Counter-measures as Interim Measures

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I. Introduction

One of the most important tasks remaining to the International Law Commission in its long-running work on State responsibility is to establish a satisfactory regime for the settlement of disputes. Within that regime, the issue of disputes over counter-measures is of particular significance. At present there are few established legal constraints on non-forcible counter-measures, apart from the criterion of proportionality and the prohibition of counter-measures violating individual human rights or rights of protected persons under international humanitarian law.[1] Since counter-measures are quite frequently used, and can tend to exacerbate disputes, there is a clear need for the Commission to propose a balanced regime to allow disputes over allegedly unlawful conduct leading to the taking of counter-measures to be resolved.

It is necessary first to identify what principles should apply to the settlement of disputes in relation to counter-measures. This needs to be done, independently of the question whether any of them reflect present international law. The primary issue for the International Law Commission and for the international community, is an issue of policy – how to develop a satisfactory regime for counter-measures. Whether this involves codification or progressive development of international law is a secondary issue.

I would identify six general principles which should apply to the settlement of disputes in relation to counter-measures. Stated somewhat schematically, they are as follows.

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1 This point was made with precision by the Second Special Rapporteur (Riphagen) in his Fourth Report: ILC Report (1983) Vol. 2(1), 8 (para. 35), 9 (para. 42).

5 EJIL (1994) 65-76

A. First principle

The function of a civilized legal system is to restrict the scope for reprisals (as distinct from collective action).

Unilateral breach of an international obligation in response to the breach of another international obligation is a crude and unhappy way of responding to unlawful conduct. This is especially so when (a) the breach need not relate directly to the initial wrong; (b) the principle of proportionality will necessarily apply in a rather approximate way.

Both (a) and (b) seem to be necessary corollaries of the permission of counter-measures. Except in the context of special reciprocal regimes such as diplomatic relations, where every sending State is also a receiving State, to limit counter-measures to strictly reciprocal action would be arbitrary in its incidence. In respect of any particular rules or institutions, States are in unequal positions – upstream and downstream States; primary-producing States and importers of primary produce; capital-importing and capital-exporting States; States with extensive military capacities as against States with little or no capacity, etc. A system limited to reciprocal counter-measures would be unworkable.[2] But once one has allowed that counter-measures may be taken in relation to rules of a different character than that alleged to have been violated, it follows that the principle of proportionality has to be applied in a rather loose way.[3]

The point is that once these two positions are allowed, the need for other safeguards in relation to counter-measures becomes more pressing.

B. Second principle

Counter-measures can only be taken in response to an actual breach of the law, and only by or on behalf of a State which is injured by that breach. It is not sufficient for a State to justify unlawful conduct (as distinct from lawful but unfriendly conduct, i.e. retorsion) by asserting a *belief* that this is in response to conduct which is unlawful. The conduct must actually be unlawful. A State which takes counter-measures to that extent acts at its peril.[4]

As to which States are to be regarded as 'injured' for this purpose, the Commission has already adopted a broad definition of 'injured States', especially in relation to multilateral legal wrongs such as international crimes and breaches of

2 Although Riphagen's Draft Article 8 was so limited, it operated concurrently with Draft Article 9 (reprisals), which was subject to its own regime. The distinction has vanished in subsequent drafts.

3 This is reflected in Draft Article 13 as adopted by the Drafting Committee: 'Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured States.'

4 This feature is common in the Draft Articles proposed by both Special Rapporteurs and the Draft Article 11 as adopted by the Drafting Committee.

human rights.[5] The question of international crimes raises quite special issues, which cannot be addressed here. In relation to breaches of human rights, the rule stated in Article 5(2)(e)(iii) of Part 1 is a necessary one. On the one hand it would be a mistake to limit counter-measures to conduct directly injuring another State, given the importance of human rights protections. On the other hand if third States are to be regarded as injured by breaches of human rights, all third States should be so regarded.[6] The 'protection of human rights and fundamental freedoms' is not the same thing as the protection of nationals, co-religionists, members of one's own culture, etc. although the two overlap.

Again, this conclusion necessarily broadens the range of States which can take counter-measures, and thus increases the need for a satisfactory system for resolving disputes. It also presents a range of problems which have been discussed in the Commission under the rubric of 'differently interested States'. For example, what if a dispute over a given multilateral violation has been resolved through negotiation between the State concerned and one or more States which protested against the violation but are now satisfied with the action taken? Can a third State which has not participated in those discussions effectively reopen the issue? How is the principle of proportionality to be applied to counter-measures taken by a number of States, perhaps with little or no coordination between them? These problems are not unique to the topic of counter-measures: they apply equally, for example, to the question of what constitutes 'full reparation'. They will not be discussed in detail here, but it is necessary to bear them in mind when seeking to formulate actual provisions.

C. Third principle (corollary of the first two principles)

A State taking counter-measures places in issue between itself and the target State both the legality of its own conduct and the legality of the conduct to which it is responding. Neither State should be able to insist on a unilateral judgment of legality in either respect. As Riphagen observed, 'each move and countermove cannot be definitively appreciated legally otherwise than on the basis of a settlement of the original dispute of fact and law relating to the primary rules'.[7]

D. Fourth principle

The purpose of counter-measures should be to redress the grievance of the State taking the counter-measure in respect of the conduct of the target State. As we have seen, that grievance only exists if the latter conduct is in truth unlawful (second

5 See Part 1, Draft Article 5.

6 Art. 5(2)(e) quite properly limit to this to States which are parties to the multilateral treaty or bound by the rule of general international law in question. In practice this is not a restriction.

7 Fourth Report: ILC Report (1983) Vol. 2(1), 9 (para. 37).

principle, above), although the position will be aggravated if the injured State is continuing to suffer actual damage as a result of any breach. Thus the purpose of counter-measures should be regarded as met if (a) an expeditious procedure for determining the legality of the conduct in question is triggered; and (b) the injured State is not continuing to suffer avoidable damage as a result of the breach, i.e. the target State is doing all it can reasonably do to avoid or mitigate the damage.

E. Fifth principle

A primary form of redress for unlawful conduct is restitution (*restituo in integrum*). Similarly the regime of counter-measures should encourage counter-measures which can themselves be reversed in their effects, and should discourage counter-measures which do irreversible harm.

The proportionality rule may be too general in character to be relied on as the only way of achieving this result. Moreover the proportionality rule seeks to measure the character and effects of the breach as against the character and effects of the counter-measures taken in response. It may not be well adapted for taking into account any *continuing* effects of the counter-measures after restitution or reparation has been provided or the primary dispute settled. The latter issue will almost always be speculative and hypothetical at the time the counter-measures are taken.

On the other hand what is irreversibility for this purpose needs to be viewed broadly. For example, the cancellation of a licence or permit can be reversed in effect by the issue of a new licence. Damage of a financial character (e.g. loss of profits or interest) is rarely irreversible, although the consequential effects of such damage (e.g. the insolvency of the company in question) might well be irreversible. To some extent the latter problem may be avoided through a distinction between direct and indirect or consequential effects of unlawful conduct.

F. Sixth principle (corollary of principles 1-5)

Counter-measures should be regarded as equivalent to interim measures of protection of the interests and rights of the injured State, differing only in that they are decided on, in the first instance, by the State itself and secondly that the State may be entitled to take further action if the target State fails to cooperate in the resolution of the dispute. By contrast, in the case of interim measures of judicial protection this would require a further application to the court or tribunal, a step which would often not be taken on the grounds that it would be futile.

It is not the function of this short note to provide a general analysis of the relations between counter-measures and the peaceful settlement of disputes. Instead it is proposed to examine the Draft Articles so far proposed or adopted within the ILC, to see to what extent they reflect the six principles identified above, and in

particular the principle of counter-measures as interim measures of protection of the rights and interests of the (putatively) injured State.

II. The Riphagen Draft Articles

In the Draft Articles of Part 2 referred to the Drafting Committee in 1985 and 1986, but never discussed by it, Riphagen responded to the concerns expressed above in a number of ways. First, counter-measures took the form of the *suspension* of obligations, whether by way of reciprocal counter-measures (Draft Article 8)[8] or by way of reprisals (Draft Article 9). Special provisions were made in relation to breaches of a multilateral treaty where the obligation concerned was one established in the general interest or for the protection of general human rights, or where the treaty provided a collective decision-making procedure for dealing with breaches.[9] More relevant for present purposes was his Draft Article 10, which applied only to counter-measures by way of reprisals, and not to reciprocity counter-measures under Draft Article 8. Draft Article 10 provided:

> 1. No measure in application of Article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in Article 6 [discontinuance and restitution].
>
> 2. Paragraph 1 does not apply to:
>
> (a) interim measures of protection taken by the injured States within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;
>
> (b) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.

Thus the Riphagen Draft Articles adopted the idea of counter-measures (reprisals) as interim measures in two main respects:

(1) Counter-measures took the form of *suspension* of obligations, which would revive when the right to take counter-measures was suspended or terminated. On the other hand no provision was made for the situation where the conduct taken by the injured State, i.e. conduct which would have been unlawful but for the suspension of an obligation, produced some irreversible effect. Presumably the position was that, the conduct being lawful, so were its effects, and that the subsequent revival of the obligation did not affect this unless it gave rise, independently, to some new duty to remedy or undo the effects of the conduct. The reference to suspension of

8 These were defined as obligations which 'correspond to, or are directly connected with, the obligations breached', and the suspension was to occur 'by way of reciprocity'.

9 Draft Article 11, but subject to Draft Article 13 (egregious violations).

obligations may have been useful in emphasizing that counter-measures were intended to involve conduct temporary in duration, if not in character. But it was not clear that they had any substantial effect.

(2) Draft Article 9 incorporated a clear distinction between interim measures of protection and other measures not of an interim character (i.e. measures which could only be taken after the injured State had exhausted available international dispute settlement procedures). Interim measures of protection could only be taken by the injured State pending a decision on their admissibility by way of a peaceful settlement procedure: in addition the injured State could take measures (not necessarily interim in character) where the target State failed to comply with interim measures ordered by a competent international court or tribunal. In the latter case, the failure to comply with interim measures was apparently equated to the exhaustion of dispute settlement procedures.

On the other hand the idea of interim measures, although clearly expressed in the language of the Draft Articles, was of uncertain ambit, for several reasons.

First, the distinction had no relevance to reciprocity counter-measures under Draft Article 8. Secondly, the distinction ceased to apply where the target State failed to comply with an order for or indication of interim measures, independently of the status of that order or of the relation between the steps indicated and the counter-measures taken. Thirdly and more importantly, there was no definition of interim measures, other than a stipulation that they be taken by the injured State 'within its jurisdiction'. In the absence of such a definition it could have been argued that interim measures could include any proportionate measures taken by the injured State in the period prior to the indication of interim measures by a court or tribunal. In other words, it was arguable that the measures did not need to be of a temporary or reversible *character*, and that they were 'interim' measures only from a temporal point of view, i.e. because they were taken in the interim between the wrongful act and a decision or indication by a court or tribunal.

To summarize, the Riphagen Draft Articles on counter-measures reflected the idea of counter-measures as interim measures to a certain extent. But the two main respects in which they did so, on closer analysis, did not impose very significant restraints on the injured States, beyond the principle of proportionality. Of particular significance was the absence of any definition of interim measures when taken by the State, or of any suggestion that such measures should approximate to the measures that an international court or tribunal might indicate.

III. The Arangio-Ruiz Draft Articles

Following Riphagen's departure from the Commission, Gaetano Arangio-Ruiz was elected the third Special Rapporteur on State responsibility. His early reports focused on reparation, but in his Fourth Report he proposed Articles on counter-measures which were referred to the Drafting Committee.[10]

His proposals differed from Riphagen's in a number of ways. For example they abandoned the distinction between reciprocity counter-measures and reprisals, and adopted the single term 'counter-measures' to cover the field of non-forcible conduct the illegality of which was precluded because of its character as a counter-measure.[11] The basic precondition for taking counter-measures was the circumstance that demands for reparation had not met with an 'adequate response': this requirement was more flexible than that apparently intended to apply under Riphagen's Draft Article 8. In addition, the language of 'suspension' of obligations was no longer used, although given the limited effect the reference to 'suspension' seems to have had, this change may have been of little significance. There was also a longer and more explicit Article dealing with prohibited counter-measures.

Despite these and other differences, Draft Article 12 ('Conditions of resort to counter-measures') was clearly strongly influenced by and textually derived from Riphagen's Draft Article 10. It reads as follows:

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

10 For the Fourth Report see A/CN.4/444 & Add. 1-3 (1992).

11 This is consistent with the terminology adopted in the heading to Draft Article 30 of Part 1.

Like Riphagen's proposal, Draft Article 12 drew a distinction between 'final' counter-measures and 'interim measures'. Both Drafts required exhaustion of available methods of peaceful settlement before 'final' counter-measures could be taken, although the Arangio-Ruiz formula went to greater length in specifying the methods of peaceful settlement which were to be considered as 'available', as well as requiring notification to the target State of the intention to take counter-measures. The provision allowing 'interim measures' was also substantially similar in language and in intent to Riphagen's Draft, although paragraph (a), dealing with failure to cooperate in good faith in choice of measures of peaceful settlement, was a useful addition.

On the other hand Draft Article 12, like its predecessor, made no attempt to define the central idea of interim measures taken by the injured State itself. This was unfortunate, especially since the term has another (though related) meaning in the context of third party dispute settlement.

Arangio-Ruiz also added clause (3), which precluded reliance on the interim measures exception in vaguely defined circumstances, using language drawn from Article 2(3) of the United Nations Charter. Clause 12(3) was in effect an exception to an exception to an exception, and gave Article 12 an air of complexity, even convolution. Since Charter obligations would prevail over the Draft Articles in any case, and since Article 2(3) is not an isolated provision but part of the overall structure of the dispute settlement obligations of the Charter, it was probably not necessary to include it.

IV. The Drafting Committee's Draft Article (1993)

In 1993 the Drafting Committee adopted Draft Articles 11-14, dealing with counter-measures, although these have not yet been adopted by the Commission itself.[12] For present purposes the significant provisions are contained in Draft Articles 11(1) and especially 12. Draft Article 11(1) reads as follows:

> 1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under Articles 6 to 10 bis, the injured State is entitled, subject to the conditions and restrictions set forth in Articles ..., not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under Articles 6 to 10 bis.

Draft Article 11(1) implies two restrictions on the taking of counter-measures. First, while avoiding the term 'suspend' used in Riphagen's proposals, the introductory phrase ('As long as the State...') implies that the right to take counter-measures is inherently temporary in character. Secondly, the Draft Article makes it clear that the

12 See ILC Report (1993) (A/48/10) 79-80, and for an explanation of the Draft Articles see the Report of the Chairman of the Drafting Committee (A/CN.4/L. 480).

purpose of counter-measures should be to induce the target State to comply with the obligations of reparation set out in Articles 6 to 10 bis, and that counter-measures can only be taken when 'necessary' for this purpose. These are useful clarifications, though neither is very precise or stringent in its effect.

The central provision is however Draft Article 12 ('Conditions relating to resort to counter-measures'), which reads as follows:

> 1. An injured State may not take counter-measures unless:
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> (a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or
>
> (b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.
>
> 2. The right of the injured State to take counter-measures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.
>
> 3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take counter-measures.

Draft Article 12 as adopted differs from the Special Rapporteur's proposal in a number of important respects. That is of course not unusual in the practice of the Commission, in this and other topics. In assessing Draft Article 12 as adopted, from the perspective of the principles outlined above, four things should be noted.

First, there is no temporal priority between the taking of counter-measures and recourse to a dispute settlement procedure. Paragraph (1) does not say, as both the Riphagen and Arangio-Ruiz Drafts clearly said, that recourse to a dispute settlement procedure is a *pre-requisite* to the taking of counter-measures. At best, such recourse would be a *co-requisite*, something to be done or offered at the same time as taking counter-measures. Since, unlike the two earlier Drafts, Draft Article 12 as adopted does not contain any reference to the idea of interim measures, this change in emphasis is understandable. One of the most effective forms of counter-measure is a freezing order, i.e. an order freezing assets of the target State held in the injured State.[13] But having regard to the international mobility of capital a freezing order will usually be waste paper if prior notice or warning has to be given to the target State, or if elaborate procedures first have to be followed before a freezing order can be made. A freezing order is a classic example of an interim measure: it is reversible in its effects, it does not infringe basic human rights, its precise impact is readily

13 It is true that such orders are more available to some States (those which include major financial centres) than others, but this is only relatively the case, and it is true of all forms of counter-measures.

quantifiable. The Arangio-Ruiz proposal would have exempted freezing orders and similar interim measures from the obligation to notify and exhaust dispute settlement procedures. Draft Article 12 as adopted simply allows counter-measures to be taken at the same time as, or even just before recourse to or an offer of dispute settlement. It therefore avoids any problem of giving prior warning to the target State of a freezing order, but at the risk of exacerbating a dispute by the taking of much more drastic action without prior notice or opportunity for the target State to seek to settle the dispute.

Secondly, the suspension of the right to take counter-measures occurs under Draft Article 12(2) 'when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith' by the target State. This is unexceptionable: it refers only to the conduct of the target State, so that lack of cooperation on the part of the injured State would normally not prevent the target State from triggering the suspension of the right to take counter-measures. On the other hand, paragraph (2) does not say in so many words that the counter-measures already taken should be withdrawn once the injured State is cooperating in good faith in a dispute settlement procedure. What is suspended is 'the right ... to take counter-measures', and this leaves the position unclear as to counter-measures already taken. Presumably if the counter-measure constitutes a continuing act, Draft Article 12 would require the act to be suspended. On the other hand, if the counter-measure takes the form of a single act not extending in time, it is far from clear that the act should be suspended or withdrawn, even though its *effects* continue in time. Draft Article 24 of Part 1 draws this distinction: it provides that...

> The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.[14]

It is useful to compare a counter-measure which takes the form of a freezing of assets with one which takes the form of an outright confiscation. No doubt the effects of a confiscation extend in time, but the act of confiscation is a single act which (depending on the relevant law) can produce an immediate vesting of title in the confiscating State. By contrast a freezing of assets is by definition a continuing act. Title to the assets is not affected, merely the right to dispose of them, and the restraint on that right has a continuing character. The point is that the distinction between continuous acts and single acts in time does not correspond to a distinction between serious and less serious breaches, or to a distinction between interim and permanent measures. Indeed one is inclined to say that interim measures are *more likely* to involve conduct extending in time, whereas single acts in time are less

14 By contrast Articles 25 and 26 of Part 1 deal with different kinds of wrongful act extending in time.

likely to be reversible, or readily reversible.[15] No doubt the principle of proportionality will limit the gravity of single acts taken by way of counter-measures. But as we have seen that principle is for good reason phrased in a rather general way ('not out of proportion'). It is a rather slender basis for instituting a preference for counter-measures of a reversible or interim character.

Moreover one would not want to say that the implementation in good faith of a dispute settlement procedure should lead automatically to the suspension of all counter-measures, including those of an interim character. The nomination of a party-appointed arbitrator is a simple act to perform, and it does not necessarily betoken subsequent cooperation in the arbitration. One could imagine a State making such a nomination merely in order to procure the release of assets. The words 'to the extent that' in Draft Article 12(2) do not solve the problem, since at this stage the target State will have done *everything* it was required to do by the dispute settlement procedure.

Thirdly, the suspension of the right to take counter-measures under Draft Article 12 is conditional upon the cessation of the internationally wrongful act. But in the realities of dispute settlement, cessation of an allegedly wrongful act may amount to a rather difficult or humiliating climb-down on the part of the target State – which after all may in good faith assert that its act was not unlawful. As we have seen, the idea of interim measures does not reflect a simple distinction between single acts in time and acts of a continuing character. What should matter, in the period prior to a decision under a third party dispute settlement procedure, is that the allegedly wrongful act is not continuing to produce harmful *effects*, something which, as Draft Article 24 of Part 1 makes clear, is not the same as saying that the internationally wrongful act is continuing. It would have been better to require that the target State *suspend* any continuing wrongful act, and take all available steps to alleviate any harmful effects on the wrongful act (whether or not it is a continuing act). For example, if the wrongful act took the form of the eviction of foreigners from their home, or the cancellation of a licence, it should be sufficient for the purposes of Draft Article 12(2) for the target State to suspend the eviction or grant a new temporary licence, pending the outcome of the dispute settlement procedure. International law should not require what amounts to the capitulation of the alleged wrongdoing State, if that State is cooperating in good faith in the resolution of the dispute and is taking all reasonable steps to minimize the harm caused by its act in the meantime.

To summarize, Draft Article 12 marks an advance in the international law of counter-measures in requiring a State which takes counter-measures to offer a third

15 When the cowboy in the western saloon says to his opponent 'Freeze!', he performs an act having a continuing character. Shooting his opponent dead would be a single act in time, covered (if he were the Sheriff) by Draft Article 24 of Part 1.

party dispute settlement procedure.[16] But it substitutes for the idea of interim measures pending the outcome of that procedure, a separate set of requirements based on the distinction between wrongful acts of a continuing character and wrongful acts which take effect at a single point in time. In the interim period while some third party dispute procedure is being followed, what should matter is the suspension as far as possible of the allegedly wrongful conduct and the alleviation as far as possible of any harmful effects of that conduct, whether or not the conduct itself has a continuing character.

V. Conclusion

Discussions about counter-measures tend to take place at two levels. At one level the position is clear: in the white corner we have the injured State, innocent and aggrieved; in the black corner, 'the State which *has* committed the internationally wrongful act', truculent but clearly in the wrong. And this is sometimes the case. One's habituation as a student of international relations and of international law to discerning minute variations in shades of grey must not be allowed to prevent the recognition and even the denunciation of real evils, by whomever committed. But the problem is that the Draft Articles on State responsibility have to apply across the whole spectrum of cases, from the Italian invasion of Ethiopia to the bilateral aviation or trade dispute in which the conduct of neither party is without blemish, and what matters is the resolution of the dispute rather than the aggravation of self-righteousness.

Thus at another level many disputes over State responsibility raise genuinely difficult issues, where it is not clear which State is 'in the wrong', and where the encouragement of counter-measures is likely to exacerbate matters still further. No doubt the interests of good relations, policy and reciprocity will mean that States will be cautious before taking counter-measures, and the recognition that when doing so they must offer a form of third party settlement should assist in that regard. But it is regrettable that the distinctions drawn by the Commission in Draft Article 12 did not focus more clearly on the resolutions of disputes in the interim phase, and that, under the guise of the struggle of 'right' and 'wrong' they may tend to turn disputes in that phase into trials of competing strength.

16 It is regrettable that Draft Article 12(1) does not make it clear that the third party procedure should extend both to the question of the initial unlawful act and to the question of the justification of the counter-measures actually taken. This should be made clear in the Commentary.