

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY
OF A STATE

Part Three deals with the implementation of State responsibility, *i.e.* with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Commentary

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, *i.e.* with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.^{[1915] 664} This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as “direct” versus “indirect” injury or “objective” versus “subjective” rights.

(3) Although article 42 is drafted in the singular (“an injured State”), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is “injured” in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision

^{[1915] 664} Cf. the statement by ICJ that “all States can be held to have a legal interest” as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

in the S.S. “*Wimbledon*” case.^{[1916] 665} It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, *i.e.* to apply as a *lex specialis*.

^{[1916] 665} Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the S.S. “*Wimbledon*” (footnote [28] 34 above).

Article 42. Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or**
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:**
 - (i) specially affects that State; or**
 - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the “injured State”. It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,^{[1917] 666} or even the taking of countermeasures. In order to take such steps, *i.e.* to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, *e.g.* a right of action specifically conferred by a treaty,^{[1918] 667} or it must be considered an injured State. The purpose of article 42 is to define this latter category.

^{[1917] 666} An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and “informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute”.

^{[1918] 667} In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to counter-measures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, *e.g.* under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, “A State is entitled as an injured State to invoke the responsibility”.

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.^{[1919] 668} This is why article 60 is restricted to “material” breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called “integral” or “interdependent” obligation.^{[1920] 669} In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to subparagraph (a) of article 42, a State is “injured” if the obligation breached was owed to it individually. The expression “individually” indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily

^[1919] 668 Cf. the 1969 Vienna Convention, art. 73.

^[1920] 669 The notion of “integral” obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an “all or nothing” basis. The term “interdependent obligations” may be more appropriate.

be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, *e.g.* of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.^{[1921] 670} If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.^{[1922] 671}

(8) In addition, subparagraph (a) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (a) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to “bundles’ of bilateral relations”.^{[1923] 672}

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over

[1921] 670 Cf. the 1969 Vienna Convention, art. 36.

[1922] 671 See, *e.g.*, Article 59 of the Statute of ICJ.

[1923] 672 See, *e.g.*, K. Sachariw, “State responsibility for multilateral treaty violations: identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, “Bilateralism and community interest in the law of State responsibility”, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, “The legal régime of *erga omnes* obligations in international law”, *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, “Solidarity and breaches of multilateral treaties”, *BYBIL*, 1988, vol. 59, p. 151, at pp. 154–155.

the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the “fundamentally unlawful character” of the Islamic Republic of Iran’s conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.^{[1924] 673}

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) Subparagraph (b) deals with injury arising from violations of collective obligations, *i.e.* obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression “group of States”, article 42, subparagraph (b), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character.

(12) Subparagraph (b) (i) stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. The term “specially affected” is taken from article 60, paragraph (2) (b), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (b), of the 1969 Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered “injured”. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a

^[1924] 673 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 41–43, paras. 89 and 92.

State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (b) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (c), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those “of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations”. Examples include a disarmament treaty,^{[1925] 674} a nuclear free zone treaty, or any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (b) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION PANEL

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel, in considering the European Communities argument according to which the United States had “no legal right or interest” in the case (given that its banana production was minimal and its banana exports were nil, and therefore it

^[1925] 674 The example given in the commentary of the Commission to what became article 60: *Year-book ... 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

had not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by article 3.3. and 3.7 of the WTO Dispute Settlement Understanding), considered that a WTO member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO agreement were each sufficient to establish a right to pursue a WTO dispute settlement proceeding. The panel was of the view that this result was consistent with decisions of international tribunals: in a footnote,^{[1926] 210} it referred to relevant findings by the Permanent Court of International Justice and the International Court of Justice, as well as to paragraph 2 (e) and (f) of draft article 40 adopted by the International Law Commission on first reading.^{[1927] 211}

[A/62/62, para. 118]

^[1926] ²¹⁰ WTO, Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM and WT/DS27/R/HND, 22 May 1997, para. 7.50, footnote 361.

^[1927] ²¹¹ Draft article 40, paragraph 2 (e) and (f) adopted on first reading were amended and incorporated respectively in article 42(b) and article 48, paragraph 1 (a), finally adopted in 2001. The complete text of draft article 40 adopted on first reading is reproduced in footnote [2017] 221 below.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Two.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.^{[1928] 675}

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, *etc.* Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".^{[1929]676} The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

^[1928] 675 See article 48, paragraph (3), and commentary.

^[1929] 676 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 253, para. 31.

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to “seek a sympathetic reconsideration of Nauru’s position”.^{[1930] 677}

The Court summarized the communications between the parties as follows:

The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru’s Application was not rendered inadmissible by passage of time.^{[1931] 678}

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, paragraph 2 (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) Paragraph 2 (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,^{[1932] 679} or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.^{[1933] 680} Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States

^[1930] 677 *Ibid.*, p. 254, para. 35.

^[1931] 678 *Ibid.*, pp. 254–255, para. 36.

^[1932] 679 As PCIJ noted in the *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

^[1933] 680 In the *Passage through the Great Belt (Finland v. Denmark), Provisional Measures*, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark’s argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark’s international obligations. For the terms of the eventual settlement, see M. Koskeniemi, “L’affaire du passage par le Grand-Belt”, *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Mr Franck Charles Arif v. Republic of Moldova

The arbitral tribunal in *Mr Franck Charles Arif v. Republic of Moldova* referred to the commentary to article 43 in support of the view that “the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution”.^{[1934] 230}

[A/71/80, para. 154]

INTERNATIONAL COURT OF JUSTICE

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom and Marshall Islands v. India)

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament between Marshall Islands v. United Kingdom and Marshall Islands v. India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to “reject the [respondent’s] view that notice or prior negotiations are required” in accordance with article 43 of the State responsibility articles. The International Court of Justice further observed that “[t]he Court’s jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified”.^{[1935] 241}

[A/74/83, p. 41]

^{[1934] 230} See footnote [320] 46 above, footnote 264.

^{[1935] 241} ICJ, Judgment, 5 October 2016, para. 42.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.^{[1936] 681} By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

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.^{[1937] 682}

Subparagraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.^{[1938] 683}

^{[1936] 681} For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

^{[1937] 682} *Mavrommatis* (footnote [800] 236 above), p. 12.

^{[1938] 683} Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic “Diplomatic protection” in *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1. [Editor’s Note: the Commission subsequently adopted the draft articles on diplomatic protection, in 2006; see *Yearbook ... 2006*, vol. II (Part Two), para. 49.]

(3) Subparagraph (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.^{[1939] 684} In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.^{[1940] 685}

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.^{[1941] 686}

(5) Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (b), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.^{[1942] 687}

^{[1939] 684} *ELSI* (footnote [144] 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappetz, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, “Local remedies, exhaustion of”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote [1085] 409 above), vol. 3, pp. 238–242; and G. Perrin, “La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international”, *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

^{[1940] 685} *ELSI* (footnote [144] 85 above), p. 46, para. 59.

^{[1941] 686} *Ibid.*, p. 48, para. 63.

^{[1942] 687} The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514. (See footnote [1938] 683 above.)

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL

Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France

In its 1978 award, the arbitral tribunal established to hear the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, to decide on France's allegation according to which the United States was required, before resorting to arbitration, to wait until the United States company (Pan American World Airways) that considered itself injured had exhausted the local remedies available under French law, referred to the principles appearing in draft article 22, as provisionally adopted by the International Law Commission.^{[1943] 212} It considered that it was "significant" that the said provision:

establishes the requirement of exhaustion of local remedies only in relation to an obligation of "result", which obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State", and which is an obligation "concerning the treatment of aliens". Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of "procedure" or one of "substance"—a matter which the Tribunal considers irrelevant for the present case—it is clear that the juridical character of the *rules* of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under article I of the Air Service Agreement, "[t]he Contracting Parties grant to each other the rights specified in the Annex hereto ..." (emphasis added), and sections I and II of the annex both mention "the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country ..." as a right granted by one *Government* to the other *Government*. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a "result" to be achieved, let alone one allowing an "equivalent result" to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an "equivalent result".^{[1944] 213}

^{[1943] 212} This provision was amended and incorporated in article 44(b) finally adopted by the ILC in 2001. The text of draft article 22 provisionally adopted was as follows:

Article 22
Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment. (*Yearbook ... 1980*, vol. II (Part Two), para. 34.)

^{[1944] 213} Award, 9 December 1978, para. 31, reproduced in UNRIIA, vol. XVIII [(Sales No. E/F.80.V.7), pp. 431–432.

On this basis, the arbitral tribunal thus found that its decision should not be postponed until such time as the company had exhausted local remedies.

[A/62/62, para. 119]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)

In its 1999 judgment in the *M/V “SAIGA” (No. 2)* case, the Tribunal invoked draft article 22, as adopted by the International Law Commission on first reading,^{[1945] 214} in the context of determining whether the rule that local remedies must be exhausted was applicable in the said case:

As stated in article 22 of the draft articles on State responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when “the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ...”. None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.^{[1946] 215}

[A/62/62, para. 120]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Maffezini v. Kingdom of Spain

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini v. Spain* case, in support of its finding that

where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding ... because the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations ... that are in dispute,

referred to draft article 22 adopted by the International Law Commission on first reading and the commentary thereto.^{[1947] 216}

[A/62/62, para. 121]

^[1945] 214 The text of that draft article was identical to that of draft article 22 provisionally adopted by the International Law Commission. (See footnote [1943] 212 above.)

^[1946] 215 See footnote [1096] 159 above, para. 98.

^[1947] 216 ICSID, *Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 29 and footnote 5, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 12.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

The Loewen Group, Inc. and Raymond L. Loewen v. United States

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 NAFTA to hear *The Loewen Group, Inc. and Raymond L. Loewen v. United States* case, in examining the argument of the respondent that “State responsibility only arises when there is final action by the State’s judicial system as a whole”, referred to article 44 finally adopted by the International Law Commission in 2001:

The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law ... Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Elettronica Sicula Spa (ELSI) United States v. Italy* (1989) ICJ 15 at para. 50.^{[1948] 217}

[A/62/62, para. 122]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Philip Morris Brands Sàrl, and others v. Uruguay

The arbitral tribunal in *Philip Morris Brands Sàrl, and others v. Uruguay* noted that “[t]he reference [by the claimants] to Art. 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies”.^{[1949] 231}

[A/71/80, para. 155]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

ST-AD GmbH v. Republic of Bulgaria

In *ST-AD GmbH v. Republic of Bulgaria*, the arbitral tribunal relied on, *inter alia*, article 44, subparagraph (b), in support of the view that “the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the ICJ”.^{[1950] 232} Specifically, the tribunal noted that the article “refers to the exhaustion of any ‘available and effective local remedy’”.^{[1951] 233}

[A/71/80, para. 156]

^[1948] ²¹⁷ NAFTA (ICSID Additional Facility), Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 149, footnote 12, reproduced in *ILM*, vol. 42, 2003, p. 835 (citing *ELSI*, see footnote [144] 85 above.).

^[1949] ²³¹ ICSID, Case No. ARB/10/7 (formerly *FTR Holding S.A., Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Decision on Jurisdiction, 2 July 2013, para. 135.

^[1950] ²³² PCA, Case No. 2011–06, Award on Jurisdiction, 18 July 2013, para. 365.

^[1951] ²³³ *Ibid.*, footnote 395.

[INTERNATIONAL COURT OF JUSTICE]

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom and Marshall Islands v. India)

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands v. United Kingdom* and *Marshall Islands v. India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to “reject the [respondent’s] view that notice or prior negotiations are required” in accordance with article 43 of the State responsibility articles ...^[1952] 241

[A/74/83, p. 41]]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay

The arbitral tribunal in *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* noted that “[t]he reference [by the claimants] to article 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies”.^[1953] 243

[A/74/83, p. 41]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain

The arbitral tribunal in *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain* cited article 44, subparagraph (b), and the commentary thereto, and indicated that the exhaustion of local remedies was not a requirement to bring arbitral claims. The tribunal noted the explanation in the commentary that the provision is

not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the condition for the admissibility of cases brought before such courts or tribunals. Rather, [it] define[s] the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States.^[1954] 227

[A/77/74, p. 37]

^[1952] ^[241] ICJ, Judgment, 5 October 2016, para. 42.]

^[1953] ²⁴³ ICSID, Case No. ARB/10/7, Award, 8 July 2016, para. 135.

^[1954] ²²⁷ See footnote [1407] 157 above, paras. 516–518 and 526.

Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) the injured State has validly waived the claim;**
- (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.**

Commentary

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) Subparagraph (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.^{[1955] 688}

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term “valid waiver” is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.^{[1956] 689} Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a preemptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In *Certain Phosphate Lands in Nauru*, it was argued that the Nauruan authorities before independ-

^[1955] 688 *Russian Indemnity* (footnote [1014] 354 above), p. 446.

^[1956] 689 Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

ence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question “did not at any time effect a clear and unequivocal waiver of their claims”.^{[1957] 690}

In particular, the statements relied on “[n]otwithstanding some ambiguity in the wording ... did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”.^{[1958] 691}

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. Subparagraph (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in *Certain Phosphate Lands in Nauru*, in the following passage:

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.^{[1959] 692}

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.^{[1960] 693}

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.^{[1961] 694} In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not

^{[1957] 690} *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 247, para. 13.

^{[1958] 691} *Ibid.*, p. 250, para. 20.

^{[1959] 692} *Ibid.*, pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru’s application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

^{[1960] 693} *LaGrand, Provisional Measures* (footnote [150] 91 above) and *LaGrand, Judgment* (footnote [236] 119 above), at pp. 486–487, paras. 53–57.

^{[1961] 694} See *Stevenson*, UNRIIA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid.*, vol. X (Sales No. 60.V.4), p. 551 (1903).

establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.^{[1962] 695}

(9) Moreover, contrary to what may be suggested by the expression “delay”, international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit, expressed in terms of years, has been laid down.^{[1963] 696} The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.^{[1964] 697} Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.^{[1965] 698} None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.^{[1966] 699} It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.^{[1967] 700} Thus, in *Certain Phosphate Lands in Nauru*, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.^{[1968] 701} In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.^{[1969] 702}

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any pre-

^{[1962] 695} See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote [1961] 694 above), pp. 386–387.

^{[1963] 696} In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

^{[1964] 697} Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

^{[1965] 698} C.-A. Fleischhauer, “Prescription”, *Encyclopedia of Public International Law* (footnote [1085] 409 above), vol. 3, p. 1105, at p. 1107.

^{[1966] 699} A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes [777] 230 and [779] 232 above), see, e.g. *Gentini* (footnote [1961] 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

^{[1967] 700} For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim’s International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

^{[1968] 701} *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 250, para. 20.

^{[1969] 702} *Tagliaferro* (footnote [1962] 695 above), p. 593.

dice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.^{[1970] 703}

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL COURT OF JUSTICE

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)

In its 2005 judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court invoked its own previous case law and the commentary of the International Law Commission to article 45, as finally adopted in 2001, in relation to the argument, made by the Democratic Republic of the Congo, that Uganda had waived whatever claims it might have had against the Democratic Republic of the Congo as a result of actions or inaction of the Mobutu regime:

The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247–250, paras. 12–21). Similarly, the International Law Commission, in its commentary on article 45 of the draft articles on responsibility of States for internationally wrongful acts, points out that “[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal” (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)), para. 77). In the Court’s view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu regime.^{[1971] 218}

[A/62/62, para. 123]

WORLD TRADE ORGANIZATION APPELLATE BODY

Peru—Additional Duty on Imports of Certain Agricultural Products

The Appellate Body in *Peru—Additional Duty on Imports of Certain Agricultural Products* indicated that “there is no need for us to address whether the ... ILC Articles 20 and 45 are ‘rules of international law applicable in the relations between the parties’, or the meaning of the term ‘parties’ in both Article 31(3)(a) and (c) of the Vienna Convention”.^{[1972] 234}

[A/71/80, para. 157]

^{[1970] 703} See article 39 and commentary.

^{[1971] 218} ICJ, Judgment, 19 December 2005, para. 293.

^{[1972] 234} See also footnote [977] 126, para. 5.105 (as restated in paras. 5.118 and 6.4).

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V “Norstar” (Panama/Italy)

In *M/V “Norstar” (Panama/Italy)*, the International Tribunal for the Law of the Sea relied on the commentary to article 45 of the State responsibility articles to find “that Panama has not failed to pursue its claim since the time when it first made it, so as to render the Application inadmissible”^{[1973] 244} and to “rejec[t] the objection raised by Italy based on extinctive prescription”.^{[1974] 245}

[A/74/83, p. 41]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Salini Impregilo S.p.A. v. Argentine Republic

The arbitral tribunal deciding on jurisdiction and admissibility of the claim in *Salini Impregilo S.p.A. v. Argentine Republic* noted with regard to “extinctive prescription as a matter of international law” that:

this is not mentioned as a separate ground for loss of the right to invoke responsibility in the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts. The ILC rejected the idea that lapse of time alone might entail the loss of a claim. Rather, Article 45(b) specifies that the responsibility of a state may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.^{[1975] 246}

Having regard to all circumstances, the arbitral tribunal concluded that “the delay here was not unreasonable, did not entail any acquiescence by Salini Impregilo in the lapse of its claim and did not trigger the principle of extinctive prescription”.^{[1976] 247}

[A/74/83, p. 41]

^{[1973] 244} ITLOS, Preliminary Objections, Judgment of 4 November 2016, paras. 310 and 313.

^{[1974] 245} *Ibid.*, para. 314.

^{[1975] 246} ICSID, Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 85.

^{[1976] 247} *Ibid.*, para. 91.

Article 46. *Plurality of injured States*

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Commentary

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as “injured” States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (b) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the S.S. “*Wimbledon*” case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed “any interested Power” to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that “each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags”. It held they were each covered by article 386, paragraph 1, “even though they may be unable to adduce a prejudice to any pecuniary interest”.^{[1977] 704} In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.^{[1978] 705} In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.^{[1979] 706}

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than

^{[1977] 704} S.S. “*Wimbledon*” (footnote [28] 34 above), p. 20.

^{[1978] 705} ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment, *I.C.J. Reports 1959*, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: “One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages” (footnote [1033] 363 above), p. 106.

^{[1979] 706} See *Nuclear Tests (Australia v. France)* and *(New Zealand v. France)* (footnote [738] 196 above), pp. 256 and 460, respectively.

one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.^{[1980] 707} In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, “International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case”.^{[1981] 708}

^{[1980] 707} Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (footnote [1058] 382 above), p. 1432.

^{[1981] 708} *Reparation for Injuries* (footnote [32] 38 above), p. 186.

Article 47. Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) is without prejudice to any right of recourse against the other responsible States.

Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.^{[1982] 709}

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions^{[1983] 710} and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.^{[1984] 711} In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,^{[1985] 712} Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in

^{[1982] 709} See article 17 and commentary.

^{[1983] 710} For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote [1258] 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

^{[1984] 711} See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

^{[1985] 712} See footnote [777] 230 above.

Monetary Gold,^{[1986] 713} the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was “solidary” and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of “solidary” responsibility it said:

Australia has raised the question whether the liability of the three States would be “joint and several” (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.^{[1987] 714}

The Court was careful to add that its decision on jurisdiction “does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems ... and, in particular, the special role played by Australia in the administration of the Territory”.^{[1988] 715}

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.^{[1989] 716} A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for “joint and several liability” where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

In all cases of joint and several liability referred to in paragraph 1 ... the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.^{[1990] 717}

^{[1986] 713} See footnote [917] 286 above. See also paragraph (11) of the commentary to article 16.

^{[1987] 714} *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), pp. 258–259, para. 48.

^{[1988] 715} *Ibid.*, p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru’s claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote [779] 232 above) and the settlement agreement (*ibid.*).

^{[1989] 716} A special case is the responsibility of the European Union and its member States under “mixed agreements”, where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, “Mixed Union—mixed agreements”, *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

^{[1990] 717} See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.^{[1991] 718} At the same time, it indicates what a regime of “joint and several” liability might amount to so far as an injured State is concerned.

(6) According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.^{[1992] 719} Yet, it was not suggested that Albania’s responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in paragraph 2. Subparagraph (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.^{[1993] 720} This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States,

^{[1991] 718} See paragraph 4 of the introductory commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

^{[1992] 719} *Corfu Channel, Merits* (footnote [29] 35 above), pp. 22–23.

^{[1993] 720} Such a principle was affirmed, for example, by Permanent Court of International Justice in the *Case concerning the Factory at Chorzów, Merits* case (footnote [28] 34 above), when it held that a remedy sought by Germany could not be granted “or the same compensation would be awarded twice over” (p. 59); see also *ibid.*, pages 45 and 49.

but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in subparagraph (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (b) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL

In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 19 of the Treaty between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaries of a Channel Fixed Link Signed at Canterbury on 12 February 1986 between 1. The Channel Tunnel Group Limited 2. France-Manche S.A. and 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland 2. Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République Française (hereinafter the "partial award in the Eurotunnel case")

In its 2007 partial award in the *Eurotunnel* case, the arbitral tribunal constituted to hear the case, in examining the Claimants' thesis of the "joint and several responsibility" of the Respondents (France and the United Kingdom) for the violation of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (the "Treaty of Canterbury") and the Concession Agreement that followed, referred to article 47 finally adopted by the International Law Commission in 2001, and the commentary thereto:

173. It is helpful to start with Article 47 of the ILC Articles on State Responsibility, to which all Parties referred in argument

174. As the commentary notes:

The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.^{[1994] 12}

[A/62/62/Add.1, para. 8]

^{[1994] 12} Partial Award in the *Eurotunnel* case, paras. 173–174.

COMMITTEE ON THE RIGHTS OF THE CHILD

Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey

In five cases—*Sacchi et al. v. Argentina*,^{[1995] 228} *Brazil*,^{[1996] 229} *France*,^{[1997] 230} *Germany*^{[1998] 231} and *Turkey*^{[1999] 232} respectively—concerning the legal implications of climate change, the Committee on the Rights of the Child referred to the commentary to article 47, finding that “the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location”.

[A/77/74, p. 37]

INTERNATIONAL COURT OF JUSTICE

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)

In its judgment on reparations in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, the International Court of Justice referred to the commentary to articles 31 and 47, noting that “in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors”^{[2000] 233}.

[A/77/74, p. 38]

^[1995] 228 *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), para. 10.10.

^[1996] 229 *Sacchi et al. v. Brazil* (CRC/C/88/D/105/2019), para. 10.10.

^[1997] 230 *Sacchi et al. v. France* (CRC/C/88/D/106/2019), para. 10.10.

^[1998] 231 *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019), para. 9.10.

^[1999] 232 *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019), para. 9.10.

^[2000] 233 See footnote [1410] 160 above, para. 98.

Article 48. Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase “[a]ny State other than an injured State” in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.^{[2001] 721} Although the Court noted that “all States can be held to have a legal interest in” the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as “interested States”. The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

^{[2001] 721} *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

(4) Paragraph 1 refers to “[a]ny State other than an injured State”. In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (a)), and obligations owed to the international community as a whole (paragraph 1 (b)).^{[2002] 722}

(6) Under paragraph 1 (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*”.

(7) Obligations coming within the scope of paragraph 1 (a) have to be “collective obligations”, *i.e.* they must apply between a group of States and have been established in some collective interest.^{[2003] 723} They might concern, for example, the environment or security of a region (*e.g.* a regional nuclear free zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.^{[2004] 724} But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.^{[2005] 725}

^{[2002] 722} For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

^{[2003] 723} See also paragraph (11) of the commentary to article 42.

^{[2004] 724} In the S.S. “*Wimbledon*” (footnote [28] 34 above), the Court noted “[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind” (p. 23).

^{[2005] 725} Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

(8) Under paragraph 1 (b), States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”.^{[2006]726} The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”.^{[2007] 727} With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.

(9) While taking up the essence of this statement, the articles avoid use of the term “obligations *erga omnes*”, which conveys less information than the Court’s reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.^{[2008] 728} In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.^{[2009] 729}

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (a) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (b). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) Paragraph 2 specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a

^{[2006] 726} For the terminology “international community as a whole”, see paragraph (18) of the commentary to article 25.

^{[2007] 727} *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

^{[2008] 728} *Barcelona Traction* (*ibid.*), p. 32, para. 34.

^{[2009] 729} See footnote [48] 54 above.

State is in breach and on cessation if the breach is a continuing one. For example, in the S.S. “*Wimbledon*” case, Japan which had no economic interest in the particular voyage sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.^{[2010] 730} In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.^{[2011] 731} In that case, as the Court itself pointed out in 1971, “the injured entity” was a people, viz. the people of South West Africa.^{[2012] 732}

(12) Under paragraph 2 (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, paragraph 2 (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.^{[2013] 733} Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles cannot solve.^{[2014] 734} Paragraph 2 (b) can do no more than set out the general principle.

(13) Paragraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph 3 subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

^{[2010] 730} S.S. “*Wimbledon*” (footnote [28] 34 above), p. 30.

^{[2011] 731} *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment*. (See footnote [2005] 725 above.)

^{[2012] 732} *Namibia* case (footnote [690] 176 above), p. 56, para. 127.

^{[2013] 733} See, e.g., the observations of the European Court of Human Rights in *Denmark v. Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

^{[2014] 734} See also paragraphs (3) to (4) of the commentary to article 33.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION PANEL

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel referred, *inter alia*, to paragraph 2 (f) of draft article 40 (Meaning of injured State) adopted by the International Law Commission on first reading. The relevant passage is [summarized on pages 467–468] above.

[A/62/62, para. 124]

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Tihomir Blaškić (“Lasva Valley”)

In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber noted that article 29 of the Statute of the Tribunal

does not create bilateral relations. Article 29 [of the Statute] imposes an obligation on Member States towards all other Members or, in other words, an “obligation *erga omnes partes*”. By the same token, article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in article 29 (on the manner in which this legal interest can be exercised ...).^{[2015] 219}

In a first footnote accompanying this text, the Appeals Chamber observed:

As is well known, in the *Barcelona Traction, Power & Light Co.* case, the International Court of Justice mentioned obligations of States “towards the international community as a whole” and defined them as obligations *erga omnes* (I.C.J. Reports 1970, p. 33, para. 33). The International Law Commission has rightly made a distinction between such obligations and those *erga omnes partes* (*Yearbook of the International Law Commission*, 1992, vol. II, Part Two, p. 39, para. 269). This distinction was first advocated by the Special Rapporteur, G. Arangio-Ruiz, in his third report on State responsibility (see *Yearbook ...*, 1991, vol. II, Part One, p. 35, para. 121; see also his fourth report, *ibid.*, 1992, vol. II, Part One, p. 34, para. 92).^{[2016] 220}

In a second footnote, it added, with regard to the obligation under article 29 of the Statute:

... The fact that the obligation is incumbent on all States while the correlative “legal interest” is only granted to Member States of the United Nations should not be surprising. Only the latter category encompasses the “injured States” entitled to claim the cessation of any breach of article 29 or to promote the taking of remedial measures. See on this matter article 40 of the draft articles on State responsibility adopted on first reading by the International Law Commission (former art. 5 of Part Two). It provides as follows in para. 2 (c): “[injured State means] if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court

^{[2015] 219} International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaškić (“Lasva Valley”), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 26 (footnotes omitted). (See footnote [52] 8 above.)

^{[2016] 220} *Ibid.*, para. 26, footnote 33.

or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right”, in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*.^{[2017] 221}

[A/62/62, para. 125]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (SEABED DISPUTES CHAMBER)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber con-

^{[2017] 221} *Ibid.*, para. 26, footnote 34. Draft article 40, as adopted on first reading, read as follows:

Article 40

Meaning of injured State

1. For the purposes of the present articles, “injured State” means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, “injured State” means:

(a) If the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

- (i) The right has been created or is established in its favour;
- (ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
- (iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(f) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, “injured State” means, if the internationally wrongful act constitutes an international crime, all other States. (*Yearbook ... 1996*, vol. II (Part Two), para. 65.)

In the articles finally adopted in 2001, the International Law Commission followed a different approach in which it distinguished, for purposes of invocation of responsibility, the position of the injured State, defined narrowly (article 42), and that of States other than injured State (article 48). The passages of the judgement of the Appeals Chamber reproduced in the text concern the latter category of States and this is the reason why they are reproduced here with reference to article 48.

sidered which subjects were entitled to claim compensation for “damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment”.^{[2018] 198} It expressed the opinion that while,

[n]o provision of the Convention can be read as explicitly entitling the Authority to make such a claim[, it] may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act ‘on behalf’ of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility^{[2019] 199}

[A/68/72, para. 138]

INTERNATIONAL COURT OF JUSTICE

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom and Marshall Islands v. India)

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament between Marshall Islands v. United Kingdom and Marshall Islands v. India*, the International Court of Justice stated that “Article 48, paragraph 3, applies that requirement [to give notice of a claim under Article 43 of the State responsibility articles] *mutatis mutandis* to a State other than an injured State which invokes responsibility”.^{[2020] 248}

[A/74/83, p. 42]

[INTER-AMERICAN COURT OF HUMAN RIGHTS]

The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)

In an advisory opinion concerning the effects of a State’s denunciation of the American Convention on Human Rights, the Inter-American Court of Human Rights, in an analysis of *jus cogens* norms, cited articles 40, 41 and 48 and the commentary to article 40, indicating that the obligations contained in article 40 “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values”.^{[2021] 222}

[A/77/74, p. 36]]

^[2018] 198 See footnote [12] 10 above, para. 179.

^[2019] 199 *Ibid.*, para. 180.

^[2020] 248 ICJ, Judgment, 5 October 2016, para. 42.

^[2021] 222 IACHR, Series A, No. 26, Advisory Opinion No. OC-26/20, 9 November 2020, paras. 103–104.]

CHAPTER II

COUNTERMEASURES

Commentary

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures, which would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State. They were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.^{[2022] 735} This is reflected in article 23 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.^{[2023] 736} More recently, the term “reprisals” has been limited to action taken in time of international armed conflict; *i.e.* it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.^{[2024] 737} Countermeasures are to be contrasted with retorsion, *i.e.* “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic

^{[2022] 735} For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

^{[2023] 736} See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote [1070] 394 above), vol. II, chap. XVIII, p. 342.

^{[2024] 737} *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), at p. 106, para. 201; and *Gabčikovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 82.

relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 23. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.^{[2025] 738} Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called “reciprocal countermeasures” and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State “if such obligations correspond to, or are directly connected with, the obligation breached”.^{[2026] 739} There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.^{[2027] 740} A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.^{[2028] 741} Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclu-

^{[2025] 738} On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

^{[2026] 739} See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook ... 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

^{[2027] 740} Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

^{[2028] 741} Cf. *Ireland v. United Kingdom* (footnote [800] 236 above).

sion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.^{[2029] 742}

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (a)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.^{[2030] 743}

^[2029] 742 See footnotes [992] 339 and [1944] 213 above.

^[2030] 743 See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL COURT OF JUSTICE

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court relied, *inter alia*, on draft articles 47 to 50, as adopted by the International Law Commission on first reading,^{[2031] 222} to establish the conditions relating to resort to countermeasures:

In order to be justifiable, a countermeasure must meet certain conditions (see Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) Merits, Judgment, I.C.J. Reports 1986, p. 127, para. 249. See also Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, United Nations, Reports of International Arbitral Awards (RIAA), vol. XVIII, pp. 443 *et seq.*; also articles 47 to 50 of the draft articles on State responsibility adopted by the International Law Commission on first reading, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 144–145.)^{[2032] 223}

[A/62/62, para. 126]

WORLD TRADE ORGANIZATION PANEL

Mexico—Tax Measures on Soft Drinks and Other Beverages

In its 2005 report on *Mexico—Tax Measures on Soft Drinks and Other Beverages*, the panel noted that the European Communities (which was a third party in the proceedings) had criticized Mexico's invocation of article XX(d) of GATT 1994^{[2033] 224} as a justification for the measures at issue by invoking the articles finally adopted by the International Law Commission in 2001, which it considered a codification of customary international law on the conditions imposed on countermeasures. According to the European Communities:

^{[2031] 222} These provisions were amended and incorporated in articles 49 to 52 finally adopted by the International Law Commission in 2001, which constitute, together with articles 53 and 54, chapter II of Part Three of the articles.

^{[2032] 223} See footnote [31] 37 above, at p. 55, para. 83.

^{[2033] 224} Mexico had argued that the challenged tax measures were “designed to secure compliance” by the United States with NAFTA, a law that was considered not inconsistent with the provisions of GATT 1994. The relevant part of article XX (General exceptions) of GATT 1994 reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

...

5.54. At a systemic level, Mexico's interpretation would transform article XX(d) of GATT 1994 into an authorization of countermeasures within the meaning of public international law. It must be assumed, however, that if the contracting parties had intended such an interpretation, they would have expressed this in a clearer way. Moreover, under customary international law, as codified in the International Law Commission's articles on responsibility of States for internationally wrongful acts, countermeasures are subject to strict substantive and procedural conditions, which are not contained in article XX(d) of GATT 1994.

5.55. The EC notes that Mexico has not so far justified its measure as a countermeasure under customary international law. Such a justification would already meet the objection that the Mexican measure does not only apply to products from the United States, but from anywhere. In any event, should Mexico still attempt such a justification, then this would also raise the difficult question of whether the concept of countermeasures is available to justify the violation of WTO obligations. In accordance with article 50 of the International Law Commission's articles on responsibility of States for internationally wrongful acts, this would not be the case if the WTO agreements are to be considered as a *lex specialis* precluding the taking of countermeasures. This complex question has been addressed in the report of the International Law Commission at its fifty-third session.^{[2034] 225}

The panel considered that the phrase "to secure compliance" in article XX(d) was to be interpreted as meaning "to enforce compliance" and that therefore the said provision was concerned with action at a domestic rather than international level; it thus further found that the challenged measures taken by Mexico were not covered under that provision.^{[2035] 226} In that context, the panel referred itself to the text of article 49 in support of its interpretation of article XX(d):

... it is worth noting that the draft articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission do not speak of enforcement when addressing the use of countermeasures. Rather, paragraph 1 of article 49 states that "[a]n 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". Nor is the notion of enforcement used in the commentary on the articles, except in regard to procedures within the European Union, which because of its unique structures and procedures is obviously a special case.^{[2036] 227}

[A/62/62, para. 127]

^[2034] 225 WTO, Panel Report, WT/DS308/R, 7 October 2005, paras. 5.54–5.55 (footnotes omitted).

^[2035] 226 This conclusion was later upheld by the WTO Appellate Body in *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006.

^[2036] 227 WTO, Panel Report, WT/DS308/R, 7 October 2005, para. 8.180 (footnotes omitted).

Article 49. Object and limits of countermeasures

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.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.^{[2037] 744} Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

In order to be justifiable, a countermeasure must meet certain conditions ...

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.^{[2038] 745}

(3) Paragraph 1 of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in

^{[2037] 744} For these obligations, see articles 30 and 31 and commentaries.

^{[2038] 745} *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 83. See also “*Naulilaa*” (footnote [990] 337 above), p. 1027; “*Cysne*” (footnote [991] 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (footnote [147] 88 above), p. 128.

the event of an incorrect assessment.^{[2039] 746} In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.^{[2040] 747}

(4) A second essential element of countermeasures is that they “must be directed against”^{[2041] 748} a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.^{[2042] 749} The word “only” in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.^{[2043] 750}

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and paragraph 2 of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to “obligations” in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make

^{[2039] 746} The tribunal’s remark in the *Air Service Agreement* case (footnotes [992] 339 and [1944] 213 above), to the effect that “each State establishes for itself its legal situation *vis-à-vis* other States” (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

^{[2040] 747} See paragraph (8) of the introductory commentary to chapter V of Part One.

^{[2041] 748} *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 55–56, para. 83.

^{[2042] 749} In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia’s response was directed against it on that ground.

^{[2043] 750} On the specific question of human rights obligations, see article 50, paragraph (1) (b), and commentary.

itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.^{[2044] 751}

(7) The phrase “for the time being” in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.^{[2045] 752} Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State “under Part Two”. It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State’s refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.^{[2046] 753} In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.^{[2047] 754}

(9) Paragraph 3 of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.^{[2048] 755}

^{[2044] 751} See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

^{[2045] 752} This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

^{[2046] 753} See paragraph (1) of the commentary to article 37.

^{[2047] 754} Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (b), and commentary.

^{[2048] 755} *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 56–57, para. 87.

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase “as far as possible” in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION PANEL

Mexico—Tax Measures on Soft Drinks and Other Beverages

In its 2005 report on *Mexico—Tax Measures on Soft Drinks and Other Beverages*, the panel, in relation to Mexico’s argument according to which the measures at issue were a response to the persistent refusal of the United States to respond to Mexico’s repeated efforts to resolve the dispute, referred, in a footnote and without any further comment, to a passage of the International Law Commission’s commentary to article 49 finally adopted in 2001:

As the International Law Commission noted in its commentary on countermeasures, “[a] second essential element of countermeasures is that they ‘must be directed against’ a State which has committed an internationally wrongful act . . . This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties . . . Similarly if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.”^{[2049] 228}

[A/62/62, para. 128]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* referred to article 49 of the State responsibility articles as follows:

The Tribunal takes as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice [in the *Gabčíkovo-Nagymaros* case], as confirmed by the ILC Articles.^{[2050] 67}

^{[2049] 228} WTO, Panel Report, WT/DS308/R, 7 October 2005, para. 4.335, footnote 73. The passage referred to is taken from paragraphs (4) and (5) of the commentary to article 49 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

^{[2050] 67} *Archer Daniels Midland Company* (footnote [3] 4 above), para. 125.

One of the issues before the tribunal was to decide whether a tax had been enacted by Mexico “in order to induce” the United States to comply with its NAFTA obligations, as required by article 49 of the State responsibility articles. Following an analysis of the facts, the tribunal held that that was not the case, and accordingly the tax was not a valid countermeasure within the meaning of article 49 of the State responsibility articles.^{[2051] 68}

[A/65/76, para. 45]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

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

In its 2008 Decision on Responsibility, the tribunal established to consider the case of *Corn Products International Inc. v. Mexico* was presented with a defence raised by the respondent that its imposition of a tax, which the tribunal found violated its obligations under NAFTA, was justified as a lawful countermeasure taken in response to a prior violation by the State of nationality of the applicant, the United States. One of the central issues for consideration by the tribunal was whether the countermeasures regime under the State responsibility articles was applicable to claims by individual investors under Chapter XI of NAFTA. The tribunal proceeded from the position, reflected in the commentary to article 49 (which it cited *in extenso*), that “[i]t is a well established feature of the law relating to countermeasures that a countermeasure must be directed against the State which has committed the prior wrongful act”.^{[2052] 69} The tribunal further noted the distinction, drawn in paragraphs (4) and (5) of the commentary to article 49, between a countermeasure extinguishing or otherwise affecting the “rights” as opposed to the “interests” of a third party and stated:

A countermeasure cannot ... extinguish or otherwise affect the *rights* of a party other than the State responsible for the prior wrongdoing. On the other hand, it can affect the *interests* of such a party.^{[2053] 70}

The issue then was “whether an investor within the meaning of article 1101 of the NAFTA has rights of its own, distinct from those of the State of its nationality, or merely interests. If it is the former, then a countermeasure taken by Mexico in response to an unlawful act on the part of the United States will not preclude wrongfulness as against [the investor], even though it may operate to preclude wrongfulness against the United States”.^{[2054] 71} The tribunal subsequently held that NAFTA did confer upon investors substantive rights separate and distinct from those of the State of which they are nationals, and accordingly that a countermeasure ostensibly taken against the United States could not deprive investors of such rights, and thus could not be raised as a circumstance precluding wrongfulness in the relation to a violation of the investor’s rights.^{[2055] 72} The tribunal was further confronted with the question of whether the requirements for a lawful countermeasure, as relied upon by the respondent, had been satisfied. In particular, the requirement of a prior

^[2051] 68 *Ibid.*, paras. 134–151.

^[2052] 69 *Corn Products International Inc.* (footnote [4] 5 above), para. 163.

^[2053] 70 *Ibid.*, para. 164, emphasis in the original.

^[2054] 71 *Ibid.*, para. 165.

^[2055] 72 *Ibid.*, paras. 167 and 176.

violation of international law, which it considered to be “an absolute precondition on the right to take countermeasures”, as supported by, *inter alia*, article 49, paragraph 1, of the State responsibility articles (which it cited together with the corresponding sentence in the commentary^[2056] 73). In its view, “[i]t [was] plainly not open to this Tribunal to dispense with a fundamental prerequisite of this kind”^[2057] 74. The difficulty the tribunal faced was that it lacked jurisdiction to ascertain whether the allegations of the respondent against the United States, in support of the respondent’s defence of lawful countermeasures, were well founded or not, since the United States was not a party to the proceedings. As such, it could not uphold the respondent’s defence since it had not established one of the requirements of a valid countermeasure.^[2058] 75 The tribunal cited, *inter alia*, the following extract from the commentary to article 49:

A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.^[2059] 76

[A/65/76, para. 46]

ARBITRATIONS UNDER ARTICLE 22(6) OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING AND ARTICLES 4(11) AND 7(10) OF THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement and United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement

In two decisions taken in 2009, the arbitrator in the *United States—Subsidies on Upland Cotton, Recourse to Arbitration* case considered the reference to “appropriate countermeasures” under article 4, paragraph 10 (and separately under article 7, paragraph 10), of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and held, *inter alia*:

4.40 We note that the term ‘countermeasures’ is the general term used by the ILC in the context of its Draft Articles on State Responsibility, to designate temporary measures that injured States may take in response to breaches of obligations under international law.

4.41 We agree that this term, as understood in public international law, may usefully inform our understanding of the same term, as used in the SCM Agreement. Indeed, we find that the term ‘countermeasures’, in the SCM Agreement, describes measures that are in the nature of countermeasures as defined in the ILC’s Draft Articles on State Responsibility.

4.42 At this stage of our analysis, we therefore find that the term ‘countermeasures’ essentially characterizes the nature of the measures to be authorized, *i.e.* temporary measures that would otherwise be contrary to obligations under the WTO Agreement and that are taken in response to a breach of

^[2056] 73 Paragraph (2): “A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure.”

^[2057] 74 *Corn Products International Inc.* (footnote [4] 5 above), paras. 185–187.

^[2058] 75 *Ibid.*, para. 189.

^[2059] 76 *Ibid.*, para. 187, quoting from paragraph (3) of the commentary to article 49 (footnote omitted).

an obligation under the SCM Agreement. This is also consistent with the meaning of this term in public international law as reflected in the ILC Articles on State Responsibility.^{[2060] 77}

The arbitrator, in making the assertion that “[t]he fact that countermeasures ... serve to induce compliance does not in and of itself provide specific indications as to the level of countermeasures that may be permissible ...”, held that such “distinction is also found under general rules of international law, as reflected in the ILC’s Articles on State Responsibility”. He proceeded to recall that “[a]rticle 49 of [the] Draft Articles defines ‘inducing compliance’ as the only legitimate object of countermeasures, while a separate provision, Article 51, addresses the question of the permissible level of countermeasures, which is defined in relation to proportionality to the injury suffered, taking into account the gravity of the breach”.^{[2061] 78}

[A/65/76, para. 47]

^{[2060] 77} WTO, Case No. WT/DS267/ARB/2, Decision by the Arbitrator, 31 August 2009, paras. 4.30–4.32 (footnotes omitted). See also the discussion under article 55 below.

^{[2061] 78} *Ibid.*, paras. 4.113 and 4.61, respectively.

Article 50. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of fundamental human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible State;

(b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations, which by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; and (d) other obligations under peremptory norms of general international law.

(4) Paragraph 1 (a) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of

force.”^{[2062] 756} The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial^{[2063] 757} and other bodies.^{[2064] 758}

(6) Paragraph 1 (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the “*Naulilaa*” arbitration, the tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States”.^{[2065] 759} The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must “abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience”.^{[2066] 760} This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.^{[2067] 761}

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,^{[2068] 762} as well as with countermeasures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights”,^{[2069] 763} and went on to state that:

it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.^{[2070] 764}

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited.”^{[2071] 765}

^{[2062] 756} General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first “Basket” of that Final Act reads: “Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force”.

^{[2063] 757} See especially *Corfu Channel, Merits* (footnote [29] 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 127, para. 249.

^{[2064] 758} See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

^{[2065] 759} “*Naulilaa*” (footnote [990] 337 above), p. 1026.

^{[2066] 760} *Annuaire de l’Institut de droit international*, vol. 38 (1934), p. 710.

^{[2067] 761} See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

^{[2068] 762} See below, article 59 and commentary.

^{[2069] 763} E/C.12/1997/8, para. 1.

^{[2070] 764} *Ibid.*, para. 4.

^{[2071] 765} See also paragraph 2 of article 54 (“objects indispensable to the survival of the civilian population”) and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that “In no case may a people be deprived of its own means of subsistence”.

(8) Paragraph 1 (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.^[2072] ⁷⁶⁶ The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.^[2073] ⁷⁶⁷

(9) Paragraph 1 (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to “other” obligations under peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.^[2074] ⁷⁶⁸

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (d). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.^[2075] ⁷⁶⁹ Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend conces-

^[2072] ⁷⁶⁶ Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

^[2073] ⁷⁶⁷ See K. J. Partsch, “Reprisals”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, “Methods and means of combat”, D. Fleck, ed., *op. cit.*, p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

^[2074] ⁷⁶⁸ See paragraphs (4) to (6) of the commentary to article 40.

^[2075] ⁷⁶⁹ On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91–63 (*Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities v. Italian Republic*), *ibid.*, p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities v. French Republic*), *ibid.*, p. 2729 (1979); and case

sions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.^{[2076] 770} Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations”.^{[2077] 771} To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”,^{[2078] 772} they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in paragraph 2 (a), applies to “any dispute settlement procedure applicable” between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council*:

Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.^{[2079] 773}

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision

C-5/94 (*The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I-2553 (1996).

^{[2076] 770} See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

^{[2077] 771} See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote [94] 73 above), paras. 7.35–7.46.

^{[2078] 772} To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

^{[2079] 773} *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.^{[2080] 774}

(14) The second exception in paragraph 2 (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (b), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.^{[2081] 775} The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions”,^{[2082] 776} and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.^{[2083] 777}

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.^{[2084] 778} On the other hand, no reference need be made

^{[2080] 774} *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 28, para. 53.

^{[2081] 775} See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

^{[2082] 776} *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 38, para. 83.

^{[2083] 777} *Ibid.*, p. 40, para. 86. Cf. article 45, subparagraph (a), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (a), of the Vienna Convention on Consular Relations (premises, property and archives to be protected “even in case of armed conflict”).

^{[2084] 778} See articles 9, 11, 26, 36, paragraph 2, 43 (b) and 47, paragraph 2 (a), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (b), subparagraph (c) and article 35,

in article 50, paragraph 2 (b), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, *i.e.* the international organization concerned.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Zoran Kupreškić, Mirjanić Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić (“Lasva Valley”)

In its 2000 judgement in the *Kupreškić et al. (“Lasva Valley”)* case, the Trial Chamber invoked draft article 50(d) adopted on first reading^{[2085] 229} to confirm its finding that there existed a rule in international law that prohibited belligerent reprisals against civilians and fundamental rights of human beings. It stated that:

... the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanization of armed conflict is among other things confirmed by the works of the United Nations International Law Commission on State responsibility. Article 50(d) of the draft articles on State responsibility, adopted on first reading in 1996, prohibits as countermeasures any “conduct derogating from basic human rights”.^{[2086] 230}

In the same context, the Trial Chamber again relied on draft article 50(d) adopted on first reading, which it considered authoritative, to confirm its interpretation of the relevant rules of international law. It observed that:

The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on subparagraph d of article 14 (now article 50) of the draft articles on State responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that article 3 common to the four 1949 Geneva Conventions “prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment”. It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, common article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held

paragraph (3), of the Vienna Convention on Consular Relations.

^{[2085] 229} The relevant subparagraph was amended and incorporated in article 50, paragraph 1 (b), finally adopted by the International Law Commission in 2001.

^{[2086] 230} International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Zoran Kupreškić, Mirjanić Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić (“Lasva Valley”)*, *Judgement*, Case No. IT-95-16-T, 14 January 2000, para. 529 (footnote omitted).

in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.^{[2087] 231}

[A/62/62, para. 129]

ERITREA-ETHIOPIA CLAIMS COMMISSION

Prisoners of War—Eritrea’s Claim 17, Partial Award

In its 2003 partial award on *Prisoners of War—Eritrea’s Claim 17*, the Eritrea-Ethiopia Claims Commission noted that Eritrea had claimed *inter alia* that:

Ethiopia’s suspension of prisoner of war exchanges cannot be justified as a non-forcible countermeasure under the law of state responsibility because, as article 50 of the International Law Commission’s articles on responsibility of States for internationally wrongful acts emphasizes, such measures may not affect “obligations for the protection of fundamental human rights”, or “obligations of a humanitarian character prohibiting reprisals”.^{[2088] 232}

The Claims Commission did not refer explicitly to the International Law Commission articles in its subsequent reasoning, but it considered that Eritrea’s arguments were “well founded in law”, although they were considered insufficient to establish that Ethiopia had violated its repatriation obligation.^{[2089] 233}

[A/62/62, para. 130]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)

In the matter of an Arbitration Between Guyana and Suriname

In its 2007 award in the *Guyana v. Suriname* case, the arbitral tribunal constituted to hear the case, after holding that certain military action taken by Suriname constituted a threat of the use of force in contravention of the United Nations Convention on the Law of the Sea of 1982, the Charter of the United Nations and general international law, was faced with a claim by Suriname that the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana. The tribunal held that “[i]t is a well established principle of international law that countermeasures may not involve the use of force” and continued:

This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(a), which states that countermeasures shall not affect ‘the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’. As the commentary to the ILC Draft Articles mentions, this principle is consistent with the jurisprudence emanating from international judicial bodies. It is also contained in the Declaration on Principles of International Law concerning Friendly Relations

^[2087] 231 *Ibid.*, para. 534 (footnotes omitted).

^[2088] 232 Eritrea-Ethiopia Claims Commission, *Prisoners of War—Eritrea’s Claim 17*, Partial Award, 1 July 2003, para. 159.

^[2089] 233 *Ibid.*, para. 160.

and Cooperation among States in accordance with the Charter of the United Nations, the adoption of which, according to the ICJ, is an indication of State's *opinio juris* as to customary international law on the question.^{[2090] 79}

[A/65/76, para. 48]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

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

The tribunal established to hear the case of *Corn Products International Inc., v. Mexico*, in its 2008 Decision on Responsibility, relied on article 50 of the State responsibility articles to draw the inference that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of countermeasures in the case of alleged violations of obligations under NAFTA.^{[2091] 80}

[A/65/76, para. 49]

^{[2090] 79} *Guyana v. Suriname* (footnote [967] 19 above), para. 446 (footnote omitted).

^{[2091] 80} *Corn Products International Inc.* (footnote [4] 5 above), para. 158. See article 22 above.

Article 51. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the “*Naulilaa*” case:

even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.^{[2092] 779}

(3) In the *Air Service Agreement* arbitration,^{[2093] 780} the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France’s refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States’ countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they “do not appear to be clearly disproportionate when compared to those taken by France”. In particular, the majority said:

It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the “proportionality” of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.^{[2094] 781}

^[2092] 779 “*Naulilaa*” (footnote [990] 337 above), p. 1028.

^[2093] 780 *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), para. 83.

^[2094] 781 *Ibid.*; Reuter, dissenting, accepted the tribunal’s legal analysis of proportionality but suggested that there were “serious doubts on the proportionality of the counter-measures taken by the

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagyymaros Project* case.^{[2095] 782} ICJ, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagyymaros Barrage System of 1977, went on to say:

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

“[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others” ...

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law ...

The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.^{[2096] 783} The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely “quantitative” element of the injury suffered, but also “qualitative” factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but “taking into account” two

United States, which the tribunal has been unable to assess definitely” (p. 448).

^[2095] 782 *Gabčíkovo-Nagyymaros Project* (footnote [31] 37 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

^[2096] 783 E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to “the rights in question” has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION PANEL

United States—Import Measures on Certain Products From the European Communities

In its 2000 report on *United States—Import Measures on Certain Products from the European Communities*, the panel noted that the suspension of concessions or other obligations authorized by the Dispute Settlement Body—which is the remedial action available, in last resort, for WTO members under the WTO Dispute Settlement Understanding—was “essentially retaliatory in nature”. In a footnote, it further referred to the conditions imposed on countermeasures under the International Law Commission articles, and in particular draft article 49, as adopted on first reading:^{[2097] 234}

... Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on state responsibility (proportionality, *etc.* ... see article [49] of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO Dispute Settlement Understanding.^{[2098] 235}

[A/62/62, para. 131]

^[2097] 234 Although the original text of the quoted passage inadvertently refers to draft article 43 with regard to the issue of proportionality, the draft article adopted on first reading that dealt with that issue was draft article 49, which was amended and incorporated in article 51 finally adopted by the International Law Commission in 2001. The text of draft article 49 adopted on first reading was the following:

Article 49

Proportionality

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State. (*Yearbook ... 1996*, vol. II (Part Two), para. 65.)

^[2098] 235 WTO, Panel Report, WT/DS165/R, 17 July 2000, para. 6.23, footnote 100.

WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan

In its 2001 report on *United States—Cotton Yarn*, the Appellate Body considered that its interpretation according to which article 6.4, second sentence, of the agreement on textiles and clothing did not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone had caused all the serious damage

[was] supported further by the rules of general international law on State responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.^[2099] 236

This sentence was followed by a footnote that reproduced the complete text of article 51 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 132]

United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea

In its 2002 report on *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, the Appellate Body again referred to article 51 finally adopted by the International Law Commission in 2001, which it considered as reflecting customary international law rules on State responsibility, to support its interpretation of the first sentence of article 5.1 of the agreement on safeguards:

We note ... the customary international law rules on State responsibility, to which we also referred in *US—Cotton Yarn*. We recalled there that the rules of general international law on State responsibility require that countermeasures in response to breaches by States of their international obligations be proportionate to such breaches. Article 51 of the International Law Commission's draft articles on responsibility of States for internationally wrongful acts provides that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". Although article 51 is part of the International Law Commission's draft articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law. We observe also that the United States has acknowledged this principle elsewhere. In its comments on the International Law Commission's draft articles, the United States stated that "under customary international law a rule of proportionality applies to the exercise of countermeasures".^[2100] 237

[A/62/62, para. 133]

^[2099] 236 WTO Appellate Body, WT/DS192/AB/R, 8 October 2001, para. 120.

^[2100] 237 WTO Appellate Body Report, WT/DS202/AB/R, 15 February 2002, para. 259 (footnotes omitted).

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* referred to article 51 of the State responsibility articles in recalling that, as per the requirement of proportionality, countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.^[2101]⁸¹ Reference was further made to paragraph (7) of the commentary to article 51, which provides:

(7) Proportionality is concerned with the relationship between the international wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49.^[2102]⁸²

In casu, the tribunal found that Mexico's aim to secure compliance by the United States of its obligations under Chapters Seven and Twenty of NAFTA could have been attained by other measures not impairing the investment protection standards. Accordingly, it held that a tax imposed by Mexico, ostensibly to secure such compliance, did not meet the proportionality requirement for the validity of countermeasures under customary international law.^[2103]⁸³

[A/65/76, para. 50]

ARBITRATIONS UNDER ARTICLE 22(6) OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING AND ARTICLES 4(11) AND 7(10) OF THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement and United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement

In two decisions taken in 2009, the arbitrator in the *United States—Subsidies on Upland Cotton, Recourse to Arbitration* case referred to article 51 of the State responsibility articles in noting that the articles maintain a general distinction between the purpose of countermeasures and the level of permissible countermeasures.^[2104]⁸⁴

[A/65/76, para. 51]

^[2101] ⁸¹ *Archer Daniels Midland Company* (footnote [3] 4 above), para. 152.

^[2102] ⁸² *Yearbook of the International Law Commission, 2001, Volume II (Part Two)*, p. 135.

^[2103] ⁸³ *Archer Daniels Midland Company* (footnote [3] 4 above), para. 160.

^[2104] ⁸⁴ Case No. WT/DS267/ARB/1, Decision by the Arbitrator, 31 August 2009, para. 4.113, and Case No. WT/DS267/ARB/2, Decision by the Arbitrator, 31 August 2009, para. 4.61. See also the discussion under article 49 above.

Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.^{[2105] 784} At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

^{[2105] 784} See above, paragraph (7) of the commentary to the present chapter.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.^{[2106] 785} The first requirement, set out in paragraph 1 (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommatio*”) was stressed both by the tribunal in the *Air Service Agreement* arbitration^{[2107] 786} and by ICJ in the *Gabčíkovo-Nagymaros Project* case.^{[2108] 787} It also appears to reflect a general practice.^{[2109] 788}

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (a).

(5) Paragraph 1 (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (a) and (b) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take “such urgent countermeasures as are necessary to preserve its rights” even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (b) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended “without undue delay”. The phrase “without undue delay” allows a limited tolerance for the arrangements required to suspend the measures in question.

^{[2106] 785} *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), pp. 445–446, paras. 91 and 94–96.

^{[2107] 786} *Ibid.*, p. 444, paras. 85–87.

^{[2108] 787} *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 56, para. 84.

^{[2109] 788} A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

(8) A dispute is not “pending before a court or tribunal” for the purposes of paragraph 3 (b) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.^{[2110] 789} Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.^{[2111] 790} The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.^{[2112] 791}

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

^{[2110] 789} Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

^{[2111] 790} The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote [236] 119 above), pp. 501–504, paras. 99–104.

^{[2112] 791} Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute” (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Continued Suspension of Obligations in the EC—Hormones Dispute

In its 2008 report, the WTO Appellate Body in the *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, declined to uphold the argument of the European Communities that the latter's position was consistent with the approach in article 52, paragraph 3, of the State responsibility articles, *i.e.* requiring that countermeasures be suspended if the internationally wrongful act has ceased and the dispute is pending before a tribunal that has the authority to make decisions binding upon the parties.^{[2113] 85}

[A/65/76, para. 52]

^{[2113] 85} WTO Appellate Body, Case No. AB-2008-5, Report of the Appellate Body, 14 November 2008, para. 382 (“the Articles on State Responsibility do not lend support to the European Communities’ position”). See article 53. See also *WTO Appellate Body, Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, Case No. AB-2008-6, Report of the Appellate Body, 14 November 2008, para. 382.

Article 53. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Continued Suspension of Obligations in the EC—Hormones Dispute

In its 2008 report, the WTO Appellate Body in the *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, held that

... Article 53 provides that countermeasures must be terminated as soon as the State ‘has complied with its obligations’ in relation to the internationally wrongful act. Thus, relevant principles under international law, as reflected in the Articles on State Responsibility, support the proposition that countermeasures may continue until such time as the responsible State has ceased the wrongful act by fully complying with its obligations.^{[2114] 86}

[A/65/76, para. 53]

^[2114] 86 *Ibid.*

Article 54. Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.^{[2115] 792}

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.^{[2116] 793} More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.^{[2117] 794}

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (*e.g.* breaking off air links or other contacts). Examples include the following:

– *United States–Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.^{[2118] 795} The legislation recited that “[t]he Government of Uganda ... has committed geno-

^{[2115] 792} See, *e.g.*, M. Akehurst, “Reprisals by third States”, *BYBIL*, 1970, vol. 44, p. 1; J. I. Charney, “Third State remedies in international law”, *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote [1923] 672 above); Sicilianos, *op. cit.* (footnote [2022] 735 above), pp. 110–175; B. Simma, “From bilateralism to community interest in international law”, *Collected Courses ... , 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, “Reactions by not directly affected States to breaches of public international law”, *Collected Courses ... , 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

^{[2116] 793} See article 59 and commentary.

^{[2117] 794} See article 57 and commentary.

^{[2118] 795} Uganda Embargo Act, Public Law 95–435 of 10 October 1978, *United States Statutes at Large* 1978, vol. 92, part 1 (Washington D. C., United States Government Printing Office, 1980), pp. 1051–1053.

cide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.^{[2119] 796}

– *Certain Western countries–Poland and the Soviet Union (1981)*. On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.^{[2120] 797} The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.^{[2121] 798} The suspension procedures provided for in the respective treaties were disregarded.^{[2122] 799}

– *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.^{[2123] 800} Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the Agreement.^{[2124] 801} The embargo adopted by the European countries also constituted a suspension of Argentina’s rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,^{[2125] 802} for which security exceptions of the Agreement did not apply.

– *United States–South Africa (1986)*. When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.^{[2126] 803} Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African

^{[2119] 796} *Ibid.*, sects. 5(a) and (b).

^{[2120] 797} RGDIP, vol. 86 (1982), pp. 603–604.

^{[2121] 798} *Ibid.*, p. 606.

^{[2122] 799} See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People’s Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States–Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

^{[2123] 800} Security Council resolution 502 (1982) of 3 April 1982.

^{[2124] 801} Western States’ reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

^{[2125] 802} The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

^{[2126] 803} Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote [2022] 735 above), p. 165.

Airlines on United States territory.^{[2127] 804} This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories^{[2128] 805} and was justified as a measure which should encourage the Government of South Africa “to adopt reforms leading to the establishment of a non-racial democracy”.^{[2129] 806}

– *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.^{[2130] 807} This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

– *Collective measures against the Federal Republic of Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.^{[2131] 808} For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.^{[2132] 809} Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that “President Milosevic’s ... worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally apply.”^{[2133] 810} The Federal Republic of Yugoslavia protested these measures as “unlawful, unilateral and an example of the policy of discrimination”.^{[2134] 811}

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

– *Netherlands–Suriname (1982)*. In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development

^{[2127] 804} For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

^{[2128] 805} United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

^{[2129] 806} For the implementation order, see ILM (footnote [2127] 804 above), p. 105.

^{[2130] 807} See, e.g., President Bush’s Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

^{[2131] 808} Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid.*, No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

^{[2132] 809} See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, H. M. Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

^{[2133] 810} BYBIL, 1998, vol. 69, p. 581; see also BYBIL, 1999, vol. 70, pp. 555–556.

^{[2134] 811} Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1999.

assistance under which Suriname was entitled to financial subsidies.^[2135]⁸¹² While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.^[2136]⁸¹³

– *European Community member States—the Federal Republic of Yugoslavia (1991)*. In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.^[2137]⁸¹⁴ This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.^[2138]⁸¹⁵

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.^[2139]⁸¹⁶

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessa-

^[2135] ⁸¹² *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

^[2136] ⁸¹³ R. C. R. Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", *NYIL*, 1984, vol. 15, p. 321.

^[2137] ⁸¹⁴ *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

^[2138] ⁸¹⁵ See also the decision of the European Court of Justice in *A. Racke GmbH and Co. v. Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998–6, p. I–3655, at pp. 3706–3708, paras. 53–59.

^[2139] ⁸¹⁶ Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

tion of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of “lawful measures” rather than “countermeasures” so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.