

Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.^{[2105] 784} At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

^[2105] 784 See above, paragraph (7) of the commentary to the present chapter.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.^{[2106] 785} The first requirement, set out in paragraph 1 (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommatio*”) was stressed both by the tribunal in the *Air Service Agreement* arbitration^{[2107] 786} and by ICJ in the *Gabčíkovo-Nagymaros Project* case.^{[2108] 787} It also appears to reflect a general practice.^{[2109] 788}

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (a).

(5) Paragraph 1 (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (a) and (b) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take “such urgent countermeasures as are necessary to preserve its rights” even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (b) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended “without undue delay”. The phrase “without undue delay” allows a limited tolerance for the arrangements required to suspend the measures in question.

^{[2106] 785} *Air Service Agreement* (footnotes [992] 339 and [1944] 213 above), pp. 445–446, paras. 91 and 94–96.

^{[2107] 786} *Ibid.*, p. 444, paras. 85–87.

^{[2108] 787} *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 56, para. 84.

^{[2109] 788} A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

(8) A dispute is not “pending before a court or tribunal” for the purposes of paragraph 3 (b) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.^{[2110] 789} Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.^{[2111] 790} The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.^{[2112] 791}

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

^{[2110] 789} Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

^{[2111] 790} The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote [236] 119 above), pp. 501–504, paras. 99–104.

^{[2112] 791} Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute” (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Continued Suspension of Obligations in the EC—Hormones Dispute

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.^{[2113] 85}

[A/65/76, para. 52]

^{[2113] 85} WTO Appellate Body, 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. 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.