invocation does not fit the intended scenario whereby an injured state consciously uses the doctrine to push the wrongful state towards compliance with legal norms.

Thus, the restrictive elements of countermeasures go too far because of the fear of abuse, when surely an abusive use of the doctrine – ie countermeasures taken with no prior requests for compliance, or with irreversible effects upon the wrongful state's interests – would not align with the coercive self-help purpose of countermeasures, and thus would be ruled invalid by a court or tribunal. Prior negotiation, reversibility, and notification as formulated by the *RSIWA* all carry pragmatic difficulties which interfere with effective state action and, in the case of negotiation, may actually impair coercion.

B *Proportionality*

Whilst the ILC's codification has somewhat increased certainty in the doctrine of countermeasures, there remains uncertainty in their application as a result of the

requirement of proportionality. Proportionality requires analysis that involves a not insignificant degree of approximation.¹⁰² A state seeking to deploy countermeasures must first determine whether the impact of the potential measures would be excessive when considered in light of the wrong to which they are addressed. The ILC's commentary does recognise that it would be 'virtually impossible' to take countermeasures that precisely match the qualitative and quantitative effects of the initial wrong.¹⁰³ Thus, the articles allow some flexibility; there is no need for states to definitively determine proportionality. However, the vagueness with which art 51 explains how proportionality is to be determined leaves much to be desired. Art 51 explains that both the 'gravity of the internationally wrongful act' and 'the rights in question' must be taken into account — but the weight they are to be given is left completely undefined. Furthermore, the 'gravity' of a wrongful act is a highly subjective factor. Whilst the injured state may believe that the wrong poses a grave threat to its rights and to international peace and stability, there is no guarantee that the international community, or an international court or tribunal, will share this view. Such was the predicament of Slovakia in the *Gabčíkovo-Nagymaros* case; in Slovakia's view, the redirection of the Danube in order to complete the works unilaterally was clearly proportionate to the aim of recouping the losses it no doubt suffered as a result of Hungary's failure to carry out construction on the project.¹⁰⁴ However, the ICJ found that Hungary's natural resources rights had been damaged in a way that exceeded Slovakia's injuries, invoking the law governing non-navigational uses of international watercourses. This reveals a further issue: the term 'the rights in question' is so broad as to render it extremely difficult for the state seeking to use countermeasures to consider every relevant right. Clearly, Slovakia had failed to consider the principle that states are entitled to 'perfect equality' in the use of such waterways; or if they had, then they had failed to afford Hungary's rights relevant weight.¹⁰⁵ Spain and the Republic of Korea registered concerns about the clarity of art 51 in their 2001 comments on the *RSIWA*.¹⁰⁶ Spain suggested the addition of more criteria to be used for judging proportionality, and South Korea pointed out that the term 'the rights in question' does not clearly identify to which rights it refers — whether it be those of the injured state, of the wrongful state, of third party states, or of all three.¹⁰⁷ Regarding South Korea's point, the ILC commentary on art 51 does state that all three such rights may be relevant. Nonetheless, the reservations of these states reveals that art 51 is perceived as giving insufficient guidance for states to ensure their compliance with this element.

Furthermore, some states have argued that the ILC's formulation of the proportionality requirement is so restrictive as to remove the coercive value of countermeasures. They adopt the perspective that the proportionality should be assessed with reference to what is necessary to induce performance of the wrongful state's obligations. Japan noted that, where a smaller and less powerful state seeks countermeasures against a relatively strong state, it is likely that the injury suffered by the small state would be relatively insignificant to the stronger state, so that countermeasures proportionate to the injury could have little coercive effect.¹⁰⁸ Indeed, the ILC seemed to note the need to consider inequality of power in proportionality calculations in 1993, but this concern was not

¹⁰² *Air Service*, (1978) 18 R Int Arb Awards 417, 443 [83].

¹⁰³ *ILC commentaries*, above n 10, 135[6].

¹⁰⁴ Cannizzaro, above n 40, 898.

¹⁰⁵ *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 56 [85].

¹⁰⁶ *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 86.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

reflected in the *RSIWA* or their commentaries.¹⁰⁹ The United States registered its concern that art 51's use of the phrase 'the rights in question' was not sufficient to reflect the *Air Service* finding that a response may outweigh the seriousness of the wrong if it is necessary to induce compliance with a significant principle.¹¹⁰ Thus, the ILC's codification of proportionality is problematic for states in two respects: it requires them to risk responsibility for a wrongful act on the basis of a subjective, uncertain calculation; and it limits the potential effectiveness of countermeasures. It seems quite possible that the proportionality element is a prominent disincentive to states considering taking countermeasures.

C *The Bilateral Nature of Countermeasures*

The *RSIWA* and precedent depict countermeasures as a mechanism that is essentially bilateral, being taken by one state and directed at one other state; yet international disputes rarely involve just two state actors. In a globalised world, with increasingly complex ties between states and a greater understanding of cross-border issues such as climate change and cybercrime,¹¹¹ it is becoming less probable that a state's wrongful acts will only affect the rights of one other state. Some states are concerned with this lacuna: Spain, in its 2001 comments on the *RSIWA*, criticised them on the grounds that they lacked a provision on the permissibility of consequences for third states.¹¹² Whilst there are provisions elsewhere in the *RSIWA* that address situations where state responsibility involves multiple injured or responsible states, these only clarify that each injured state is entitled to a claim against each responsible state.¹¹³ The use of countermeasures by third states that have not been directly injured by the wrongful state is, in fact, countenanced by the *RSIWA* in art 54. Yet this does not amount to anything more than recognition that the doctrine could be developed further in this respect in the future. The statement that existing articles 'do not prejudice' the lawfulness, or lack thereof, of third party countermeasures, is hardly a solid basis for a state to confidently become involved in a conflict by which they have not yet been directly affected. The *RSIWA* leaves open too many questions for third states. For example, is the proportionality of third party countermeasures to be assessed by comparing the effects of the measures with the injury suffered by the injured state, or by the indirect injury caused to the third state as a result of the general threat to international peace and stability? If the former, how are third states in a position to fully assess the effects of the initial wrong and take appropriate countermeasures? If the latter, how can such an abstract injury be weighed against concrete injuries? Multilateral disputes are simply not adequately provided for by the countermeasures provisions. Interestingly, Crawford notes that art 54 was more substantive, but comments from states caused it to be significantly reduced to a mere saving clause.¹¹⁴ This suggests that states are concerned with the clause being used to justify interventionism – a valid misgiving, but one which could have been better addressed by placing tighter restrictions upon third party countermeasures, rather than leaving them an open-ended possibility. Furthermore, non-state actors have become

¹⁰⁹ International Law Commission, 45th sess, 2318th mtg, UN Doc A/CN.4/SER.A/1993 (13 July 1993) 143 [23].

¹¹⁰ 2001 *Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 87.

¹¹¹ Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-first Century' (2002) 96 *American Journal of International Law* 798, 800.

¹¹² 2001 *Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 84.

¹¹³ *RSIWA*, UN Doc A/RES/56/83, arts 46, 47.

¹¹⁴ James Crawford, 'The ILC's Articles on State Responsibility: A Retrospect' (2002) 96 *American Journal of International Law* 874, 875.

exponentially more numerous and powerful over the latter half of the 20th century and the beginning of the 21st. Yet the *RSIWA* articles are – as the name makes clear – exclusively about state responsibility, and do not countenance how this might interact with the rights and obligations of non-state actors.¹¹⁵ This statist focus of the *RSIWA* has been criticised as being outdated.¹¹⁶ Bederman notes that it is an irony that, over the fifty years of the *RSIWA*'s drafting process, states have become much less significant in the international sphere compared to other actors.¹¹⁷ Whilst it is understandable that the ILC limited the scope of the articles, given the complexity of the area without other complications, it is undeniable that the lack of guidance as to how countermeasures may and may not affect the rights of third parties is a flaw that may dissuade states from employing the doctrine.

D *The A Priori Wrongfulness of Countermeasures*

It is surely uncontroversial to assert that states are reluctant to admit that they have perpetrated an internationally wrongful act – and countermeasures are, by definition, internationally wrongful acts only rendered lawful by a successful invocation of the doctrine. Given the potential for purported countermeasures to be later ruled invalid, as demonstrated in the *Gabčíkovo-Nagymaros* and *Corn Products* cases, states may be unwilling to openly declare that they are committing what is a priori a wrongful act. This notion is supported by the fact that previous invocations of countermeasures have not tended to constitute a primary argument, but rather an alternative to an allegation that their action was lawful in the first place. In *Gabčíkovo-Nagymaros*, Slovakia did not raise countermeasures as a primary argument because it argued that its actions in diverting the Danube and unilaterally constructing new hydroelectric facilities were lawful.¹¹⁸ It was only after the court had determined that Slovakia's actions were not condoned by the treaty that countermeasures became an issue for consideration. Similarly, the United States in *Nicaragua* raised countermeasures as an alternative to the argument that the actions constituted lawful self-defence.¹¹⁹ Further, the a priori wrongfulness of countermeasures is emphasised by the ILC's framing of the doctrine as possessing an exceptional character.¹²⁰ The *RSIWA* drafts initially framed countermeasures as lawful with several exceptions to that lawfulness, rather than as the specific exception to wrongfulness as they appear today.¹²¹ This approach was changed after members of the ILC expressed reservations about this positive framing.¹²² References to states having an entitlement to take countermeasures were removed to ensure that they were not perceived as permitted acts, but as wrongful acts rendered permissible.¹²³ Several members of the ILC regarded countermeasures as 'an unfortunate fact of international law',¹²⁴ and understood the purpose of codifying them as a limitation of future use of the doctrine, rather than approval. These reservations are shared by numerous states that supported the limitations placed upon the exercise of lawful

¹¹⁵ *ILC commentaries*, above n 10, 31.

¹¹⁶ Weiss, above n 110, 809.

¹¹⁷ Bederman, above n 24, 829.

¹¹⁸ *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 55 [82].

¹¹⁹ *Nicaragua*, [1986] ICJ Rep 14, 127 [248].

¹²⁰ *ILC commentaries*, above n 10, 128 [2], 129 [6].

¹²¹ *ILC 2366th mtg*, UN Doc A/CN.4/SER.A/1994, 263 [27]-[28].

¹²² *Ibid.*

¹²³ International Law Commission, 48th sess, 2456th mtg, UN Doc A/CN.4/SER.A/1996 (10 July 1996) 166–169.

¹²⁴ *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 161 [27].

countermeasures in the *RSIWA*.¹²⁵ Thus, any state purporting to take countermeasures must be aware that their actions will be subject to significant scrutiny from the international community, and that they are risking liability and censure if they fail to meet the strict requirements of the doctrine. At the very least, states may be concerned about the reputational damage that they will incur from committing an international wrong, regardless of whether that wrong has a lawful justification. Once again, the *RSIWA* impose a significant disincentive to the use of the doctrine.

E *The Risk of Escalation*

Finally, the view of advocates of countermeasures that they effectively resolve disputes whilst avoiding escalation does not appear to be shared by many states. On the contrary, countermeasures are generally regarded as an escalating step. Indeed, it is difficult to understand how countermeasures could have any coercive force if they did not escalate matters in some way, thus motivating the wrongful state to change its behaviour. However, they also risk provoking further action from the wrongful state, which in turn leads to a stronger response from the invoking state and an escalating dispute.¹²⁶ Even in *Air Service*, where the Tribunal evinced a favourable view of countermeasures and their role in dispute resolution, they were regarded as the final step in a series of measures by which the parties escalated the dispute.¹²⁷ It was also acknowledged that ‘it goes without saying’ that countermeasures risk further action from the wrongful state that could worsen the existing conflict;¹²⁸ essentially, it was regarded by the Tribunal as self-evident that countermeasures can lead to escalation. This view is explicitly shared by several states. Notably, in its preliminary arguments in a 2000 dispute with EU members about the authority of the Council of the International Civil Aviation Organisation, the United States argued that without this authority states would exercise their rights through countermeasures – a situation that was framed as undesirable as it would escalate, rather than resolve, disputes.¹²⁹ Furthermore, Mexico, in its comments on the final version of the *RSIWA* in 2001, expressed its general opposition to the codification of the law on countermeasures on the grounds that it essentially gave international approval for the doctrine’s use, which ‘could aggravate an existing conflict’.¹³⁰ Whilst the other commenting states did not share Mexico’s objections to any codification at all, the majority’s support for the restrictive framing of the *RSIWA* suggests that countermeasures are perceived as a risky enterprise and should be discouraged.¹³¹ It is quite likely that the potential for escalation is a significant factor behind this general caution towards the doctrine. However, it may be said that any escalation sparked by countermeasures would be relatively slow, occurring only after the requisite negotiations, and their non-violent nature means that they are unlikely to provoke forceful responses. Further, the reversibility requirement and art 53’s specification that countermeasures be terminated once the initial wrongful act has ceased provide for de-

¹²⁵ See, eg, *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 82 (Argentina), 83 (the Netherlands).

¹²⁶ Crawford, above n 113, 883.

¹²⁷ *Air Service*, (1978) 18 R Int Arb Awards 417, 442 [75].

¹²⁸ *Ibid* 444–45 [90].

¹²⁹ ‘Response of the United States of America to the Preliminary Objections Presented by the Member States of the European Union’, *In Re the Application and Memorial of the United States of America Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944 (United States v Members of the European Union)* [2000] 21–22.

¹³⁰ *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 83.

¹³¹ *Ibid* 82–86.

escalation.¹³² Regardless, cautious states may prefer to continue negotiations, even if they lead to stasis, rather than risk provoking the other state to reciprocate in ways that prove more damaging than the initial wrong.

IV RECONCEIVING THE DOCTRINE IN LIGHT OF ITS FAILINGS

In considering the five failings together, it appears that there are three primary disincentives for states to take countermeasures: they do not believe that countermeasures will be effective as a dispute resolution mechanism, either through lacking coercive power or causing undesirable escalation; they may not be sure whether countermeasures are appropriate if their dispute involves multiple other states or non-state actors; or they are unwilling to risk committing a wrongful act because they are unsure whether they will be able to fulfil the doctrine's strict elements. Clearly, countermeasures are not regarded as a viable option, unless a state has already committed a wrongful act and is seeking to defend its actions, as in *Gabčíkovo-Nagymaros*. The majority of these restrictions pertain to the perceptions held by states, rather than the doctrine's ability to achieve its self-help purpose. It appears that countermeasures have been primarily hamstrung by an ideological conflict between the majority of states and jurists who, whilst acknowledging that countermeasures exist, wish to heavily limit their deployment for fear of their abuse, particularly by large states over weaker states; and a minority of powerful states, notably the US, UK and Japan, who strongly advocate the doctrine's use to induce compliance and who believe that its restrictions go too far and hamper its coercive power. Thus, states either subscribe to the view that countermeasures are anathema to peaceful international relations because they are used to escape obligations and exert control over weaker states, or that they have been effectively neutered by the ILC and can no longer be used to achieve their self-help purpose.

These two viewpoints give rise to two possible solutions to the doctrine's lack of use. First, further codification to more fully elucidate elements of the doctrine would address concerns about the difficulty of meeting them and about their potential for abuse. Alternatively, a significant simplification of the existing test for countermeasures to lift the burden of invoking the doctrine and draw it back to its self-help purpose would refute the perception that the doctrine has lost its coercive power. Both solutions should encourage the more frequent use of the doctrine, although each comes with its own challenges.

A *Further Codification*

Expanding and clarifying the *RSIWA* could give more certainty for states about the likely outcome of an invocation of countermeasures, whilst remaining consistent with the general preference of the international legal community to restrict the doctrine's use to exceptional circumstances. In particular, further regulations to more clearly define the requirements of reversibility and proportionality, and to expand the application of the doctrine to multilateral disputes and those involving non-state actors, would remove some ambiguity from the law. Ambiguity can cause the dual ills of restraining states with legitimate purposes for fear of failure whilst permitting opportunistic states to unscrupulously exploit the system.¹³³ As is apparent from the success of WTO

¹³² Crawford, above n 113, 883.

¹³³ Bederman, above n 24, 832.

countermeasures, if states are more certain that their countermeasures are legal, they are more likely to embrace them. Regarding multilateral countermeasures and those deployed by and against non-state actors, this simply requires more codification to explain when countermeasures can be used outside the context of bilateral disputes. Ideally, the doctrine's application would be expanded to situations where states can assert them against non-state actors. Given that they are an exemption from state responsibility, a concept that is inherently based upon state sovereignty, it would be inappropriate at this time to extend their availability as a remedy to non-state actors before a complete regime of international responsibility exists. However, there appears to be no reason why states should not be entitled to assert their rights against non-state actors that have breached their international obligations.

Further, this codification ought to make it clear that there are some exceptional circumstances where a third state may be justified in taking countermeasures on behalf of an injured state. As discussed above, the recognition in art 54 that the *RSIWA* do not prejudice the rights of third party states to take countermeasures is inadequate to give these states sufficient certainty as to the extent of their responsibility. However, giving states an unfettered ability to defend the rights of others could risk seriously destabilising the principle of non-intervention. Additional requirements that the injured state must be unable to take effective countermeasures itself, and must have explicitly called upon the third state for assistance with the relevant dispute, would ensure that countermeasures could not be used to engage in bullying, unjustified intervention, or unwarranted displays of power. However, it would be more difficult to further define the proportionality and reversibility requirements, because they are by definition relatively open-ended concepts that require some determination on the behalf of states seeking to apply them. Furthermore, if the already significant codification represented by the *RSIWA* had little effect on encouraging states to regard countermeasures as a more viable doctrine, it is unrealistic to suggest that further codification would have any more of an effect. This may be a feasible solution to the problem of countermeasures being confined to bilateral disputes, but it does not have practical value beyond this issue.

B *Simplifying the Existing Test for Countermeasures*

Alternately, a solution to the onerous nature of the doctrine is to abolish several formalistic elements and replace them with a general requirement that the state clearly demonstrates its intent to use countermeasures for a coercive purpose. The concepts of prior negotiation, notification, strict proportionality, and reversibility could be the relevant considerations when determining the true purpose of purported countermeasures, rather than strict requirements that must be met. Prior attempts to negotiate indicate that the state's first priority was to resolve the situation, rather than take punitive action. As was evidenced in *Air Service*, the act of notifying the wrongful state of the decision to take countermeasures can suffice to induce compliance or submission to dispute resolution procedures, and thus again demonstrates that the state's goal was coercion. Measures which are proportionate to what is reasonably necessary to coerce compliance with the rights in question are a further indication of true countermeasures, rather than vindictive retaliation. However, none of these are definitive; if a state failed to establish an element, but could explain why this failure was reasonable and not inconsistent with coercion, the doctrine could be applied more flexibly. This would remove some of the burden on states that are dissuaded from taking legitimate countermeasures for fear of failing to meet an element. This approach could also incorporate a good faith partial defence to liability, where if a state can show that

they genuinely believed that their actions were lawful countermeasures at the time, they are not given as strict a punishment than if they had wilfully perpetrated the same wrongful act.¹³⁴ For example, if the countermeasures were disproportionate, the state could be ordered to pay reparations to cover the amount of damage that exceeded proportionality, rather than holding the state wholly responsible for its breach. However, it must be acknowledged that the difficulty of determining motivations of states renders this defence problematic.¹³⁵

This solution would undoubtedly be the more controversial of the two proposals, given the predominant view among states and jurists that countermeasures are exceptional and should generally be discouraged. It is difficult to imagine the ILC deleting several provisions of the *RSIWA* over which it laboured for half a century, especially when so many states have expressed their satisfaction with the restrictions they impose. To do so would be seen as promoting, in the words of one ILC representative, the ‘law of the jungle rather than international law’.¹³⁶

V CONCLUSION

The ideological conflict over whether countermeasures should be used readily in disputes or should be reserved for exceptional situations means that it is especially important that the failings of the doctrine become more widely recognised and understood. The state comments and ILC debates on the *RSIWA* acknowledge that taking coercive action against other states is a reality of international relations – indeed, that it is unavoidable. This suggests that it is the explicit invocation of countermeasures that is absent from state practice, and that states have been unwilling to adjust their practice to fit the requirements by which the ILC intended to limit their use, either from fear of the negative stigma attached to the doctrine, reluctance to meet the strict elements, or a belief that countermeasures no longer have sufficient coercive power. Thus, it appears that the international legal definition of countermeasures is divorced from reality. Work must be done to render the standard more flexible and in line with its self-help function in order to encourage states to regard countermeasures in a more positive way and to explicitly cite them as justification for their behaviour in disputes. Unfortunately, this change could only come about through a significant shift in attitudes towards the doctrine, from the perception that it is a necessary evil to the perception that it is a useful tool to maintain stability and sovereign equality in the decentralised system of international law. However, it is not beyond the realm of possibility that the doctrine be subject to further development. Professor James Crawford, the final Special Rapporteur of the *RSIWA*, commented that they would ‘have to prove themselves in practice’.¹³⁷ Fourteen years after the *RSIWA* were recognised by the General Assembly, there is little indication that the provisions on countermeasures will prove themselves. Recognition in the international legal community of the flaws of the doctrine that were the result of the ILC’s over-cautious approach would be an important development that could spark further attempts to strike a more appropriate balance between the doctrine’s coercive power and its necessary limitations.

¹³⁴ Damrosch, above n 33, 795–796.

¹³⁵ Crawford, above n 113, 883.

¹³⁶ *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 163 [34] (Mr Villagrán Kramer).

¹³⁷ Crawford, above n 113, 889.

