Some Observations on the New Proposal on Dispute Settlement

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I. The Scope of the Proposed Articles

Professor Arangio-Ruiz in his Fifth Report on State Responsibility and the Draft Articles contained therein proposed a three-step or three-tiered system for the settlement of disputes between States. The scheme envisaged would entail an initial attempt at conciliation, followed if necessary by arbitration, and would provide a final mechanism for judicial settlement. The first question that comes to mind when reading these proposals is the scope of their application. Are they intended to cover the whole of Part Three of the Draft Articles, which concerns the settlement of disputes and the implementation (*mise en œuvre*) of international responsibility, or are they intended to deal only with one important issue, namely the settlement of disputes relating to counter-measures (reprisals)? The debate that followed the oral introduction of the Fifth Report to the ILC showed that this point was not clear to many members of the Commission.

In three informal papers presented in the course of the 45th session of the ILC, the Special Rapporteur tried to clarify his intentions. In particular, in a paper dated 14 June 1993 the Special Rapporteur stated that:

> the envisaged third party procedures would cover *not just* the interpretation/application of the Articles on counter-measures but the interpretation/application of *any provision of the future convention on State Responsibility*[1] (author's emphasis).

This explanation gave birth to other questions and uncertainties. It is one thing to propose a compulsory and binding third party settlement procedure for disputes relating only to counter-measures (which in itself would be an important innovation)

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1 Informal paper sent to the ILC's members by the Special Rapporteur, 14 June 1993, para. 4.

but quite another to propose the same procedure for all the disputes which may arise out of alleged breaches of any international obligation.

Besides, any impartial reader of the Report and the articles in issue will certainly note that, despite the above clarification given by the Special Rapporteur, the Report and the Articles themselves deal primarily, if not exclusively, with disputes intimately tied up with counter-measures. Thus in paragraph 74 of the Report the Special Rapporteur unequivocally stated the following:

> The 'triggering mechanism' (*mécanisme 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 counter-measure on the part of an allegedly injured State and possibly a resort to a counterreprisal from the opposite side which triggers the dispute settlement system.[2]

If we take a look at the text of the proposed Draft Articles, we immediately see that, unless the present wording is changed, the Articles can be applied only after a dispute has arisen following the adoption of a counter-measure, thereby excluding their use in cases of other disputes.[3] Further, the Special Rapporteur insisted that the Drafting Committee deal with the proposed Articles before completing its work on Part Two, which concerned substantive consequences of State responsibility. This also suggests that the proposed procedure is primarily devised to place conditions on the lawfulness of the resort to counter-measures.

However, it is not clear why at the last moment the Special Rapporteur decided to spread the proposed three-step compulsory system to the whole area of State responsibility in the above-mentioned papers introduced during the 45th session of the ILC.

II. Counter-measures and Dispute Settlement

Leaving aside this last question let us consider to what extent the proposed system of dispute settlement is adequate and viable 'as a way of correcting the negative aspects'[4] of counter-measures.

It is not without good reason that one of the members of the Commission described the Special Rapporteur's proposal as a package deal comprising

2 Fifth Report on State Responsibility by Mr Gaetano Arangio-Ruiz, Special Rapporteur. A/CN.4/453, 12 May 1993, para. 74.

3 See Article 1 which opens the three-step procedures with the following words: 'If a dispute which has arisen *following the adoption by the allegedly injured State of any counter-measure* against the allegedly law-breaking State has not been settled...' (emphasis added). A/CN.4/453/Add.1, 28 May 1993, 2.

4 The Special Rapporteur uses this expression for defining the main features of the proposed third party settlement procedure. *Supra* note 2, at 45.

substantive provisions on counter-measures and procedural rules for the settlement of related disputes.[5] With one reservation (concerning referring provisions on counter-measures to substantive rules) I would agree with this characterization of the proposal.

The obvious linkage between the Draft Articles on counter-measures in Part Two (Articles 11-14) and the proposed articles on dispute settlement necessarily requires them to be examined simultaneously. Also it is important to bear in mind the draft articles on dispute settlement advanced earlier by the previous Special Rapporteur Willem Riphagen.[6]

A careful reading of all these texts leads one to agree with the view taken by some members of the Commission, as well as by some delegations in the Sixth Committee, according to which counter-measures and special dispute settlement procedures related to them do not fall *directly* within the scope of the Articles on State responsibility.[7] Indeed, strictly speaking both subjects belong not to the substantive but to the procedural consequences of State responsibility; to the means of law-enforcement and implementation of substantive rules.[8] Detailed procedural rules should not necessarily be viewed as an indispensable and integral part of the future convention on State responsibility. This is even more so, if they touch upon such sensitive issues as unilateral law-enforcement measures or broad application of binding third party settlement.[9]

However, rightly or wrongly the ILC has already embarked on drafting appropriate articles. Having practically finished the drafting work on counter-measures proper,[10] the Commission at its 45th session sent to the Drafting Committee the Articles on dispute settlement proposed by the Special Rapporteur. Given this situation it is pointless at the present moment to prolong the discussion on the advisability of placing the articles on counter-measures and related dispute settlement in the future convention. The focal point now is the relationship between

5 Statement by Mr M. Bennouna. A/CN.4/SR 2307, 21 June 1993, 7.

6 Seventh Report on State Responsibility by Mr Willem Riphagen ILC Yearbook (1986) Vol. II (Part One) A/CN.4/397 and Add. 1.

7 For the summary of the debates on counter-measures and dispute settlement procedures in the Commission and in the Sixth Committee see the Fifth Report on State Responsibility by Mr G. Arangio-Ruiz, *supra* note 2.

8 It is significant that the Special Rapporteur himself defines counter-measures as 'an indispensable means of *implementation* of State responsibility' (emphasis added). Fifth Report on State Responsibility, *supra* note 2, para. 1. At the same time, for reasons which are not quite clear, he places the articles on counter-measures not in Part Three devoted to implementation of State responsibility, but in Part Two which deals with forms and degrees of State responsibility.

9 One can easily understand the hesitation of the Commission over the inclusion of Part Three (settlement of disputes and the implementation of international responsibility) in the Draft Articles. This hesitation was reflected in the wording of the introduction to the Chapter on State responsibility in the Commission's reports which up until 1992 permanently read as follows: 'a possible Part Three, which the Commission might decide to include...'

10 Except an important element dealing with the nature of the dispute settlement procedure to be applied (any procedure, third party procedure or only procedure with binding effect).

these two elements, irrespective of their placement in Part Two or Part Three of the Draft Articles.

Admittedly, counter-measures 'are the most difficult and controversial aspect of the whole regime of State responsibility';[11] hence the temptation to remain silent in the codification text on the practice of counter-measures so as to avoid granting them a legally superior standing, or legitimizing them. Nevertheless, the ILC chose the lesser of two evils, and resolved that it would be better to try to prevent abuse of States' unilateral reactions by way of limitations and safeguards provided for in the text of the future convention.

Important limitations and conditions are already contained in the Draft Articles on counter-measures.[12] The relationship between counter-measures and dispute settlement procedure are dealt with in Article 12 (conditions relating to resort to counter-measures), which was the subject of the most heated and lengthy discussion in the Drafting Committee.

The provisions of this article are the result of many painstaking compromises. Therefore, they do not spell out in a clear way an important point at issue, namely whether or not the use of a settlement procedure should necessarily precede recourse to counter-measures. Although the prior resort to a dispute settlement procedure was preferred by many members of the Drafting Committee serious arguments to the contrary were also advanced. Therefore, leaving this question in a 'grey zone' the article provides for a concomitant obligation of a State resorting to a counter-measure to immediately initiate a settlement procedure. The emphasis is placed on two conditions which must be met by a State taking a counter-measure from the very beginning of the dispute:

1. recourse to a specific dispute settlement procedure under a pre-existing obligation as envisaged in any relevant treaty to which both the injured State and the wrongdoing State are parties;
2. in the absence of such a pre-existing obligation an offer of a dispute settlement procedure to the wrongdoing State.

Another limitation on the right to take counter-measures relating to dispute settlement is provided for in paragraph 2 of the same article: that right is suspended as long as an agreed dispute settlement procedure is being implemented in good faith by the allegedly wrongdoing State, provided that the internationally wrongful act has ceased.

Certainly a failure to honour a request or order emanating from the dispute settlement body, including its final decision, cannot be considered as the implementation in good faith of an agreed dispute settlement procedure. This situation is covered by the third paragraph of Article 12.

11 Fifth Report on State Responsibility, *supra* note 2, para. 27

12 A/CN.4/L.480, 25 June 1993 and Add. 1, 6 July 1993. Articles 11 (Counter-measures by an injured State), 12 (Conditions relating to resort to counter-measures), 13 (Proportionality), 14 (Prohibited counter-measures).

An important uncertainty in the above mechanism, which unfortunately thus far remains unresolved in the ILC, is the nature of the dispute settlement procedure to be applied under Article 12. I submit that, had the Commission agreed to a binding third party dispute settlement procedure in Article 12, there would not be much practical need for a separate dispute settlement procedure relating to counter-measures in Part Three of the Draft Articles on State responsibility.

Conversely, if the Commission cannot agree on a less complicated binding mechanism now discussed in reference to Draft Article 12, how can one expect that it will give its consent to the complex regime of dispute settlement with a broad sphere of application as proposed by the Special Rapporteur?

In my view it is in any case preferable to treat the issue of a binding third party dispute settlement procedure only concomitantly with relevant conditions on the lawfulness of counter-measures. I would also advocate a more simple and modest approach, let us say along the lines previously proposed by the former Special Rapporteur Willem Riphagen.[13]

He proposed not a unitary regime, but a selective approach depending on the gravity of counter-measures taken or intended to be taken. According to Riphagen's formula unilateral submission to the ILC of a dispute concerning the application or the interpretation of the provisions relating to counter-measures by any one of the parties was possible only in two cases:

1. the alleged violation of an obligation deriving from a peremptory norm of general international law,
2. an alleged international crime of a State.

As regards other disputes relating to counter-measures either party was entitled to resort to a conciliation procedure provided for in a special annex to the articles.

Even this proposal met with mixed response in the ILC and in the Sixth Committee, which is duly reflected in the Fifth Report on State Responsibility.[14] Some members of the Commission and representatives of governments took the view that it was far-reaching and unacceptable. Nevertheless, this proposal *mutatis mutandis* merits new consideration in the Drafting Committee, in the light of the Draft Articles on counter-measures and new international developments.

III. Drawbacks of the Proposed Regime

As to the unitary regime of dispute settlement proposed by the present Special Rapporteur, if only in application to counter-measures, it suffers from a number of drawbacks which were indicated during the discussion in the Commission. Firstly, the regime definitively applies only *a posteriori*, at the 'post-counter-measure stage'. Secondly, it does not take into account the different character of counter-

13 *Supra* note 6.
14 Ibid., at 6-20.

measures, some of which may be of minor importance. Thirdly, it is too rigid and requires consecutive exhaustion of a serious of procedures which are spread over several years. Fourthly, it may be very costly, especially for developing countries. One should also bear in mind a possible difficulty in reconciling this regime with the pre-existing bilateral and multilateral treaty obligations of the parties concerned.[15]

My main misgivings with regard to the *ex post facto* regime of dispute settlement proposed by the Special Rapporteur may be briefly summarized as follows. Due to the above-mentioned shortcomings of the proposed regime, its efficiency in terms of its corrective impact on counter-measures (for which it is devised) becomes highly problematic.[16] At the same time, the introduction into the future convention of the proposed compulsory and binding third party procedures may make the whole instrument less acceptable to many States.

A way out of this dilemma is yet to be found. One might look for a less ambitious and selective approach depending on the nature of dispute and, when it comes to counter-measure, on the nature of the counter-measure in question. The Drafting Committee has already embarked on the road of separating disputes over counter-measures from other disputes, as when it tried to specifically incorporate some previsions on dispute settlement in Article 12 dealing with conditions relating to resort to counter-measures. If the relevant provisions in Article 12 had been agreed in the Commission and then accepted by the States, it would be an important step forward. 'Riphagen's formula', with some essential modifications, could be seen as a complementary or alternative step in the same direction.

With regard to disputes arising out of application or interpretation of other provisions of the future convention on State responsibility (except counter-measures) it is unlikely that the convention could go beyond the compulsory conciliation procedure provided for in Article 66(b) of the Vienna Convention on the Law of Treaties and the Annex thereto. It may be even more realistic to propose an optional protocol concerning the compulsory settlement of disputes.

IV. 'Piecemeal' and General Approaches Towards Dispute Settlement

It is important to bear in mind that even the relatively modest procedure of third party settlement provided for in Article 66(b) of the Vienna Convention proved to be unacceptable to the majority of States participating in this convention. Not more than one quarter of States recognized the compulsory jurisdiction of the ICJ under Article 36(2) of its Statute, and even these States made substantial reservations.

15 For the purposes of these remarks I do not consider it necessary to go into details about 'technical' shortcomings or inconsistencies of the proposal which are reflected in the Report of the ILC on the work of its 45th session. A/48/10, paragraphs 271 and especially 274 and 275.

16 That is why I find very arguable the assertion that 'there is not a single flaw (of counter-measures), among those denounced, which could not be corrected by providing for an adequate dispute settlement system'. Fifth Report on State Responsibility, *supra* note 2, para. 41.

It is true that the situation is changing for the better. The new trends and developments as exemplified by the 1982 Manila Declaration, the 1992 CSCE Convention on Conciliation and Arbitration, and the new attitude to third party settlement taken by some East European countries, are certainly encouraging. But one should not overlook the reverse trend: the actions of some States to terminate their acceptance of compulsory jurisdiction of the ICJ, non-participation of some major countries in the CSCE Convention, the very slow pace of negotiations among the permanent members of the Security Council pertaining to the acceptance of the Court's compulsory jurisdiction in certain well-defined categories of legal disputes, etc. This trend illustrates that the position of States on binding procedures has not changed to such an extent as to warrant great optimism.

We also have to remember that an increasingly alarming number of ILC drafts have remained a dead letter because they were not accepted by States. Doubtlessly this influenced many members of the Commission participating in the dispute settlement debate, and encouraged them to emphasize the distinction between what was desirable and what was possible. In the words of one of the members:

> The aim is not, of course, to produce texts that would go down in the history of the work of the Commission without ever being put into effect.[17]

My final comment will concern the argument advanced by the Special Rapporteur in paragraph 91 bis of his Fifth Report to the effect that, in the light of the numerous ineffective general dispute settlement treaties, there is not much point in undertaking any further efforts to progressively develop dispute settlement procedures of a general character. The Special Rapporteur suggested that it would be more appropriate to engage in a substantial progressive development of dispute settlement procedures in the context of the draft on State responsibility.

Firstly, in my view, there is an obvious contradiction between this assertion and the text of the Draft Articles actually proposed by the Special Rapporteur, which amount to a radical change in the application of binding dispute settlement procedures of general character.[18] Secondly, I submit that a 'piecemeal' approach as opposed to a general approach to the development of dispute settlement procedures are not necessarily mutually exclusive solutions. In the process of working on the topic of State responsibility the Commission can certainly propose some new well-founded provisions dealing with dispute settlement procedures, which could be organically linked, for instance, with the regulation of counter-measures. However, the law of dispute settlement as a whole and its substantial progressive development cannot be dealt with in passing. It is a separate, major topic which goes beyond the scope of the subject of State responsibility.

17 Statement by Mr A. Yankov. A/CN.4/SR 2308, 6 July 1993, 12.

18 Especially if one takes into account the most recent interpretation of these articles given by the Special Rapporteur as pertaining to all the provisions of the future instrument on the law of State responsibility, i.e. to the international law as a whole. *Supra* note 1.