Article 22. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[989] [336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[990] [337] *"Cysne"*,[991] [338] and *Air Service Agreement*[992] [339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[993] [340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the

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[989] [336] *Gabčíkovo-Nagymaros Project* (see footnote [31] 37 above), p. 55, para. 83.

[990] [337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[991] [338] *Ibid*., p. 1035, at p. 1052 (1930).

[992] [[339] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415.]

[993] [340] *Ibid*., especially pp. 443–446, paras. 80–98.

extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[994] 341

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[995] 342

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[996] 343 For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[997] 344 Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

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[994] 341 *"Cysne"* (footnote [991] 338 above), pp. 1056–1057.

[995] 342 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 83.

[996] 343 For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[997] 344 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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* cited article 22 of the State responsibility articles in support of its assertion that:

> Countermeasures may constitute a valid defence against a breach of Chapter Eleven [of NAFTA] insofar as the Respondent State proves that the measure in question meets each of the conditions required by customary international law, as applied to the facts of the case.[998] 20

The tribunal provided further that

> [it] took 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 [articles 22 and 49 of] the ILC Articles.[999] 21

[A/65/76, para. 23]

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 hear the case of *Corn Products International Inc.* v. *Mexico* held that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of the taking of lawful countermeasures in the case before it which involved alleged violations of obligations under NAFTA. The tribunal explained that

> … the fact that the tax violated Mexico's obligations under the GATT [did not] mean that it could not constitute a countermeasure which operated to preclude wrongfulness under the NAFTA. It is a feature of countermeasures that they may operate to preclude wrongfulness in respect of one obligation of the State which takes them, while not affecting another obligation of that State. This is apparent from the text of Article 50 of the ILC Articles on State Responsibility … [which] appears to contemplate that a measure which is contrary to one of [the obligations referred to in article 50, paragraph 1,] will entail a breach of *that* obligation by the State which undertakes it but may nevertheless preclude the wrongfulness in relation to another obligation of the State which does not fall within paragraphs (*a*) to (*d*).[1000] 22

Nonetheless, the tribunal subsequently held that, since NAFTA conferred upon investors substantive rights separate and distinct from those of the State of which they are nationals, a countermeasure ostensibly taken against the United States could not deprive investors of such rights, and accordingly could not be raised as a circumstance precluding

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[998] 20 See footnote [3] 4 above, para. 121.

[999] 21 *Ibid*., para. 125.

[1000] 22 See footnote [4] 5 above, para. 158, emphasis in the original.

wrongfulness in relation to a violation of the investor's rights.[1001] [23] The tribunal also held that the defence of the taking of lawful countermeasures could not be upheld because the Respondent had failed to establish the existence of a prior breach of international law by the United States, in response to which the Respondent was taking the countermeasure. As the United States was not a party to the proceedings, the tribunal held that it did not have the jurisdiction to evaluate such a claim. [1002] [24]

[A/65/76, para. 24]

International Court of Justice

Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. *Greece)*

In its judgment in the *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia* v. *Greece)*, the International Court of Justice referred to the State responsibility articles when rejecting the respondent's claim that "its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO".[1003] [121]

[A/68/72, para. 88]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1004] [82]

[A/77/74, p. 17]]

[1001] [23] *Ibid*., paras. 167 and 176. See also article 49.

[1002] [24] *Ibid*., paras. 182–189. See also article 49.

[1003] [121] ICJ, Judgment, 5 December 2011, *I.C.J. Reports 2011*, p. 644, at p. 692, para. 164.

[1004] [82 See footnote [126] 14 above, para. 155.]