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.