COUNTERMEASURES IN INVESTMENT ARBITRATION. PHENOMENON OF "COUNTER-COUNTERMEASURES".

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Abstract

The use of countermeasures remains a legal tool in intranational law as a "self-help" for the States. The concept precludes the wrongfulness of otherwise unlawful measure taken by one State towards the other if it was enacted to address a previous violation of obligation by this State. However, the question remains how countermeasures interact with investment protection? The question becomes even more complex in the case of "counter-countermeasures" which developed through the practice of counter-sanctions enacted by such States as Russian Federation and Iran to address the sanctions imposed on them.

The main research question of this thesis is to investigate the phenomenon of "counter-countermeasures" in the scope of investment protections granted by the investment treaties. This thesis argues that "counter-countermeasures" constitute a second level of 'classical' countermeasures established by the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ('**ARSIWA**').

The analysis of the case law reveals inconsistency of the tribunal's reasoning on the matter of 'first-level' countermeasures and calls for the establishment of a clearer legal approach towards the matter to avoid contradicting reasonings of arbitral tribunals in the future.

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INTRODUCTION

Countermeasures in international law serve as a dynamic tool for addressing breaches, enforcing legal rights, and promoting compliance. Their role is multifaceted, encompassing both resolution and prevention of disputes while requiring careful consideration of legal principles and potential challenges. Countermeasures are not only part of international trade law, but in a broad sense they also serve as a decentralized regulation system to address the violations of the world peace through the economic collective sanctions. The Doctrine on Countermeasures, however, did not foresee the probability of the imposition of a 'second-level' countermeasures by the offending State. In this thesis such phenomenon is addressed as "counter-countermeasures".

The main research question of this thesis is to investigate what the investment protections are to be applied when "counter-countermeasures" disrupt the investment protection regime on the examples of Iran and the Russian Federation.

The first chapter of the thesis is dedicated to the origin of the concept of countermeasures and their definition. The criteria lied out in the Articles on State Responsibility for Internationally Wrongful Act ('**ARSIWA**') are analyzed to establish the definition and the criteria for a lawful countermeasure.

Chapter two investigates the clash between investment treaties and countermeasure and provides for the analysis of the available case law, namely the Sugar War between the United States and Mexico. Further, it discusses the nature of the investor's rights to protection provided by the investment treaties.

Chapter three focuses on the modern outset of the clash between investment protections and the "counter-countermeasures" enacted by Iran and the Russian Federation as a response to the international sanctions or 'first-level' countermeasures. This chapter discusses the scope of "counter-countermeasures" in relation to the foreign investors' rights. It also evaluates the challenges that the foreign investors in these countries could face may they want to initiate arbitration proceedings.

1. ORIGIN AND DEFINITION OF A COUNTERMEASURE

Before diving into the intricacies of application of countermeasures it is important to follow its long-lasting development. Countermeasures were and remain widely recognized as a self-help tool of a State to react to a wrongful act of another State, immediately and efficiently. The chapter discusses the origins of a concept and the definition contained in the ARSIWA.

1.1. Origin of Countermeasures to the modern use

The availability of countermeasures as a self-help tool for the States to protect their interests and rights finds its beginning as early as in the 14th century. In the form of reprisals, it was widely recognized as an essential right of the States. More precisely, the concept of non-armed reprisals performed the function of what we call countermeasures today[1], as it is also a temporary non-performance of obligations by the injured State towards the oppressor State. The need for a new term appeared after prohibition of the use of force, which eventually made armed reprisals unlawful.[2] Undoubtedly, the international law has developed significantly since that time by tying up the States with reciprocal obligations and trade connections to avoid imbalanced power allocation. The immersive system of investment treaties cannot be taken out of the international legal order. Thus, the availability of countermeasures to the States may be greatly limited by the provisions of bilateral and multilateral investment treaties not to disrupt the investment protection regime. However, the need for a unilateral self-help for the States remains in place and countermeasures as such cannot be eliminated.

[1] Mary Ellen O'Connell, 'Unilateral Countermeasures' in Mary Ellen O'Connell, *The Power and Purpose of International Law* (1st edn, Oxford University Press New York 2008) 233.
[2] ibid 235.

Mary Ellen O'Connell compares the law of contracts to the international law in the sense that where a breach of obligations under the contract is found, other party is entitled to suspend its obligations under the same contract, as well as in case of a breach of a treaty by one State, the other State is not precluded from self-enforcement of its rights by applying economic sanctions, or by withdrawing over-flight rights.[3]

There are two cases that are considered to be cornerstones in the practice of countermeasures: Air Service Agreement arbitration between France and the United States of America[4], 1978 and an ICJ Gabcikovo – Nagymaros case between Hungary and Slovakia, 1997.[5] The Air Service Agreement case concerned calling off the rights of the French air crafts to land in Los Angeles, territory of the United States of America. The arbitrators described the measure as "contrary to international law, but justified by a violation of international law allegedly committed by the State against which they are directed."[6] Gabcikovo-Nagymaros case regarding the implementation and termination of the Treaty on the Construction and Operation of the Gabtikovo-Nagymaros Barrage System[7] established essential criteria for a lawful countermeasure, which later became the basis for the reasonings rendered by the arbitral tribunals in Sugar-War cases between the United States of America and Mexico.

[3] ibid 230.

[4] Air Service Agreement of 27 March 1946 between the United States of America and France (1978) XVIII Reports of International Arbitral Awards 417, 443 para. 84.

[5] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia). Judgment of 25 September 1997 (International Court of Justice 1997) ICJ Rep 7, 56 para 83.

[6] Air Service Agreement of 27 March 1946 between the United States of America and France (1978) XVIII Reports of International Arbitral Awards 417, 443 (n 4) 444.

[7] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia). Judgment of 25 September 1997 (International Court of Justice 1997) ICJ Rep 7, 56 (n 5) 11.

What can be seen nowadays, is that the sanctions as a form of countermeasures have been widely used to address military conflicts or nuclear threats. For example, the United Nations adopted numerous packages of economic sanctions against Iraq in the period from 1990 to 2003 to address Iraq's invasion of Kuweit.[8] Moreover, by imposing collective sanctions the international community was addressing the breach of Non-Proliferation Treaty by the Democratic People's Republic of Korea (DPRK or North Korea). The sanctions included a ban on the exports of certain goods like coal, lead or agricultural products, among others, as well as complete exclusion of North Korea from the international financial system; sanctions were even extended to the nationals of North Korea with a prohibition to obtain an employment abroad.[9]

For the same reason, sanctions were enacted against Iran. However, Iran was not ready to just accept the pressure imposed on it by the other States and therefore implemented its own "counter-countermeasures" to limit the control of foreign investments.[10] The People's Republic of China (PRC or China) was not ready either to just let the sanctions flow and thus passed a new Anti-Foreign Sanctions Law to protect the Chinese individuals and entities from the negative consequences incurred as a result of 'illegal sanctions'.[11]

This example was followed by the Russian Federation in the recent war of aggression against Ukraine. Unprecedented number of sanctions – now overriding a number of sanctions imposed on

[8] S.C. Res. 661 (Aug. 6, 1990); S.C. Res. 665 (Aug. 25, 1990); S.C. Res. 670 (Sept. 25, 1990).
[9] UNSC Res 1718 (14 October 2006) UN Doc S/RES/1718; UNSC Res 1874 (12 June 2009) UN Doc S/ RES/1874 (2009); UNSC Res 2087 (22 January 2013) UN Doc S/RES/2087; UNSC Res 2094 (7 March 2013) UN Doc S/RES/2094; UNSC Res 2270 (2 March 2016) UN Doc S/RES/2270; UNSC Res 2321 (30 November 2016) UN Doc S/RES/2321; UNSC Res 2371 (5 August 2017) UN Doc S/RES/2371; UNSC Res 2375 (11 September 2017) UN Doc S/RES/2375 (2017); UNSC Res 2397 (22 December 2017) UN Doc S/RES/2397.
[10] Ghodoosi, Farshad, Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility: A Case Study of Iran (November 1, 2014). Fordham International Law Journal, Vol. 37, 2014,
[11] Chen Qingqing and Liu Xin 'China's newly passed Anti-Foreign Sanctions Law to bring different effect against Western hegemony', available at: https://www.globaltimes.cn/page/202106/1225911.shtml.

Iran – were put in place by the States around the world: the United States, Canada, the United Kingdom, the European Union and others, to which Russia responded by implementing its own "counter-sanctions" towards the "unfriendly" States and individuals.[12] The "counter-countermeasures" regime in Russia therefore disrupts the activity of foreign investors and a number of arbitration cases are soon to arise in regards to the breach of investment protection. This issue will be discussed in more details in Chapter 3.

1.2. Definition of Countermeasures under International Law

Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts

The intention of International Law Commission ('**ILC**') was to keep the countermeasures "within generally acceptable bounds"[13] thus the matter was observed from different perspectives to identify the possible risks. The ILC reports for 1992 and 1993 evidence concerns of the Commission members regarding the unilateral character of the countermeasures and possibility of abuse of a right to countermeasures by the more powerful States.[14] The members were also concerned about the risk of invocation of 'counter-countermeasures'[15], as from what we can observe today, alleged inefficiency of countermeasures and possible disruption of the international

[12] Decree No. 81 of the President of the Russian Federation dated 1 March 2022, Order No. 430-r of the Government of the Russian Federation dated 5 March 2022.

[13] 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 (A/56/10) 20, ch.2 commentary (2).

[14] Oscar Schachter, 'Dispute Settlement and Countermeasures in the International Law Commission' (1994) 88 American Journal of International Law 471, 472.

[15] ibid 473.

legal order by the unilateral nature of such measures. Nevertheless, the Articles were adopted with the provisions to allow a lawful countermeasure.

Countermeasures are defined in Chapter two of Part Three (The implementation of the international responsibility of a State) of Draft Articles on Responsibility of States for Internationally Wrongful Acts ('**ARSIWA**'). It includes articles concerned object and limits of countermeasures, as well as obligations affected by countermeasures, proportionality, conditions relating to resort to countermeasures, termination of countermeasures and measures taken by State other than an injured State.[16]

Article 22 of ARSIWA exempts State from liability for breach of an international obligation if and to the extent such act constitutes a countermeasure. Articles 49-54 are dedicated to the implementation of the responsibility for breach of international obligation. This approach effectively captures the dual context of countermeasures: firstly, to prevent the wrongful nature of breaching, and secondly, as a measure taken to guarantee the enforcement of responsibility for breaching it.[17] Paparinski creatively identified function of countermeasures as a "shield" – to prevent wrongfulness; and as a "sword" – to enforce State's rights.[18]

Article 49 of ARSIWA outlines the definition of countermeasures:

[16] United Nations (n 13) ch II.
[17] Paparinskis, Martins, Investment Arbitration and the Law of Countermeasures (June 27, 2008). Society of International Economic Law (SIEL) Inaugural Conference 2008, 270.
[18] Paparinskis (n 17).

> *"1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.*
>
> *2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.*
>
> *3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."*[19]

According to the above-mentioned article, the requirements for a lawful countermeasure are: 1) responsive nature, 2) inducing the compliance of the former, 3) in a form of suspension of current international obligations, 4) proportionality and 5) temporality. Article 52 of ARSIWA imposes one more requirement for a lawful countermeasure and it is a notification of the responsible State of a decision to take a countermeasure and offer to negotiate.[20]

The form of countermeasure can vary from the unilateral to collective countermeasure. Article 48(1) grants a right to the non-injured States to invoke responsibility when *erga omnes* obligations are at stake:

> "[*a]ny State other than an injured State is entitled to invoke the responsibility of another State" if "the obligation breached is owed to the international community as a whole*."[21]

[19] ILC, '2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 13) art 49.
[20] ibid 52.
[21] ibid 48(1).

The scholars argue[22] whether the collective sanctions would constitute the collective countermeasures under Article 48(1) of ARSIWA. For this thesis I will assume that they do.

In the context of investment regime, it is worth noting that countermeasures are not always available to the Parties. The right to countermeasures can be explicitly excluded by the Investment Treaty or concern the fields of law where countermeasures are not available.[23] For example, ARSIWA contain a provision which implicates inapplicability of countermeasures against the "fundamental human rights".[24]

1.3. Conclusion of Chapter 1

The conducted research brings an understanding of how deeply rooted the tool of countermeasures is. Firstly, the interconnection between what was called reprisals and countermeasures showed that the latter originate from the former. The non-forcible reprisals constitute the concept of countermeasures in the modern world for the reason of prohibition of armed-reprisals. Secondly, the importance of Draft Articles on Responsibility of States for Internationally Wrongful Acts and its elaborate criteria contributed a lot to the practice by being used as a basis to identify a lawful countermeasure.

[22] Hathaway, Oona A. and Mills, Maggie and Poston, Thomas, War Reparations: The Case for Countermeasures (November 8, 2023). Stanford Law Review, Vol. 76, No. 5, Forthcoming , Yale Law School, Public Law Research Paper, Yale Law & Economics Research Paper, 1027.
[23] Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 Harvard International Law Journal 401.
[24] ILC, '2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 13) art 50(1)(b).

2. INVESTOR-STATE ARBITRATION: ARE THE COUNTERMEASURES AVAILABLE?

The clash between the countermeasures and investment protections is inevitable. The Chapter two, therefore, investigates the availability of the countermeasures in investment treaties and provides for an analysis of the case law. There are not many cases where a question of countermeasures legality was raised, however, there is a trio of disputes on this matter, which are commonly called "the Sugar War". For the benefit of comparison how the legality of countermeasures was considered in these three cases, I will analyze Archer Daniels Midland[25] , Cargill[26] and Corn Products International[27] cases in the following chapter.

2.1. Clash of investment treaties and countermeasures.

Anthea Roberts indicates one more relevant condition for the legality of countermeasures.[28] To her opinion, a countermeasure can only be valid in cases where the investment treaty contains a provision allowing the use of countermeasures or if the same matter has already been discussed in a State-State Tribunal and considered as a valid one. She emphasizes on the lack of jurisdiction in investor -State tribunal to rule on the validity of a countermeasure. However, when the treaty in place is a trade agreement, which fall under the World Trade Organization (**'WTO'**) regulations, the right to an authorized countermeasure cannot be excluded.[29] This approach would solve the

[25] Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007).
[26] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009).
[27] Corn Products International, Inc. v. The United Mexican States ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008).
[28] Roberts (n 23) 402.
[29] ibid.

issue of a clash between the *lex specialis* contained in the investment agreements regarding the dispute settlement and the availability of countermeasures. *Lex specialis* is a special legal regime governing the matters if two laws govern the same issue. In such cases *lex specialis* prevails over *lex generalis* – the general law.

In the investment arbitration cases the availability of a countermeasure also depends on the jurisdiction of the arbitral tribunal, interpretations of the investment treaty or the limitations contained in the customary international law.[30]

For example, the investor-State tribunal may be precluded from deciding on the existence of the previously committed wrongful act committed by the State due to the limited scope of jurisdiction. Regarding the interpretation issue, in the cases discussed below, it becomes evident that the tribunals interpreted same North American Free Trade Agreement ('**NAFTA**') provision in different ways, that may even be contradictory. The Archer Daniels Midland's ('**ADM**') tribunal recognized the availability of the countermeasure under the NAFTA Agreement, whereas in other cases the tribunals excluded it. If the provision of countermeasure would be included into the scope of the treaty, this inconsistency can be eliminated.

The State-to-State relations cannot be dependent on the investor-State tribunal. The volatility of the decision would considerably disrupt the system and put too much power in hands of the investors.

[30] Anna Ventouratou, 'Revisiting the Availability of Countermeasures in Investment Arbitration' in Panos Merkouris and others (eds), *Custom and its Interpretation in International Investment Law* (1st edn, Cambridge University Press 2024) 125.

The availability of a countermeasure can also be excluded by the nature of the investor's rights in the investment treaty. Therefore, if the investor enjoys full protection which is guaranteed by the treaty, any disruption of the investment regime protection caused by the countermeasure would be unlawful.

2.2. Case study: Sugar War between the United States of America and Mexico

2.2.1. Background of the cases

All three of the disputes arose between Mexico and the United States of America (the '**US**'). The background for the claims is the following: on January 1, 2002, Mexico imposed a beverage tax on the soft drinks and other products produced with corn sweeteners. In these cases Claimants from the US are the producers of the high fructose corn syrup ('**HFCS**').[31] HFCS is used as a sweetener in a number of products such as beverages and food which makes it a competitor with the sweeteners made from sugar.[32] HFCS became commonly used mainly because it was cheaper than cane sugar and supplied in liquid, thus more convenient to use.

In the preceding years of 1990s Mexico consumed more sugar than it could produce, therefore the Mexican Government implemented reforms in the industry to support the rise of production. As the market price for sugar in the US was still higher than in the rest of the world, Mexico negotiated to export the surplus to the US market.[33] However, the US was not ready to allow Mexican sugar appear on the market immediately and offered a transitional arrangement for surplus import.[34] Over the time, the Mexican Government would complain that the US

[31] Corn Products International, Inc. v. The United Mexican States ICSID Case No. ARB(AF)/04/01 (n 25) para 2.
[32] ibid 26.
[33] ibid 32.
[34] ibid 33.

Government exported smaller quantity of sugar than it should have according to the agreed arrangement. As a result of the underperformed exports, the Mexican Government faced big financial losses. To regulate the situation, it first referred to the US directly, claiming that the latter broke its obligations. However, the US representatives would not agree with such statement. The Mexican Government then tried to initiate arbitral proceedings under Chapter XX of NAFTA, but the arbitral tribunal was never established for the assumed lack of jurisdiction.

After the failure to attract attention to the problem, the Mexican Government imposed an extensive tax of 20% on the full price of each soft drink with an exception for the drinks with a sugar cane sweetener.[35] The tax burden would lie on the drinks produced with HFCS, regardless of whether the syrup was produced in Mexico or in the US.

Investment agreements and the NAFTA itself do not contain explicit provision on countermeasures, and only in Archer Daniels Midland v. Mexico ('**ADM**') case, the tribunal presumed the availability of a lawful countermeasure.[36] Three arbitration proceedings were initiated by the investors from the US with little difference in time. The Tribunals did not refer to the decisions rendered before, except for one case – Cargill v. Mexico, where the Tribunal also considered the reasoning of the ADM case. The reason for that is that the ADM award was the only one available to the Tribunal at the time.

[35] ibid 40.
[36] Junianto James Losari and Michael Ewing-Chow, 'A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law' (2015) 16 The Journal of World Investment & Trade 274, 277.

2.2.2. Comparative analysis of the awards

2.2.2.1. Archer Daniels Midland Company v. The United Mexican States

In Archer Daniels Midland v. Mexico ('**ADM**') case the tribunal agreed with the Respondent's position that the arbitral tribunal has a jurisdiction over the issue of countermeasures. Article 1131 (1) extends the jurisdiction of the Tribunal to the rules of international law and the right to a countermeasure is one of such rules.[37] The claimant argued that NAFTA Parties excluded the use of countermeasures for alleged violations of NAFTA provisions, as according to *lex specialis* established by Article 55 of the ILC. The respondent's position is that due to the impossibility to invoke[38] *lex specialis*, the dispute cannot be governed by it. The tribunal decided that there is no prohibition of countermeasures in the NAFTA and therefore the availability of countermeasures is not a question of *lex specialis*, but of a customary international law.[39]

In paragraph 126 the Tribunal refers to the decision of the International Court of Justice in Gabcikovo-Nagymaros case to establish the conditions of the legality of a countermeasure.

> "*In the first place it must be taken **in response** to a previous international wrongful act of another state and **must be directed against that State**… Secondly, the injured state must have **called** upon the state committing the wrongful act **to discontinue** its wrongful conduct or to make reparation for it… In the view of the Court, an*

[37] Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5 (n 25) para 111: "The central jurisdictional point, according to the Respondent, is that, pursuant to Article 1131 (1) of the NAFTA, the Tribunal has jurisdiction to apply a customary international law defense to any claimed breaches of Articles 1102, 1106 and 1110. Article 1131 (1) provides that "a Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law".
[38] Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5 (n 25).
[39] ibid 120.

> *important consideration is that the effects of a countermeasure must be* ***commensurate*** *with the injury suffered, taking account of the rights in question… [and] its purpose must be* ***to induce the wrongdoing state to comply*** *with its obligations under international law, and… the measure must therefore* ***be reversible*** *(Gabcikovo-Nagymaros Project, ICJ Reports, 1997, pp- 7, 55-6)*"[40] [emphasis added]

The Tribunal then moved forward to examine the countermeasure's legality and established four conditions in order to prove that the countermeasure was legal:

> *"1. The United States breached Chapter Three and/or Seven and Chapter Twenty. (Respondent did not agree with the conjunctive with respect to Chapter Twenty).*
>
> *2. The Tax was enacted in response to the alleged U.S. breaches, and was intended to induce U.S. compliance with its NAFTA obligations concerning access of Mexican sugar to the U.S. market and concerning U.S. obligations pursuant to NAFTA Chapter Twenty.*
>
> *3. The Tax was a proportionate measure*
>
> *4. The Tax did not impair individual substantive rights of Claimants."*

After examining the relevant facts and discovering that a number of anti-dumping measures to protect the sugar industry were enacted by Mexico before this case, the Tribunal decided

[40] ibid 126.

that the Tax in place was rather a measure to protect the internal sugar market, than to induce the US to comply with its export obligation.[41] In the proportionality analysis the Tribunal concluded that the Mexico's purpose to secure the compliance by the US could have been reached by a different measure not impairing the investment protection.[42] Therefore, the Tribunal concluded that the Tax measure cannot be considered as a lawful countermeasure because it does not satisfy the criteria established by the customary law.[43]

2.2.2.2. Corn Products International, Inc. v. United Mexican States

In Corn Products case the Claimant also argued that the countermeasure is not a lawful one. The reasoning was based on the fact that the WTO Tribunal has already considered the measure and rejected the lawfulness of the Tax measure as a countermeasure. Nevertheless, the arbitral Tribunal in place did not agree with the argument of the Claimant and stated that regardless of the decision of the WTO Dispute Settlement Body ('**DSB**'), the countermeasure could still constitute a lawful measure under international customary law.[44] The decision of the WTO DSB mainly evolved around the lack of jurisdiction, as the case concerned the performing of obligation under the NAFTA agreement and not the WTO one.

The Tribunal then outlined the requirements for a lawful countermeasure according to the Article 22, and 49-53 of the ARSIWA:

[41] ibid 151.
[42] ibid 159.
[43] ibid 160.
[44] Corn Products International, Inc. v. The United Mexican States ICSID Case No. ARB(AF)/04/01 (n 27) para 157.

"1. Be taken to a prior breach of international law by another State;

2. Be directed against that wrongdoing State

3. Be taken for the purpose of inducing that State to comply with its international obligations;

4. Be limited in time and, so far as possible, be taken in such a way as to permit resumption of the performance of the obligations in question;

5. Be proportionate to the injury caused by the original wrongful act, taking account of the gravity of the wrongful act and the rights in question;

6. Be accompanied by a call on the State responsible for the original wrongful act to fulfil its obligations and a good faith attempt to negotiate or resolve the dispute in question through other forms of dispute settlement."[45]

The Tribunal did not move forward to analyze the legality of a countermeasure, as it found that the investor has its own rights under Chapter XI of the NAFTA to protect their interests and those cannot be deprived by a countermeasure enacted by the host State against its home State.[46]

[45] ibid 146.
[46] ibid 175.

2.2.2.3. Cargill, Incorporated v. United Mexican States

By the time Cargill case was initiated, decisions in ADM and Corn products cases were already rendered. The Cargill tribunal wanted to take into consideration both of the previous awards, however, it was only the ADM award available at the time. The claimant in the present case – an HFCS supplier – argued that "investors and their national States cannot necessarily be assimilated for legal purposes" and "Mexico may not lawfully take countermeasures that "target" United States investors."[47]

Mexico claims that if the investors were given the right to challenge the availability of countermeasures, it would be unproportionate to grant more rights to an investor than to the State. Therefore, the Claimant cannot challenge a measure adopted against the State to prove it is unlawful, as only the State may have such a discretion. If the investor succeeded in their claim, it would nullify the State's right to a lawful countermeasure.[48]

The Claimant argues that the regime of the NAFTA agreement excludes the availability of countermeasures under the customary law until the dispute resolution process under Chapter XX was exhausted, which constitutes the *lex specialis*.[49] The Respondent therefore raises the same issue as in the ADM case – impossibility to resort to dispute resolution process under Chapter XX not for their own fault, as they took all the measures available to them to resolve the dispute before the invocation of the countermeasure.[50]

[47] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/Z (n 26) para 387.
[48] ibid 392.
[49] ibid 394.
[50] ibid 401.

In the conclusion of the Tribunal in regards to the legality of the defense raised by Mexico finds that the countermeasure directed at the offending State not necessarily means that it can be considered justified for the obligations breached towards the United States' nationals.[51] The Tribunal also disagreed with the decision in ADM on the matter that the investors possess more procedural rights under the Chapter XI of the NAFTA.[52]

To the defenses presented by the Respondent regarding the impossibility of invocation of the legal countermeasure where the interests of the investors are violated, the Tribunal stated that it finds no controversy in such a holding, even though the countermeasure may be less effective, there should be other countermeasures to be adopted to address the breach.[53] This statement triggers a proportionality requirement as it was also discussed in the ADM case. The tribunal further declares that the countermeasure in place cannot diminish the rights of the investors under Chapter XI of NAFTA, which protects the nationals of the offending State – the United States of America. It also contents that there is no need for an explicit exclusion of the availability of a countermeasure in an investment agreement due to the existence of the limits already contained in the ARSIWA Article 50 (such as the obligations for the protection of fundamental human rights).[54]

The decisions of the Tribunal agree on the matter that the investor possess protections granted by the investment treaty and cannot be diminished by the State-to-State

[51] ibid 422.
[52] ibid 424.
[53] ibid 428.
[54] ibid.

relationships in the case of the countermeasure. This analysis defines a need to establish the nature of the investors' rights under the State-to-State investment agreements.

2.3. Nature of the investors' rights. Investment triangular between home State, host State and the investors.

The investors are not explicitly parties to the investment treaties; however, they enjoy the protections provided in those treaties. If to assume that the investors enjoy the third-party beneficiary rights, the rights cannot exceed what is granted to the home States. At the same time if the investment treaties grant absolute rights to the investors that cannot be limited, it makes it impossible for the host State to justify its countermeasure as a lawful one against the investor's home State, which eventually means that countermeasures are ipso facto impermissible.[55]

The discussion about the investors' rights is quite contradictable. Eran Sthoeger and Christian J Tams state that ILC Commentaries assume that if the investors have no individual rights, they cannot complain either.[56] The authors bring an analogy to the trade treaties, with the suspension of which some companies may go bankrupt or lose their business to emphasize that the indirect effects cannot be avoided entirely.[57] That would be contradictory to the practice of investment arbitration: where the investor can initiate the proceedings against the host State, there is no need to initiate proceedings on behalf of the home State. Some scholars compare the investors' rights under the investment protection regime to the human rights system.[58] Is it indeed sensible? It is

[55] Roberts (n 23) 356.
[56] Eran Sthoeger and Christian J Tams, 'Swords, Shields and Other Beasts: The Role of Countermeasures in Investment Arbitration' (2022) 37 ICSID Review - Foreign Investment Law Journal 121, 132.
[57] ibid.
[58] Douglas Z. *The International Law of Investment Claims*. Cambridge University Press; 2009, supra note 18, p. 94.

true that to some extent the regimes of human and investors' rights are comparable, but they are acting in parallel. The property rights, for example, that the investors enjoy are the human rights by nature, however, in case of a lawful expropriation and the following compensation, they work in a synergy and complement each other. There is no need for a confusion of the two.

The scholars have been concerned with the problem for a long time, Anthe Roberts, for instance, offers a solution to establish triangular investment treaties.[59] She argues that the treaty is usually understood as the bilateral relationship; however, in case of investment treaties, the investors are granted a right to protect their interests against the host State and to enforce the decision, therefore the rights allocation should be clear to avoid controversies emerging from the unilateral measure of one State affecting the investors' position.[60]

Today's system offers three models of the investors' rights under the investment treaty: the derivative model, the direct model, and the intermediate model.

The derivative model foresees that the investors do not benefit from the rights provided by the investment treaty but derive them from the rights of their home States. It was first established in the Mavrommatis case of the Permanent Court of International Justice:

> *"It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is*

[59] Roberts (n 23) 357.
[60] ibid 354.

in reality asserting its own rights -its right to ensure, in the person of its subjects, respect for the rules of international law."[61]

Direct model, to the contrary, grants rights to the individuals and companies directly from the investment treaty. If investors possess direct rights from the investment treaty, a lawful countermeasure cannot be enacted in any case for the absence of the obligation breached by the investor to the host State. It makes it inevitably difficult to prove legality of the measure.

This approach was applied in two of the cases discussed above. The Tribunal in the Corn Products case emphasized on the following:

"In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals."[62]

Opinion of the tribunal in the Cargill case is aligned to the decision of the Corn Products' tribunal:

"This is not the situation under Chapter 11 of the NAFTA. Article 1116(1) provides that it is the investor that "may submit to arbitration under this Section a claim;" not the State of. that investor. Likewise, it is the investor, and not the State of that investor, that is the named party to the proceedings. Similarly, it is

[61] Edwin D Dickinson, 'Publications of the Permanent Court of International Justice' (1923) 22 Michigan Law Review 186, 12.
[62] Corn Products International, Inc. v. The United Mexican States ICSID Case No. ARB(AF)/04/01 (n 27) para 167.

the investor that is named in the operating paragraph or "dispositive" of the award."[63]

The intermediate model is also called "procedural-direct model" and the name reflects the mechanism of how rights are granted under the investment treaties. This model was adopted in the ADM case. The Tribunal moved forward to analyze separately the substantive and the procedural rights of the investors. Regarding the procedural rights, the investors obtain the direct rights to commence arbitral proceedings before a tribunal under Chapter XI if the investments protection breach occurred.[64] But the substantial rights, e.g., the investment protection "*are not owed by the host State to the investors, but to the investors' home State*." [65]

Arthur W. Rovine issued his concurring opinion on the ADM decision disagreeing with the division of substantial and procedural rights by the Tribunal. In his opinion it is impossible to grant only the procedural rights to the investors, since when the arbitral proceedings are initiated, the investors immediately exercise their substantive rights too. The award, thus, presents that the investor exercised their substantial rights to the investment protection.[66] He also brings an analogy to the internal laws, such as contract law, to prove that an individual right to a legal redress in case of a contract breach with remedies provided is a substantive right and not merely a procedural one.[67] I tend to agree with the opinion of Arthur W. Rovine. In my mind, it is impossible to divide

[63] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/Z. (n 26) para 425.
[64] Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5 (n 25) para 177.
[65] ibid 178.
[66] ADM v Mexico (Concurring Opinion of Arthur W Rovine of 20 September 2007) ICSID Case No ARB(AF)/04/05 paras 42–49.
[67] ibid 47.

the procedural and the substantial rights of the investors – otherwise the investment protection cannot be seen as a whole.

2.4. Conclusion of Chapter 2

Chapter two provided for the analysis of case practice of countermeasure application. It first addressed the issue of a clash between the countermeasures and the investment treaties and argued for a need to include an explicit provision to address the availability of countermeasures. It considered three cases available at the time of writing of this thesis: Archer Daniels Midland case, Corn Products case and Cargill case. Even though the case law did not substantially bring clarity to the use of countermeasures, it constituted ground for further discussions. What is noticeable is that the tribunals were reluctant to go through the analysis of countermeasures per se. Among the three cases discussed above only Tribunal in the ADM case accepted the availability of a lawful countermeasure, nevertheless it established that Mexico had a different objective to impose the Tax measure, incompatible with the aim of a countermeasure. The cornerstone to establish the availability of the countermeasure was the nature of the investor's rights and protection granted by the investment treaties - NAFTA in place. Chapter two also discussed three models of the investor rights: derivative model, direct model and intermediate model to clarify how countermeasures affect the investor's rights protected by the investment treaties.

3. "COUNTER-COUNTERMEASURES". THE NEW REALITY OF THE INVESTMENT PROTECTION REGIME IN IRAN AND THE RUSSIAN FEDERATION.

As it was mentioned in the preceding chapters, the States like Iran, China and Russia are pioneers in presenting the 'second level' countermeasures or "counter-countermeasures" as a layer above 'classical' countermeasure. This new phenomenon of international law brings more uncertainty towards the protections granted to the investors in the sanctioned States. This Chapter briefly touches upon the current investment regime in Iran to argue that it served as an example to the recently occurred case of "counter-countermeasures" enacted by Russia. The Chapter concludes with some suggestions for the foreign investors, whose assets are still located in the territory of Russia.

3.1. Iranian case

As a response to the sanctions – considered as collective countermeasures in this thesis – enacted by the United Nations Security Council ('**UNSC**'), the United States ('**US**'), the United Kingdom ('**UK**') and the European Union ('**EU**') as a response to the breaches of Non-Proliferation Treaty, Iran has included Article 81 to the country's Constitution to strengthen the control of property rights possessed by the foreigners: "*Granting of concessions to foreigners for the incorporation of companies or institutions dealing with commerce, industry, agriculture, service, or mineral extraction, is* ***absolutely forbidden***".[68] [emphasis added] Furthermore, Article 44 of the Iranian

[68] Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 81.

Constitution provides for the nationalization of the most important sectors, such as banking, insurance, post and others.[69] For the foreign investors it is also a challenge to refer the dispute to the arbitral tribunal constituted outside of the territory of Iran, because of the Article 139 of the Iranian Constitution, which provides for an obligation to obtain an approval from the Board of Ministers and the Parliament, may the parties want to resolve the dispute in arbitration.[70] The fact that Iran is not a party to the International Centre for Settlement of Investment Disputes' Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('**ICSID Convention**') or the World Trade Organization ('**WTO**'), makes the protection of the investors very volatile. Yet Iran has recently become a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**")[71] and implemented the arbitration laws pursuant to the United Nations Commission on International Trade Law ('**UNCITRAL**') Model law.

All of the obstacles mentioned above undoubtedly create the unfavorable investment environment. Farschad Ghodoosi articulates several concerns regarding the effect of Iran's Investment Laws regarding the enforceability of the arbitral awards. He argues that regardless of the fact that Iran is now a member of the New York Convention, it does not preclude the availability on the invocation of public policy objections to refuse the enforcement.[72] He further foresees the probability of the invocation of a constitutional prohibition at the jurisdictional stage to restrain the case from being decided by the international tribunal.[73]

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[69] Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 44.
[70] Qanuni Assassi. Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 139.
[71] Iran ratified the Ney York Convention on 15th October 2001. 'New York Convention, Contracting States', accessed at: https://www.newyorkconvention.org/contracting-states.
[72] Ghodoosi, Farshad, Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility: A Case Study of Iran (November 1, 2014). Fordham International Law Journal, Vol. 37, 2014, 1750.
[73] ibid, 1751.

The Iranian case is relevant to the analysis as it provides for the first example of "counter-countermeasures", which were later adopted by countries like China and Russia. The "counter-countermeasures" recently adopted by Russia strike a similarity to the current investment protection regime in Iran. The following subsection will examine the provisions on "unfriendly" States and entities in Russian legislation to prove the point. The concerns lied out in this subchapter are also relevant to the suggestions to the foreign investors in Russia.

3.2. The Russian Federation case

3.2.1. 'Counter-countermeasures' against "unfriendly states"

As the statistics show, the Russian Federation was quite a popular destination for the foreign investors – in 2019, Russia was still among the top 10 investor economies.[74] The situation changed drastically after Russia launched its full-scale invasion of Ukraine in 2022. As a response to the tremendous scope of sanctions introduced by the European Union, the United States, Canada and other countries, the Russian Federation enacted their own laws on "unfriendly" countries and territories.[75] One of the first decisions was to impose a stricter control over foreign direct investment ('**FDI**')[76] which provided for a mandatory approval to be obtained from Russia's Government Commission on Monitoring Foreign Investment in order to transfer shares, securities

[74] United Nations Conference on Trade and Development, *World Investment Report 2021: Investing in Sustainable Recovery* (United Nations 2021) 64 <https://www.un-ilibrary.org/content/books/9789210054638> accessed 2 June 2024.

[75] Decree of the Government of the Russian Federation No 430-r on approval of the list of foreign States and territories committing unfriendly actions against the Russian Federation, Russian legal entities and individuals (adopted 5 March 2022, amended 23 July 2022).

[76] Decree of the Government of the Russian Federation No 295 on approval of the rules for issuance permits by the Government Commission for Control for the implementation of foreign investment in the Russian Federation in order to implement additional temporary measures of economic character to ensure the financial stability of the Russian Federation (adopted 6 March 2022, amended 26 March, 9 April, 6 June, 20 July and 19 September 2022).

and real estate. If the foreign investor decides to sell its assets to a Russian company, he must first obtain an approval from the board of directors of the Central Bank of Russia.[77] In exceptional cases like the sale of companies in strategic sectors (e.g., fuel-energy sector) the transaction must be approved by the president.[78]

Foreign investors were left with not many options how to leave the Russian market. They could either sell their company to the local management with a call option to buy it back at some point or sell it to an entity of Russian origin or the one different from the "unfriendly" States.[79] However, it does not mean that the investors did not face huge losses. The statistics reveal that the losses suffered by the foreign investors can be more than $107 billion since late February 2022.[80]

3.2.2. Investment protection regime in the Russian Federation

ICSID Convention and bilateral investment treaties ('**BIT**s') and other investment treaties are the most common legal instruments to provide for the investors' protection. Even though the ICSID forum is among the most popular to decide the investment arbitration cases, Russia is only a signatory of the ICSID Convention and not a party to it, therefore the investors cannot enjoy the protections granted under ICSID Convention. As regards to the Energy Charter Treaty ('**ECT**'), the Russian Federation signed the Treaty in 1991, but has never ratified it.[81] Protections under ECT

[77] Mercédeh Azeredo Da Silveira and Yulia Levashova, 'Economic Sanctions, Countermeasures and Investment Claims against the Russian Federation: A Battle on Multiple Fronts' (2024) 38 ICSID Review - Foreign Investment Law Journal 693, 3.

[78] Presidential Decree No 520 on the application of special economic measures in the financial and fuel-energy sectors in connection with unfriendly actions of certain foreign States and international organizations (adopted 5 July 2022).

[79] Azeredo Da Silveira and Levashova (n 77) 4.

[80] Alessandro Parodi and Alexander Marrow,Foreign Firms' Losses from Exiting Russia Top $107 Billion | Reuters, accessed at https://www.reuters.com/markets/europe/foreign-firms-losses-exiting-russia-top-107-billion-2024-03-28/.

[81] Energy Charter Treaty, Russian Federation, accessed at: https://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/.

are also unavailable for the foreign investors in Russia. However, the Russian Federation is a party to 66 BITs, 33 of which were concluded with the now "unfriendly" States and under some of them the investors can refer their dispute to the ICSID tribunal.[82] The arbitration clause can vary greatly from one BIT to another and not necessarily would be similar to the dispute resolution clause of the European BITs. Some Soviet-era BITs[83] would resemble more the Chinese-style BITs to limit the subject of the dispute to the amount of compensation for expropriation and/or free transfer of funds.[84] Therefore, it makes it difficult to bring a case under any provision, except for protection against direct expropriation, or to prove a violation of the other substantial clauses of the investment treaty.

Recent law on prohibition of asset transfer may be a valid ground for the claims under Fair and Equitable Treatment ('**FET**') provision, as well as the party could claim that the division of the investors from "friendly" and "unfriendly" countries constitutes discrimination under National Treatment ('**NT**') clause to prove indirect expropriation.

3.2.3. Suggestions for the foreign investors

As the situation is rapidly changing, investors are advised to collect all the information and monitor their investment closely. It is beneficial for the foreign investors to keep a close eye on how their

[82] For instance, the Russia-Japan BIT, Article 11.2(1) "*If any legal dispute that may arise out of investments made by an investor of such other Contracting Party cannoe be settled through such negotiations, the dispute shall at the request of the investor concerned be submitted to: (1) conciliation or arbitration in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington, March 18, 1965 (hereinafter referred to as "the Washington Convention"), so long as the Washington Convention is in force between the Contracting Parties*;"

[83] Belgium/Luxemburg – Russia BIT (1989), Spain – Russia BIT (1990).

[84] Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (First edition, Oxford University Press 2013) 614.

investment is harmed to collect the claims for future arbitration proceedings.[85] Moving forward to the dispute resolution may not be an easy path either. With the packages of sanctions coming out, the reaction of the Russian Government was to amend the Arbitrazh (Commercial) Procedure Code and grant an exclusive jurisdiction over disputes involving sanctioned Russian parties to the domestic courts.[86] The sanctioned party could also request an anti-arbitration injunction under the new legislation, which makes it inevitably difficult for the foreign investor to even establish an international arbitration tribunal.

It is not only challenging for the investors to establish arbitral tribunal and win the long-lasting case, but also to implement the enforcement stage. In case the Tribunal is established in the European Union, it is advisable for the investors to obtain a security for cost to enhance the recognition and enforcement procedures. It would be increasingly difficult to enforce a favorable award in Russia against the state-owned assets, therefore, it would be reasonable to seek enforcement in other countries, where Russian assets are located.[87]

By the common initiative of Ukraine and the EU, the Register of Damages for Ukraine was created, as Council of Europe announced it on April 30, 2024.[88] Its aim is to capture damages incurred by

[85] Georg Scherpf, Update on measures faced by foreign investors in Russia, 16 January 2023, accessed at: https://www.clydeco.com/en/insights/2023/01/update-on-measures-faced-by-foreign-investors-in-r.
[86] Arbitration Agreements with Russian Parties – Growing Risks for Foreign Litigants, 01.05.2024, available at: https://www.debevoise.com/insights/publications/2024/05/arbitration-agreements-with-russian-parties#:~:text=In%20June%202020%2C%20Russia%20enacted,(the%20%E2%80%9CAmendments%E2%80%9D).
[87] Valts Nerets, Arturs Kazaks, Concerns about investment protection in Russia during its invasion of Ukraine, available at: https://www.sorainen.com/publications/concerns-about-investment-protection-in-russia-during-its-invasion-of-ukraine/.
[88] The Register of Damage for Ukraine opens for claims at the Ministerial Conference "Restoring Justice for Ukraine" in the Hague (2 April), 30.04.2024, available at: https://www.eeas.europa.eu/delegations/council-europe/register-damage-ukraine-opens-claims-ministerial-conference-%E2%80%9Crestoring-justice-ukraine%E2%80%9D-hague-2_en.

the individuals, companies and State of Ukraine in Ukraine due to Russia's invasion.[89] This could be a potential forum for the foreign investors in Ukraine, who suffered damages, to seek compensation for the breach of investment protection.

3.3. Conclusion of Chapter 3

Chapter 3 discussed the recently emerged concept of "counter-countermeasures" adopted by the two most sanctioned States of the world: Russia and Iran. It outlined the foreign invertors' protections to emphasize on the very unfavorable investment regimes that evolved in these countries. The limitations on the property rights and multiple obligations to obtain the approval from State authorities gives a clear understanding of the dissolving investment protections. The analysis focused on the investment regime in Russia as a more recent case and warned the investors of the potential risks of expropriation and difficulties to commence the arbitration proceedings, as well as the foreseeable problems with the enforcement stage.

[89] Volodymyr Yaremko et al., Russia: Investment Protection and Arbitration | Part 2, 03.04.2024, available at: https://www.mayerbrown.com/en/insights/publications/2024/04/russia-investment-protection-and-arbitration-part-2.

CONCLUSION

The practice of countermeasures continues to be a relevant tool to address the violations of international obligations by the States. The research showed how the deeply-rooted concept of non-armed reprisals evolved through the years into a valuable practice of countermeasures nowadays. The purpose of this thesis was to investigate the regulation of the countermeasure towards the investment protections and introduce the allegedly evolving 'second level' of countermeasures or "counter-countermeasures" in the States' practice.

The investigation of the available legal provisions in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts provided for an understanding of the legal nature of countermeasures and the requirements of the legality. What seemed important is to create a clear framework of the requirements for the lawful countermeasure and highlight the distinctive features of this concept.

This thesis aimed at bringing some clarification to the co-existence of the countermeasures and the investment protections lied out in the investment treaties. As the research showed the clash between the two is conditioned to the *lex specialis* regime and the nature of investor's rights provided by the investment treaties. Most evidently it became visible through the analysis of the case-law in the so-called "Sugar War" between the United States of America and Mexico and inconsistency of the Tribunals' Awards in the interpretation of the NAFTA provisions. The Tribunals showed a tendency to side with the direct model of the investor's rights in the investment treaties, however, in the Archer Daniels Midland Award, the Tribunal took a position that the nature of investor's rights is accorded to the intermediate model, therefore, dividing the procedural and substantive rights of the investor. Within the case law analysis, it became evident that the Tribunals

are rather reluctant to go through the intricacies to establish the legality of the countermeasures in investor-State cases. It proves it sensible to implement the provisions on countermeasures into the investment agreements to insure the investment protection.

The thesis argued that a second 'level' countermeasures evolved as a practice to respond to the 'classical' countermeasures known in the Doctrine. Analysis of the recently adopted "counter-countermeasures" by Iran and the Russian Federation, revealed that the countries' approaches strike similarity as towards the content of "counter-countermeasures'. The responsive countermeasures contained imposition of limitation on property rights of the foreigners and establishing a system of approvals from the State authorities. The changes implemented to the laws concerning the foreign investors made the investment protections in these countries vague and volatile.

Emergence of the "counter-countermeasures" proved a need for an amendment of the present legal regime of the Draft Articles on Responsibility of States for Internationally Wrongful Acts and further research on the matter.

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