### *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]

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[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

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[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.