

Counter-measures and Dispute Settlement: A Plea for a Different Balance

Bruno Simma *

Unilateral counter-measures resorted to by States injured through breaches of international law are, without doubt, extremely difficult and perhaps even dangerous to codify.¹ As means of self-help based in principle on the auto-determination of the victim, they will always be prone to abuse on the part of the strong against the weak. On the other hand it simply cannot be denied that counter-measures are a fact of life, indeed a necessity, in an international system still essentially devoid of compulsory third-party settlement of disputes and central law enforcement. It is thus to be welcomed that the ILC has decided to include the topic of counter-measures in Part Two of its codification project on State responsibility. But now that it has done so, the Commission ought to devise a legal regime actually permitting effective application of counter-measures, and not frustrating their use. This is far from denying the necessity of adequate substantive as well as procedural safeguards. Rather, what is advocated here is an overall approach proceeding from the assumption that a State choosing to take counter-measures will normally do so in good faith, because it actually seeks redress for an injury which it has suffered or is still suffering.

Viewed from this angle, Draft Article 12 as proposed by Special Rapporteur Arangio-Ruiz in 1992, together with the system for 'post-counter-measures' dispute settlement put before the Commission in 1993, calls for some critical comments. The totality of the procedural hurdles to be overcome by an injured State during both the pre-counter-measure and post-counter-measure stage, to use the Special Rapporteur's jargon, would not only have a sobering but a choking effect.

Starting with the conditions set forth in Draft Article 12(1)(a), they have quite rightly been labelled as both too vague and too strict. We have to keep in mind that

* Professor of International and European Community Law at the University of Munich; Member of the Editorial Board.

¹ Obviously this article only deals with counter-measures not involving the threat or use of military force.

recourse to counter-measures not involving the threat or use of force is in itself a *peaceful* means of settling a dispute arising from an internationally wrongful act. Therefore, the requirement of prior exhaustion 'of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which [a State seeking redress] is a party' is questionable from a systemic as well as from a practical point of view. As to the first consideration, Draft Article 12(1)(a) appears inadequate because it puts in the way of – *pacifical* – counter-measures all the procedural safeguards developed in law to ensure – *pacifical* – settlement of disputes. But the proposal would lead to overkill from a pragmatic perspective as well. Let us imagine its application to a delict-counter-measures situation of a 'normal', relatively unspectacular nature. Our example could involve a State injured by acts of confiscation of private property of its nationals, which contemplated the freezing of assets belonging to the perpetrator of this breach of international law. In such a situation, to ask the victim State to overcome the procedural obstacle course set up in Draft Article 12(1)(a) in advance of any such means of redress, means punishing the wrong party and deterring the victim instead of the violator.

Within the mechanics of Draft Article 12 as proposed by the Special Rapporteur, this undesirable, if not intolerable, effect could only be avoided by means of an extremely extensive interpretation of paragraph (2), particularly with regard to the concept of 'interim measures of protection'. Applied to our example, if the State injured by foreign confiscation measures were allowed to resort to freezing the assets of the confiscating State as an 'interim measure of protection', while the two parties are engaged in their long march through the procedures prescribed in paragraph (1), it could probably live with Draft Article 12. But would not this provision then be turned into a sham and 'interim measures of protection' into a sort of *Ersatz* counter-measures? Such a result does not seem to have been intended by the Special Rapporteur.

The present author would therefore join the ranks of those who advocate a different balance between the rights and interests of injured States and those of States finding themselves as targets of counter-measures. In a certain sense, the basic principle determining the procedural relationship, so to say, between the States involved as well as between dispute settlement and counter-measures, ought to be reversed.

During the 1992 discussion of Professor Arangio-Ruiz's Draft Article 12, the clearest view to this effect was expressed by Professor Bowett, according to whom the precondition of prior fulfilment of any obligations relating to the peaceful settlement of disputes

could not be a precondition to the right to take legitimate measures of self-defence or even measures of reprisals or countermeasures, since that would be to ignore the time factor. The obligations in that connection could embrace negotiations, conciliation, mediation, arbitration and judicial settlement – in a word, the whole range of methods of peaceful settlement to which the two States were committed. But the implementation of

that kind of measure took time and it would be quite unreasonable to expect the injured State to refrain from taking countermeasures until all those obligations had been fulfilled. It seemed to him that any provision on the matter should rest on the concept that any right to take countermeasures must be suspended, first, when the breach had ceased, and, secondly, when the wrongdoing State had accepted and implemented bona fide a method for the peaceful settlement of disputes. That would, first of all, determine whether a wrongful act had been committed and, secondly, if so, what the appropriate reparation would be.²

Among the contributors to the present Symposium, Professor Tomuschat expresses, and expands upon, the same view.³ He draws attention to the fact that the proposal made by Professor Bowett accomplishes two things: first, it would safeguard the possibility for the injured State to defend itself against the encroachment of its rights. And second, it would also prevent the victim State from reaping an unfair advantage from the injury it claims to have suffered. As a matter of principle, to require the (alleged) wrong-doer to take the initiative in instituting dispute settlement procedures, is more equitable and just than to put the burden upon the injured State. But the solution supported here would also be more effective. It would ensure that efforts at dispute settlement could remain 'proportional' to, and could be tailored in accordance with, the seriousness and exigencies of each concrete case. Thus, as Professor Tomuschat points out, if the State accused of an internationally wrongful act had to admit that the allegation was well-founded, it would be induced to break the vicious circle, discontinue the breach and/or offer reparation. If, on the other hand, it considered the counter-measures unjustified, or some aspects of reparation remained to be settled, the parties could have recourse to any procedure regarded as adequate for the issues in point.⁴

In the light of these considerations, the present writer suggests that the Bowett-Tomuschat formula should be explored further. However, in doing so, one element should be added to it. While the cornerstone of the system should be the general principle that the injured State, after an 'appropriate and timely communication of its intention',⁵ may take counter-measures, and that it will then be up to the target State of such measures to change this situation by initiating a dispute settlement procedure, the precedence of *specific* procedural requirements attached to the rules of law at issue must be maintained. For instance, if a State considered itself injured by a breach of a treaty containing a compromissory clause, it would, as a matter of course, have to exhaust the specific dispute settlement procedure provided therein before it could initiate any further counter-measures. It is obvious that in these cases, the requirement of *ex ante* recourse to third-party settlement must be upheld under any circumstances (made more palatable, if need be, by the possibility of resorting to interim measures of protection).

2 Provisional summary record of the 2266th meeting, UN Doc. A/CN.4/SR.2266 (1992), 16.

3 See the article entitled 'Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures' in the Symposium, at 77.

4 Ibid.

5 Art. 12(1)'b) as proposed by the Special Rapporteur.

Counter-measures and Dispute Settlement: A Plea for a Different Balance

The proviso outlined here bears a certain similarity to Draft Article 12(1)(a) as adopted by the ILC Drafting Committee in 1993.⁶ However, it differs in two decisive aspects. First, the solution proposed by the Drafting Committee remains too close to the principle defended by the Special Rapporteur, of *ex ante* recourse to settlement procedures by the injured State contemplating counter-measures – a formula to be discarded for the reasons just provided. Second, the words ‘under any relevant treaty’ used by the Drafting Committee are, according to an explanation given by its Chairman,⁷ meant to refer to any treaty ‘applicable to the area to which the wrongful act and counter-measures related’. Whatever may be the true meaning and purpose of the wording proposed by the Drafting Committee,⁸ the interpretation by the Chairman would be incompatible with the solution advocated here, under which an injured State would be free to choose the object of its counter-measures from among all international legal obligations owed towards the perpetrator; subject, of course, to limitations protecting *ius cogens*, fundamental human rights, etc.⁹

As regards Professor Arangio-Ruiz’s 1993 proposals for ‘post-counter-measures’ dispute settlement contained in Draft Articles 1 to 6 and the Annex of Part Three of the ILC project, the overall alternative suggested here would lead to a system in which any dispute settlement (with the exception of a procedure specifically linked to the substantive rules breached) would take place after recourse to counter-measures had begun. Thus, any duplication of settlement procedures could be avoided. However, contrary to the construction employed by the Special Rapporteur, the settlement procedure envisaged here ought not only to be ‘triggered’ by a dispute arising from a contested resort to counter-measures. Rather, it ought to be available, and suitable, for any dispute involving issues of State responsibility. How far the Commission should go in the elaboration of such a comprehensive scheme is beyond the scope of the present comments.

6 UN Doc. A/CN.4/L. 480/Add. 1 (1993).

7 Provisional summary record of the 2318th meeting, UN Doc. A/CN.4/SR.2318 (10 August 1993) 6 (emphasis added).

8 Cf. the criticism by Professor Arangio-Ruiz in his article entitled ‘Counter-measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: A Crucial Issue before the International Law Commission’ in the Symposium, at para. 23.

9 Cf. in this regard Draft Article 14 proposed by the Special Rapporteur in his Fourth Report. The reformulated text appears in UN Doc. A/CN.4/444/Add. 3 (1992).