Article 42. Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[1917] [666] or even the taking of countermeasures. In order to take such steps, *i.e.* to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, *e.g.* a right of action specifically conferred by a treaty,[1918] [667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

[1917] [666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[1918] [667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, *e.g.* under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[1919] [668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "interdependent" obligation.[1920] [669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to subparagraph (*a*) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily

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[1919] [668] Cf. the 1969 Vienna Convention, art. 73.

[1920] [669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, *e.g.* of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[1921] [670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[1922] [671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to "'bundles' of bilateral relations".[1923] [672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over

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[1921] [670] Cf. the 1969 Vienna Convention, art. 36.

[1922] [671] See, *e.g.*, Article 59 of the Statute of ICJ.

[1923] [672] See, *e.g.*, K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL*, 1988*, vol. 59, p. 151, at pp. 154–155.

the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[1924] 673

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) Subparagraph (*b*) deals with injury arising from violations of collective obligations, *i.e.* obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character.

(12) Subparagraph (*b*) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a

[1924] 673 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 41–43, paras. 89 and 92.

State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (*b*) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[1925] [674] a nuclear free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel, in considering the European Communities argument according to which the United States had "no legal right or interest" in the case (given that its banana production was minimal and its banana exports were nil, and therefore it

[1925] [674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

had not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by article 3.3. and 3.7 of the WTO Dispute Settlement Understanding), considered that a WTO member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO agreement were each sufficient to establish a right to pursue a WTO dispute settlement proceeding. The panel was of the view that this result was consistent with decisions of international tribunals: in a footnote,[1926] [210] it referred to relevant findings by the Permanent Court of International Justice and the International Court of Justice, as well as to paragraph 2 (*e*) and (*f*) of draft article 40 adopted by the International Law Commission on first reading.[1927] [211]

[A/62/62, para. 118]

[1926] [210] WTO, Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM and WT/DS27/R/HND, 22 May 1997, para. 7.50, footnote 361.

[1927] [211] Draft article 40, paragraph 2 (*e*) and (*f*) adopted on first reading were amended and incorporated respectively in article 42(*b*) and article 48, paragraph 1 (*a*), finally adopted in 2001. The complete text of draft article 40 adopted on first reading is reproduced in footnote [2017] 221 below.