Document:-
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Summary record of the 2310th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

76. If equitable and reasonable use was made the predominant criterion, however, any significant harm caused to a watercourse State would be excusable as long as it was also equitable and reasonable. It was that fact which constituted the major difficulty in the Special Rapporteur's proposed new article 7. For similar reasons, he found it difficult to accept the new formulation on pollution, which would radically alter the balance in regard to pollution and would disturb the whole equilibrium of the draft articles themselves. The Special Rapporteur's formulation would appear to provide a useful handle whereby polluting States could seek to continue their activities by invoking the terms of subparagraphs (*a*) and (*b*) of the proposed new article 7. The simplicity of the former article 7 was far more preferable.

77. He would hesitate to endorse any attempt to revise article 8, in regard to which the Special Rapporteur stated, in paragraph 28 of the report, that a general formulation would be more appropriate. Greater precision could perhaps be achieved, but it might be at the cost of sacrificing the general nature of the provision. He none the less agreed that the concepts of good faith and good neighbourliness, although salutary in themselves, had no place in the draft articles.

78. Mr. EIRIKSSON said that the Commission's main task should be to stick to the goal of completing the second reading of the draft articles by the end of the next session, in 1994. Any suggestions in the next report about the elaboration of provisions on management and the introduction of a system of dispute settlement should take that into account.

79. He was concerned about the proposal to replace the word "appreciable" by the word "significant", which could be interpreted as a substantive change and as raising the threshold of the draft articles. If the word "appreciable" was ambiguous in English, that point could perhaps be covered in the commentary. The same problem had in fact arisen in the Drafting Committee in connection with the draft articles on the topic of international liability. The Special Rapporteur might therefore wish to seek advice from other sources before the matter was taken up in the Drafting Committee.

80. Mr. KOROMA, congratulating the Special Rapporteur on an excellent report, noted that the Special Rapporteur had resisted the temptation to "tinker", to use his own word, with the draft articles, except where absolutely necessary. That was a sure sign of a good rapporteur.

81. He would be loath, at the present stage in international relations, to choose between model rules or a framework convention, but the ultimate decision would, he believed, depend on the quality of the Commission's work. If the draft articles were balanced and authoritative, they would inevitably recommend themselves to the international community.

82. The word "significant", as opposed to "appreciable", perhaps posed a problem for those not conversant with the common law, but it would make the text clearer. As the Special Rapporteur explained in his report, the word "appreciable" had two distinct meanings, whereas the word "significant" pinpointed the issues involved. He agreed with the recommendation that the definition of pollution should be brought forward to article 2, on the use of terms. The sooner that was done the better.

The meeting rose at 1 p.m.

2310th MEETING

Tuesday, 22 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,[1] A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. de SARAM said that the Commission, in plenary and in the Drafting Committee, was addressing at the same time two closely related matters: the first was the situation in which a countermeasure had not as yet been taken (the "pre-countermeasure" stage considered in the fourth report of the Special Rapporteur,[2] currently being discussed in the Drafting Committee); and the second was the situation in which a countermeasure had already been taken (the post-countermeasure stage considered in the fifth report of the Special Rapporteur, currently before the Commission in plenary).

2. The overall approach advocated by the Special Rapporteur in his fourth and fifth reports was the following: any State which intended to take a countermeasure should notify, in advance, its intention to the State against which that countermeasure was to be taken, requesting that recourse should be had promptly to a dispute settlement procedure which did not necessarily need to be a binding third-party one. However, whatever the settlement procedure might be, if the dispute was not resolved and if a countermeasure was taken, it was essential that there should be a prompt and binding third-party settlement—at least as a matter of final recourse, should negotiation or conciliation fail—whereby the legitimacy of the countermeasure would be determined.

[1] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3.

3. It was an approach with which, in the overall interest of reaching a consensus in the Commission, he would agree, albeit regretfully. In his view, it should be possible to interpose a binding third-party settlement procedure prior to the taking of a countermeasure in a manner that could be designed both to remove any possibility of the procedure being frustrated by deliberate recalcitrance and, as well, to put into place the necessary interim measures until the question of whether there had in fact been a wrongful act, and, if so, what the reparations should be, had been decided. Whatever the delays such an interposition of a binding third-party settlement requirement prior to the taking of a countermeasure might entail in the observance of the law, such delays would be of far less magnitude, far less disruptive of the law, than what a reactive breach of the law (a countermeasure) might entail. Moreover, there would always be a possibility of a countermeasure being taken in haste, without full appreciation of all the circumstances; a countermeasure that might be unnecessary, disproportionate or that might cause loss to those to whom no loss should be caused. It should be pointed out, in that connection, that the previous Special Rapporteur, Mr. Riphagen, had proposed in article 10[3] that recourse to dispute settlement processes should be a precondition for the taking of countermeasures other than by way of reciprocity. Nor should the Commission forget that, should it not require the interposition of dispute settlement procedures prior to the taking of a countermeasure, it would be placing its imprimatur on and would preserve for decades to come a relic of earlier times when the taking of the law into one's own hands, by way of reprisal for a wrong believed to have been committed, was the prevalent doctrine and practice—a doctrine and practice from which the inter-State system had decided in other spheres that it was time to move away.

4. The reasons why the law turned, on occasion, to binding third-party settlement required no restatement. Yet there was one reason which, above all others, needed to be underlined. It was that the law had surely to provide not only for cases where States in dispute were more or less of equally persuasive weight; but also for cases where there was an inequality. It was the presence, then, of the third party and the requirement of a binding third-party settlement, that sought to ensure that, whatever the other inequalities might be, there was (at least as far as legal procedures could provide) equality before the law. Such a responsibility could not confidently be entrusted to the voluntary recommendatory processes of negotiation, mediation or conciliation, whose essential purpose was the achievement of amicable settlement.

5. Accordingly, in his view, the draft articles proposed by the Special Rapporteur in his fifth report for the "post-countermeasure" stage of a dispute should be referred to the Drafting Committee for consideration in conjunction with the proposals that were currently in discussion in the Drafting Committee with reference to the "pre-countermeasure" stage of a dispute. Alternatively, the Drafting Committee should at least be advised that it should not conclude its work on the draft articles for the pre-countermeasure stage of a dispute, until it had decided how the draft articles dealing with the post-countermeasure stage were to be formulated. If the Commission did not provide for a binding third-party settlement procedure, at the very least immediately after a countermeasure was taken, it would seem to him inevitable that the entire question of the inclusion of provisions on countermeasures in the future instrument on State responsibility would, once again, be called into question.

6. Turning to the draft articles proposed by the Special Rapporteur in his fifth report,[4] he said that, before dealing with the formulation of specific articles, the Commission should address two matters. In the first place, it should consider the nature of the issues to be resolved after a countermeasure had been taken and, secondly, having regard to the importance of promptitude in a post-countermeasure situation, it should consider the stage at which a binding third-party settlement should be invoked. The first matter raised essentially factual issues: what were the facts prior to the countermeasures; what were the legal obligations; was there in fact a breach of obligation and, if so, whether the countermeasure had been necessary and proportionate. These were essentially issues of a factual nature, requiring findings as to the facts and to what the applicable legal obligations were; and as such were not issues for which the processes of negotiation, mediation, conciliation—whose overall objective was voluntary amicable settlement—were well suited. He therefore concurred in the conclusions of Mr. Calero Rodrigues, namely, that no meaningful purpose would seem to be served in disputes at the post-countermeasure stage by prescribing that there should be conciliation before binding third-party settlement; that the nature of disputes at the post-countermeasure stage required that they be handled separately from other disputes relating to the interpretation or application of the future convention on State responsibility; and that consideration might need to be given to creation of a special body to which those disputes could be speedily referred.

7. It would also be unfortunate if the Commission were to foreclose—as too cumbersome, or otherwise inappropriate, or too unlikely to be acceptable to States—any possibility of ICJ serving as the third party to which a State, in a post-countermeasure dispute, may require recourse. As was known, as part of a continuing United Nations effort to encourage greater use by States of the Court's facilities, an effort that included the approval by the General Assembly of the Manila Declaration on the Peaceful Settlement of International Disputes,[5] the Court had revised its rules on the composition of its ad hoc chambers, leading to the ad hoc chamber procedure receiving far greater attention than it had in the past. Moreover, the administrative and other facilities which a permanent United Nations institution, such as the Court, could routinely provide parties made, at least in terms of comparative costs, resort to an ad hoc chamber of the Court the obviously sensible course.

[3] For the texts of articles 5 to 16 proposed by the previous Special Rapporteur in his fifth report, see *Yearbook... 1984*, vol. II (Part One), p. 2, document A/CN.4/380, sect. II.

[4] For the text, see 2305th meeting, para. 25.

[5] General Assembly resolution 37/10, annex.

8. A governing consideration in deciding on the appropriateness of particular dispute settlement procedures must, of course, always be that a procedure should be expeditious, and the least costly possible. It was necessary to avoid the situation where a State subjected to a countermeasure decided that it would be preferable to abide by the countermeasure rather than contest its legitimacy through a costly dispute settlement procedure. The Commission might therefore wish to consider whether it would not be right for a State, the subject of a countermeasure, to be accorded the ability to choose, from among a number of binding third-party settlement procedures, the one it deemed most appropriate from its own point of view.

9. One possibility would obviously be to give States an opportunity to have a fact-finding inquiry carried out by or under the auspices of an international authority, along the lines of the mission entrusted to the Secretary-General of the United Nations in the *Rainbow Warrior* case;[6] though there the Secretary-General was entrusted with more than a fact-finding responsibility.

10. There remained the question whether, for the broader range of possible disputes relating to the interpretation or application of a convention on State responsibility, the Commission should also recommend that, as a matter of ultimate recourse if other voluntary and recommendatory dispute settlement processes should fail, the draft articles should provide for resort to a binding third-party settlement procedure. At the present preliminary stage, he shared the view of other members of the Commission that, as a matter of final recourse, provision ought to be made in part 3 of the draft for the possibility of a binding third-party settlement procedure, for two main reasons: first, because it was the presence of a binding third-party settlement requirement that would ensure, in so far as legal procedures could possibly do that, whatever the other inequalities may be, there would at least be equality before the law; and, secondly, because it was the Commission's role to advise the General Assembly in the exercise of the Assembly's responsibilities under Article 13, paragraph 1 (*a*), of the Charter of the United Nations to "encourage the progressive development of international law and its codification". It was, thus, the responsibility of the Commission to advise the Assembly on the standards that should, in the Commission's view, be recommended to Governments for best ensuring the "progressive development of international law and its codification". It was from that responsibility that the Commission derived its considerable prestige in the international legal community. The Commission had been structured with such a responsibility in view.

11. In conclusion, he thanked the Special Rapporteur and congratulated him on the frankness and clarity with which he had advised the Commission on the course to be followed on an important topic.

12. Mr. IDRIS said that the Special Rapporteur's fifth report and his oral explanations were not a dream or the result of a wild imagination in the field of legal thinking, but a progressive innovation and a new and courageous view of a complex question which did not claim to provide ready-made solutions, especially with regard to the general regime of the settlement of disputes. The basic problem was that countermeasures would always have the main defect of being based on a unilateral assessment of the right which had been violated and of the legitimacy of the countermeasures, which could in turn lead to a reaction by the allegedly wrongdoing State in the form of counter-reprisals. By its very nature, a countermeasure could lead to an injustice if the States parties to the conflict were in a situation of inequality. Hence the need to look closely, before going on to consider the proposed system for the settlement of disputes, at the legal regime of countermeasures and its relationship with the draft on State responsibility.

13. In that connection, the Special Rapporteur should give in-depth consideration to the question of whether countermeasures should necessarily precede third-party dispute settlement or, in other words, whether that was the only means of bringing the allegedly wrongdoing State to settle the dispute. Or could third-party dispute settlement precede countermeasures and still be acceptable to the international community? It must be taken into account that there was no means of speedily and impartially determining the existence of a wrongful act and that the extent of the harm and the exhaustion of means of settlement were questions to be decided exclusively by the victim State.

14. Without going into the background of the question, he had five comments to make. The first was that means other than countermeasures would have to be found or resort to countermeasures would have to be curtailed in order to avoid abuse by one of the parties—and that was the approach taken by the Special Rapporteur in his fifth report.

15. Secondly, he endorsed the principle of third-party settlement of disputes if it was a substitute for countermeasures and for unilateral measures, as a means of mitigating the consequences of the inequality of States.

16. Thirdly, third-party dispute settlement was an improvement over the practice of countermeasures because it guaranteed that the State which claimed to be the victim of a wrongful act would comply with the conditions and criteria defined in the draft articles for the application of that type of measure.

17. Fourthly, the presence in the draft of an effective dispute settlement regime would strengthen all rules of international law, including past and future agreements. Many international legal instruments had been mentioned in that connection, such as Chapter VI of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States,[7] the Manila Declaration,[8] the Charter of the Organization of American States,[9] the Pact of Bogotá[10] and the Charter of the Organization of

[6] Ruling of 6 July 1986 by the Secretary-General (United Nations, *Reports of International Arbitral Awards*, vol. XIX (Sales No. E/F.90.V.7), pp. 197 *et seq.*).

[7] General Assembly resolution 2625 (XXV), annex.

[8] See footnote 5 above.

[9] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324).

[10] American Treaty on Pacific Settlement (United Nations, *Treaty Series*, vol. 30, p. 55).

African Unity and its Protocol.[11] Moreover, he did not entirely agree with the Special Rapporteur's view that, since those instruments were too vague to provide effective protection against breaches of international obligations, there was no point in developing them. The OAU Charter and its Protocol had made it possible to settle a number of conflicts peacefully on the basis of the principle of conciliation. In any case, even if those international instruments were generally not the best possible solution to the problem of the settlement of disputes in the draft on State responsibility, their existence was far from incompatible with the establishment of a settlement regime such as that proposed by the Special Rapporteur.

18. Fifthly, the three-step dispute settlement system—conciliation, arbitration and judicial settlement—suggested that the third-party dispute settlement procedure could be set in motion only after the adoption of countermeasures. That was an innovation compared to article 12, paragraph 1 (*a*), which made the exhaustion of the available procedures for amicable settlement a condition for resort to countermeasures, whether those procedures had existed prior to the dispute or had been created subsequently, without, however, imposing any particular settlement procedure.

19. In conclusion, he expressed the hope that the Special Rapporteur would reply to two questions which he considered important. First, why must the binding third-party dispute settlement procedure not begin before the use of countermeasures? Secondly, must it be concluded from the three-step system proposed by the Special Rapporteur—on the basis of the assumption that the mechanism that triggered the settlement obligation was the dispute that had arisen as the result of the use of a countermeasure by the State which considered itself injured against the allegedly wrongdoing State—that the basic question of fact and of law related to countermeasures or that the allegedly injured State could invoke, as a matter of fact and of law, the allegedly wrongful act which had given rise to the conflict?

20. Lastly, he thanked the Special Rapporteur for having explained in the paper distributed on 14 June that the proposed third-party settlement procedures would relate not only to the interpretation and application of the articles on countermeasures, but also to the interpretation and application of all of the provisions of the future convention on State responsibility.

21. Mr. EIRIKSSON said that the fifth report on State responsibility contained draft articles[12] which were in some respects a novel scheme for the settlement of disputes. It nevertheless seemed to him that the proposed system had not been endorsed fully enough in the Commission to be used as the only point of departure for future work. The question even arose in a more general way whether provision should be made for the settlement of disputes in respect of State responsibility. Only at its forty-fourth session had the Commission decided to make its best efforts to ensure that the draft articles included a part 3 on the settlement of disputes. He had noted a tendency towards Government-bashing in recent discussions in the Commission and other bodies, whereas the premise should at least be that States represented their people and might have legitimate reasons for the views they held on various questions, including dispute settlement. The Commission should also not be afraid that its work would be disapproved of by States and should try to provide some leadership on that question and on others.

22. There was a clear link between article 12, currently before the Drafting Committee, and the proposals which were contained in the fifth report and were, according to the Special Rapporteur, meant to be applicable to all of parts 1 and 2. That did not change the fact that countermeasures were the most important aspect of the dispute settlement issue. Although he was opposed in principle to the use of countermeasures as a means of settling disputes, he had agreed that the Commission should try to establish a legal regime for countermeasures in order to make them less unacceptable. Since one step in that direction would be to set up a dispute settlement system to be used when countermeasures were being contemplated or had already been taken, he had endorsed the Drafting Committee's work on article 12. There was, however, some uncertainty as to whether article 12 would be adopted at the current session and its discussion might be postponed until after the consideration of part 3. In that connection, Mr. Calero Rodrigues (2308th meeting) had made a very interesting proposal relating to a special mechanism to be used when countermeasures were being contemplated, and the Commission should give further attention to that proposal. In his view, part 3 should be referred to the Drafting Committee, not for the purpose of an article-by-article review of the proposed system, but so that the Committee could determine how much of part 3 it could consider in a reasonable period of time and, accordingly, how much of the first reading of the articles on State responsibility could be accomplished.

23. Mr. Sreenivasa RAO said that, unlike other topics considered by the Commission, State responsibility encompassed the entire field of international law and the aspect of the topic covered in the fifth report, namely, the settlement of disputes, touched on the very fabric of the rule of law in international relations. Given its mandate, the Commission must, at the risk of being criticized for taking so much time, do everything possible to establish a clear, uniform and universal body of law. As stated at the preceding session with regard to countermeasures, the rule of law in international relations could not allow States to decide unilaterally what was right or wrong and to turn that unilateral decision into a legal basis for countermeasures. He therefore saw a contradiction in the fact that it might be said, as it had been in the report, that countermeasures were part of customary international law and that dispute settlement procedures belonged to the progressive development of international law. Countermeasures were undoubtedly part of reality, but no State, not even a State which applied such measures, inferred that they meant the right to determine and to enforce the law unilaterally. In his view, the use of countermeasures did not justify the value judgement that such measures were part of customary international law. Article 2 of the Charter of the United Nations ruled out the unilateral use of force and linked that provision to the obligation to settle disputes peacefully. It was on that basis that the Commission should work to promote the rule

[11] United Nations, *Treaty Series*, vol. 479, p. 39.

[12] For the text, see 2305th meeting, para. 25.

of law. The peaceful settlement of disputes was an existing fundamental international obligation. That obligation, and the obligation not to resort to force, were two sides of the same coin and one could not be classified as customary international law while the other was classified as the progressive development of international law.

24. Affirming the rule of law meant not only that the international community could neither tolerate nor lend legitimacy to a unilateral interpretation of the rights of each State, and much less to a unilateral implementation of such rights, but also that there was a need for a new element, namely, the settlement of disputes by a third party. However, neither the objections to which that ideal solution gave rise nor the practical difficulties it involved should be underestimated in a world where the dividing line between the rule of law and the law of the jungle was somewhat blurred by the actions of the big and powerful States. Hence the need to be innovative and to adopt other strategies. In that connection, he recalled that Article 33 of the Charter, as referred to in the Handbook on the Peaceful Settlement of Disputes between States,[13] made a wide range of means available to States for fulfilling in a democratic and egalitarian manner the obligation to settle disputes peacefully and that, in practice, States settled 90 per cent of their disputes through the free choice of means. Given those circumstances, the Commission must avoid at all costs giving the impression that anything but third-party settlement would be the law of the jungle because, otherwise, it would be discouraging States from settling their disputes peacefully and denying itself even the possibility of imposing that fundamental obligation: States should be given the choice of how to fulfil that obligation, although they must be encouraged to choose third-party settlement.

25. The obligation to settle disputes peacefully should not function solely to test the legality of countermeasures already taken, but should extend to the entire spectrum of State responsibility, as countermeasures were by definition an abuse of law; and since they were inevitable, countermeasures must be subject to some preconditions, foremost among them the prior obligation to seek a peaceful settlement procedure; and it was to be hoped that the big and powerful States and those which applied countermeasures would place their membership in the international community above their self-interests. Yet, it seemed that, in the work done thus far, a narrow conception of the obligation to settle disputes peacefully had prevailed, whereby States with the necessary means were able to judge their own cases. If that was true, he thought that it would be best to leave countermeasures aside and end the draft articles with provisions on the peaceful settlement of disputes. The fact was, as the Special Rapporteur had said, that, while third-party settlement was clearly the only way to place the rule of law on a firm footing, it was for the time being only a theory.

26. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had demonstrated in his fifth report that two conditions were essential for the correct implementation of the chapter on countermeasures: the convention itself had to establish means of dispute settlement and must not limit itself to referring to such means as might exist between the parties; and the chosen means must lead without fail to the solution of the controversy. In other words, the use of third-party settlement must be compulsory if other means failed. For his contentions, the Special Rapporteur had been seen either as a dangerous revolutionary who intended to upset the foundations of international law or as a timid reformer who proposed nothing new. He was in reality neither one nor the other.

27. The Commission could not fail to realize that the adoption of the proposals in the fifth report would mean important changes, but that should not prevent it from supporting the report's basic ideas, in particular the two capital points just mentioned. Not being a political body, the Commission had to propose a system that States might or might not adopt, but that would improve on the existing system, which was unacceptable. At the same time, the Commission must endeavour to design as practical a system as possible. He could not endorse a system that would be unacceptable to States.

28. The Special Rapporteur was proposing a rather complicated system, which consisted of: first, maintaining the general lines of article 12 of part 2, which required prior resort by the States concerned to the means of settlement available to them, while amending paragraph 1 (*a*) so as to make the lawfulness of any resort to countermeasures conditional upon the existence of the "said binding third-party pronouncement"; and, secondly, strengthening, in part 3,[14] the non-binding conciliation commission without affecting the prerogative of the injured State to take countermeasures.

29. The Special Rapporteur had argued in favour of maintaining article 12, despite having shown convincingly, in his fifth report, that what really mattered was a more or less organic system of third-party settlement procedures ultimately leading, failing agreement, to a binding third-party pronouncement. In fact, part 3 contained much more than "a more or less" strengthened conciliation procedure: if conciliation failed, compulsory arbitration would follow; if that failed, recourse could be had to ICJ. In that respect, the Special Rapporteur seemed to have a peculiar notion of the fragility of settlement mechanisms, proposing as he did an apocalyptic scenario in which the conciliation commission failed to perform its duty and the arbitral tribunals failed to constitute themselves or to give timely awards, so that the case had to be brought before ICJ. If an automatic procedure were established for that purpose, the bodies concerned should not encounter any insurmountable difficulties in constituting themselves and performing their functions. OAS had, moreover, a complete and organic system of dispute settlement, which was provided for in one of its three constituent instruments, the Pact of Bogotá.[15]

30. The system proposed by the Special Rapporteur seemed too complicated and its implementation excessively long: if all the different time-limits were added together, it might take two or three years, or even more.

[13] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 33* (A/46/33), annex.

[14] See 2305th meeting, para. 25.

[15] See footnote 10 above.

Moreover, it was difficult to see the advantage of a conciliation procedure, by definition non-compulsory, followed by a compulsory third-party settlement procedure. Why not be content with a third-party procedure? It might also be asked whether countermeasures warranted such a cumbersome machinery: after all, a countermeasure was not a declaration of war.

31. To his mind, a method which fulfilled the two conditions regarded as indispensable by the Special Rapporteur would be sufficient, particularly if it found a consensus in the Commission. It might be a very simple method, established perhaps in part 2, which would ensure the solution of the controversy. The maintenance of the rather confused system of article 12, in the version proposed by the Special Rapporteur or in a modified, but essentially identical version, might hinder the proper functioning of the draft articles.

32. The Drafting Committee had examined an idea which warranted the Commission's attention, for it seemed to fulfil the Special Rapporteur's conditions and would make it possible to settle disputes concerning countermeasures through a method provided for in the convention itself: the injured State would be authorized to take countermeasures provided that it offered at the same time to have recourse to a third-party settlement procedure. By ensuring an impartial assessment of the legality of the countermeasures, such a system would represent a great improvement over the present situation. Of course, that applied only to the main elements of the system discussed in the Drafting Committee and not to the accessory clauses which might accompany them.

33. He could accept a system based on those general lines provided that the arbitration procedure was absolutely automatic and its implementation could not be obstructed by any of the parties. For that purpose, part 3 should clearly determine the different steps and modalities of the procedure, so that the establishment and functioning of the arbitral tribunal—appointment of the arbitrators and the president, drafting of the *compromis* by the tribunal if the parties failed to reach an agreement, and so forth—were entirely automatic. The arbitral tribunal should also be given the power to order the immediate cessation of the countermeasure or the adoption of the measures of protection or other measures which it considered necessary for the fulfilment of its mandate.

34. He agreed with Mr. Eiriksson that there was nothing to be gained by continuing the discussion of the question in plenary. The draft articles could be referred to the Drafting Committee, perhaps with the proviso stated by Mr. Eiriksson.

35. Mr. VERESHCHETIN said that he had the impression, confirmed by Mr. Eiriksson's statement, that there was some uncertainty about the need to add to the draft articles a part 3 on implementation and dispute settlement which would be independent and just as important as parts 1 and 2. He therefore wondered whether the Commission had taken a formal decision on the point; if the answer to that question was affirmative, he would like to know when the decision had been taken and whether the scope of part 3 had been defined.

36. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in 1985 and 1986, in particular, the Commission had referred to the Drafting Committee all the proposals made by the previous Special Rapporteur, Mr. Riphagen. That was why Mr. Mahiou (2306th meeting) had been able to recall quite rightly that the Drafting Committee had regularly considered a draft text for part 3 and that it must in any event work on it. But the Commission was, of course, free to take any decision it wished in that regard.

37. The CHAIRMAN pointed out that the report on the work of the forty-fourth session of the Commission[16] stated that, since 1986 the Commission assumed that a part 3 on the settlement of disputes and the implementation (*mise en œuvre*) of international responsibility would be included in the draft articles. Therefore, the question no longer arose.

38. Mr. EIRIKSSON said that, in 1992, the Commission had sought to remove the ambiguity of the words "a possible part 3, which the Commission might decide to include, could concern the question of the settlement of disputes and the 'implementation' (*mise en œuvre*) of international responsibility", which had until then appeared in the introduction to the chapter on State responsibility in the Commission's report, by deciding to replace them with the words which the Chairman had just read out.

39. Mr. YANKOV, supported by Mr. VILLAGRÁN KRAMER and Mr. THIAM, said that, for several years in its work on the topic, the Commission had assumed the existence of a part 3, which had, moreover, been the subject of various proposals.

40. Mr. TOMUSCHAT said that the Commission ought to complete the articles on substantive issues before producing the procedural rules of part 3 of the draft articles.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the present case, it was very difficult to distinguish between substantive and "procedural" questions. For methodological reasons, of course, he had had to distinguish between the substantive consequences of the wrongful act, namely, the obligation of reparation, and the "procedural" consequences, namely, countermeasures, but the result was that part 2 of the draft articles on countermeasures contained many procedural provisions. It was important not to be too formalistic; he did not think he could clearly separate substance from procedure and was not convinced that such a distinction was very wise in the present case.

42. The CHAIRMAN said that the Commission was now entitled to take it that the draft articles included a part 3 concerning the implementation of the future convention and dispute settlement, without thereby prejudging the content of such a part 3.

The meeting rose at 11.45 a.m.

[16] See *Yearbook... 1992*, vol. II (Part Two), p. 17, para. 108.