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

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[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 *Gabčíkovo-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-

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[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:
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> …
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> (*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;
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> …

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

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[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

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[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

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[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-

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[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

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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

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[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, Mirjian 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

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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, Mirjian 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-Nagymaros 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-Nagymaros 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

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

[2095] [782] *Gabčíkovo-Nagymaros 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 "*sommation*") 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-

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[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

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[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

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[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-

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[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.