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).