# Symposium: Counter-measures and Dispute Settlement: The Current Debate within the ILC

# Counter-measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: A Crucial Issue before the International Law Commission

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## Introduction

### A. 'Substantive' Consequences and 'Instrumental' Consequences of Internationally Wrongful Acts

1. Considering the relatively advanced stage attained by the ILC project on State responsibility the time seems ripe for all concerned – including, hopefully, the community of independent scholars – to focus attention on the role that the project ought to reserve to dispute settlement means.

In addition to the well-known Articles of Part One of the project – covering the concept, attribution and classification of internationally wrongful acts as well as the circumstances excluding wrongfulness – the ILC has adopted eleven of the Articles of that Part Two which is to cover the substantive core of the international responsibility relationship. Five of those Articles deal with general problems relating to this crucial subject. The following six Articles, adopted in 1993, deal with Cessation (Article 6), the Forms of Reparation (Article 6 bis), Restitution in Kind (Article 7), Compensation (Article 8), Satisfaction (Article 10) and Guarantees of Non-Repetition (Article 10 bis).[1]

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1 The Articles on Cessation and Restitution in kind had been proposed in 1988 (A/CN.4/416/Add. 1 of 27 May 1988); the Articles on Compensation, Satisfaction and Guarantees of Non-Repetition had been proposed in 1989 (A/CN.4/425/Add.1 of 22 June 1989). Although those Articles were referred to the Drafting Committee in 1988 and 1989, action on them was not taken in view of the Commission's decision first to conclude it labours on other projects.

2. The Articles so far adopted on first reading seem thus to cover, except for the wrongful acts defined as international crimes of States in Article 19 of Part One, about the totality of the *substantive consequences* of internationally wrongful acts. The ILC has thus reached the dividing line between such substantive consequences, namely, the rights and duties of the parties pertaining to cessation and reparation, on the one hand, and instrumental consequences, on the other. By *instrumental consequences* we mean[2] the rights or, more precisely, the *facultés* relating to the ways and means – the instrumentalities – by which an injured State may seek to obtain cessation and reparation – or impose a sanction against the law-breaking State.

## B. Counter-measures (CMs) and Amicable Dispute Settlement Means (DSMs) as Instruments for the Redress of International Torts

3. The ways and means generally resorted to by injured States in pursuit of the abovementioned aims fall into one or the other of the two broad categories of 'non-amicable' and 'amicable' means of redress.

The former category encompasses the unilateral coercive means known from time immemorial as reprisals and nowadays generally referred to as counter-measures (CMs).[3]

Amicable means are the various dispute settlement means (DSMs) ranging from negotiation (with or without good offices or mediation) to conciliation, procedures before regional or universal political bodies and more advanced means such as arbitration and judicial settlement.

4. It is equally well-known that amicable and non-amicable means are not always totally exclusive of each other. Although States frequently resort to CMs without any significant preliminaries, their unilateral action is not infrequently preceded by a phase of amicable exchanges and possibly negotiation. In such cases CMs will be resorted to only after the amicable exchanges fail to lead either to a direct settlement agreement or to a third party resolution.[4] Furthermore, CMs are not infrequently

Further Draft Articles proposed by the Special Rapporteur are Articles 11-14 on Counter-measures, submitted in 1992 (Fourth Report, Doc. A/CN.4/444 of 12 May 1992; Add.1 of 25 May 1992 with Corr. 1 of 19 June 1992; Add. 2 of 1 June 1992; and Articles 1-6 and Annex of Part Three on Dispute Settlement submitted in 1993 (Fifth Report, Doc. A/CN.4/453 of 12 May 1993; Add. 1 of 28 May 1993 with Corr. 1 of 9 June 1993; Corr. 2 of 14 June 1993 and Corr. 3 of 29 June 1993; and Add. 3 of 24 June 1993.

2 Introduction to the preliminary Report, Doc. A/CN.4/416 of May 1988.

3 The latter term seems to be rightly or wrongly preferred in the belief that this would be more consonant with the condemnation of those frequently abused armed reactions with which all reprisals were or are (wrongly) identified and which at present are rather ineffectively banned. The prohibition is rather frequently evaded by presenting manifest armed *reprisals* under the label of self-defence actions.

4 This does not mean, on the other hand, that an injured State is not enabled ultimately to impose, totally or in part, its unilateral assessment of its right by a mere threat of a counter-measure.

resorted to by an injured State, not so much in order to impose directly the alleged law-breaker's compliance with its 'primary' or 'secondary' obligations as in order to induce it to negotiation and eventually to the acceptance of a 'third party' resolution procedure.

5. It is thus recognizable that amicable and non-amicable means of redress do frequently combine, in the practice of States, in order to enable an injured State to obtain redress of a tort committed against it.

Dispute settlement procedures do not seem to be, therefore, incompatible with the nature of the responsibility relationship or, for that matter, with the nature of the law of the inter-State system.[5]

## I. The Role of Amicable Dispute Settlement Obligations in Correcting the Use of Unilateral Counter-measures (CMs) and the ILC Project on State responsibility

### A. The *Inconvénients* of Unilateral CMs and the Role of Dispute Settlement Means (DSMs)

6. It is obvious, on the other hand, that amicable and non-amicable means differ dramatically from the viewpoint of their aptitude to ensure a proper implementation of the law.

DSMs, and 'third-party' procedures in particular, are by their very nature the most likely to ensure a correct and equitable solution of any dispute between an allegedly injured and an allegedly law-breaking State.

As for CMs, they are surely intended *in principle* – as an accepted 'institution' or 'device' of general international law – for redress of tort. The study of the practice of States also shows that resort to CMs is generally recognized to be subject to various kinds of restrictions. The most commonly known among these are the requirement of proportionality, the prohibition of armed reprisals and the prohibition of measures incompatible with respect for fundamental human rights and humanitarian exigencies. Another requirement seems to be that CMs are not resorted to prior to an unsatisfied demand of cessation or reparation. The unilateral character of CMs, however, makes them very questionable, as a means of enforcement of legal rights and duties. Consisting as they do in the non-compliance by the allegedly injured State with one or more of its obligations towards the allegedly law-breaking State, CMs present in any case the undesirable feature of legitimizing breaches of international obligations. Reprisals, in other words, simply oppose the original tort by another tort. Even if the outcome of the process may well prove to be a correct one – which may not always be the case – this is surely not, in principle, the best way to make justice and promote the rule of law. Secondly, the

5 This point is stressed, *inter alia*, in the Friendly Relations Declaration of 1970.

unilateral nature of counter-measures is likely to favour the strong and wealthy States to the detriment of the weak and poor ones. Powerful States are advantaged both by the greater facility and the greater effectiveness of unilateral reaction on their part. The less powerful may be either totally unable to react or only capable of an ineffective reaction. Thirdly, the unilateral nature of the system inevitably lends itself to abuse, and legal restrictions are easily ignored. The frequent violation of the prohibition of armed reprisals under the guise of self-defense is a typical example. A further snag is that whenever the target State feels rightly or wrongly abused by an unjustified CM, it has normally no other choice but to resort to a 'counter-counter-measure' (counter-reprisal). It need hardly be added that the uncontrolled use of unilateral reactions is not the best way to preserve friendly relations and cooperation among States.

To put it bluntly, CMs are one of the most striking among the rudimentary features of the inter-State system. It would be difficult not to share the severe criticism of CMs voiced by the majority of State representatives in the course of the Sixth Committee debate of the Autumn of 1992.

7. The most appropriate *correctif* of the described *inconvénients* of unilateral counter-measures would be the alternative means of redress represented by the amicable procedures, which are frequently contemplated in bilateral or multilateral dispute settlement instruments. In many ways, however, these instruments fail to meet adequately the problem. First of all they vary considerably from the viewpoint of their degree of effectiveness. Low effectiveness characterizes the general and flexible obligations set forth in Articles 2(3) and 33(1) of the United Nations Charter (as inevitably understood under the principle of the freedom of choice of means). Greater effectiveness can be expected from the precise settlement obligations deriving from those most advanced arbitration or judicial settlement instruments – namely, treaties or compromissory clauses – providing for the possibility that the procedure be initiated by some form of unilateral request.

Secondly, the most advanced among the DSMs envisaged by existing instruments – and practically the only ones that could effectively correct the abuse of unilateral measures – are frequently viewed by States with diffidence. States seem reluctant to have recourse to them for various reasons; either on the pretext that the interests of States and peoples can be looked after only by their respective governments, or by lack of trust in the fairness of arbitrators, or by fear of submitting to judgments based on the existing law or even by the allegedly excessive cost of 'third party' procedures.

Thirdly – and most importantly – the existing amicable settlement instruments, including the most advanced among them, do not ordinarily explicitly set forth the contracting parties' obligation to have recourse to the envisaged settlement procedures *prior to* resorting to a unilateral coercive measure. In other words, a prior resort to amicable DSMs is ordinarily *not* set forth, in the relevant treaties and compromissory clauses, as a condition of lawful resort to CMs. In a sense, the

conventional rules on amicable dispute settlement procedures, on the one hand, and the customary rules on unilateral CMs, on the other hand, seem to be viewed somehow, despite the obvious interaction between the rights, *facultés* and obligations they respectively envisage, as separate systems or branches of international law.

The result of this is that although recourse to amicable DSMs is not infrequent, unilateral measures end up on the whole by prevailing: not rarely to the detriment of justice and equality among States.

8. Confronted with such a situation, one understands, in a measure, the position taken by that member of the ILC who suggested that the State responsibility project should not deal with CMs at all. According to that opinion, the mere fact of including in the project Articles admitting the possibility of resort to CMs would purport the legitimation of a 'primitive', abusive practice: a step that should be avoided by the States participating in a future Responsibility convention.

However, if the ILC were to take such a course, it would not act in conformity with its mandate as interpreted in the light of the Commission's statute. While not helping in any measure to outlaw the existing practice of unilateral reactions, ignoring the subject in the project might be understood as an acceptance of the view that nothing should or could be done in order to regulate, correct and ultimately curb that practice in any sense or to any degree.[6] It would run against any notion of progressive development in the area.

It seems more sensible to believe that the future State responsibility convention should, on the one hand, recognize the role of the customary practice as an indispensable, albeit unsatisfactory means of enforcement of international law. On the other hand, it should codify and progressively develop all the rules necessary to reduce, if not to eliminate altogether the *inconvénients* of the system. The ILC would render a bad service to the General Assembly – and ultimately to States and peoples – if it failed to determine, specify and progressively develop an adequate regulation of CMs. However, the Commission should confine itself neither to the formulation of the customary prohibitions, restrictions and requirements nor to the progressive development of such rules. It seems imperative that in addition the ILC should devise ways and means *to correct more effectively the essential arbitrariness of the system of unilateral reactions*. The only way to do so is to strengthen, within the framework of the future convention on State responsibility, the obligations of States to submit to effective dispute settlement procedures.

As noted earlier, the study of State practice does indicate, that reliance of unilateral determinations and reactions does not exclude recourse to amicable DSMs, more appropriate for a correct implementation of both the primary and the secondary rules involved in a responsibility relationship. It is widely admitted

6 Which is precisely the view taken even recently by some of the developed States in their statements in the Sixth Committee.

among scholars that recourse to DSMs should *precede* resort to CMs, especially when the use of such means is the object of the parties' international obligations. Authoritative pronouncements to that effect have been made by the International Law Institute and other bodies.

9. The two Special Rapporteurs who succeeded Roberto Ago in the difficult task of dealing with the consequences of internationally wrongful acts have both taken that course.

On the one hand, they proposed Draft Articles codifying and progressively developing the rules of customary law setting forth the restrictions, prohibitions and requirements conditioning lawful resort to CMs. On the other hand, they also proposed Draft Articles intended to strengthen the role that DSMs should play within the area of International Responsibility – real or alleged – relationships.

## B. DSMs in the ILC Project: Pre CMs and Post-CMs Dispute Settlement Obligations

10. Focussing at this point on dispute settlement, that problem could theoretically be approached, within a State responsibility convention, in different ways depending on the degree of intended development. Three ways can be identified among which further alternatives could be interpolated.

a) The maximalist approach would be:
   (i) to insert in the convention a more or less organic system of third-party settlement procedures ultimately leading, failing agreement, to a binding third-party pronouncement;
   (ii) at the same time, to make the lawfulness of resort to CMs – except for provisional protective measures – conditional upon the existence of an agreed settlement or a binding third-party pronouncement.

   Within such a system, CMs could in principle be lawfully resorted to by State A against State B exclusively in order to coerce a supposedly recalcitrant B to comply with an arbitral award or an ICJ judgement finding B to be in breach of one or more of its primary or secondary obligations. Although even then CMs would still be, in the absence of adequate institutional arrangements, the main instrument for ensuring compliance, resort to them would only *follow* a binding third-party pronouncement. Justice and equality would surely be better safeguarded. This solution, however, would not be realistic.[7]

b) At the opposite extreme there would be the minimalist approach. This would consist of doing nothing about the matter. Those who favour this facile approach – a solution apparently favoured by some members of the ILC – try to justify it by a political and a technical argument. Politically, they say, the inclusion in the project of any significant dispute settlement obligations would

7 The conditions of such a major development of international law are unlikely to occur during the current United Nations Decade of International Law or at any time in the near foreseeable future.

risk reducing the chances of adoption of a State responsibility convention. Technically, they say, dispute settlement belongs to international *procedural law*. The ILC should confine itself to the codification of the *substantive law* of State responsibility, such law including, *in their view*, the right to resort to CMs (see paragraph 74, *infra*). Dispute settlement should be taken care of – as in some ways it is – in more or less special or general areas by international rules *other* than those that should be embodied into a State responsibility convention.

c) Somewhere between the minimalist and the maximalist approach would be any solution under which the Responsibility Convention would not directly curtail the injured State's customary law prerogative to be in principle the judge of its substantive rights and its *faculté* to resort to the CMs necessary to safeguard them. At the same time, the Convention could provide for dispute settlement, in either or both of two ways. On the one hand, it could refer to procedures to which the parties were obliged to resort *regardless of the convention* itself, prior resort to such procedures to become, however, *by virtue of the Convention*, a condition of *lawful resort* to CMs. On the other hand, the responsibility convention could directly provide that, *once* a CM had been taken, any dispute arising with regard to the measure's legitimacy would have to be submitted to more or less decisive procedures directly indicated by the Convention.

11. While understandably tempted to prefer the ideally more satisfactory maximalist approach, the Special Rapporteur who was called to deal with the matter in 1992 and 1993 deemed it prudent not to go beyond the middle course indicated under sub-paragraph (c) of the preceding paragraph. The same middle course – in a less pronounced measure – had been taken by his predecessor Professor Riphagen in 1985-1986 with his Draft Article 10 of Part Two and Draft Articles 1 to 5 of Part Three. The Commission itself had found Riphagen's proposals sufficiently satisfactory for it to refer his Articles to the Drafting Committee.

The 1992-1993 proposals are thus based on the same distinction which is set forth in paragraph 10(c) *supra*: namely, the distinction between, so to speak, pre-CMs and post-CMs dispute settlement obligations.

The pre-CMs phase is covered by Draft Article 12 of Part Two, as combined with Draft Article 11 of the same Part Two. The post-CMs phase is dealt with in Articles 1 to 6 of Part Three and in the Annex thereto.

## II. Pre-CMs Dispute Settlement Obligations

### A. The Special Rapporteur's 1992 Draft Article 12 of Part Two of the Project

#### *1. Draft Article 12(1)(a)*

12. To begin with Draft Article 12 of Part Two, it sets forth, in paragraphs 1(a) and 2(a) the requirement of prior resort to dispute settlement procedures as a condition of lawful resort to counter-measures. Paragraph 1(a) provides that no CM shall be

taken by the injured State 'prior to: (a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter and any other dispute settlement instrument to which it is a party'. The envisaged DSMs thus include all the means listed in Article 33 of the Charter, from the simplest forms of negotiation to the most elaborate judicial settlement procedures.

By making the concept of 'available' procedures all embracing instead of confining it, as had been envisaged by the previous Special Rapporteur (SR) to third party settlement procedures capable of being unilaterally initiated, sub-paragraph (a) of Article 1 was intended to impose, perhaps too severely, maximum restraint on the injured State.

*2. Draft Article 12(1)(b)*

13. This paragraph is a simplification of the previous Special Rapporteur's detailed proposals on notification. It merely enjoins the injured State not to resort to CMs prior to giving 'appropriate and timely communication of its intention' to the wrong-doing State.

*3. Draft Article 12(2)(a)*

14. Paragraph 2(a) balanced the stringent requirement contained in paragraph 1(a) by providing that the said requirement did not apply if the 'wrongdoing State did not cooperate in good faith' in selecting and implementing available settlement procedures. This attenuation was intended to operate, in particular, with regard to those kinds of settlement procedures the 'availability' of which is less immediate or effective than those that can be set into motion by unilateral initiative. I refer to the procedures requiring from both sides, as most of the settlement means listed in Article 33 of the UN Charter, a display of good faith and goodwill in the absence of which no agreement could effectively make 'available' either a direct settlement or a third party settlement procedure.

Indeed, it is more particularly with regard to negotiation – the most rudimentary, no doubt, among the means listed in Article 33 of the Charter – that should come into play the reference to the alleged law-breaker's good faith contained in paragraph 2(a) of Draft Article 12 (as well as the reference to 'adequate response' contained in the SR's Draft Article 11).

*4. Article 12(2)(b) and (c)*

15. Paragraph 2(a) was not, however, the only attenuation of the severity of paragraph 1(a)'s requirement.

By sub-paragraphs (b) and (c) of the same paragraph 2, the condition of prior resort to the available dispute settlement procedures did not apply:

(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;

and

(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.

The said exceptions to the requirement of prior 'exhaustion' would not apply, however, according to paragraph 3 of Draft Article 12, '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.' This 'exception to the exceptions', as some members humorously called it, was meant to discourage abuse of allegedly 'provisional' or 'protective' measures on the part of an allegedly injured State.[8]

16. In the 1992 plenary debate, the Commission's reactions to the proposed Article 12 were mostly positive. Article 12 was in fact referred to the Drafting Committee, at the conclusion of that debate, together with the other Articles (11, 13 and 14) relating to the *régime* of counter-measures.

While, however, many members of the Commission found considerable merit in the attempt to strengthen the requirement of prior resort to amicable means of settlement, some members found the requirement too strict. They objected, in particular, to the extension of the requirement to *all* available procedures and to the vagueness of the concept of 'availability': two points on which some adjustment might be necessary.

17. Any such adjustments became moot, however, when the Draft Articles were taken up by the Drafting Committee at the following, 1993, Session. The *majority* of the members of that Committee confirmed the view they had expressed in the plenary debate of 1992, namely, that Article 12 should spell out, as proposed, an obligation of *prior* recourse to DSMs on the part of the injured State. However, that majority did not manage to reflect itself in the tenor of the Article 12 that the 1993 DC provisionally came to adopt. Furthermore, the text of that Article differs very considerably also in other respects from the SR's 1992 proposal. In addition, important changes have been introduced (by the 1993 DC) in a part of Article 11 closely related to Article 12.[9]

8 This provision was found to be so difficult to understand by some members of the Commission that the Special Rapporteur gave up any effort to defend it. On second thought, however, we believe that the provision should be retained. (See *infra* paras. 45-46).

9 Indeed, one of the main changes in Article 11 is the elimination of the concept of 'adequate response' which figured in the SR's draft of 1992. Under that formula the (alleged) law-breaker could avert CMs if, for example, it accepted in principle some liability or negotiation, the (allegedly) injured State being precluded from resort to CMs as long as at least a dialogue was

The following paragraphs analyse the 1993 DC formulation and compare it with the original 1992 proposal. This will be done also in the light of the 1993 DC Chairman's statement to the plenary of July 13, 1993 illustrating the four Articles (11, 12, 13 and 14) adopted by the Committee in the course of the Session (but not adopted yet by the *plenum* of the ILC).

## B. The 1993 Drafting Committee's Text of Article 12

### *1. The 1993 Drafting Committee's Article 12(1)(a)*

18. By far the most important feature of the 1993 DC's Article 12 is the abandonment of that fundamental point of the 1992 SR proposal which was the *prior* exhaustion of available DSMs as a condition of lawful resort to CMs. According to the 1993 DC's formulation, 'An injured State may not take counter-measures unless: (a) it has recourse to a [binding/third party] dispute settlement procedure' etc. Nothing being said about the time element, it is clearly implied that the requirement in question would be met by the injured State *whenever* it chose to have recourse to the envisaged DSMs. In other words, recourse to such means may well accompany or follow, instead of preceding, resort to CMs.

19. A different reading seems to be suggested in the cited statement of the 1993 DC Chairman. According to that statement the DC found it 'preferable not to spell out the temporal element in the text and opted for a formulation *emphasizing the conditions that must be met from the start* for counter-measures to be lawfully resorted to'.[10] This is, however, an understatement of the legal impact of a provision in which nothing is said about the temporal element. To say nothing means inevitably that nothing is *meant* about the temporal element. And that would inescapably be understood in the sense that, in so far as Article 12 is concerned, the temporal relationship between resort to CMs and recourse to DSMs is indifferent; it is left to the discretionary appreciation of the allegedly injured State. The expression 'from the start' embodied in the cited statement – and not in the Article – seems to be not in conformity with the text.

20. The abandonment of the DSMs priority is aggravated by that further major change which is represented by the narrow definition of the DSMs to which the injured State would be obliged to have resource. These DSMs would be, according to Article 12(1)(a), only those which the States involved 'are bound to use under any *relevant* treaty to which they are parties' (emphasis added).

pursued by the other side in good faith. This possibility seems to be excluded by the 1993 DC's formulation of Article 11. Under that provision the (allegedly) injured State's *faculté* to resort to CMs would be open 'as long as' the (alleged) law-breaker 'has not *complied* with its obligations' (of cessation/reparation). CMs would seem thus to be admissible even where the (alleged) law-breaker responded in a positive way – albeit not yet finally or completely – to the (allegedly) injured State's protests or demands.

10 Cited Statement (SR. 2318) at 8: author's emphasis.

If one reads this provision in conformity with the ordinary, usual concept of legal relevance, one should conclude that a relevant treaty would be any treaty in force between the parties binding them to pursue dispute settlement by amicable means, namely means 'falling short', so to speak, of unilateral CMs. If such was to be the case, the loose obligation deriving from the temporally undetermined requirement of recourse to DSMs would become at least less vague in its object, namely, the DSMs to be used. These would include – subject to the further specifications provisionally enclosed in square brackets and to which we shall refer further on – any DSMs that the parties may be bound to pursue under any dispute settlement treaties, such as the United Nations Charter, multilateral regional dispute settlement arrangements and, of course, bilateral instruments of arbitration, conciliation and judicial settlement.[11] Considering that a dispute over an international tort would be a legal dispute, there would be a high degree of probability that one or more of such multilateral or bilateral treaties would meet the 'relevance' requirement.

21. However, it appears that this was not the intent pursued by the members of the Drafting Committee who were successful in including word 'relevant' in paragraph 1(a). As explained in the cited statement of the 1993 DC Chairman, the 'word 'relevant'' (to be further explained, presumably, in the commentary to the Article before its adoption in plenary) 'refers to a *treaty applicable to the area to which the wrongful act and counter-measure relate*'.

In other words, the only treaties relevant for the purpose of the injured State's (loose) DS obligation would be those covering the *subject matter* affected by the *wrongful act and the CM* in question in each concrete case. If such was to be the reading of paragraph 1(a) of Article 12, the injured State would be entitled to completely disregard, for the purposes of resort to CMs, not only paragraph 3 of Article 2 and indeed the whole Chapter VI of the UN Charter but also any general treaties of conciliation, arbitration or judicial settlement in force between the parties, not to mention the general declarations of acceptance of the ICJ Statute's so-called optional clause. There would only remain the compromissory clauses embodied in the treaties covering the area involved in the wrongful act and the CM in question.

22. Much as one may be disposed to accept the 1993 DC Chairman's statement as a piece of 'authentic' interpretation by the DC of the paragraph in question, one cannot but wonder on what basis, once the text had been adopted in a convention, could it be said, for example, that a general treaty envisaging compulsory conciliation, arbitration or judicial settlement ('compulsory' meaning that the procedure can be initiated by unilateral request or application) is not 'relevant' for a dispute, simply because the dispute happens to involve an alleged international tort. The same question could be asked with regard to a case where the dispute over the

11 The definition of the DSMs to be used would thus be analogous – *mutatis mutandis* – to the definition resulting from the term 'available' used in the SR's 1992 Draft Article 12(1)(a).

wrongful act in question was indisputably covered by a jurisdictional link between the allegedly injured and the allegedly law-breaking party by virtue of their acceptance of the ICJ Statute's optional clause.

Considering, however, that the text under review has been presented in those terms to the plenary, it would be difficult to expect that a broad interpretation of the term 'relevant' could prevail in the ILC plenary, unless the matter was taken up again in depth therein and possibly referred again to the Drafting Committee. It would seem more likely that the plenary would make the narrow meaning of 'relevant' explicit.

23. The restriction deriving from the term 'relevant' attached to the treaties of which the injured State must take account for the purposes of paragraph 1(a) of the 1993 DC's Article 12 would be further aggravated if one accepted in particular as 'authentic' also that part of the DC Chairman's illustration which consists of the phrase 'area to which the wrongful act *and* the counter-measure relate' (emphasis added).

If the 'and' means what it ordinarily means, the treaty must be doubly relevant – both to the wrongful act *and* the CM. One wonders, therefore, *quid juris* where 'wrongful act' and CM fell in different areas. Considering that most CMs do not belong to the class of the so-called 'reciprocity' measures, the possibility of non-coincidence is far from remote. So, what if the two areas are subject to different settlement régimes? What, in particular, if the wrongful act's area is covered by a compromissory clause and the CM is not, or viceversa?

24. If the 'relevant' were to remain in paragraph 1(a) of Article 12 as adopted by the 1993 DC, the future State responsibility convention might well amount to a major weakening if not partial abrogation of amicable settlement obligations existing between the parties to that convention.

Authorizing CMs means authorizing non-compliance with international obligations as a means to impose a solution of a dispute over cessation/reparation of a tort. To do so without providing at least for prior compliance with existing amicable settlement treaties would erode, albeit indirectly, the obligations deriving from such treaties. The entry into force of a State responsibility convention would thus mark, by jeopardizing a considerable part of the existing dispute settlement arrangements, a step backwards in the law of amicable settlement. The ILC would have contributed, in this area, to a regressive development of international law. We will return to this important matter further on.[12]

25. An explanation of the 1993 DC's main choice with regard to paragraph 1(a) is to be found in the cited DC Chairman's statement to the plenary. After noting that the 'Point ... most extensively debated' in the DC 'was whether the use of a settlement procedure should necessarily precede resort to counter-measures or not'

12 Paras. 44 ff.

and adding, even more importantly, that 'the first solution had the definitive *preference of a large number of members*' (emphasis added), the Chairman stated that a different choice would have prevailed in view of the fact that the preferred solution (*i.e.* prior recourse to a settlement procedure) 'would give rise to *several* problems' (emphasis added). According to the same speaker, the problems would have been: (i) first that a requirement of prior recourse 'would be unjustified in cases where the internationally wrongful act continues'; (ii) second, it would not take account of the fact that 'interim measures of protection (such as freezing of assets etc.) might have to be taken by the injured State without prior recourse to a settlement procedure'; (iii) thirdly, according to 'some members' 'there were situations' [outside those of a continuing tort and interim measures of protection,] 'where it would not always be justified to require that resort to dispute settlement should precede the taking of counter-measures'.[13]

Considering that these were the reasons justifying the choice that was made it seems appropriate, for a correct understanding of the text, to take a closer look at them.

26. To begin with the first point, the continuing tort hypothesis should not exclude, in our view, the possibility that the State responsibility project envisage in principle an obligation, on the part of an alleged injured State, to have recourse to DSMs *prior* to resort to CM.

27. In the first place, not all breaches of international obligations are of a continuing character. Even if the rule of prior recourse to DSMs had to be renounced for continuing breaches – a point which is less sure than it may seem at first sight – it is difficult to see why it should not be adopted *at least* for non-continuing breaches.

28. Secondly, it is far from sure that the rule of prior recourse to DSMs could not usefully be adopted for the case of continuing breaches themselves. It must not be overlooked that although one speaks, for the sake of brevity, of the 'injured State' and the 'State which committed the internationally wrongful act' it would be more correct always to speak – or at least *think* – of *allegedly* injured and *allegedly* law-breaking States. As no certainty exists since the outset as to whether a wrongful act has been or is being committed by the allegedly law-breaking State, one should only speak *à la rigueur*, until the issue is resolved in one way or another, of an *alleged* obligation to cease and an *alleged* obligation to provide reparation. Now, there is really not much difference, from this viewpoint, between cessation and reparation. They are both the object of a claim on the part of one or more allegedly injured States. It follows that in most cases of ordinary breaches (and except for interim measures of protection) an immediate resort to CMs is not necessarily more justified for cessation of a continuing breach than it is justified for reparation of the consequences of a completed breach. In either case resort to CMs should be

13 *Supra* note 10, at 8-9.

preceded in principle not only by a demand but also by an attempt at dialogue and possibly settlement by amicable means. For a continuing breach – as well as an urgent reparation of a very serious breach – the answer should be interim measures: – something about which must now be said.

29. Be it as it may of the preceding considerations, an injured State's obligation of prior recourse to amicable means must not necessarily be viewed as absolute in any case.

Whether the alleged tort is a completed or a continuing one, some room should be left for any measures which may be necessary in order to ensure a provisional protection of the allegedly injured State's right. Much as it may be true that interim measures are not easy to define – a point to which we must revert again further on[14] – the difficulty of so doing (not tackled by the 1993 Drafting Committee more than the plenary) – was not surely a justification for that DC to abandon – for either kind of alleged breaches – any idea of a prior recourse to DSMs.

As acknowledged by the DC's Chairman in his cited presentation, the Draft Article proposed by the Special Rapporteur in 1992 *did provide* for the interim measures exception to the general rule of prior recourse to DSMs. Paragraph 2(a) of that Draft Article stated that the

> condition [of prior recourse to legally available dispute settlement provisions] does not apply ... (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.

As stated in the Drafting Committee Chairman's statement of 13 July 1993,

> It [was] true that the Special Rapporteur had addressed [the issue of unilateral protection measures] by way of an exception ... to the general rule of prior resort... But the Drafting Committee did not find it appropriate to follow that approach in view of the vagueness of the concept of 'interim measures' of protection taken by the injured State.[15]

It seems odd, however, that while thus rejecting interim measures, this notion is in practice maintained – as indicated in the cited DC Chairman's presentation – within the framework of the DC's formulation.

30. Indeed, it is difficult to see in what sense the vagueness of the concept of interim measures could have induced the 1993 DC to meet the problem of continuing breaches by the abandonment of the prior recourse to DSMs requirement. The lamented – and partly unavoidable – vagueness of the concept of interim measures as used by the SR could only favour the allegedly injured State's position. The more vague the concept of interim measures, the greater the possibility for the latter to avail itself of the exception to the rule of prior recourse.

14 This issue will be returnd to *infra* text paragraphs 47 to 50.

15 *Supra* note 10, at 8-9.

Assuming that the ILC or the DC considered this to be undesirable, they should have made at least an attempt to reduce the uncertainty of the concept: but nothing of the kind was done by either body. It is therefore even harder to understand how the 1993 DC could have been persuaded instead that the broadness of the interim measures exception to a rule of prior recourse (particularly in the case of a continuing breach) should be remedied, for any kind of breach, by a ... total abandonment of that rule.

31. Coming now to the third reason indicated in the cited statement, it would be difficult to see in what further situations – 'outside' of continuing breaches and other cases calling for interim measures – 'some members' believed that 'it would not always be justified to require that resort to dispute settlement should precede the taking of counter-measures'. Again, one can hardly see why, if exceptions had to be made to the rule of prior recourse to amicable settlement this could not be done either by permitting (possibly better defined) interim measures of protection or by expressly allowing any kind of CMs whenever the allegedly law-breaking State failed to 'cooperate in good faith in the choice and the implementation of available settlement procedures' (as in the original paragraph 2(a) of the 1992 Draft Article). One fails to see in what sense it was, on the contrary, inevitable to set aside *any idea* of prior resort to amicable means altogether and to back up the notion of the total discretion of the allegedly injured State.

32. Although the abandonment of the *prior* recourse to DSMs requirement is a major defect of the 1993 DC formulation of Article 12, it is surely not the only one.

Another serious defect of that text is the failure to meet the equally essential problem of the definition of the DSMs recourse to which should be had by an allegedly injured State. As indicated by the presence of square brackets in the relevant parts of paragraph 1(a) and (b) – not to mention for the moment paragraph 2 – the 1993 DC text leaves that issue open for the *plenum* of the ILC to decide. More than three possibilities must thus be considered.

One alternative would be that paragraph 1(a) and (b) envisage *any* amicable dispute settlement procedures, ranging from ordinary negotiation, mediation and conciliation to arbitration, judicial settlement and recourse to universal or regional political bodies. A second alternative would be that both 1(a) and 1(b) envisage only *third party* settlement procedures including, however, both binding and non-binding procedures. This alternative would encompass conciliation as well as arbitration and judicial settlement. A third possibility (judging from the square bracketed words) would be that both 1(a) and 1(b) only envisage, as the object of the injured State's rather loose obligation of recourse to amicable means, *binding* third party procedures, namely arbitration and judicial settlement only.

These are however not the only possibilities. As noted in the 1993 DC Chairman's statement of last July, some members of the DC favoured one solution

for paragraph 1(a) and a different solution for paragraph 1(b).[16] Such a diversification would open the way to an additional number of alternatives. For the sake of brevity, we shall confine ourselves to the (three) main alternatives.

33. If Article 12(1)(a) and (b) were to be read in such a broad sense as to cover *all* DS procedures, it would bring about a degree of restraint (of the injured State's discretion) relatively close, *mutatis mutandis*, to that envisaged in Draft Article 12 as proposed by the SR and referred to the Drafting Committee in 1992. The amicable settlement effort obligation would extend in principle to *any* DSMs, from mere negotiation to any kind of judicial or political, binding or non-binding third party procedures.

Two capital differences, however, would still distinguish, surely, the 1993 DC formulation.

One difference would be, of course, the crucial, noted disappearance of the *prior* recourse requirement.[17] The injured State would remain free to choose whether recourse to amicable means should precede, accompany or follow resort to CM.

The second, equally crucial, difference resides in the likely restriction (of this already loose injured State's obligation) which would derive from the expression '*relevant* treaty'. In the measure in which 'relevant' treaties were considered to be only those governing the subject matters affected by both the alleged wrongful act and the CM, the injured State's obligation might prove to be very limited indeed. It would include recourse neither to the means provided for by such general instruments as the Charter nor the means provided for by general, bilateral or multilateral DS treaties (namely, general treaties of conciliation, arbitration or judicial settlement). The prior, contemporaneous or subsequent recourse to such procedures would only be mandatory, under 12(1)(a), in the measure in which it was obligatory under a compromissory clause embodied in the treaty governing the area of inter-State relations affected by the alleged breach and/or the CMs; – in other words, under the compromissory clause of the treaty allegedly infringed by the wrongful act and/or the CM.

34. The 1993 DC's requirement of recourse to DSMs would be even less strict if Article 12(1)(a) was to be read, under alternatives two and three, as referring to *third party* procedures only or, even worse, to *binding* third party procedures only. Considering the further limitation deriving from the restriction of the requirement to the use of the DSMs envisaged by 'relevant' treaties – in the presumably narrow sense of that term – the injured State's obligation would be far narrower than the obligation that the same provision would envisage in alternative one. *A fortiori*, it

16 If, for example, sub-para. 1 (a) envisaged *any* DS procedure while sub-para. 1 (b) only envisaged third party procedures, or viceversa, and para. 2 envisaged one or the other – or even a third – solution. The possible combinations would obviously be very numerous.

17 The question whether the requirement should be spelled out in terms of recourse, implementation or 'exhaustion' (the latter concept appearing in the Special Rapporteur's 1992 proposal) should be more carefully debated than it has been done so far in the ILC.

would be narrower than the obligation deriving from the Special Rapporteur's 1992 Draft Article 12(1)(a). Under alternative two the injured State would only be obliged to have recourse to conciliation, arbitration or judicial settlement envisaged by 'relevant' treaties (in the narrow sense explained); under alternative three it would only be obliged to have recourse to arbitration and judicial settlement envisaged by the said 'relevant' treaties.

*2. The 1993 Drafting Committee's Article 12(1)(b)*

35. Subparagraph (b) of paragraph 1 of the 1993 DC's Article 12 provides for the case where no 'relevant' settlement obligation exists between the parties in a responsibility relationship. In such a case – presumably a frequent one especially if the choice of the ILC was to fall upon the second or third of the alternatives left open by the DC in 12(1)(a)[18] – the injured State is enjoined to offer to the other party to resort to a DS procedure. Considering that the kind of procedure to be offered is characterized in paragraph 1(b) by the same square-bracketed language of sub-paragraph 1(a), one faces again a number of alternatives. As well as in 1(a), the main alternatives would seem to be three, namely: (i) *any* DSMs; (ii) *any third* party DSMs; and (iii) only *binding* third party DSMs.[19]

36. According to the cited statement of the 1993 DC Chairman, the possibility covered by sub-paragraph 1(b) was not provided for in the Special Rapporteur's 1992 proposal. This is *formally* correct, in the sense that that proposal did not envisage *expressly* the case where no DSMs were available to the injured State by way of an applicable international legal rule. However, any lawyer can see that the tenor of the Special Rapporteur's Article 12 of 1992 was such as to make the very possibility of such a 'gap' in the parties' DS obligations extremely improbable.

By enjoining the injured State to have recourse to *any* DSMs *legally available* under general international law, the UN Charter or any other DS instrument in force between the parties that Article covered such a broad *spectrum* of DSMs, that the injured State would *at least* be bound to try negotiation: *and thereby,* if nothing else was available, it could also propose to move to more elaborate means among those contemplated in Article 33(1) of the Charter. The theoretical gap would be thus filled in practice thanks at least to the latter provision.

37. The important difference to be stressed between the 1993 DC's Article 12(1)(b) and the Special Rapporteur's 1992 draft proposal is a different one. It resides, as explained *supra*, in the temporal element. In the 1992 proposal any offer would have to *precede* resort to CMs. The 1993 DC provision would instead be complied with even by an offer *following* or *accompanying* CMs. A further difference would come about if the *plenum* of the ILC, in finalizing the paragraph in question, chose

18 Para. 32 *supra.*
19 Same para. 32.

to exclude the first alternative (*any* DS means) leaving open only the second (*any* third party procedures) or the third (*only binding third party* procedures). The injured State's offer would thus have to be restricted to more effective means than negotiation under alternative two or conciliation under alternative three. In that *very modest* measure the 1993 DC solution might appear – were it not for the crucial 'gap' represented by the 'relevant' treaty clause in sub-paragraph 1(a) – more demanding for the injured State. Considering, however, the temporal element – considering, namely, that the injured State is not required to make a third party or binding third party settlement offer *prior* to resorting to CMs – that *prima facie* advantage is illusory.

*3. The 1993 Drafting Committee's Article 12(2)*

38. While abandoning the *prior* recourse to DSMs requirement, the 1993 DC's formulation of Article 12 does make an attempt to restrict the injured State's *faculté* to resort to CMs. To that effect paragraph 2 of the Article provides that that *faculté* 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.

The term 'agreed' seems to refer, as explained by the 1993 DC Chairman in his cited statement,

> both to procedures under pre-existing obligations as envisaged in paragraph 1(a) and to procedures accepted as a result of an offer under paragraph 1(b).[20]

It is difficult to analyse the function of this provision within the framework of the 1993 DC formulation of Article 12 – and to compare it with the SR's Draft Article 12 – due to some obscurities in the text.

The main obscurity derives from the fact that unlike paragraph 1(a) and (b) the square-bracketed word 'binding' is not accompanied by a reference to third party procedures. In any case, it would seem that the intention of the DC members who wished to leave out non-binding procedures was to exclude not only conciliation but also negotiation from the procedures the initiation of which would suspend the injured State's *faculté* to resort to CMs. The provisional formulation of paragraph 2 of the 1993 DC's Article 12 would thus embody two alternatives. Under one of these the suspensive effect would only occur in the presence of an arbitration or judicial settlement procedure. Under the other alternative the suspensive effect would also derive from the initiation of conciliation or negotiation.

20 *Supra* note 11, at 9.

39. Prohibiting the use of CMs while an amicable settlement is being pursued – and suspending any CM already taken – seems to be a correct solution. It is also natural that the suspension should not be mandatory where the allegedly law-breaking State does not pursue the procedure in good faith.

This requirement seems to be particularly appropriate when a settlement is being sought by negotiation or conciliation. It is less so, perhaps, where the parties are engaged in an arbitral or judicial procedure, where the ... procedural good faith of both parties is subject to the adjudicating body's vigilance and measures. The good faith requirement would remain essential, however, in the phase of preparation of the arbitral or judicial procedure; in case of indication, by the tribunal, of interim measures of protection; and, of course, at the moment when the Tribunal issued a decision which would have to be complied with in good faith by both sides.

40. We are less sure – for the reasons indicated in paragraph 28 *supra* – about the appropriateness of that second condition of suspension which would be, according to the DC's formulation of paragraph 2 of Article 12, the cessation of the allegedly unlawful conduct on the part of the alleged wrongdoer.

As explained earlier, this requirement would be fully justified if the existence and attribution of the unlawful act had been ascertained.[21] Here, again, cessation should not ordinarily be dealt with any differently from reparation. Although this seems to be especially correct whenever the pending procedure is a third party procedure, it should be the right solution even where a negotiation is being pursued in good faith by the alleged wrongdoer.[22]

### *4. Paragraph 3 of the 1993 DC's Article 12*

41. The third paragraph of the 1993 DC's Article 12 reads rather cryptically that 'A failure by the [wrong-doing State] 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 counter-measures'. Although the term 'interim measure' does not appear, it is presumable that it is precisely to interim measures that this provision refers when it speaks of 'a request or order emanating from the dispute settlement procedure': and it is surely appropriate that a failure by an allegedly wrong-doing State to comply with such a request or order should lift the suspension of the injured State's *faculté* to take CMs.

It must be noted, however, that the only DSMs from which an interim measures 'request or order' could emanate are third party procedures – and in principle only

21 Together, of course, with the absence of any circumstances excluding wrongfulness.

22 This point would be covered, we submit, not only by the 'good faith' reference in para. 2(a) of Draft Article 12 as proposed by the Special Rapporteur in 1992, but also by the 'adequate response' requirement indicated as a condition of lawful resort to CMs in Draft Article 11 as proposed by the Special Rapporteur in the same year. The latter concept was also set aside as too vague by the 1993 DC (footnote 9, *supra*).

judicial procedures. It follows that this provision might require some reconsideration in the hypothesis that the settlement procedures envisaged as 'suspensive' (in paragraph 2 of Article 12) were to include, once the square-bracketed alternatives were resolved, any procedures not envisaging the possibility of request or order of interim measures. Such would be the case for negotiation and, in principle, ordinary conciliation and the ordinary forms of arbitration.

*5. Main Shortcomings of the 1993 Drafting Committee's Formulation of Article 12*

42. Much as one may concede to the difficulty of accomplishing more significant steps forward in the development of both the law of State responsibility and the law of amicable dispute settlement, one cannot fail to be impressed by the degree to which the 1993 DC's formulation of Article 12 – not to mention Article 11[23] – falls short of any measure of progress in such vital areas. From that viewpoint it marks a striking departure not just from Draft Article 12 proposed by the present SR but also from Draft Article 10 proposed by his predecessor: both drafts having been referred by the ILC to the DC in 1992 and 1985-1986, respectively.

In addition to the obscurities and technical defects discussed so far, the most serious shortcomings of the 1993 Article 12 can be summed up as follows.

43. On the one hand, the adopted text of Article 12 almost totally fails to counterbalance the legitimation of unilateral CMs by adequately strict obligations of *prior* recourse to amicable DSMs. On the contrary, an allegedly injured State:

(i) would remain free, under the future responsibility convention, to resort to CMs *prior* to recourse to any amicable settlement procedure;

(ii) would in addition only be obliged to have recourse (at any time it may choose) to such means as are provided by a 'relevant' treaty (in the explained narrow sense);

(iii) the obligation so narrowly circumscribed would be further narrowed down if the future responsibility convention were to confine it to such means as *third party* procedures or, worse, to *binding* third party procedures; and

(iv) furthermore, the 1993 DC's formulation completely ignores the problem of prior and timely communication, by the injured State, of its intention to resort to CMs. This requirement was set forth in paragraph 1(b) of the SR's Draft Article 12. According to the DC's formulation the injured State would instead be relieved of any burden of prior notification of CMs (and no chance of 'repentance' would be left for the law-breaker).

44. Secondly – but not less importantly – by not condemning resort to CMs *prior* to recourse to DSMs to which any participating States may be bound to have recourse under instruments *other* than the Responsibility Convention, the 1993 DC's

23 On one of the contestable elements in the 1993 DC's formulation of Article 11 see footnote 9 *supra*.

formulation would seem to relieve such States, in so far as the Responsibility convention was concerned, from their amicable DS obligations.

Inevitably involved anyway in the mere fact of not imposing recourse to amicable means *prior to CMs*, the jeopardy of the said DS obligations would be further aggravated, firstly by the 'relevant' treaties clause; secondly by the exclusion of given DSMs under the above-mentioned alternatives two and three.

45. The negative impact of the provision in question upon existing DS obligations seems to be more serious than it may first appear. *Prima facie*, it could be argued that the fact that a Responsibility convention did *not* prescribe *prior* recourse to DSMs provided for by instruments in force between the parties – as would be the case under the adopted 1993 DC's formulation of Article 12(1)(a) – would not affect the validity and effectiveness of the parties' obligations under such instruments. It could be argued, for example, that since armed reprisals are prohibited – a rule that the convention could not fail to codify[24] – the CMs to which an injured State could lawfully resort would not contravene the general (and practically universal) obligation to settle disputes by *peaceful* means as embodied in paragraph 3 of Article 2 of the UN Charter. No doubt, lawful CMs are bound to be peaceful.

We wonder, however, whether such a consideration dispels any doubt. Letting aside the question to what extent CMs would be compatible with that further requirement (of the same Charter provision of Article 2(3)) that international peace and security, *and justice*, are not endangered,'[25] ... the liberalization of CMs embodied in the 1993 DC's formulation of Article 12(1)(a) would not be easy to reconcile with *positive* dispute settlement obligations. I refer for example to such positive obligations as those spelled out in Article 33 of the UN Charter and those deriving, for any parties in a (real or alleged) responsibility relationship, from bilateral dispute settlement treaties or compromissory clauses. Much as one may concede to the 'free choice' of means principle under which Article 33(1) of the Charter is generally read, one finds it difficult to accept the notion (too easily accepted by the 1993 DC) that resort to a CM before seeking a solution by one of the means listed therein would be compatible, under existing customary and Charter law, with Article 33(1).[26]

Far less, we submit, would a prior resort to CMs be compatible either with a treaty or a compromissory clause providing for the arbitration of legal disputes not settled by diplomacy (CMs hardly qualifying, we assume, as part of diplomacy). Even less would prior resort to CMs be compatible with the existence between the

24 See for example Article 14 as proposed by the Special Rapporteur in 1992 and adopted by the 1993 Drafting Committee.

25 This point was covered by the SR's Draft Article 12(3): on which *supra* para. 15.

26 No one could seriously argue that since Article 33(1) refers to disputes 'the continuance of which is likely to endanger the maintenance of international peace and security', many disputes arising in the area of State responsibility would not be of such a nature as to fall under the general obligation set forth in Article 33(1).

parties of a jurisdictional link deriving from their recognition 'as compulsory *ipso facto* and without special agreement' of the 'jurisdiction of the [ICJ] in all legal disputes concerning': either 'the existence of any fact which, if established, would constitute a breach of an international obligation' or 'the nature and extent of the reparation to be made for the breach of an international obligation'.

46. It should not be overlooked either that by referring to (relevant) *treaties* only, paragraph 1(a) of the 1993 DC's Article 12 would put into question – if it ever became law – more than just a (considerable) part of the existing and future *conventional* instruments of amicable dispute settlement. It would also cast an 'authoritative' doubt over any existing rules of *general international law* in the area.

Assuming, for example, that paragraph 3 of Article 2 of the United Nations Charter had become a principle of customary international law, wouldn't the survival and development of such a principle be affected by the provision of a codification convention authorizing any allegedly injured State to resort to CMs *ipso facto*, namely without any *prior* attempt at an amicable settlement? Does that principle have the merely *negative* function of condemning *non-peaceful* means? Doesn't it also contain – as we are inclined to believe – *positive* indications with regard to *amicable* means as well as 'justice' and 'international law', especially the former? Wouldn't an authorized disregard of available amicable means – means spelled out in the Charter itself – affect the degree of *justice* of a solution?[27] Assuming further that the survival of the general principle in question was not jeopardized, wouldn't paragraph 1(a) of the text under review jeopardize its further development?

46bis. The shortcomings of the 1993 DC formulation of Article 12 of Part Two are probably due, in addition to the great difficulty of the subject and the shortness of the time that was available, to the fact that that Article was worked out prior to the consideration by the Committee of the Special Rapporteur's proposals concerning the post-CMs dispute settlement provisions, namely, the provisions of Part Three of the project, to which we shall revert in Section IV of the present paper.[28] Debated in plenary at the same session of the ILC (*infra* paragraph 81), the latter provisions were referred to the DC rather late in that session, at a time when the DC was already debating on Article 12. Considering the high degree of interaction between the pre-CMs and the post-CMs settlement obligations to be envisaged in the project, the 1994 DC would probably be well-advised if it decided, at the coming session, to reconsider the formulation of Article 12 of Part Two in conjunction with the work it is expected to undertake on the post-CMs provisions of Part Three. The close connection of Article 12 of Part Two (pre-CMs) with Part Three (post-CMs) was authoritatively emphasized, during the 1993 session, by some members of the DC.

27 The reference to 'justice' was covered, in the SR's 1992 proposal, by para. 3 of Article 12: – on which *supra* paras. 15 and 50.

28 *Infra* paras. 51 to 80 *et seq.*

## III. Interim Measures Issues

47. Something more needs to be said at this stage – mainly but not exclusively within the framework of the pre-CMs DS problem – on the role that may or should be played by interim measures. One must distinguish, in this respect, between interim measures indicated or ordered by a third party body and interim measures taken by the injured State unilaterally.

(a) Beginning with the former, the general rules on the subject are the well-known Article 41 of the ICJ Statute and Article 40 of the UN Charter, both provisions using the expression 'provisional measures'. In the SR's proposals, interim measures by a third party procedure are envisaged mainly in Part Three, namely, within the framework of post-CMs dispute settlement obligations. (*infra* paragraphs 56 ff.). Under the provisions of that Part, the third party called to operate with regard to a post-CM dispute should be empowered, by the future convention, to *order* interim measures. This would apply to the conciliation commission as well as to the arbitral tribunal or the ICJ. Third party indications or orders of interim measures are also considered, together with unilateral interim measures, in the SR's 1992 proposal of Article 12(2)(a) and (b), to which we now turn.

48. (b) As regards unilateral interim measures, resort thereto by the injured State is contemplated in the SR's 1992 Draft Article 12 as an exception to that State's obligation of prior recourse to available DSMs. The injured State's *faculté* to adopt unilateral interim measures is restrictively qualified – under paragraph 2(a) and (b) of the cited Article – by two conditions.

One condition is that the measure's object be the *protective* purpose which is inherent in the concept of interim measures. This requirement would be met, for example, by a freezing – as distinguished from confiscation and disposal – of a part of the allegedly law-breaking State's assets; or by a partial suspension of the injured State's obligations relating to customs duties or import quotas in favour of the allegedly law-breaking State.

The second requirement is that the injured State's *faculté* to adopt interim measures can only be exercised temporarily, namely 'until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure'.

49. Considering that the concept of interim measures of protection might prove to be too broad and imprecise – as rightly (although unconsequentially) pointed out by some ILC members in the course of the 1992 debate – for the injured State's *faculté* not to be abused of, some further precision should be spelled out in the paragraph. One of the main hypotheses where the adoption of interim measures would be justified – *but not the only one* – is, of course, that of a continuing breach.

50. Much as the future State responsibility convention may succeed in defining interim measures and the conditions under which they may be lawfully resorted to, a

high degree of discretionary appreciation will inevitably remain with the injured State. Three factors, however, should help ensure a reasonable measure of restraint on the part of the injured State's authorities.

One factor should be an accurate, *bona fide* appreciation, by the injured State, of the alleged wrongdoer's response to its demand for cessation/reparation. This criterion is expressed more than once, with regard to any kind of counter-measures, in the SR's proposals of 1992. Firstly, it is inherent in the general concept of 'adequate response' from the allegedly law-breaking State (in Draft Article 11). Secondly, it appears in paragraph 2(a) in the condition of good faith (on the part of that same State) in the choice and implementation of available settlement procedures.

A second factor is – always within the framework of the SR's 1992 proposals – the condemnation, in paragraph 3 of Article 12, of any measure (including an interim measure) 'not in conformity with the obligation to settle disputes in such a manner that international peace and security, *and justice*, are not endangered'.[29]

The third and most important factor is represented, within the framework of the SR's proposals of 1992, by the post-CM DS system of Part Three of the project. Any third party body called upon to deal with the dispute under that Part Three (conciliation commission, arbitral tribunal or ICJ) would be empowered by the future convention not only – as already noted – to order interim measures but also to suspend any measures previously taken by the allegedly injured State.

The references to interim measures in the 1993 DC's Article 12 have been considered *supra*.

## IV. Post-CMs Dispute Settlement Obligations

### A. The Special Rapporteur's 1993 Proposals: Draft Articles 1 to 6 and the Annex of Part Three of the Project

51. Draft Articles 1 to 6 of Part Three and the Annex thereto, as proposed in 1993 (see the Appendix), are conceived, in conformity with the chosen middle course between the minimalist and the maximalist approach, in such a manner as not to affect directly the injured State's prerogative to resort to CMs (although under the conditions and restrictions set forth in Part Two, Draft Articles 12 – as well as 11 and 13-14 – included).

52. At the same time, the said Draft Articles (1 to 6) – the content of which is interrelated with the provisions of Article 12 – are so conceived as to reduce the risk of arbitrariness of the injured State's reaction by subjecting it to *ex post facto* third party verification. The solution proposed would consist in fact of third-party

29 On the role of this provision, see paras. 3, 15 and 45 *supra*.

settlement procedures which would come into play compulsorily – namely on the unilateral initiative of either party – only after a dispute had arisen between an allegedly injured State and an allegedly law-breaking State over the lawfulness of CMs resorted to by the former and, possibly, counter-CMs resorted to by the latter.

*1. Conciliation*

53. The first procedure envisaged – and one which could hopefully lead to an agreed solution – is a conciliation procedure only in part identical with that contemplated in Professor Riphagen's 1986 proposal.

54. Either party in the real or alleged responsibility relationship would be entitled to resort to such a procedure in the presence of two primary conditions and one secondary condition. The two primary conditions are that a CM has been resorted to by an allegedly injured State *and* a dispute has arisen following a protest or other reaction on the part of the allegedly wrong-doing State. The secondary condition is that the dispute is neither settled within four months from the date when the CM was put into effect, nor submitted within the same period to a binding third-party settlement procedure.

55. The conciliation commission would be set up on the unilateral initiative of either party in conformity with the provisions of an Annex, partly similar to the one proposed in 1986. The mandate of the conciliation commission would embrace any questions relating to the lawfulness of the contested unilateral action of the allegedly injured State. Such questions would include, as explained in paragraph 65, *infra*, any issues of fact or law which may be relevant under any provision of the future State responsibility convention.

56. As regards the conciliation commission's powers, they would in principle be confined to those which are typical of any conciliation procedure. There would thus be an attempt at conciliation followed in case of failure by a report containing the commission's recommendation of terms of settlement. In addition, however, the conciliation commission would be empowered under the convention: (i) to order, with binding effect, any fact-finding (including *in loco*) which it may deem necessary; (ii) to order, with binding effect, the suspension of any CM resorted to by either party;[30] and (iii) to order (with binding effect) any necessary interim measure of protection.

30 An allegedly injured State's counter-measure might have been followed by a counter-counter-measure (the so-called *contre-représaille*) on the part of the allegedly law-breaking State. The conciliation body should be empowered to suspend both.

*2. Arbitration*

57. Failing success of conciliation – *but only in that case* – the proposed Articles of Part Three contemplate a further step represented by an arbitral procedure. This procedure would come into play, according to Draft Article 3 of Part Three: (i) either in the case where the setting up or the functioning of the conciliation commission within three months from either party's application for conciliation has been prevented by any obstacle; or (ii) in the case where, following the commission's final report, no settlement has been reached between the parties within four months from that report.

58. The arbitral tribunal would be appointed in conformity with the Annex. It would be called upon to decide with binding effect – as explained in paragraph 65 *infra* – any issues of fact or law in dispute between the parties which may be of relevance under any of the provisions of the Draft Articles on State responsibility. The Tribunal's decision should be rendered within either 10 months of the date of its establishment or 6 months of the completion of the parties' written and oral submissions.

59. As well as the conciliation commission (and *a fortiori*) the arbitral tribunal would also be empowered to provide, with binding effect: – for fact-finding (including *in loco*); – for the suspension of either party's CMs; – and for the indication of interim measures of protection.

*3. Special Role of the ICJ*

60. The third – even more *eventual* – step contemplated is a special recourse to the ICJ in case:

(i) either of failure, for whatever reason, to set up the arbitral tribunal, unless the dispute is settled by other means within six months of such failure; or

(ii) of failure of the arbitral tribunal to issue an award within the prescribed time-limit of ten or six months. In such cases, either party could unilaterally submit the matter to the International Court of Justice.

(iii) The competence of the ICJ should also be envisaged in the case of *excès de pouvoir* or in case of violation by the tribunal of a fundamental principle of arbitral procedure.

In either case, either party would be entitled to refer the matter to the ICJ by unilateral application.

61. As well as the arbitral tribunal and the conciliation commission, the ICJ should also be empowered to decide, with binding effect, on fact-finding (including *in loco*), on the suspension of either party's CMs and on interim measures of protection.

*4. Features of the Proposed Solution for Part Three*

62. The main feature of the proposed solution, surely the most important to assess its feasibility, is that the envisaged procedures would not be of such a nature as to directly curtail, in any significant measure, the injured State's *faculté* to resort to CMs. The appreciation of the lawfulness of resort to CMs, namely, the determination of the presence of an internationally wrongful act of the target State and of the existence of the conditions set forth in Draft Articles 11 to 14.– would remain in principle a prerogative to be exercised unilaterally, although at its risk, by the injured State itself, subject to any agreement to the contrary in force between the parties. The inclusion of the proposed binding third-party settlement provisions in Part Three of the Draft Articles would not directly affect this prerogative. The proposed settlement procedures would merely be activated after the injured State has made such determination and actually applied a CM.[31]

63. It should thus be clear what role the proposed dispute settlement system would perform within the framework of the State responsibility relationship. While not directly precluding, as explained, resort to CMs by the injured State, the availability of the system should have a sobering effect on an injured State's decision to resort to unilateral reaction. However, it would not be the kind of system for suspending unilateral action (*dispositif de freinage de l'action unilatérale*) that is found in other ILC drafts. I refer, for example, to the Draft Articles on the law of the non-navigational uses of international watercourses under which the implementation of a project on the part of a State may have to be suspended while a given procedure of consultation and/or conciliation is pursued. Within the framework of the system proposed for the State responsibility draft, the CM would not be suspended, except by an order of a third-party body *after* the initiation of a settlement procedure. In other words, the disincentive to a CM that the proposed system would bring about would operate in the 'mind', so to speak, of the injured State's authorities. They would hopefully be induced to exercise a higher degree of circumspection in weighing the conditions and limitations of a possible CM.

64. A second essential feature of the proposed system is that, failing an agreed settlement at any stage, it would offer all the advantages of a 'third-party' process. Firstly, it would lead in any case to a *binding settlement* of the dispute. This result would obviously be assured either by both parties' acceptance of terms of settlement recommended by the conciliation commission in its report, or, failing such agreement, by the award of an arbitral tribunal.

31 The latter point should be stressed beyond any possible misunderstanding. The 'triggering mecanism' (*méchanisme déclencheur*) of the settlement obligations the parties would be subjected to under the proposed Part Three is neither an alleged breach of a primary or secondary rule of customary or treaty law nor the dispute that may arise from the contested allegation of such a breach. It is only the dispute arising from a contested resort to a CM on the part of an allegedly injured State (and possibly a resort to a counter-reprisal from the opposite side) which triggers the dispute settlement system. See, however, *infra* text paragraphs 65 to 66 .

Furthermore, the presence of a 'third-party' body would permit both the binding *suspension* of the unilateral measures undertaken or the binding indication of *interim measures* of protection.

65. A third important feature of the proposed system is the broad scope of the 'third-party' body's competence. Although the 'triggering mechanism' would be, according to the proposal, the dispute arising from the allegedly law-breaking State's reaction to a CM, the scope of the conciliation, respectively arbitration procedure – and of any 'second degree' involvement of the ICJ – could not be circumscribed to a merely partial verification of the lawfulness of the contested CM. Such would be the case if the conciliation commission or the arbitral tribunal were to confine itself to verifying whether the CM was resorted to in compliance with the conditions and prohibitions set forth in Draft Articles 12 to 14 of Part Two as proposed in 1992, namely in compliance with the rules *most directly* affecting the legality of a CM. I refer to such rules as that of Draft Article 12 (on prior exhaustion of available settlement means), 13 (proportionality) and 14 (prohibited CM). This would not *exhaust* the conditions of legality of the unilateral reaction to be verified by the third party body. Indeed, those conditions also include – as clearly implied in Draft Article 11 as proposed in 1992 – the existence of a wrongful act, the attribution of the act to the target State, and the absence of circumstances excluding wrongfulness.

66. It follows that the conciliation, arbitration or judicial settlement procedures envisaged for Part Three would deal not only with any issue of CM legality *in a narrow sense* but also with *any other issue* of fact or law concerning the interpretation or application of any of the Articles of the future Responsibility convention, Part One and the 'substantive' portion of Part Two included.[32]

This point is expressly stated with regard to conciliation and arbitration in Draft Article 2(1)(a) and Draft Article 4(1) of Part Three, respectively.[33] It is explained in paragraph 73 of the Fifth Report (1993).[34]

### *5. The Proposed DSMs and the Parties' Freedom of Choice of Means*

67. A further important feature of the proposed system is that, while ensuring a third party settlement in any case by circumventing (thanks to the compulsory nature of the procedures) any possibility of evasion by either side, it does not dramatically hinder the parties' choices with regard to other possible means of settlement. This is notoriously a prerogative that States are reluctant to renounce.

32 Article 11 itself surely implies that the legality of a counter-measure depends in the first place upon the existence of an internationally wrongful act and the attribution thereof to the target State. Such requirements 'call in', so to speak, all the issues of fact or law covered by Part One of the project as well as the 'substantive' rules of Part Two.

33 Documents A/CN.4/453/Add. 1 and A/CN.4/453/Add. 1/Corr. 3.

34 Doc. A/CN.4/453.

68. The proposed system does, indeed, introduce some limitations in that respect. One limitation is that a unilateral application for conciliation can be made if the dispute which has arisen (following resort to a CM) is not settled or has not been submitted to a binding third-party procedure *within four months* from the date when the CM was put into effect. This deadline may be *shorter* than, and in that sense in contrast with, any longer period of time the lapse of which was envisaged in an agreement or arrangement in force between the parties. It is felt, however, that the presence in the Draft Articles of a stricter rule, *i.e.* providing for a shorter deadline for the dispute to be settled or submitted to a third-party procedure, represents a reasonable, and as such acceptable, limitation of the otherwise excessively broad 'free choice' rule of Article 33 of the Charter.[35]

69. A second limitation on the parties' freedom of choice would reside, of course, in the very fact of envisaging a *given* conciliation procedure, namely a conciliation procedure to be initiated and conducted in conformity with the relevant Articles of Part Three and the Annex. Again, this may not be in conformity with any standing or *ad hoc* arrangement between the parties. Under any such arrangement either party might be entitled, for example, to resort to a conciliation commission which is of a *different kind*, set up in a *different way* or endowed with *different powers*. Again, it is submitted that the system proposed should be made to *prevail* over any less stringent rule which might be in force between the parties.

70. Compared to the advantage of a more effective implementation of the Articles on State responsibility these restrictions seem not to represent an intolerable burden for States to accept. Indeed, in the measure in which their different choices did not reduce the effectiveness of the envisaged DSMs – notably the possibility of unilateral initiative from either side – the parties' freedom of choice would not be too gravely affected.

*6. The 'Time Factor'*

71. The fact that the proposed system could extend theoretically over the three 'layers' of conciliation, arbitration and judicial settlement would not justify any fears that the settlement process become too long.

72. It is obvious that although in principle three steps are provided for, it would presumably not be frequent that they be all necessary in every case. The dispute could well be settled during or following the conciliation procedure, namely in one step. Arbitration would come into play *only* in case of failure of conciliation; and the procedure before the ICJ, in its turn, would *only* come into play in case the

35 A discrepancy of this kind may occur, for example, between the provision proposed and the conciliation procedure provided for in the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, Vol. 1155, No. 18232, 331).

arbitral proceedings failed, or the arbitral award was contested for alleged *excès de pouvoir,* or violation of fundamental rules of arbitral procedure.

73. It follows that the envisaged process might actually lead to an earlier settlement than it would be the case for a settlement reached by way of unverified injured party's CMs.

### B. 'Faculté' to Resort to Counter-measures and Dispute Settlement Obligations as Interdependent Aspects of the Instrumental Consequences of Internationally Wrongful Acts

74. Considering the *inconvénients* of unilateral reactions so dramatically denounced in the 1992 UN General Assembly's Sixth Committee, the inclusion, in a State responsibility convention, of post-CMs third-party settlement provisions must be viewed as essential. Just as one cannot fail to recognize that CMs are, for the time being, an indispensable instrument for enforcement of international law, third party settlement procedures must be viewed as indispensable instruments of verification of the proper use of unilateral reactions. The view that the *faculté* of CM belongs to the substantive consequences of internationally wrongful acts (paragraph 10(b) *supra*) is dangerously mistaken and incompatible with the progressive development of the law of State responsibility. CMs and third party procedures must both be viewed as *instrumental* devices to obtain cessation or reparation.

75. The presence in the convention of third party settlement obligations would be highly beneficial in many ways.

Firstly, it would reduce, in the interest of justice, the risk of resort to unjustified or otherwise unlawful CMs on the part of injured or allegedly injured States.

Such a result might of course disappoint that minority of States which oppose the codification of the law of CMs, not because they question the legitimacy of unilateral measures, but because they are reluctant to see the States' *faculté* to resort to them restricted by codified rules. The inclusion of dispute settlement provisions, far from going in the direction of that minority, would meet on the contrary, and by the fairest means, the concerns of the great majority of States as expressed in the cited General Assembly debate.

76. Secondly, an effective dispute settlement system could not fail to bring about, together with a reduction of friction and conflict between allegedly injured and allegedly law-breaking States, more balanced and equitable adjustments between the parties involved.

CMs may trigger further CMs ('counter-reprisals') from the other party. The escalation of unilateral measures would inflame relations between the parties, thereby rendering them more intransigent. A more effective availability of third

party settlement procedures could provide the parties with an opportunity to 'cool off'.

In any case, the solutions reached through conciliation, fact-finding, and arbitration would in all likelihood and on the whole be more just, or less unjust, than those reached by mere resort to unilateral coercion.

77. Thirdly, one should not overlook the improvements that an effective system of dispute settlement would bring about for both potential victims and potential wrongdoers. As a potential victim of a tort, any law-abiding State has an interest in finding, within an International Responsibility convention, side by side with, and as a complement to, the rules recognizing its CMs *faculté*, dispute settlement provisions that would at least *reduce* the necessity for it to rely exclusively upon its own capacity to resort to effective unilateral reaction: – a course which, even if available, may well prove to be costly and of uncertain efficacy. As a potential wrongdoer, any State should in turn welcome the presence in the draft of dispute settlement provisions that would allow it better to defend itself before an effective third party *forum* – by challenging the admissibility or the legality of a CM – rather than being forced to accept the unilateral determinations of one or more allegedly injured States and being reduced to its own, possibly limited, capacity to react.

78. Both as a potential victim and a potential wrongdoer, any law-abiding State should realize that since armed reprisals have been rightly outlawed, the measures permissible are mainly of an economic nature. Considering the high degree of economic interdependence of States, the adoption of any economic CM is likely to adversely affect not just the law-breaking State's economy – *and* its people – but also the economy of the injured State itself. As a result, an injured State will often find it hard to respond adequately to the infringement of one of its rights by resorting to an economic measure to which there may be no alternative. Situations of the kind might become extremely serious for an injured State suffering economic difficulties.[36]

79. The above considerations should be viewed as all the more cogent as the procedures to be adopted – *i.e.* conciliation, fact-finding and arbitration (with judicial settlement only as a last resort for special problems) – would be of such a nature that both parties to the dispute would participate in the designation of the members of the 'third party' body. It follows that the third party would be unquestionably less partial than the other State which is a party to the dispute.

80. An effective dispute settlement system would also be likely to reduce in the future, for the most serious breaches – whether labelled 'crimes' or just grave 'delicts' – the necessity of relying exclusively, for the implementation of the law-

36 The possibility that economic dependence – which is not necessarily limited to unequal parties – become a 'deterrent' to the adoption of measures against international delinquencies has in fact been noted in the literature.

breaking State's liability, on options which do not seem to be quite in conformity with the exigency of progressive development of the law in this delicate area.

One option seems to be reliance on the action of a few, generally Western, States which are able and willing to react to the breach of the supposedly *erga omnes* rule: a reaction which is not less unilateral and 'uncontrolled' for the fact that it is 'concerted' and may be justified.

The other option is represented by political bodies, such as the Security Council of the United Nations. The action of these bodies has so far proved to be not only indispensable but essentially beneficial and in any case more 'controlled', thanks to the fact that it is deployed within the framework of a universal or regional constituent instrument. However, when political bodies are not paralysed for lack of the required majority, they are likely to be influenced to an undesirable degree by power politics; and having to respond to any situations, they may be led to stretch their action beyond the scope of the mandate entrusted to them.[37]

The strengthening of third party settlement procedures in the area of State responsibility might open the way to relieving political organs of that part of the burden which is more suitable for judicial treatment.

Of course this matter should better be dealt with in depth in connection with the special régime possibly to be devised for the consequences of the international 'crimes' of States contemplated in Article 19 of Part One. However, the possibility of the adoption of a special régime for 'crimes' of States may well depend in a large measure on the extent to which the 'international community' will be enabled to deal with them by *judicial* – rather than just political – machinery. The difficulties faced so far by the SR's proposals concerning the dispute settlement provisions to be embodied in the State responsibility project are therefore not encouraging for the fate of Article 19 of Part One.

## V. The 1993 ILC Debate on Post-CMs Dispute Settlement Obligations and the Prospects for 1994

81. The SR's Draft Articles 1 to 6 of Part Three and the Annex thereto were discussed, within the context of the Fifth Report, in the 1993 session of the ILC. At the end of the debate the proposed Articles were referred to the Drafting Committee with the usual formula, according to which the Committee should take account of the debate.

The debate, however, did not seem to provide very optimistic prospects for the work that the Drafting Committee is expected to carry out at the 1994 session of the ILC.

37 The inadequacies of political bodies – notably the Security Council – to deal with the categories of international crimes of States (as defined in Article 19 of Part One of the ILC project) are stressed in the SR's fifth Report (Doc. A/CN.4/453, Add. 3 of 24 June 1993 esp. paras. 95 ff.).

82. Surely, a large majority of the Commission's members expressed – not without eloquence – the belief that a State responsibility convention could not reasonably spell out in writing for the first time in history the permissibility of unilateral CMs without simultaneously setting forth dispute settlement obligations the implementation of which could open the way to a verification of the legitimacy of an injured State's unilateral reaction. A few members even went so far as to declare that the SR's proposals were not adequately advanced and expressed a preference for the 'maximalist' approach that the SR had deemed to be 'ideal' but too bold.[38]

83. This numerically prevailing attitude was counterbalanced, however, by two less encouraging factors. In the first place the majority view was very strongly opposed by a few members who argued that the SR's proposals were so much out of keeping with the stage of development of the 'international society' as to '*bouleverser*' (*sic!*) the existing international law. The majority, for their part, accompanied their general approval of the ideas embodied in the proposed Articles with suggestions and comments that watered down considerably their support. Suggestions and comments bore, *inter alia*, on the 'incompatibility' of the proposed obligations with the freedom of choice of DSMs enjoyed by States under Article 33 of the UN Charter, on the 'time-consuming' nature of the system, on some 'neglect' or 'disregard' of negotiation as a possible means of settlement and on various excesses of 'rigidity' or 'flexibility' characterizing the SR's proposals. It was also noted that some of the powers to be attributed to the conciliation commission would not be compatible with the nature of ordinary conciliation.

Considering that these and other comments were answered more or less effectively by the SR in the course of the debate, we refer the reader to the 1993 Report of the ILC to the General Assembly and to the Summary Records of the relevant meetings. We confine ourselves to pointing out that the allegedly 'time-consuming' nature of the system is discussed here in paragraphs 71-72 *supra* while the essential compatibility with the parties' freedom of choice has also been discussed in paragraphs 67-70 *supra*. As for negotiation, far from being set aside, it is quite prominent, albeit by implication, in the proposed Draft Articles. Obvious examples are Article 1 on the 'triggering' conditions of the envisaged settlement means and the provisions of Draft Article 2 concerning the conciliation procedure and the agreement to which the parties may happen ultimately to come on the basis of the conciliation commission's recommendations. It is clear that negotiation would be omnipresent in phases such as these.

84. Be it as it may of the merits of the single comments offered in the debate – all of which, hopefully, will be carefully and constructively considered by the 1994 Drafting Committee – the present writer is seriously worried by some of the implications of comments made by a formally favourable majority of the Commission. The main implication is that that majority's positive attitude is

38 I refer to the solution outlined in para. 10 (a) *supra*.

weakened by reservations most of which would seriously impair, if they were to prevail in the 1994 Drafting Committee, the effectiveness of the envisaged dispute settlement obligations. Too many members, we believe, appeared to be reluctant to abandon the tendency to assume that Governments were not prepared to accept more advanced dispute settlement obligations. The 1994 DC might thus add another step backwards to the one which in our view was accomplished on Article 12 and perhaps Article 11 by the 1993 DC.

If such was to be the case, the ILC project on State responsibility might fail to introduce – at the side of the very first codified legitimation of unilateral CMs – any significant *correctif* of the possible arbitrariness of the injured States' unilateral reactions, and, for that matter, of the possible arbitrariness of the wrong-doing States' counter-reprisals.