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Summary record of the 2366th meeting

Topic:
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(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

67. Mr. BOWETT (Chairman of the Drafting Committee) said that the purpose of the article was to provide some guidance for States in their consultations with regard to an equitable balance of interests, in which respect many facts had to be established and all the relevant factors and circumstances had to be weighed. In view of the diversity of activities and situations, the article set forth a non-exhaustive list of those factors and circumstances and no priority or weight was assigned to them. In general, the factors and circumstances indicated would allow the parties to compare the costs and benefits in each particular case.

68. Subparagraph (a) compared the degree of risk and the availability of means of preventing or minimizing such risk and of repairing the harm. The degree of risk could be high, but there might be measures that could prevent that risk or good possibilities for repairing the harm. The comparisons there were both quantitative and qualitative.

69. Subparagraph (b) compared the importance of the activity, in terms of its social, economic and technical advantages for the State of origin, and the potential harm to the States likely to be affected.

70. Subparagraph (c) made the same comparison as subparagraph (a), but as it applied to the environment. The concept of transboundary harm as used in subparagraph (a) could, of course, be interpreted as applying to the environment, but the Drafting Committee had wished to make a distinction, for the purposes of the article, between harm to some part of the environment which could be translated into value deprivation to individuals and could be assessable by standard economic and monetary means, on the one hand, and harm to the environment that was not susceptible to such measurement, on the other. The former was covered by subparagraph (a) and the latter by subparagraph (c).

71. Subparagraph (d) compared the economic viability of the activity with the costs of prevention demanded by the States likely to be affected. Such costs should not be so high as to make the activity economically non-viable. Economic viability was also assessed in terms of the possibility of conducting the activity elsewhere or by other means or by replacing it with an alternative activity. The words "conducting [the activity] by other means" referred to situations in which, for example, one type of chemical substance, which might be the source of transboundary harm, could be replaced by another chemical substance or where mechanical equipment in the plant or factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" were intended to take account of the possibility of securing the same or comparable results by another activity with no risk, or much lower risk, of significant transboundary harm.

72. Subparagraph (e) provided that one of the elements which determined the choice of preventive measures was the willingness of the States likely to be affected to contribute to the cost of prevention. If such States were

prepared to contribute to the expense of preventive measures, it might be reasonable to expect, all other things being equal, that the State of origin could take more costly, but also more effective, preventive measures.

73. Subparagraph (f) compared the standards of prevention demanded of the State of origin with those applied to the same or comparable activity in the State likely to be affected. The rationale was that, in general, it might be unreasonable to demand that the State of origin should comply with a much higher standard of prevention than that applied by the States likely to be affected. That factor was not, however, in itself conclusive. If the State of origin was highly developed and applied domestically established environmental law regulations, it might have to apply its own standards of prevention, even if they were substantially higher than those applied by a State likely to be affected, in a developing country where there might be few if any regulations on prevention. States should also take into account the standards of prevention applied to the same or comparable activities in other regions or the international standards of prevention adopted for similar activities. That was particularly relevant when the States concerned did not have any standard of prevention for such activities or they intended to improve their existing standards.

74. Mr. EIRIKSSON said he noted that subparagraph (c) spoke of "adverse effects", whereas, throughout the rest of the draft articles, the word used was "harm". He therefore proposed that, for the sake of consistency, the beginning of subparagraph (c) should be reworded to read: "The risk of harm to the environment ...". He further proposed that the concept of equitable balance, referred to at the beginning of the article, should be repeated in the title, which would then become "Factors involved in an equitable balance of interests".

75. Mr. ROSENSTOCK said that, to be completely consistent, the word "significant" should be added to the word "harm".

76. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20, as amended by Mr. Eiriksson and Mr. Rosenstock.

It was so agreed.

Article 20, as amended, was adopted.

The meeting rose at 1.05 p.m.

2366th MEETING

Wednesday, 13 July 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de

Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/453 and Add.1-3,¹ A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,² A/CN.4/L.501)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 11 to 14 of part two of the draft articles on State responsibility as adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission (A/CN.4/L.501). The titles and texts of those provisions read as follows:

Article 11. Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, (subject to the conditions and restrictions set forth in articles 12, 13 and 14) not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 6 to 10 *bis*.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 12. Conditions relating to resort to countermeasures

1. An injured State may not take countermeasures unless:

(a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 13. Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14. Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

2. Mr. BOWETT (Chairman of the Drafting Committee) reminded members that, at the Commission's forty-fifth session, the Drafting Committee had adopted for articles 11 to 14 texts that had been introduced by the then Chairman of the Drafting Committee, Mr. Mikulka, but had not been acted on in plenary pending the submission of the relevant commentaries.³ In his sixth report (A/CN.4/461 and Add.1-3), the Special Rapporteur had proposed rewording articles 11 and 12 and the Commission had agreed to refer his proposals to the Drafting Committee. The document before the Commission (A/CN.4/L.501) therefore contained article 11 as it had emerged from the discussion in the Drafting Committee at the present session and articles 12, 13 and 14 as adopted by the Drafting Committee at the forty-fifth session in 1993.⁴ Since articles 13 and 14 had not been referred back to the Drafting Committee at the present session they required no comment on his part and he would simply refer the Commission to the presentation made by the Chairman of the Drafting Committee at the forty-fifth session of the Commission.⁵

3. The Drafting Committee had re-examined the text of article 11 as adopted at the forty-fifth session in the light of the Special Rapporteur's contention that the concept of adequate response must have a place in the article if a proper balance was to be struck between the position of the injured State and that of the wrongdoing State. The Special Rapporteur took the view that the effect of the omission of the notion of adequate response would be to allow the injured State too much scope to use countermeasures in order to compel both cessation and reparation. In the case of cessation, the injured State would be allowed to apply countermeasures without the wrongdoing State being given any opportunity to explain, for example, that there was no wrongful act or that the wrongful act was not attributable to it. In the case of reparation, the injured State might continue to be the target of countermeasures even after it had admitted its responsibility and even though it was in the process of providing reparation and/or satisfaction.

4. The Drafting Committee had noted that, because the text it adopted at the previous session made the right of the injured State to resort to countermeasures subject to the conditions and restrictions set forth in subsequent articles, it provided a safeguard against abuse, and that the requirement of proportionality went some way to meeting the Special Rapporteur's concerns. It had

* Resumed from the 2353rd meeting.

¹ *Yearbook . . . 1993*, vol. II (Part One).

² Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

³ *Yearbook . . . 1993*, vol. II (Part Two), para. 204.

⁴ *Ibid.*, vol. I, 2318th meeting, para. 3.

⁵ *Ibid.*, paras. 2-35.

further noted that the phrase “as necessary to induce [the wrongdoing State] to comply with its obligations under articles 6 to 10 *bis*”, in paragraph 1, clearly implied that there were cases where resort or continued resort to countermeasures might not be necessary. At the same time, the Drafting Committee had agreed that, in such a sensitive area as that of countermeasures, there was merit in providing as much opportunity as possible for dialogue and that elaborating on the concept of necessity would serve a useful purpose. In that connection, when introducing article 11 at the previous session, the then Chairman of the Drafting Committee, Mr. Mikulka, had explained that the expression “as necessary” performed a dual function in that it first made it clear that countermeasures might be applied only as a last resort, where other means available to an injured State such as negotiations, diplomatic protests or measures of retortion would be ineffective in inducing the wrongdoing State to comply with its obligations and that it also indicated that the decision of the injured State to resort to countermeasures was to be made reasonably and in good faith and at its own risk.

5. To emphasize the desirability of a dialogue between the injured State and the wrongdoing State, the Drafting Committee had introduced, in paragraph 1, after the word “necessary”, the phrase “in the light of the response by the State which has committed the internationally wrongful act”. The phrase served a dual purpose. It made it incumbent on the wrongdoing State to take due account of the injured State’s reaction in assessing the need for resort to countermeasures, and it encouraged the wrongdoing State to enter into a dialogue with the injured State.

6. Paragraph 2 of article 11 remained unchanged.

7. The text of article 12 was identical to that adopted by the Drafting Committee at the forty-fifth session. The Drafting Committee at the present session had discussed extensively successive versions of the text as proposed by the Special Rapporteur in his sixth report. It had tried in particular to structure article 12 on the basis of the Special Rapporteur’s distinction between countermeasures, resort to which would have to be preceded by the initiation of a third party dispute settlement procedure, and urgent protective measures, which would not be subject to that precondition. However, the Drafting Committee had been unable, despite strenuous efforts by the Special Rapporteur and all members, to reach agreement on a rewording of article 12 along the lines proposed by the Special Rapporteur. Members would recall that the Commission had taken the decision to refer the Special Rapporteur’s new proposals for articles 11 and 12 to the Drafting Committee⁶ on the understanding that, if the Committee found it impossible to modify articles 11 and 12 as adopted by the Committee at the forty-fifth session, the Commission would revert to the text adopted at the previous session and that text would then form the basis of the action to be taken in plenary. In the light of that understanding, the Drafting Committee had no alternative but to revert to the text adopted for article 12 at the previous session. As that text had been

introduced by the then Chairman of the Drafting Committee, he would again simply refer members to his statement.⁷

8. The CHAIRMAN suggested that, since the commentaries to articles 11, 13 and 14 were available, the Commission should consider those three articles first and then turn to article 12.

It was so agreed.

ARTICLE 11 (Countermeasures by an injured State)

Paragraph 1

9. Mr. CALERO RODRIGUES said that the phrase “in the light of the response by the State which has committed the internationally wrongful act”, in paragraph 1, made no sense. Response to what? The Drafting Committee had in fact included that phrase in article 11 because there had been a possibility that a reference to the notion of adequate response would be added in article 12, as proposed by the Special Rapporteur. Since article 12 as adopted by the Drafting Committee at the previous session was to remain unchanged, at least for the time being, there was no need for the phrase in question in article 11.

10. Mr. TOMUSCHAT, agreeing with Mr. Calero Rodrigues, said that the article should be couched in more precise terms and should, in particular, impose an obligation on the State which had suffered an internationally wrongful act to give a formal notification to the wrongdoing State.

11. Also, it was essential to spell out in the body of the text what was meant by countermeasures. He therefore proposed that after the number “14”, a comma should be added and followed by the words “to take countermeasures, that is, . . .”.

12. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested, in response to the point made by Mr. Calero Rodrigues, that the words “to its demands” should be added in paragraph 1, either after the word “response”, or after the words “internationally wrongful act”. That should make the text crystal clear.

13. As to Mr. Tomuschat’s proposal he considered that the title sufficed to make it quite clear to the reader that paragraph 1 dealt with countermeasures.

14. Mr. EIRIKSSON said that, the exact meaning of the additional wording proposed by Mr. Tomuschat would depend on where it came in paragraph 1. If it came after the number “14”, as Mr. Tomuschat had proposed, a question would arise as to the legality of the countermeasures, for they would not then be subject to the conditions and restrictions set forth in articles 12 to 14 and, moreover, they might go beyond what was necessary in the light of the response by the State which had committed the internationally wrongful act. To overcome that difficulty, he would suggest that the words in question should be added after the word “entitled”.

⁶ See 2353rd meeting, para. 36.

⁷ See footnote 5 above.

15. Mr. TOMUSCHAT said that Mr. Eiriksson's suggestion was acceptable.

16. Mr. PAMBOU-TCHIVOUNDA suggested that the words "that is" should follow the clause reading "subject to the conditions and restrictions set forth in articles 12, 13 and 14".

17. Mr. BOWETT (Chairman of the Drafting Committee) supported the suggestion.

18. Mr. AL-BAHARNA said that paragraph 1 would read better if the phrase "subject to the conditions and restrictions set forth in articles 12, 13 and 14" came at the very end of the paragraph.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Eiriksson's point was well taken. Mr. Pambou-Tchivounda's proposal might be acceptable in the case of the French version, but in the English version the words "to take countermeasures, that is" should come after the word "entitled"; otherwise, the sense of the clause "subject to the conditions and restrictions set forth in articles 12, 13 and 14" would be altered.

20. The CHAIRMAN noted that a consensus of opinion seemed to be emerging in favour of Mr. Tomuschat's proposal as amended by Mr. Eiriksson.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) reiterated that the words "to its demands" could be inserted after "response", in the English version.

22. Mr. CALERO RODRIGUES said that the Special Rapporteur's suggestion partly resolved the problem, but it was still not clear to what "demands" the amended text was referring. Nevertheless, the entire text was scarcely a model of good drafting and he would have no objection to the proposed amendment.

23. The CHAIRMAN said that the suggested amended version of paragraph 1 of article 11 would read:

"1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set forth in articles 12, 13 and 14, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 6 to 10 *bis*."

24. Mr. GÜNEY asked whether it would not be better, in the French version of paragraph 1, to avoid the expression *c'est-à-dire*, which seemed inappropriate in a legal text.

25. Mr. PELLET said that he was not happy with the wording of the English version. Nevertheless, it was important to maintain the greatest possible consistency between the English and the French.

26. The CHAIRMAN suggested that the words *c'est-à-dire* should be replaced by the more elegant expression *à savoir*, in the French version.

It was so agreed.

Paragraph 1, as amended, was adopted.

27. Mr. PELLET said that he had deliberately waited until paragraph 1 had been adopted before speaking on a matter about which he had strong feelings. He was hostile to paragraph 1 in the form in which it had been adopted because, like Mr. Calero Rodrigues, he found it extremely badly drafted. There was also a deeper substantive reason for his hostility. It was his belief that countermeasures must be authorized only in exceptional circumstances. Yet all too often, articles 11 to 14 seemed to be drafted in precisely the opposite spirit, starting from the principle that countermeasures were lawful and going on to establish exceptions to that principle. He thus had a very fundamental general reservation regarding the articles on countermeasures. It was not his intention to oppose them at the present session, since he felt unable to take a final position on them until article 12—which, in his view, the Commission was not yet in a position to discuss—had been adopted. Only then would he be able to ascertain whether what were at present his reservations concerning article 11 would be transformed into active opposition. If article 12, when adopted, imposed firm and precise limits on the right to take countermeasures, he would not oppose it. If, on the other hand, article 12 was drafted unacceptably, his opposition would extend also to article 11. He accepted article 11 only subject to its being corrected by article 12.

28. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the light of the reservations expressed by Mr. Pellet, which in part he shared, he too had to make a reservation. He believed that the opening lines of paragraph 1 conferred excessive power on the injured State. He had not wished to obstruct the adoption of paragraph 1. None the less, his sixth report explained concisely and clearly why he believed that wording to be wrong.

29. Mr. ROSENSTOCK said that he—and, he suspected, a number of other members of the Drafting Committee—had accepted the addition of the phrase "in the light of the response by the State which has committed the internationally wrongful act" on the understanding that it was part of a compromise pursuant to which the Drafting Committee was willing to accept article 11. That wording had not been a first choice. It raised problems, and the introduction of the words "to its demands" was misleading in that it attributed a role to demands which they did not in fact possess. But perfection was the enemy of the good. The Commission was supposed to attempt to find common ground and therefore he did not press an objection to the addition of that wording. Yet that required a spirit of cooperation on the part of all those involved: not a reversion to first principles or first preferences, but rather an acceptance of a compromise package worked out by all concerned. Mr. Pellet had not been a party to that agreement.

Paragraph 2

30. Mr. TOMUSCHAT said that paragraph 2 was unnecessary. It merely stated the obvious truth that a countermeasure could not justify a breach of an obligation to the detriment of a third State. The paragraph should therefore be deleted.

31. Mr. PELLET said that he totally disagreed with Mr. Tomuschat. Paragraph 1 gave certain rights to the State, and it was very important to specify that those rights ran counter to a general rule. Unless that was stated, there would be a very great ambiguity. He was very strongly in favour of keeping paragraph 2.

32. Mr. CALERO RODRIGUES said he agreed with Mr. Tomuschat that paragraph 2 was not necessary. He could not accept Mr. Pellet's argument. Paragraph 1 laid down that the State was entitled not to comply with one or more of its obligations towards the State which had committed the internationally wrongful act. Consequently, it was not entitled to breach an obligation towards a third State. Strictly speaking, it could be contended that paragraph 2 was thus unnecessary, but no harm would come of retaining it.

33. Mr. BARBOZA said he agreed with Mr. Tomuschat. Paragraph 2 was totally unnecessary, for the reasons already given.

34. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he agreed with Mr. Calero Rodrigues, and especially with Mr. Tomuschat. If a majority of the Commission favoured deleting paragraph 2, he would be happy to accept that decision.

35. The CHAIRMAN asked members to indicate their preference by a show of hands.

Paragraph 2 was adopted.

36. Mr. PELLET said that he was not hostile to the type of procedure that the Commission had just employed. However, the debate had not yet been exhausted, and fuller explanations were needed. What was at stake was more than just a problem of legal technique. The deletion of paragraph 2 that had been proposed would have been totally preposterous in the context of the law of treaties, and it seemed to him equally preposterous in the context of countermeasures. It was gratifying that the Commission was moving towards a solution of which he approved, but the reasons why it was so doing must also be made clear. Accordingly, the proposed deletion had been incomprehensible. He regretted that Mr. Calero Rodrigues had been unable to agree with the reason he had given for wishing to retain paragraph 2. It was an important reason, one to which he held to very firmly.

37. The CHAIRMAN pointed out that articles 11 to 14 had been under discussion in the Commission and the Drafting Committee for the past two years. As Chairman, he was not prepared to resume the whole round of debate, only one and a half hours before the deadline for completion of the Commission's work on the topic. In the circumstances, he could not allow the debate on every issue to be prolonged endlessly, and it had thus been necessary to take an indicative vote.

Article 11, as a whole, as amended, was adopted.

ARTICLE 13 (Proportionality)

38. Mr. PAMBOU-TCHIVOUNDA said that the Commission must be grateful to the Special Rapporteur for proposing the words "degree of gravity" as a solution to the problem concerning the "gravity of the internationally wrongful act". Yet he wondered whether that proposal in fact solved the problem. If assessment of the gravity of the act posed problems, assessing the degree of gravity of the act was still more problematical. How was that degree of gravity to be measured? He was concerned at the juxtaposition of the two ideas of "degree" and "gravity". Perhaps the Special Rapporteur could provide the Commission with some guidance in that regard in his forthcoming commentary, on the basis of which the Commission would be in a better position to endorse his proposal.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he saw it, "degree" was a quantitative element, whereas "gravity" was a qualitative element. He saw no reason why the two elements could not coexist. If Mr. Pambou-Tchivounda was satisfied with that distinction, he would make the point clear in his commentary.

40. Mr. HE said that one purpose of article 13 was to prevent the dispute from escalating. However, such an escalation might be due to excessive countermeasures taken by the injured State, or to the persistence or intensification of delicts of the wrongdoing State. It was thus perhaps unfair to lay down obligations of proportionality only on the part of the injured State. If possible, article 13 should also provide for a corresponding obligation for the wrongdoing State not to take improper measures against the injured State.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was his impression that Mr. He was referring to counter-countermeasures. Article 13 was concerned simply with countermeasures. Counter-countermeasures would possibly constitute another internationally wrongful act.

42. Mr. HE confirmed that the measures to which he had referred were indeed counter-countermeasures.

Article 13 was adopted.

ARTICLE 14 (Prohibited countermeasures)

43. Mr. TOMUSCHAT said that he endorsed the text of article 14. As to the commentary there was a difference between rights which could not be affected by countermeasures and rights which could not be affected by a State in a situation of emergency. The two cases were not the same. But he agreed in essentials with the commentary, in which the Special Rapporteur rightly referred to a "core" of human rights. That was the interpretation to be given to the formula "basic human rights".

Article 14 was adopted.

ARTICLE 12 (Conditions relating to resort to countermeasures)

44. The CHAIRMAN said that, as stated by the Chairman of the Drafting Committee (para. 7 above), the Commission had decided to refer the Special Rapporteur's new proposals for articles 11 and 12 to the Drafting Committee, on the understanding that, if the Drafting Committee found it impossible to modify articles 11 and 12 as adopted by the Committee at the forty-fifth session, that text would form the basis of the action to be taken by the plenary. In the light of that understanding, the Drafting Committee had referred article 12 back to the Commission. He invited the Special Rapporteur to give his views on the situation with regard to the article.
45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it was of course now too late to resume the debate on article 12. As Special Rapporteur, he felt obliged to explain, however briefly, why he strongly objected to the version of the article appearing in document A/CN.4/L.501.
46. He trusted that everyone understood that article 12 related to that most central issue of the law of State responsibility, namely, the relationship between the right to take countermeasures on the one hand, and dispute settlement obligations on the other. The drawbacks of unilateral countermeasures had been so effectively and realistically denounced in the debate in the Sixth Committee at the forty-seventh session of the General Assembly that there was no need to devote further time to discussing them. The unilateral character and possible arbitrariness of countermeasures represented a constant threat to the principle of the sovereign equality of factually unequal States and to the requirement of Article 2, paragraph 3, of the Charter of the United Nations, that international disputes should be settled in such a manner that not only the exigency of peace but also the exigency of justice should be satisfied. That was why a former member of the Commission, Mr. Shi, had gone so far as to suggest at the forty-third and forty-fourth sessions that countermeasures should not be recognized by the Commission as lawful means of redress of international tort.
47. Since the Commission had rightly thought it impossible to renounce countermeasures, as proposed by Mr. Shi, as a means of enforcement of international obligations, article 12, as he had proposed at the forty-fourth session,⁸ had been intended to bring in the only possible corrective to the drawbacks of an uncontrolled system of countermeasures. The only conceivable corrective was the rule that available settlement means should be resorted to first, meaning prior to resort to countermeasures.
48. For him, it had not been a pipe-dream. It was not only the inescapable consequence of the drawbacks of countermeasures denounced in the General Assembly at its forty-seventh session; it had already been the solution proposed by the previous Special Rapporteur,
- Mr. Riphagen, in article 10 contained in his fifth report,⁹ in which he had spoken precisely, going beyond the language which he (Mr. Arangio-Ruiz) had proposed at the present session, of exhaustion of available dispute settlement procedures. That line had also been approved by the Commission in 1985 and 1986, just as it had been approved again by a decisive majority of the present members of the Commission since about 1992. Both Mr. Riphagen's and his own proposals had been referred to the Drafting Committee and a great majority of the Drafting Committee at the forty-fifth session of the Commission—as clearly stated by the then Chairman of the Committee in his presentation of the article at that session—had declared themselves in favour of the principle of prior recourse to dispute settlement means.
49. How things had developed in such a way since the previous year that the Commission was now confronted with the present situation he preferred not to argue. However, of course, like everybody else, he could see the cause very well. But he would leave that aside for the time being. The essential point was that the Commission was confronted with a text—that of the Drafting Committee proposed at the forty-fifth session—that was of a nature to set aside, by the choice of a minority of the members, any idea of prior resort to dispute settlement means.
50. Following the previous year's experience, he had proceeded towards the end of 1993 to a drastic watering-down of the proposal made in his fourth report,¹⁰ to say nothing of the 1985 proposal. In early 1994 he had submitted a new draft of the article, briefly and clearly explained in chapter I, section D, of his sixth report. In particular, the new text had done two things: first, it had reduced the variety of settlement procedures requiring prior implementation. Secondly, and most importantly, it had clarified the concept of the provisional, interim measures that would escape—to the satisfaction, he believed, of the "conservatives"—the prior recourse to the settlement procedures requirement. That watering-down had been acknowledged by a decided majority of the Drafting Committee at the present session, a majority which again—the point must be stressed beyond any possible doubt—had expressed in principle its favour for the prior resort to dispute settlement requirement. Again, however, the principle had been set aside *in concreto* in the resulting text.
51. Confronted with what he perceived as an article in which the minority view had prevailed, namely article 12 as set out in document A/CN.4/L.501, he had circulated the previous day his latest proposed version of article 12. In view of the late hour, he was not suggesting that the Commission should debate the matter immediately. Nevertheless, the issue was too crucial to the future of the law of State responsibility and the law of dispute settlement for it to be lightly set aside. He was proposing, then, that the Commission should postpone consideration of article 12 until the next session. The article would thus benefit from a more extensive review than it

⁸ For the text of draft article 12 proposed by the Special Rapporteur, see *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3; and *ibid.*, vol. I, 2273rd meeting, para. 18.

⁹ For the texts of draft articles 6 to 16 of part two referred to the Drafting Committee, see *Yearbook... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

¹⁰ See footnote 8 above.

had had in the Drafting Committee, which had only been able to devote three meetings to what he considered to be one of the central issues of State responsibility.

52. In respect of article 12, he was mainly concerned about the consequences of adopting either the version proposed by the Drafting Committee at the forty-fifth session or any of the versions worked on by the Drafting Committee at the current session, all of which he found unsatisfactory.

53. Once adopted on first reading, draft articles served as one basis for developing international law. Although not considered as binding legal enactments, the draft articles by the Commission were frequently seen as important elements in determining *opinio juris* about *lex lata* or *lex in fieri* and in establishing policy with regard to *lex ferenda*. An example of the impact of the Commission's work was provided by a recent lecture given by Mr. Tomuschat at the Academy of International Law. In discussing the enforcement of international law, Mr. Tomuschat had noted, not without implied approval, that the Drafting Committee had recently confirmed the traditional position, notwithstanding many reservations of members of third world countries in particular. The "traditional position" was that international law should be enforced by unilateral countermeasures, the dangers of which Mr. Tomuschat failed to recognize in his lecture.

54. In his view, the question was whether the Commission actually wished such implications to be drawn from article 12 by scholars, practitioners, judges and arbitrators? Did it feel compelled to make a final decision with regard to article 12 at the present session or would it not be wiser to leave the question aside for one year, allowing time for mature reflection? Given the time it would take to complete the second reading of the articles on State responsibility, the Commission might not review article 12 again for several years: did it really want to be represented during that entire period by article 12 in one of its existing versions? Would such a text be of any help at all in elaborating the law of countermeasures and dispute settlement? Would it not irremediably hamper progressive development?

55. One could still read scholarly works which revived, wholly or in part, Kelsen's notion that there was no such thing, in international law, as an obligation to make, and a right to obtain, reparation and that such a right and obligation derived only from an agreement following the application of reprisals, namely countermeasures.¹¹ Fortunately, that view had been rejected by the Commission in the draft articles on State responsibility that had been adopted thus far. But, if countermeasures were, as seen by the Commission, the means of enforcing legal obligations and rights, why should they not be subject to a minimum of juridical control? In that connection, he referred again to Mr. Tomuschat's recent lecture in which he had stated that it was true that a legal device which was not embedded in a wider framework of rules and mechanisms that restrain unilateral action, bringing disputes under community discipline, risked

indeed to open up a battlefield where soon political power would prevail. Under the constitution of a system of governance, there should be some institutions entrusted with safeguarding the interests of the community at large which would be jeopardized by any conflict that got out of hand. Thus, Kelsen's line of reasoning looks like a makeshift defence of international law—*faute de mieux et jusqu'à nouvel ordre*. This was the position taken by Mr. Tomuschat in his lectures.

56. As to *faute de mieux*, the position taken by Mr. Tomuschat, in his view something better did, in fact, exist in the international system: the judge, the arbitrator and the conciliator. Why then should a Commission, dedicated by its statute to the progressive development of the law, not give consideration to the role of such agents, at least as a corrective remedy, if not a substitute, for unilateral countermeasures? And in what sense should *jusqu'à nouvel ordre* be understood—until there was a world government or until the international community was really organized? But how could the Commission contemplate the idea of an organized international community and at the same time refuse to incorporate the obligation of prior resort to dispute settlement in article 12?

57. He wished to conclude by renewing his plea for the Commission to defer consideration of article 12 until the next session.

58. The CHAIRMAN said that, as he understood it, if the Commission were to endorse the proposal made by the Special Rapporteur, it would then be inviting the Sixth Committee and Governments to comment on articles 11, 13 and 14, on countermeasures contained in part two of the draft articles on State responsibility, but not on article 12.

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that precedents existed for such a procedure: the Commission had, on one occasion, adopted one single article on State responsibility during its entire session.¹²

60. The Commission could simply send articles 11, 13 and 14 to the General Assembly, informing it of the Commission's decision to postpone consideration of article 12. The Sixth Committee, which had at the forty-seventh session of the General Assembly in 1992 expressed vehement objections to countermeasures, would certainly understand that the Commission wished to devote more time to that crucial issue.

61. Mr. BOWETT (Chairman of the Drafting Committee) said that some members of the Commission, including himself, were doubtful about the wisdom of sending to the General Assembly a set of articles on countermeasures without article 12, which was in fact the key provision. He had thought, therefore, that it might be useful for the Commission to have before it the last version of article 12 on which the Drafting Committee had been working before it had run out of time. That version had been distributed to members.

¹¹ H. Kelsen, *Peace Through Law* (Chapel Hill, University of North Carolina Press, 1944).

¹² See *Yearbook . . . 1985*, vol. II (Part Two), p. 24.

62. Mr. BARBOZA said that the Commission was not really in a position to consider a draft article which had not been adopted by the Drafting Committee.

63. He himself was convinced by the Special Rapporteurs' arguments. Article 12 already had a long history; postponing consideration for one more year would not make a great difference. Moreover, it was true that articles adopted by the Commission did have an impact on the legal community; ICJ, in the case concerning *United States Diplomatic and Consular Staff in Tehran*¹³ for example, had found support in the Commission's reasoning in part one of the draft articles on State responsibility.

64. He was in favour of deferring consideration of article 12. The Commission could transmit articles 11, 13 and 14 to the General Assembly, while explaining that it reserved the right to revert to article 11 if necessary.

65. Mr. ROSENSTOCK said that, unlike Mr. Barboza, he had found the arguments put forward by the Special Rapporteur singularly unconvincing. The allegation that article 12 had been considered in haste was completely unfounded. The Drafting Committee had spent many hours considering the article and had produced a text for it. That text had been before the Commission for a year. The failure to arrive at a satisfactory compromise could certainly not be attributed to a cursory review of the issue.

66. The contention that article 12 presented a traditional view of the law was inaccurate. The article went beyond existing law and contained the measure of progressive development that it was reasonable to expect States to accept. The statement that the article ignored dispute settlement was so inaccurate as to be ingenuous. Article 12, as it now stood, set out a clear prohibition against taking countermeasures. Under paragraph 1, an injured State could not take countermeasures unless it met the conditions under subparagraphs (a) and (b); and under paragraph 2, the right of the injured State to take countermeasures was subject to suspension. Those provisions constituted steps beyond existing law.

67. References to a few statements in the Sixth Committee as if they represented action by that Committee or an expression of its opinion were also misleading. He was firmly opposed to postponing consideration of article 12. The Commission had before it two versions of the article, the one contained in document A/CN.4/L.501 and the one that had just been circulated informally. His personal preference was for the former. There was nothing to prevent the Commission from considering the two alternative texts at its present session. If, by the end of the session, the Commission had failed to agree on either text, it would then have to admit to the Sixth Committee that it had been unable to find a compromise solution.

68. While he had no strong objection to sending a partial set of articles to the General Assembly, he understood the views of those who felt that part two should only be transmitted in its entirety.

69. Mr. MAHIU said that article 12 was indeed the cornerstone of the articles on countermeasures. If, by postponing consideration until its next session, the Commission could devote more time to the article and arrive at a satisfactory compromise, he would certainly endorse that solution.

70. While it would, of course, be best to submit a complete set of articles to the General Assembly, that did not seem feasible in the time remaining to the Commission at the present session. The logical alternative was to transmit articles 11, 13 and 14, while stipulating that article 11 might be modified subsequently in light of the final version of article 12.

71. Mr. PELLET said that, although it had been close to consensus with regard to article 12, the Drafting Committee had not in fact adopted a final text. In view of the importance of the matter, it would be unwise to transmit to the General Assembly an article which had not met the formal requirements of the Commission.

72. The informal text that the Special Rapporteur had just circulated did not, contrary to what the Special Rapporteur had implied in his statement, represent a revolutionary approach to current practice. Nevertheless, he agreed with the Special Rapporteur that consideration of article 12 should be postponed, unless the Commission found a way to devote extra time to the article at the present session.

73. He could not accept article 11 definitively while article 12 was pending. If the Commission decided to transmit articles 11, 13 and 14 to the General Assembly, it should be made clear that the Commission reserved the right to revert to article 11 as necessary, in the light of the final drafting of article 12.

74. Mr. THIAM said that it was the task of the Drafting Committee to elaborate and adopt draft articles. The Commission seemed to be setting a dangerous precedent by considering an article, in that particular instance article 12, that had not been adopted by the Drafting Committee.

75. As to transmitting the draft articles to the General Assembly, the least desirable choice was not to send any articles at all. The Commission could easily submit a partial set of articles while reserving the right to return to article 11 as necessary.

76. Mr. EIRIKSSON said that he disagreed with many of the points made by the Special Rapporteur, especially with regard to his description of the work done on the topic. It would be an unusual procedure to ask the Drafting Committee to reconsider its proposal in the light of the Special Rapporteur's comments. He agreed that one more effort should be made to reach agreement. The Commission should not, therefore, take a decision at the present stage to defer its consideration of the item to its forty-seventh session in 1995. He would himself be interested in hearing members' views on the question whether countermeasures could be taken before all possible other recourse had been exhausted.

77. Further to a query by Mr. AL-BAHARNA, the CHAIRMAN said that the only possibility for one fur-

¹³ *Judgment, I.C.J. Reports 1980, p. 3.*

ther meeting of the Drafting Committee would be in the afternoon of Friday, 15 July, and it was not certain that interpretation services would be available.

78. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he understood the wish of several members of the Commission to make one further attempt to reach agreement. The Drafting Committee had been unable to reach a consensus because it had held only three meetings on the topic. What would be the position if it met again and still failed to reach agreement? The Commission needed to give the matter some thought between sessions, and at the forty-seventh session in 1995 the Drafting Committee should be given more time to consider it. In the past, the Commission had neglected the topic of State responsibility, especially in terms of the time allotted to it in the Drafting Committee, because of the priorities indicated by the General Assembly.

79. Mr. ROSENSTOCK pointed out that the Drafting Committee had submitted a report on the topic to the Commission at the forty-fifth session in 1993. The Commission had had plenty of time to consider it. Furthermore, the Drafting Committee had spent much time on article 12. Accordingly, there was no reason why the Commission should not take a decision on the Drafting Committee's text or consider a formal proposal to amend it. To defer the matter for another year would not help. If the Drafting Committee's version was not acceptable, then the Commission now had before it an alternative proposal. It would be less than responsible for the Commission not to take a decision now.

80. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he did not wish to go into the merits of the matter, but like other members he had the same great appreciation of the work done and the report produced by the Drafting Committee at the previous session. However, the Chairman of the Drafting Committee at that session had acknowledged that a majority of its members preferred to have a prior dispute settlement principle inserted in article 12. That had not proved possible at the time, but progress had been made at the present session on interim measures. Therefore, if the topic was given a little more thought, he was sure that a solution could be found. Mr. Rosenstock was happy with the version proposed at the forty-fifth session; other members of the Commission were not.

81. Mr. PELLET said that, although the Commission was apparently engaged in a procedural debate as to what to do next, the underlying disagreement was on a point of substance. The situation was that many members were unable to accept the text proposed at the forty-fifth session, and at the current session the substantive debate in the Drafting Committee had not been completed. It was unreasonable to expect that just one more meeting would produce a solution.

82. Mr. CALERO RODRIGUES said that he did not entirely agree with Mr. Pellet. At the current session the Drafting Committee had been trying to reach a consensus by amending the text proposed at the previous session. He had had the impression that it was close to such a consensus, and it would be a pity to let slip the opportunity of concluding the work at the present session. The Drafting Committee should make one more attempt to

reach agreement. If it failed, then obviously the matter would have to be deferred to the next session in 1995. However, he was sure that a solution was possible given good will and flexibility on all sides.

83. The CHAIRMAN said that he agreed with Mr. Calero Rodrigues. The Commission should exhaust all possibilities before deferring the matter. Perhaps the Drafting Committee should therefore meet on 15 July. There did not seem to be much enthusiasm for trying to amend the Drafting Committee's text at the present meeting.

84. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee could certainly make one more attempt, but the chances of success depended almost entirely on the attitude of the Special Rapporteur. The draft text before the Commission was the outcome of lengthy discussions involving many members, but the Special Rapporteur had withdrawn his support at the last moment and submitted his own alternative text.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said that several members of the Commission had already explained that the issue concerned two different philosophies of the relationship between countermeasures and means of dispute settlement. The point of the debate was to find a proper balance between the two philosophies, for neither one should prevail 100 per cent over the other. With some time for thought before the next session and provided a reasonable number of meetings was allotted to the Drafting Committee, a solution could probably be found. The Commission should not lose sight of the problem raised by Mr. Calero Rodrigues in the Drafting Committee at the previous session that article 12 could not be settled properly without taking into account part three of the draft. That problem could also be looked at at the next session.

86. The CHAIRMAN asked the Special Rapporteur whether he would be prepared to work on the revised text if a meeting of the Drafting Committee was arranged for 15 July.

87. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was always happy to work in the Drafting Committee, but was not at all confident that the revised text would provide a solution to the problem.

88. Mr. ROBINSON said that he had initially been attracted by the Special Rapporteur's arguments. It was clear that a majority of the members of the Commission did not support the Drafting Committee's version of article 12 and that there was no agreement to submit it to the Sixth Committee in its present form. He agreed that one more effort should be made to find a solution and he would be happy to participate in the Drafting Committee. However, there was no point in members referring continually to the text produced by the Drafting Committee at the previous session: that was to promote formalism at the expense of reality.

89. Mr. BOWETT (Chairman of the Drafting Committee) said that the Special Rapporteur had apparently answered the Chairman's question in the negative.

90. The CHAIRMAN suggested that the Commission should take up the matter again at its meeting on the morning of 15 July.

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/457, sect. C, A/CN.4/459,¹⁴ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (concluded)

91. The CHAIRMAN invited members to make general statements on the draft articles adopted by the Drafting Committee (A/CN.4/L.494 and Corr.1) and by the Commission on first reading.

92. Mr. TOMUSCHAT said that, after the adoption of the draft articles by the Commission he wished to place his reservations on record once again. By virtue of the draft articles, States would be burdened with heavy obligations, for the articles amounted essentially to an environmental impact assessment procedure, but one which extended over many fields, such as medical research and genetic engineering, which had not been identified. That lack of clarity must be remedied at a later stage by means of a clear definition of activities involving risk. All the existing parallel sets of rules providing for an environmental impact assessment procedure contained annexed lists of activities to which they applied. Were it otherwise, the authorities would not know what they were expected to do.

93. The much emphasized distinction between activities involving risk and activities causing harm was an artificial one which could not be sustained in practice. It was inconsistent, in particular, with the idea of prevention. Most activities could be carried out in different ways and if sufficient care was taken—generally requiring expensive investment—any concrete threat of harm, and thus of transboundary harm, could be excluded from almost any industrial activity. Prevention was intended to ensure that no significant harm would be caused. Unforeseen and unforeseeable accidents, on the other hand, were not a proper subject matter of prevention and must be handled within the framework of liability in the true sense of the word. The Commission had thus taken only a modest step forward. The draft articles could at most serve as a blueprint for a declaration to be adopted by the General Assembly but not as a treaty, since the scope of activities involving risk was so ill-defined that States could not possibly submit to a regime requiring great expenditure of time, money and manpower.

94. Mr. de SARAM said that the basic concept of article 20 (Factors involved in an equitable balance of interests) was very useful. But, given the breadth of the topic,

it was difficult to identify in the abstract the factors that were to be taken into account by the parties concerned in making their crucial determinations. The draft articles would, of course, be given fuller consideration at a later stage in the light of comments by Governments. If there were other examples of the concept of balancing of interests in the field of transboundary harm, apart from in the law of the non-navigational uses of international watercourses, which included the concept of equitable and reasonable utilization, it would be useful to have them available later.

95. He was also concerned at the endeavour to subordinate proper concern that an activity might cause harm to considerations of cost and a comparison of the situations in States or in the region. There was a vast technological gap between the industrial and the developing countries. In a situation in which a developing country did not possess the best available technology, it would be wrong to lower the technical standards, for what was at stake was large-scale harm. Therefore, he was not sure that the Commission should become involved in identifying the factors to be taken into consideration and, if it did so, whether it could cover the whole range. The balancing of interests was really a matter for the States concerned.

96. Mr. ROSENSTOCK said that he largely shared Mr. Tomuschat's reservations. The draft articles could be accepted as an interim stage pending a more precise definition of their scope. Producing a list of activities might be the best solution, although that possibility had been looked at before. Even with a more precise definition, the Commission should be envisaging an instrument other than a treaty. It must not assume that it was drafting a treaty.

97. Mr. PELLET said that he too had reservations about the text, especially articles 13 and 18. However, it was generally acceptable, and the Commission had been right to concentrate on prevention as a first step in its work. The draft articles as they stood could serve as the basis either for a treaty or for some other instrument. The consideration of the draft articles should not be affected by the decision—yet to be taken—on the subsequent procedure.

98. The Commission had dealt with the safest part of the topic—injurious consequences—and was now about to step on to much less firm ground—the question of international liability. Unlike some members of the Commission, he thought it would be interesting to consider what could be done with the existing part of the draft articles independently of the rest.

99. The CHAIRMAN said that the Commission had thus concluded its consideration of the draft articles on first reading. It would take up the draft commentary under preparation by the Special Rapporteur as soon as possible.

The meeting rose at 6.05 p.m.

¹⁴ Reproduced in *Yearbook . . . 1994*, vol. II (Part One).