

Appendix:
A. Draft Articles 11-14 Proposed by the Special Rapporteur in his Fourth Report and Referred to the Drafting Committee by the Commission at its Forty-Fourth Session in 1992

Article 11

Counter-measures by an injured State

An injured State whose demands under Articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following Articles, not to comply with one or more of its obligations towards the said State.

Article 12

Conditions of resort to counter-measures

1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding Article shall be taken by an injured State prior to:
 - (a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is party; and
 - (b) appropriate and timely communication of its intention.
2. The condition set forth in sub-paragraph (a) of the preceding paragraph does not apply:
 - (a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;
 - (b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure;
 - (c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body.
3. The exceptions set forth in the preceding paragraph do not apply wherever the measure envisaged is not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered.

Article 13

Proportionality

Any measure taken by an injured State under Articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof.

Article 14

Prohibited counter-measures

1. An injured State shall not resort, by way of counter-measure, to:
 - (a) the threat or use of force [in contravention of Article 2, paragraph 4, of the United Nations Charter];
 - (b) any conduct which:
 - (i) is not in conformity with the rules of international law on the protection of fundamental human rights;

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- (ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;
 - (iii) is contrary to a peremptory norm of general international law;
 - (iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.
2. The prohibition set forth in paragraph 1(a) includes not only armed force but also any extreme measures of political or economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.

B. Draft Articles 1-6 and Annex of Part Three Proposed by the Special Rapporteur in his Fifth Report and Referred to the Drafting Committee by the Commission at its Forty-Fifth Session (1993) *

Part Three

Article 1

Conciliation

If a dispute which has arisen following the adoption by the allegedly injured State of any counter-measures against the allegedly law-breaking State has not been settled by one of the means referred to in Article 12(1)(a) or has not been submitted to a binding third party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a Conciliation Commission in conformity with the procedure indicated in the Annex to the present Articles.

Article 2

Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:
- (a) examine any question of fact or law which may be relevant for the settlement of the dispute under any Part of the present Articles;
 - (b) where appropriate, order, with binding effect:
 - (i) the cessation of any measures taken by either party against the other;
 - (ii) any provisional measures of protection it deems necessary;
 - (c) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.
 - (d) Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations.

Article 3

Arbitration

Failing the establishment of the Conciliation Commission provided for in Article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an

* A/CN.4/453/Add. 1 dated 28 May 1993; A/CN.4/453/Add. 1/Corr. 1 dated 9 June 1993; A/CN.4/453/Add. 1/Corr. 2 dated 14 June 1993; A/CN.4/453/Add. 1/Corr. 3 dated 29 June 1993.

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Arbitral Tribunal to be constituted in conformity with the provisions of the Annex to the present Articles.

Article 4

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be of relevance under any of the provisions of the present Articles, shall operate under the rules laid down or referred to in the Annex to the present Articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the parties' written and oral pleadings and submissions] [its appointment].
2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

Article 5

Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

- (a) by either party:
 - (i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in Article 4, if the dispute is not settled by negotiation within six months of such failure;
 - (ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in Article 4;
- (b) by the party against which any measures have been taken in violation of an arbitral decision.

Article 6

Excès de pouvoir or violation of fundamental principles of arbitral procedure

Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with *excès de pouvoir* or departing from fundamental principles of arbitral procedure.

C. Draft Articles 11-14 as Adopted by the Drafting Committee at the Forty-Fifth Session

Part Two

Article 11

Counter-measures 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 ..., not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under Articles 6 to 10 bis.