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Responsibility of States for internationally wrongful acts

Responsibility of States for internationally wrongful acts

Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

Contents

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Abbreviations

GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
NAFTA	North American Free Trade Agreement
WTO	World Trade Organization

I. Introduction

1. The International Law Commission adopted the draft articles on responsibility of States for internationally wrongful acts at its fifty-third session, in 2001. In resolution 56/83 of 12 December 2001, the General Assembly took note of the articles (hereinafter referred to as the State responsibility articles), the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

2. As requested by the General Assembly in resolution 59/35 of 2 December 2004, the Secretary-General prepared a compilation of decisions of international courts, tribunals and other bodies referring to the State responsibility articles.[1]

3. In resolution 62/61 of 6 December 2007, the General Assembly once again commended the State responsibility articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in that regard, and to submit that material well in advance of its sixty-fifth session.

4. By a note verbale dated 6 March 2009, the Secretary-General invited Governments to submit, no later than 1 February 2010, information regarding decisions of international courts, tribunals and other bodies referring to the articles for inclusion in an updated compilation. Such information was received from the Czech Republic (28 January 2010), Germany (18 January 2010) and Mexico (5 February 2010).

5. The present compilation includes an analysis of cases in which the State responsibility articles were referred to in decisions taken during the period from 1 February 2007[2] to 31 January 2010.[3] Such references were found in the decisions of the International Court of Justice; the WTO Appellate Body; international arbitral tribunals; panels established under GATT and WTO; the Special Court for Sierra Leone; the European Court of Justice; the European Court of Human Rights; the Inter-American Court of Human Rights; and the Caribbean Court of Justice.

6. The present compilation, which supplements the earlier Secretariat compilation, reproduces the extracts of decisions under each of the articles referred to by international courts, tribunals or bodies, following the structure and numerical order of the State responsibility articles. Under each article, decisions appear in chronological order.

7. Since the issuance of the initial compilation, there have been an additional 25 instances in which international courts, tribunals and other bodies have referred in their decisions to the State responsibility articles and commentaries. In view of the number and length of these decisions, the compilation includes only the relevant

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[1] A/62/62 and Corr.1 and Add.1.

[2] Some decisions prior to 2007 not previously covered have been included in the present compilation.

[3] A judgment of the International Court of Justice, handed down on 20 April 2010, has been included in the report. See note 53 below.

extracts of the decisions referring to the State responsibility articles, together with a brief description of the context in which the statement was made.

8. The compilation contains those extracts in which the State responsibility articles are invoked as the basis for the decision or where the articles are referred to as reflecting the existing law governing the issue at hand. It does not cover the submissions of the parties invoking the State responsibility articles, nor opinions of judges appended to a decision.

II. Extracts of decisions referring to the articles on responsibility of States for internationally wrongful acts

General comments

International arbitral tribunal (under the ICSID Additional Facility Rules)

9. In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* made the following assessment of the status of the State responsibility articles:

> "The Tribunal acknowledges the fact that the ILC Articles are the product of over five decades of ILC work. They represent in part the 'progressive development' of international law — pursuant to its UN mandate — and represent to a large extent a restatement of customary international law regarding secondary principles of state responsibility."[4]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

10. In its 2008 Decision on Responsibility, the tribunal established to consider the case of *Corn Products International Inc. v. Mexico* noted that it was "accepted" that the State responsibility articles constituted the "most authoritative statement" on the rules on State responsibility.[5]

International arbitral tribunal (under the ICSID Convention)

11. The tribunal in the 2008 *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case referred to the articles as "a codification of the rules of customary international law on the responsibility of States for their internationally wrongful acts".[6]

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[4] ICSID, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States*, Case No. ARB(AF)/04/05, award, 21 November 2007, para. 116.

[5] ICSID, *Corn Products International Inc., v. The United Mexican States*, Case No. ARB(AF)/04/01, decision on responsibility, 15 January 2008, para. 76.

[6] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Case No. ARB/05/22, award, 24 July 2008, paras. 773 and 774.

Part One
The internationally wrongful act of a State

Chapter I
General principles

Article 2
Elements of an internationally wrongful act of a State

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

12. In its 2006 award, the arbitral tribunal constituted to hear the *Fireman's Fund Insurance Company vs. The United Mexican States* case, in the first case under NAFTA to be heard under Chapter Fourteen devoted to cross-border investment in Financial Services, considered the meaning of the term "expropriation" in article 1110(1) of NAFTA. Upon a review of prior decisions and "customary international law in general", the tribunal identified a number of elements, including that expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by NAFTA. In a footnote citing article 2 of the State responsibility articles, the tribunal added that:

> "[a] failure to act (an 'omission') by a host State may also constitute a State measure tantamount to expropriation under particular circumstances, although those cases will be rare and seldom concern the omission alone."[7]

International arbitral tribunal (under the ICSID Additional Facility Rules)

13. In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* considered article 2 as reflecting a rule applicable under customary international law.[8]

International arbitral tribunal (under the ICSID Convention)

14. In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case, considered the question as to whether actual economic loss or damage was necessary for a cause of action relating to expropriation. The tribunal held that "the suffering of substantive and quantifiable economic loss by the investor [was] not a pre-condition for the finding of an expropriation" under the bilateral investment treaty in question, but that where there had been "substantial interference with an investor's rights, so as to amount to an expropriation … there may be scope for a non-compensatory remedy for the expropriation (e.g. injunctive, declaratory or restitutionary relief)". In coming to that conclusion, the tribunal referred to the commentary to article 2 of the State responsibility articles, where the Commission stated:

> "It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, 'damage' to another State. But whether such elements are

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[7] ICSID, *Fireman's Fund Insurance Company vs. The United Mexican States*, Case No. ARB(AF)/02/01, award, 17 July 2006, para. 176(a), footnote 155.

[8] *Archer Daniels Midland Company*, cited in note 4 above, para. 275.

required depends on the content of the primary obligation, and there is no general rule in this respect."[9]

Chapter II
Attribution of conduct to a State

Article 4
Conduct of organs of a State

WTO panel

15. In its 2007 report, the panel in the *Brazil — Measures Affecting Imports of Retreaded Tyres* case, cited, in a footnote, article 4 of the State responsibility articles, in support of its finding that Brazilian domestic court rulings did not exonerate Brazil from its obligation to comply with the requirements of article XX of the General Agreement on Tariffs and Trade 1994.[10]

WTO Appellate Body

16. In its 2009 report in the *United States — Measures Relating to Zeroing and Sunset Reviews* case, the WTO Appellate Body referred to article 4 of the State responsibility articles in support of its assertion that:

> "[i]rrespective of whether an act is defined as 'ministerial' or otherwise under United States law, and irrespective of any discretion that the authority issuing such instructions or taking such action may have, the United States, as a Member of the WTO, is responsible for those acts in accordance with the covered agreements and international law."[11]

Article 5
Conduct of persons or entities exercising elements of governmental authority

International arbitral tribunal (under the ICSID Convention)

17. The arbitral tribunal in the *Helnan International Hotels A/S v. Egypt* case considered a challenge by the Respondent to its jurisdiction on the ground that the actions of the domestic entity under scrutiny in the case were not attributable to Egypt, despite the fact that the entity was wholly owned by the Government of Egypt. While the tribunal found that it did have jurisdiction on other grounds, it nonetheless proceeded to consider the Respondent's challenge and found that the claimant had convincingly demonstrated that the entity in question was "under the close control of the State". In making this finding, it referred to the commentary to article 5 of the State responsibility articles, first by way of acknowledgment that the "fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject

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[9] *Biwater Gauff*, cited in note 6 above, para. 466, citing paragraph (9) of the commentary to article 2.

[10] WTO Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, para. 7.305, footnote 1480.

[11] WTO Appellate Body, *United States — Measures Relating to Zeroing and Sunset Reviews, recourse to Article 21.5 of the DSU by Japan*, Case No. AB-2009-2, Report of the Appellate Body, 18 August 2009, para. 183 and footnote 466.

to executive control — these are not decisive criteria for the purpose of attribution of the entity's conduct to the State".[12] Nonetheless, the tribunal noted that "[the domestic entity] was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government" and proceeded to recall article 5 (which is quoted in full) and then held that "[e]ven if [the domestic entity] has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State".[13]

Chapter III
Breach of an international obligation

Article 13
International obligation in force for a State

European Court of Human Rights

18. In the *Šilih v. Slovenia* case, the European Court of Human Rights referred to draft article 13 of the State responsibility articles as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the court.[14]

Article 14
Extension in time of the breach of an international obligation

European Court of Human Rights

19. In the *Šilih v. Slovenia* case, the European Court of Human Rights referred to draft article 14 of the State responsibility articles as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the court.[15]

European Court of Human Rights

20. In the *Varnava and Others v. Turkey* case, the European Court of Human Rights, in a case involving alleged disappearance of individuals 15 years prior to the initiation of the case, had to consider the applicability of the six-month time limit for the bringing of a complaint under the Convention of an alleged continuing violation. The Court maintained that "[n]ot all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake … [and] where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay".[16] It proceeded to hold, nonetheless, that the "applicants had acted, in the special

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[12] Paragraph (3) of the commentary to article 5.

[13] ICSID, *Helnan International Hotels A/S v. The Arab Republic of Egypt*, Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras. 92 and 93.

[14] European Court of Human Rights, Grand Chamber, *Šilih v. Slovenia*, Case No. 71463/01, Judgment, 9 April 2009, para. 107.

[15] Ibid., para. 108.

[16] European Court of Human Rights, Grand Chamber, *Varnava and Others v. Turkey*, Case Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment, 18 September 2009, para. 161.

circumstances of their cases, with reasonable expedition for the purposes of … the [European Convention on Human Rights]".[17]

Inter-American Court of Human Rights

21. In the 2009 *Radilla Pacheco v. Mexico* case, the Inter-American Court of Human Rights cited article 14, paragraph 2, of the State responsibility articles (which it quoted) when distinguishing between instantaneous acts and those of a continuing or permanent nature.[18]

Chapter V
Circumstances precluding wrongfulness

General comments

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

22. In its 2007 award in the *Guyana v. Suriname* case, involving the delimitation of a maritime boundary between the two States, the arbitral tribunal constituted to hear the case considered a challenge by Suriname to the admissibility of the proceedings on the grounds of lack of good faith and clean hands. In dismissing such challenge, the tribunal maintained that "[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law", and noted that "the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms".[19]

Article 22
Countermeasures in respect of an internationally wrongful act

International arbitral tribunal (under the ICSID Additional Facility Rules)

23. 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."[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

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[17] Ibid., para. 170.

[18] Inter-American Court of Human Rights, *Radilla Pacheco v. United Mexican States*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 23 November 2009, para. 22.

[19] *In the matter of an Arbitration Between Guyana and Suriname*, award, 17 September 2007, para. 418 (footnote omitted), referring to paragraph (9) of the general commentary to Part One, Chapter V ("Circumstance precluding wrongfulness").

[20] *Archer Daniels Midland Company*, cited in note 4 above, para. 121.

> *Gabčíkovo-Nagymaros* case], as confirmed by [articles 22 and 49 of] the ILC Articles".[21]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

24. 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)."[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 wrongfulness in relation to a violation of the investor's rights.[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. [24]

Article 23
Force majeure

International arbitral tribunal (under the ICSID Convention)

25. In its 2007 award, the arbitral tribunal constituted to hear the *Sempra Energy International v. Argentina* case, which arose under the 1991 bilateral investment treaty between the United States and Argentina, was faced with a claim arising out of changes in the regulatory framework for private investments made in the wake of the economic crisis in Argentina in the late 1990s. The tribunal was presented, inter alia, with an argument on the part of the respondent that "the theory of 'imprévision' has been incorporated into Argentine law", to which the tribunal responded:

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[21] Ibid., para. 125.
[22] *Corn Products International Inc*., cited in note 5 above, para. 158, emphasis in the original.
[23] Ibid., paras. 167 and 176. See article 49 below.
[24] Ibid., paras. 182-189. See also article 49 below.

> "Insofar as the theory of 'imprévision' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation. In the commentary to this article, it is stated that '[*f*]*orce majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'."[25]

Article 25
Necessity[26]

International arbitral tribunal (under the ICSID Convention)

26. The arbitral tribunal constituted to hear the *Sempra Energy International v. Argentine Republic* case, in its 2007 award, dealt with a plea, raised by the respondent, of the existence of a state of necessity. In considering the assertions of the parties as to the customary international law status of article 25 of the State responsibility articles, the tribunal

> "... share[d] the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period of time.
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> …
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> "345. There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity 'may not be invoked' unless such conditions are met …"[27]

In applying article 25, the tribunal held that while the economic crisis which Argentina faced in the late 1990s was severe, it nonetheless did not find the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, to

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[25] ICSID, *Sempra Energy International v. Argentine Republic*, Case No. ARB/02/16, award, 28 September 2007, para. 246.

[26] A Trial Chamber of the Special Court for Sierra Leone, in *Prosecutor v. Fofana and Kondewa (CDF Case)*, Case No. SCSL-04-14-T, in a judgment handed down on 2 August 2007, made an indirect reference, at para. 84, to the predecessor article to draft article 25 of the 2001 articles on responsibility of States for internationally wrongful acts (namely, draft article 33, as adopted on first reading) by referring to the 1997 judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, as "clearly express[ing] the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts". As described in the Secretary-General's 2007 report, the International Court of Justice in that case cited the work of the International Law Commission *in extenso* in its analysis of the defence of necessity (see A/62/62, para. 92).

[27] *Sempra Energy International*, cited in note 25 above, paras. 344 and 345.

be convincing.[28] Furthermore, the tribunal referred to the requirement in article 25 that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity, which it understood to be a mere "expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault".[29] On an analysis of the facts, the tribunal held that there had to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore could not be claimed that the burden fell entirely on exogenous factors.[30] Finally, the tribunal recalled the decision of the International Court of Justice in the *Gabčíkovo-Nagymaros* case[31] in which the Court referred to the work of the International Law Commission and held that the conditions in the predecessor provision to article 25 were to be cumulatively met. Since that was not the case on the facts before it, the tribunal concluded that "the requirements for a state of necessity under customary international law ha[d] not been fully met".[32] The tribunal further considered the interplay between the State responsibility articles, operating at the level of secondary rules, and the bilateral treaty between the parties in the context of an invocation by the respondent of the state of necessity under article XI of the treaty, which envisaged either party taking measures for the "protection of its own essential security interests". In considering what was meant by "essential security interest", the tribunal explained that "the requirements for a state of necessity under customary international law, as outlined … in connection with their expression in Article 25 of the State responsibility articles, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case."[33] Furthermore, the tribunal confirmed that it did not "believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle."[34] As the Tribunal found that the crisis invoked did not meet the customary law requirements of Article 25, it likewise concluded that it was not necessary to undertake further judicial review under Article XI given that the article did not set out conditions different from customary law.[35]

Article 27
Consequences of invoking a circumstance precluding wrongfulness

International arbitral tribunal (under the ICSID Convention)

27. The arbitral tribunal constituted to hear the *Sempra Energy International v. Argentina* case, in its 2007 award, noted that the requirement of temporality in subparagraph (a) of article 27 was not disputed by the parties, even though "the continuing extension of the emergency … [did] not seem to be easily reconciled with the requirement of temporality". That in turn resulted in "uncertainty as to what

[28] Ibid., para. 348.
[29] Ibid., para. 353.
[30] Ibid., para. 354.
[31] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.
[32] *Sempra Energy International*, cited in note 25 above, para. 355.
[33] Ibid., para. 375.
[34] Ibid., para. 378.
[35] Ibid., para. 388.

will be the legal consequences of the Emergency Law's conclusion",[36] which related to the application of subparagraph (b) of article 27. In the face of an interpretation of subparagraph (b), offered by the respondent, that the provision would require compensation only for the damage arising after the emergency was over, and not for that taking place during the emergency period, the tribunal expressed the following view:

> "Although [Article 27] does not specify the circumstances in which compensation should be payable because of the range of possible scenarios, it has also been considered that this is a matter to be agreed with the affected party. The Article thus does not exclude the possibility of an eventual compensation for past events. The 2007 agreements between the Respondent and the Licensees appear to confirm this interpretation …"[37]

Part Two
Content of the international responsibility of a State

Chapter I
General principles

Article 31
Reparation

International arbitral tribunal (under the ICSID Convention)

28. The arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina* case, having previously found Argentina to be in breach of its obligations under the 1991 bilateral investment treaty between the United States and Argentina,[38] proceeded to consider the applicable standard for reparation in its 2007 award. The tribunal stated that it agreed with the claimants that "the appropriate standard for reparation under international law is 'full' reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts".[39]

International arbitral tribunal (under the ICSID Additional Facility Rules)

29. In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* considered article 31 to reflect a rule applicable under customary international law.[40]

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[36] Ibid., para. 392.

[37] Ibid., para. 394 (footnote omitted).

[38] See ICSID, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, Case No. ARB/02/1, decision on liability, 3 October 2006 (discussed in document A/62/62, para. 96).

[39] Ibid., award, 25 July 2007, para. 31.

[40] *Archer Daniels Midland Company*, cited in note 4 above, award, 21 November 2007, para. 275.

International arbitral tribunal (under the ICSID Convention)

30. In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case cited the definition of the term "injury" in article 31, paragraph 2 ("… any damage, whether material or moral, caused by the internationally wrongful act of a State") in support of its assertion that "[c]ompensation for any violation of the [investment treaty between the United Kingdom and the United Republic of Tanzania], whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach … and the loss sustained".[41] The tribunal then proceeded to quote *in extenso* extracts from the commentary to article 31 describing the necessary link between the wrongful act and the injury in order for the obligation of reparation (here in the form of compensation) to arise,[42] and held that "in order to succeed in its claims for compensation, [the claimant] has to prove that the value of its investment was diminished or eliminated, and the actions [it] complains of were the *actual and proximate cause* of such dimunition in, or elimination of, value".[43] The tribunal also found occasion to refer to the definition of "injury" in paragraph 2 in support of its view that "[i]t is … insufficient to assert that simply because there has been a 'taking', or unfair or inequitable conduct, there must necessarily have been an '*injury*' caused such as to ground a claim for compensation. Whether or not each wrongful act by the [respondent] 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages".[44]

International arbitral tribunal (under the ICSID Convention)

31. In its 2008 award, the tribunal in the *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador* case, referred to article 31 as having, in its view, "codified" the principle of "full" compensation, as earlier established by the Permanent Court of International Justice in the *Factory at Chorzów* case.[45] The tribunal saw "no reason not to apply this provision by analogy to investor-state arbitration".[46]

Eritrea-Ethiopia Claims Commission

32. In its 2009 final awards on *Ethiopia's Damages Claims* and *Eritrea's Damages Claims*, the Eritrea-Ethiopia Claims Commission recalled that an earlier version of the State responsibility articles had included a qualification that "[i]n no case may a people be deprived of its own means of subsistence", which was also reflected in article 1, paragraph 2, of both Human Rights Covenants.[47] The Claims Commission

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[41] *Biwater Gauff,* cited in note 6 above, paras. 779 and 783.

[42] Ibid., para. 785, quoting extracts from paragraph (10) of the commentary to article 31.

[43] Ibid., para. 787, emphasis added.

[44] Ibid., para. 804 and footnote 369, (footnotes omitted) emphasis in the original.

[45] *Case concerning the Factory at Chorzów (Germany v. Poland)*, 1928, PCIJ, Series A No. 17, p. 21.

[46] ICSID, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Case No. ARB/04/19, award, 18 August 2008, para. 468.

[47] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims*, Final Award, 17 August 2009, para. 19, and Eritrea-Ethiopia Claims Commission, *Eritrea's Damages Claims*, Final Award, 17 August 2009, para. 19, reference to the predecessor to article 31, namely draft article 42 [6 bis], at paragraph 3, as adopted by the Commission on first reading, at its forty-eighth session in 1996. The provision was deleted during the second reading, at the fifty-second session of the Commission in 2000. See *Yearbook of the International Law Commission, 2000*, vol. II,

further observed that the principle set out by the Permanent Court of International Justice in the *Chorzów Factory* case, that the purpose of compensation payable by a responsible State is "to seek to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" was reflected in article 31 of the State responsibility articles.[48]

Article 33
Scope of international obligations set out in this Part

International arbitral tribunal (under the ICSID Additional Facility Rules)

33. In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, after holding that Chapter Eleven of NAFTA enjoys the status of *lex specialis* in relation to the State responsibility articles,[49] noted that Chapter Eleven includes the possibility of private claimants (who are nationals of a NAFTA member State) invoking in an international arbitration the responsibility of another NAFTA member State. Accordingly, "it is a matter of the particular provisions of Chapter Eleven to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account". In support of this latter assertion the tribunal cited article 33, paragraph 2, of the State responsibility articles, which provides that the customary rules on state responsibility codified therein operate "... without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". Accordingly, in the view of the tribunal:

> "Customary international law — pursuant to which only sovereign States may invoke the responsibility of another State — does not therefore affect the rights of non-State actors under particular treaties to invoke state responsibility. This rule is not only true in the context of investment protection, but also in the human rights and environmental protection arena."[50]

Chapter II
Reparation for injury

Article 34
Forms of reparation

International arbitral tribunal (under the ICSID Convention)

34. In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd. v. Tanzania* case, in the context of an analysis of article 2 of the State responsibility articles, held that where there had been "substantial interference with an investor's rights, so

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Part Two, paras. 79, 100 and 101. A reference to the qualification, as contained in article 1, paragraph 2, of the two Human Rights Covenants was, however, retained in the commentary to article 50, at paragraph (7). See further the discussion under article 56 below.

[48] Ibid., *Ethiopia's Damages Claims*, para. 24, and *Eritrea's Damages Claims*, para. 24, quoting *Factory at Chorzów,* cited in note 45 above, p. 47.

[49] See article 55 below.

[50] *Archer Daniels Midland Company*, cited in note 4 above, para. 118.

as to amount to an expropriation … there may be scope for a non-compensatory remedy for the expropriation (e.g. injunctive, declaratory or restitutionary relief)".[51]

Caribbean Court of Justice

35. In the *Trinidad Cement Limited and TCL Guyana Incorporated v. Guyana* case, the Caribbean Court of Justice referred to a passage in the commentary to the State responsibility articles confirming that "[i]n accordance with article 34, the function of damages is essentially compensatory".[52]

International Court of Justice

36. In its 2010 judgment in the *Pulp Mills on the River Uruguay* case, the International Court of Justice, citing, inter alia, the State responsibility articles, recalled that "customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both."[53]

Article 35
Restitution

European Court of Human Rights

37. In the *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* case, the European Court of Justice referred to article 35 of the State responsibility articles as reflecting "principles of international law". The Court alluded to the qualifications in the provision, i.e. that the obligation to make restitution was subject to such restitution not being "materially impossible" and not involving "a burden out of all proportion to the benefit derived from restitution instead of compensation", which it interpreted as meaning that "while restitution is the rule, there may be circumstances in which the State responsible is exempted — fully or in part — from this obligation, provided that it can show that such circumstances obtain".[54]

European Court of Human Rights

38. In the *Guiso-Gallisay v. Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 35 of the State responsibility articles (which it considered to be relevant international law) as reiterating the principle of *restitutio in integrum*.[55]

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[51] *Biwater Gauff*, cited in note 6 above, para. 466. See article 2 above.

[52] Caribbean Court of Justice, *Trinidad Cement Limited and TCL Guyana Incorporated v. The State of the Co-Operative Republic of Guyana*, Case No. [2009] CCJ 5 (OJ), Judgment, 20 August 2009, para. 38, reference to paragraph (5) of the introductory commentary to Part Two, Chapter III. See further Part Two, Chapter III, below.

[53] International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, para. 273.

[54] European Court of Human Rights, Grand Chamber, *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, Case No. 32772/02, Judgment, 30 June 2009, para. 86.

[55] European Court of Human Rights, Grand Chamber, *Guiso-Gallisay v. Italy*, Case No. 58858/00,

Article 36
Compensation

International arbitral tribunal (under the ICSID Convention)

39. In its 2007 award, the arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina* case applied article 36 of the State responsibility articles in its determination of the loss suffered by the investor.[56] It recalled the relevant paragraph of the commentary to article 36 indicating that the function of compensation is "to address the *actual losses incurred as a result* of the internationally wrongful act",[57] and held that

> "[a]ccordingly, the issue that the Tribunal has to address is that of the identification of the '*actual loss*' suffered by the investor '*as a result*' of Argentina's conduct. The question is one of '*causation*': what did the investor lose by reason of the unlawful acts?"[58]

The tribunal also referred to the State responsibility articles in its consideration of a claim for loss of profits. It again recalled the relevant extracts of the commentary in holding that,

> "as a matter of principle, it is necessary to outline at this point the distinction between accrued losses and lost future profits. Whereas the former have commonly been awarded by tribunals, the latter have only been awarded when '*an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable*'. Or, in the words of the Draft Articles, '*in so far as it is established*'. The question is one of '*certainty*'. '*Tribunals have been reluctant to provide compensation for claims with inherently speculative elements'*."[59]

International arbitral tribunal (under the ICSID Convention)

40. The arbitral tribunal constituted to hear the *Sempra Energy International v. Argentine Republic* case, in its 2007 award, referred to the requirement in article 36, paragraph 2, that compensation is meant to cover any "financially assessable damage including loss of profits insofar as it is established", as reflecting the "appropriate standard of reparation under international law" in the absence of restitution or agreed renegotiation of contracts or other measures of redress.[60]

International arbitral tribunal (under the ICSID Additional Facility Rules)

41. 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 36 of the State responsibility articles in support of the assertion that

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Judgment (Just satisfaction), 22 December 2009, para. 53.

[56] ICSID, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, Case No. ARB/02/1, award, 25 July 2007, paras. 41-43.

[57] Ibid., para. 43. Reference to paragraph (4) of the commentary to article 36, emphasis in award.

[58] Ibid., para. 45, emphasis in original.

[59] Ibid., para. 51 (footnotes omitted). References to article 36, paragraph 2, and to paragraph (27) of the commentary to article 36, emphasis in award.

[60] *Sempra Energy International*, cited in note 25 above, para. 401.

> "compensation encompasses both the loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*). Any direct damage is to be compensated. In addition, the second paragraph of Article 36 recognizes that in certain cases compensation for loss of profits may be appropriate to reflect a rule applicable under customary international law."[61]

The tribunal continued:

> "Any determination of damages under principles of international law requires a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, i.e., damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage, measured in an amount of money."[62]

International arbitral tribunal (under the ICSID Convention)

42. In its 2008 award, the arbitral tribunal constituted to hear the *Desert Line Projects LLC v. Yemen* case, in dealing with a claim for non-material ("moral") damages, cited the commentary to article 36 in support of its conclusion that "[e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them. ... [As] it was held in the *Lusitania* cases, non-material damages may be 'very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated'."[63]

European Court of Human Rights

43. In the *Guiso-Gallisay v. Italy* case, the European Court of Human Rights, in a case involving alleged unlawful expropriation, cited article 36 of the State responsibility articles as reflecting relevant international law in the case.[64]

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Caribbean Court of Justice

44. In the *Trinidad Cement Limited and TCL Guyana Incorporated v. Guyana* case, the Caribbean Court of Justice, in considering the question of the acceptance

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[61] *Archer Daniels Midland Company*, cited in note 4 above, para. 281.

[62] Ibid., para. 282.

[63] ICSID, *Desert Line Projects LLC v. The Republic of Yemen*, Case No. ARB/05/17, award, 6 February 2008, para. 289, emphasis in original, citing the reference to the *Lusitania* case, *United Nations Reports of International Arbitral Awards*, vol. VII, p. 32 (1923), in paragraph (16) of the commentary to article 36.

[64] *Guiso-Gallisay*, cited in note 55 above, para. 54.

of exemplary (punitive) damages in international law, quoted the following passage from the general commentary to chapter III:

> "[T]he award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms."[65]

The Court went on to hold that it was "… not persuaded that exemplary damages may be awarded by it and in this case shall not award any such damages".[66]

Part Three
The implementation of the international responsibility of a State

Chapter II
Countermeasures

Article 49
Object and limits of countermeasures

International arbitral tribunal (under the ICSID Additional Facility Rules)

45. 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."[67]

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.[68]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

46. 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

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[65] *Trinidad Cement Limited*, cited in note 52 above, para. 38, quoting from paragraph (5) of the introductory commentary to Part Two, Chapter III.

[66] *Trinidad Cement Limited*, para. 40.

[67] *Archer Daniels Midland Company*, cited in note 4 above, para. 125.

[68] Ibid., paras. 134-151.

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".[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."[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".[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.[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 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[73]). In its view, "[i]t [was] plainly not open to this Tribunal to dispense with a fundamental prerequisite of this kind".[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.[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."[76]

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[69] *Corn Products International Inc.*, cited in note 5 above, para. 163.

[70] Ibid., para. 164, emphasis in the original.

[71] Ibid., para. 165.

[72] Ibid., paras. 167 and 176.

[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."

[74] *Corn Products International Inc.*, cited in note 5 above, paras. 185-187.

[75] Ibid., para. 189.

[76] Ibid., para. 187, quoting from paragraph (3) of the commentary to article 49 (footnote omitted).

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

47. 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 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."[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".[78]

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[77] WTO, *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*, Case No. WT/DS267/ARB/1, Decision by the Arbitrator, 31 August 2009, paras. 4.40-4.42 (footnotes omitted) 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*, 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.

[78] Ibid., paras. 4.113 and 4.61, respectively.

Article 50
Obligations not affected by countermeasures

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

48. 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 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."[79]

International arbitral tribunal (under NAFTA and the ICSID Additional Facility Rules)

49. 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.[80]

Article 51
Proportionality

International arbitral tribunal (under the ICSID Additional Facility Rules)

50. 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.[81] Reference was further made to paragraph (7) of the commentary to article 51, which provides:

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[79] *Guyana v. Suriname*, cited in note 19 above, para. 446 (footnotes omitted).
[80] *Corn Products International Inc.*, cited in note 5 above, para. 158. See article 22 above.
[81] *Archer Daniels Midland Company*, cited in note 4 above, para. 152.

> "(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."[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.[83]

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

51. 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.[84]

Article 52
Conditions relating to resort to countermeasures

WTO Appellate Body

52. 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.[85]

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[82] *Yearbook of the International Law Commission*, 2001, Volume II (Part Two), p. 135.

[83] *Archer Daniels Midland Company*, cited in note 4 above, para. 160.

[84] *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*, para. 4.113, 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*, cited in note 77 above, para. 4.61. See also the discussion under article 49 above.

[85] WTO Appellate Body, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, 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 below. 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

WTO Appellate Body

53. 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."[86]

Part Four
General provisions

Article 55
Lex specialis

International arbitral tribunal (under the ICSID Additional Facility Rules)

54. In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States* considered the question of the relationship between the State responsibility articles and NAFTA. It recalled that

> "… the ILC Articles may be derogated from by treaty, as expressly recognized in Article 55 in relation to *lex specialis* … Accordingly, customary international law does not affect the conditions for the existence of a breach of the investment protection obligations under the NAFTA, as this is a matter which is specifically governed by Chapter Eleven [of NAFTA]"[87]

and further that

> "[t]he customary international law [rules] that the ILC Articles codify do not apply to matters which are specifically governed by *lex specialis* — i.e., Chapter Eleven of the NAFTA in the present case".[88]

However, notwithstanding its finding regarding Chapter Eleven of NAFTA, the tribunal went on to add that "customary international law continues to govern all matters not covered by Chapter Eleven" and that, "[i]n the context of Chapter Eleven, customary international law — as codified in the ILC Articles therefore operates in a residual way". This was confirmed by article 1131, paragraph 1, of NAFTA, endorsing the Tribunal's mandate to "... decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law".[89] This latter finding of the continued application of the State responsibility articles related to the tribunal's treatment of the question of countermeasures. It held that "Chapter Eleven

[86] Ibid.
[87] *Archer Daniels Midland Company*, cited in note 4 above, para. 116.
[88] Ibid., para. 118.
[89] Ibid., para. 119.

neither provides nor specifically prohibits the use of countermeasures. Therefore, the question of whether the countermeasures defence is available to the Respondent is not a question of *lex specialis*, but of customary international law". Since, other than the special situation provided for in article 2019 of NAFTA, no provision is made for countermeasures, the tribunal held that the "the default regime under customary international law applies to the present situation".[90]

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

55. In two decisions taken in 2009, the arbitrator in the *United States — Subsidies on Upland Cotton, Recourse to Arbitration* case noted that "by their own terms, the Articles of the ILC on State Responsibility do not purport to prevail over any specific provisions relating to the areas it covers that would be contained in specific legal instruments", and quoted the following passage from the commentary to Part Three, Chapter II ("Countermeasures") of the State responsibility articles:

> "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."[91]

Article 56
Questions of State responsibility not regulated by these articles

Eritrea-Ethiopia Claims Commission

56. In its 2009 final award on *Ethiopia's Damages Claims*, the Eritrea-Ethiopia Claims Commission noted that the "size of the Parties' claims raised potentially serious questions involving the intersection of the law of State responsibility with fundamental human rights norms". It recalled that an earlier version of the State responsibility articles had included a qualification that "[i]n no case may a people be deprived of its own means of subsistence", which was also reflected in article 1, paragraph 2, of both Human Rights Covenants.[92] The Claims Commission proceeded to confirm that, while such qualification was not included in the 2001 text, that did "not alter the fundamental human rights law rule of common Article I(2) in the Covenants, which unquestionably applies to the Parties".[93]

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[90] Ibid., para. 122.

[91] *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*, note 129, 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*, footnote 69, cited in note 77 above, quoting paragraph (9) of the introductory commentary to Part Three, Chapter II.

[92] See article 31 above.

[93] *Ethiopia's Damages Claims*, para. 19, and *Eritrea's Damages Claims*, para. 19, cited in note 47 above.