United States Department of State

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1-B

Draft Articles on State Responsibility
Comments of the Government of the United States of America
March 1, 2001

Introduction and Summary

The Government of the United States of America welcomes the opportunity to provide comments on the second reading text of the draft articles on state responsibility prepared by the International Law Commission.[1] The Commission has made substantial progress in revising the draft articles; however, certain provisions continue to deviate from customary international law and state practice. The United States' comments first address those provisions that raise the most serious concerns:

(1) Countermeasures: We continue to believe that the second reading draft articles on countermeasures contain unsupported restrictions on the use of countermeasures.

(2) Serious breaches of essential obligations to the international community: While we welcome the Commission's recognition that the concept of "international crime" has no place in the draft articles on state responsibility, we question the wisdom of drawing a distinction between breaches and "serious breaches." We particularly oppose any interpretation of these articles that would allow punitive damages as a remedy for serious breaches.

(3) Injured states: We welcome the Commission's decision to draw a distinction between states that are specifically injured by the acts of wrongdoing states, and other states that do not directly sustain injury, but believe the Commission's definition of "injured state" should be narrowed even further to strengthen this distinction.

In addition to these areas, the United States would like to draw the Commission's attention to other provisions, including Article 30(b) on assurances and guarantees of non-repetition, which we believe should be deleted as it reflects neither customary international law nor state practice. We also would urge the Commission to clarify that moral damages are included as financially assessable damages under Article 37 (2) on compensation. Finally, with regard to the question of what form the draft articles on state

[1] The text of the draft articles, provisionally adopted on the second reading by the Commission, may be found in the ILC's report on its work during its fifty-second session. *See* Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10, pp. 124 - 140).

responsibility should ultimately assume, the United States believes it would be preferable to finalize the Commission's work in a form other than a Convention so as to enhance prospects for its acceptance by a broad group of states. It is our hope that these comments will facilitate the Commission's continuing and important efforts to finalize the draft articles on state responsibility by aligning them more closely with customary international law and state practice.

I. Countermeasures

Countermeasures are acts of a state that would otherwise be considered wrongful under international law, but are permitted and considered lawful to allow an injured state to bring about the compliance of a wrongdoing state with its international obligations. Article 23 defines countermeasures as those acts whose wrongfulness is precluded to the extent the act constitutes a countermeasure under the conditions set forth in Articles 50 to 55. The United States prefaces its remarks by noting that any actions by a state that are not otherwise prohibited under international law are outside the scope of Articles 23 and 50 to 55 as these actions would not, by definition, constitute countermeasures.

The United States continues to believe that the restrictions in Articles 50 to 55 that have been placed on the use of countermeasures do not reflect customary international law or state practice, and could undermine efforts by states to peacefully settle disputes. We therefore strongly believe these articles should be deleted. However, should the Commission nonetheless decide to retain them, we believe that, at a minimum, the following revisions must be made: (1) delete Article 51 which lists five obligations that are not subject to countermeasures, because this article is unnecessary given the constraints already imposed on states by the United Nations Charter, and because the article suffers from considerable vagueness; (2) recast Article 52 on proportionality to reflect the important purpose of inducement in countermeasures; (3) revise Article 53 which sets forth conditions governing a state's resort to countermeasures to (a) either delete the requirement for suspension of countermeasures or clarify that "provisional and urgent" countermeasures need not be suspended when a dispute is submitted to a tribunal and (b) reflect that under customary international law a state may take countermeasures both prior to and during negotiations with a wrongdoing state.

A. Article 51 - Obligations not subject to countermeasures

Article 51(1) lists five obligations that are not subject to countermeasures. This article is not necessary. First, the Charter of the United Nations already establishes overriding constraints on behavior by states. Second, by exempting certain measures from countermeasures, Article 51(1) implies that there is a distinction between various classes of obligations, where no such distinction is reflected under customary international law. Third, the remaining articles on countermeasures already impose constraints on the use of countermeasures. It would be anomalous to prevent a state from using a countermeasure, consistent with the other parameters provided in these articles, and in response to another state's breach, particularly where that breach involved graver

consequences than those in the proposed countermeasure. Finally, Article 51(1) has the potential to complicate rather than facilitate the resolution of disputes. There is no accepted definition of the terms the article uses, inviting disagreements and conflicting expectations among states. There is no consensus, for example, as to what constitutes "fundamental human rights." In fact, no international legal instrument defines the phrase "fundamental human rights," and the concept underlying this phrase is usually referred to as "human rights and fundamental freedoms." Likewise, the content of peremptory norms in areas other than genocide, slavery and torture is not well-defined or accepted. Moreover, Article 51(1) would inhibit the ability of states, through countermeasures, to peacefully induce a state to remedy breaches of fundamental obligations. The United States recommends deleting this article.

B. Article 52 - Proportionality

The United States agrees that under customary international law a rule of proportionality applies to the exercise of countermeasures, but customary international law also includes an inducement element in the contours of the rule of proportionality. As stated in our 1997 comments on the first reading text, proportionality may require, under certain circumstances, that countermeasures be related to the initial wrongdoing by the responsible state. *See State Responsibility: Comments and Observations Received from Governments*, International Law Commission, 50th Sess., at 126, U.N. Doc. A/CN.4/488 (1998) [hereinafter "Comments"]. Likewise, proportionality may also require that countermeasures be "tailored to induce the wrongdoer to meet its obligations." *Id.* In his Third Report on State Responsibility, the Special Rapporteur addresses the question of whether it would be useful to introduce a "notion of purpose" or the inducement prong into the proportionality article. *See Third Report on State Responsibility*, International Law Commission, 52d Sess., at para. 346, p.28, U.N. Doc. A/CN.4/507/Add.3 (2000). He concludes that while it is indeed a requirement for countermeasures to be "tailored to induce the wrongdoer to meet its obligations," this requirement is an aspect of necessity (formulated in the first reading text draft Article 47 and second reading text draft Article 50), and not of proportionality. *Id.* The United States respectfully disagrees. The requirement of necessity deals with the initial decision to resort to countermeasures by asking whether countermeasures are necessary. *See Comments*, at 127 n. 113, U.N. Doc. A/CN.4/488 (1998). In contrast, whether the countermeasure chosen by the injured state "is necessary to induce the wrongdoing state to meet its obligations" is an aspect of proportionality. *Id.* The United States continues to believe that this aspect of proportionality should be included in Article 52.

Article 52, as revised, incorporates language from the *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 1997 I.C.J. 7, 56 (Sept. 25) [hereinafter *Gabcikovo-Nagymaros*]. In *Gabcikovo-Nagymaros*, the International Court noted that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question." *Id.* In his Third Report, the Special Rapporteur notes that, in response to the proposals of several governments that "the requirement of proportionality be more strictly formulated," the double negative

formulation of the first reading text ("[c]ountermeasures . . . shall not be out of proportion" to the internationally wrongful act) should be replaced by the positive formulation of *Gabcikovo-Nagymaros* (countermeasures should be "commensurate with the injury suffered"). *See Third Report on State Responsibility*, International Law Commission, 52d Sess., at para. 346, p. 27, U.N. Doc. A/CN.4/507/Add.3 (2000).

The International Court's analysis does not clearly indicate what is meant by the term "commensurate," and this term likewise is not defined in Article 52. A useful discussion of the term "commensurate" in the context of the rule of proportionality can be found in Judge Schwebel's dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 259 (June 27). Judge Schwebel (citing Judge Ago) notes that "[i]n the case of conduct adopted for punitive purposes. . . it is self-evident that the punitive action and the wrong should be commensurate with each other, but in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result." *Id.* at 368. Although Judge Schwebel's analysis of proportionality arose in the context of collective self defense, his reasoning is equally applicable to countermeasures.

The United States is concerned that the term "commensurate" may be interpreted incorrectly to have a narrower meaning than the term "proportional." Under such a view, a countermeasure might need to be the exact equivalent of the breaching act by the responsible state. The United States does not believe such an interpretation is in accord with international law and practice. We believe that the rule of proportionality permits acts that are tailored to induce the wrongdoing state's compliance with its international obligations, and that therefore a countermeasure need not be the exact equivalent of the breaching act. To avoid any ambiguity, the United States recommends that the phrase "commensurate with" in Article 52 be replaced with the traditional phrase "proportional to."

The United States also notes that the phrase "rights in question," taken from *Gabcikovo-Nagymaros*, is not defined by the case itself or by Article 52. While the phrase "rights in question" generally refers to the rights alleged to have been violated by the parties to a particular dispute brought before the ICJ, in *Gabcikovo-Nagymaros*, the phrase is not used to refer the rights of Hungary or Slovakia but rather is used as part of the Court's general definition of countermeasures. The United States understands the phrase "rights in question" to preserve the notion that customary international law recognizes that a degree of response greater than the precipitating wrong may sometimes be required to bring a wrongdoing state into compliance with its obligations if the principles implicated by the antecedent breach so warrant. *See Comments*, at 127, U.N. Doc. A/CN.4/488 (1998); *see also Case Concerning the Air Services Agreement of March 27, 1946 Between the United States of America and France*, 18 R.I.A.A. 417, 443-44 (1978) [hereinafter "Air Services Case"].

Accordingly, with the changes the United States proposes, Article 52 would read "Countermeasures must be proportional to the injury suffered, taking into account both the gravity of the internationally wrongful act and the rights in question as well as the degree of response necessary to induce the State responsible for the internationally wrongful act to comply with its obligations."

C. Article 53 - Conditions relating to resort to countermeasures

1. Negotiation

Article 53(2) requires that an injured state offer to negotiate with the breaching state prior to taking countermeasures, and Article 53(4) requires that countermeasures not be undertaken while negotiations are being pursued in good faith. These articles contravene customary international law, which permits an injured state to take countermeasures prior to seeking negotiations with the responsible state, and also permits countermeasures during negotiations. *See Air Services Case* at 444-46. The Air Services Tribunal noted that it "does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations. . . ." *Id.* at 445. The reason for the Air Services rule is clear: it prevents the breaching state from controlling the duration and impact caused by its breach by deciding when and for how long to engage in "good faith negotiations." The United States believes it is essential that the Commission delete the negotiation clause from Article 53(2), and Article 53(4) in its entirety in order to bring the draft articles into conformity with customary international law.

2. Provisional and urgent countermeasures

Article 53(3) creates an exception to Articles 53(2) and 53(4) for "such provisional and urgent countermeasures as may be necessary to preserve" the injured state's rights. The United States commends the Commission's decision to replace the language of the first reading text, which referred to "interim measures of protection" with the reference in Article 53(3) to "provisional and urgent countermeasures." Nonetheless, several problems with this provision still remain. First, there is nothing under customary international law to support limiting the countermeasures that may be taken prior to and during negotiations only to those countermeasures that would qualify as "provisional and urgent." The United States maintains that the negotiation clause in Article 53(2) and Article 53(4) in its entirety should be deleted. The inclusion of Article 53(3) does not satisfy these objections.

Second, it would appear that even "provisional and urgent" countermeasures would be required to be suspended under Article 53(5)(b) if the dispute "is submitted to a court or tribunal which has the authority to make decisions binding on the parties." As discussed below, the United States strongly believes that Article 53(5)(b) should be deleted, but, at a minimum, if Article 53(5)(b) is retained, Article 53(3) needs to be exempt from the suspension requirement of Article 53(5)(b). The purpose of Article

53(3) is to enable an injured state to preserve its rights during negotiations with the responsible state. The injured state's need for preservation of these rights does not disappear when the responsible state submits the dispute to a court or tribunal with the authority to make binding decisions on the parties. Otherwise a breaching state could control the duration and impact of the injury it is causing through its breach.

That provisional and urgent countermeasures appear to be subject to Article 53(5)(b)'s suspension requirement may well be a drafting error. Under the first reading text, in Article 48(1) "interim measures of protection" could be taken to preserve an injured state's rights, but these "interim measures of protection" were not subject to the suspension requirement of first reading text Article 48(3). Article 48(3) required only "countermeasures" but not "interim measures of protection" to be suspended when the relevant dispute was submitted to a tribunal. Because the language "interim measures of protection" has been replaced in the second reading text with the language "provisional and urgent countermeasures" these countermeasures, as all other countermeasures, now appear to have been made subject to Article 53(5)(b)'s suspension requirement. The Commission at a minimum needs to make explicit that Article 53(3) is exempt from Article 53(5)(b).

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3. Suspension of countermeasures

Under Article 53(5)(b), once a dispute is submitted to a court or tribunal with the authority to make binding decisions, no new countermeasures may be taken, and countermeasures already taken must be suspended within a reasonable time. The United States believes that this provision needs to be deleted as there is no basis for such an absolute rule. The Air Services Tribunal noted that, once a dispute is submitted to a tribunal that has the "means to achieve the objectives justifying the countermeasures," the right to initiate countermeasures disappears, and countermeasures already initiated "*may*" be "eliminated" but only to the extent the tribunal provides equivalent "interim measures of protection." *Air Services Case* at 445-46 (emphasis supplied). Further, the Air Services tribunal noted that "[a]s the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely." *Id.* at 446. This approach appropriately reflects the need to ensure that an injured party is able to respond to a continuing injury caused by another state's breach. The United States submits that the requirement to suspend countermeasures is not so much related to a tribunal's authority to make binding decisions on the parties, as it is to whether a tribunal actually orders equivalent "interim measures of protection" to replace the suspended countermeasures in protecting the injured state's rights. Likewise, the right to initiate countermeasures does not disappear completely if a tribunal's ability to impose interim measures of protection is insufficient to address the injury to the state caused by the breach. As these determinations can only be made on a case by case basis, the United States urges the Commission to delete Article 53(5)(b).

II. Serious breaches of essential obligations to the international community

The United States welcomes the removal of the concept of "international crimes" from the draft articles. Articles 41 and 42 dealing with "serious breaches of essential obligations to the international community" have replaced the first reading text Article 19, which dealt with "international crimes." Though the replacement of "international crimes" with the category of "serious breaches" is undoubtedly an important improvement, the United States questions the merit of drawing a distinction between "serious" and other breaches.

There are no qualitative distinctions among wrongful acts, and there are already existing international institutions and regimes to respond to violations of international obligations that the Commission would consider "serious breaches." For example, the efforts underway to establish a permanent International Criminal Court, and the Security Council's creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, are examples of special regimes of law better suited than the law of state responsibility to address serious violations of humanitarian law. Indeed, responsibility for dealing with violations of international obligations that the Commission interprets as rising to the level of "serious breaches" is better left to the Security Council rather than to the law of state responsibility. Further, the description of some breaches as "serious" derogates from the status and importance of other obligations breached. The articles on state responsibility are an inappropriate vehicle for making such distinctions. Finally, the draft articles are intended to deal only with secondary rules. Articles 41 and 42 in attempting to define "serious breaches" infringe on this distinction between primary and secondary rules, as primary rules must be referenced in order to determine what constitutes a "serious breach."

The United States also notes that the definition of what constitutes a "serious breach" in Article 41(2) uses such broad language that any purpose of drawing a distinction between "serious" breaches and other breaches is essentially negated. Almost any breach of an international obligation could be described by an injured State as meeting the criteria for "serious breach," and given the additional remedies the draft articles provide for "serious breaches," injured states might have an incentive to argue that an ordinary breach is in fact a "serious breach." There is little consensus under international law as to the meaning of the key phrases used to define "serious breach," such as "fundamental interests" and "substantial harm." This lack of consensus makes it nearly impossible for the Commission to draft a definition of "serious breach" that would be widely acceptable. This difficulty in arriving at an acceptable definition of "serious breach" provides additional strong grounds for the deletion of these articles.

The most troubling aspect of the articles on "serious breaches" is that these articles provide additional remedies against states found to have committed "serious breaches," above and beyond those provided for ordinary breaches. The United States is

most concerned with Article 42(1), which includes language ("damages reflecting the gravity of the breach") that can be interpreted to allow punitive damages for serious breaches. There is scant support under customary international law (in contrast to domestic law) for the imposition of punitive damages in response to a "serious breach," and the United States believes it is crucial that this paragraph be deleted. The Special Rapporteur has acknowledged the lack of a basis under customary international law for the imposition of punitive damages, stating that "[t]here is no authority and very little justification for the award of punitive damages properly so-called, in cases of State responsibility, in the absence of some special regime for their imposition." *See Third Report on State Responsibility*, International Law Commission, 52nd sess., at para. 190 and n.157, U.N. Doc. A/CN.4/507/Add.1 (2000); *see also*, *First Report on State Responsibility*, International Law Commission, 50th sess., at para.63, U.N. Doc. A/CN.4/490/Add.2 (1998), listing cases that have rejected claims for punitive damages under international law.

The United States notes that detailed proposals for the consequences that should attach to responsible states committing international crimes were rejected both in 1995 and in 1996 by the Commission. *See First Report on State Responsibility*, International Law Commission, 50th Sess., at para. 51 and n.35, U.N. Doc. A/CN.4/490/Add.1 (1998). The Commission should likewise reject any attempt at this late date to introduce what appears to be a special regime for the imposition of punitive damages into the draft articles as a potential remedy for "serious breaches." The United States strongly urges the Commission to delete Articles 41 and 42.

III. Invocation of the state responsibility of a state

A. Definition of "injured state"

The United States welcomes the important distinction that the Commission has drawn between states that are specifically injured by the acts of the responsible state, and other states that do not directly sustain injury. We believe this distinction is a sound one. We also support the Commission's decision to structure Article 43 in terms of bilateral obligations dealt with in paragraph (a) and multilateral obligations dealt with in paragraph (b). We share the view noted in the Special Rapporteur's Third Report that Article 43(b) pertaining to multilateral obligations would not apply "in legal contexts (e.g. diplomatic protection) recognised as pertaining specifically to the relations of two States *inter se*". *See Third Report on State Responsibility*, International Law Commission, 52nd sess., at para. 107, Table 1, U.N. Doc. A/CN.4/507 (2000). Thus, there is nothing in Article 43 that would change the doctrine of espousal.

The definition of injured state was narrowed in the revised articles, and we welcome this improvement. We believe, however, that the draft articles would benefit from an even further focusing of this definition. Article 43(b)(ii) provides that if an obligation breached is owed to a group of states or the international community as a whole and "is of such a character as to affect the enjoyment of the rights or the

performance of the obligations of all the States concerned," then a state may claim injured status. The broad language of this provision allows almost any state to claim status as an injured state, and thereby undermines the important distinction being drawn between states specifically injured and those states not directly sustaining an injury. Further, it inappropriately allows states to invoke the principles of state responsibility even when they have not been specially affected by the breach. Article 43(b)(i) provides an adequate standard for invoking state responsibility for a breach owed to a group of states that is more in keeping with established international law and practice. The United States urges that Article 43(b)(ii) be deleted.

IV. Other issues

A. Attribution of conduct carried out in absence of official authority

Article 7 allows the conduct of private parties to be attributed to a state when private parties exercise "elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority." The commentary to first reading Article 8(b) (the predecessor to Article 7) noted that international practice in this area is very limited and thus acknowledged that there is little authority to support this article. *See* Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading at 34 (Text Consolidated by Secretariat, January 1997, Doc. 97-02583) [hereinafter "Commentary"]. Moreover the commentary noted that this article would apply only in exceptional circumstances, such as when organs of administration are lacking as a result of war or natural disaster. Because the persons to whom this article would apply "have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in exceptional cases." *Id.* The United States believes Article 7 should be redrafted to more explicitly convey this exceptional nature.

B. Breach consisting of composite act

The United States commends the Commission for substantially revising and streamlining the articles concerning the moment and duration of breach. In particular, the United States notes that Article 15(1) defines breach of an international obligation as occurring in the context of "a series of actions or omissions defined in aggregate as wrongful" only when an action or omission taken with all other actions or omissions is sufficient to constitute the wrongful act. This is, for example, inherently so with regard to judicial actions. A lower court decision may be the first action in a series of actions that will ultimately be determined in the aggregate to be internationally wrongful. The lower court decision, in and of itself, may be attributable to the State pursuant to Article 4; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in Article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes

the final expression of the court system as a whole, i.e. until there has been a decision of the court of last resort available in the case. The United States also wishes to note its understanding that, consistent with Article 13, the series of actions or omissions defined in aggregate as wrongful cannot include actions or omissions that occur before the existence of the obligation in question.

While the United States approves of Article 15(1), we believe that Article 15(2) requires further consideration. The current draft does not differentiate between categories of action which clearly lend themselves to consideration as composite acts, such as genocide, and other categories of action where such characterization is not so clearly appropriate under customary international law. This could result in inappropriately extending liability in certain situations.

C. Responsibility of a state in respect of the act of another state

Article 16 allows a state which aids or assists another state in committing an internationally wrongful act to be held responsible for the latter state's wrongful act if the assisting state does so "with knowledge of the circumstances of the internationally wrongful act" and if the act would be internationally wrongful had it been committed by the assisting state itself. The United States welcomes the improvements in Article 16 over its first reading predecessor (Article 27), particularly the incorporation of an intent requirement in the language of Article 16(a) which requires "knowledge of the circumstances of the internationally wrongful act." The United States is also pleased to note that Article 16 is "limited to aid or assistance in the breach of obligations by which the assisting State is itself bound." *See Second Report on State Responsibility*, International Law Commission, 51st Sess., at para. 186, U.N. Doc. A/CN.4/498/Add.1 (1999).

The United States believes that Article 16 can be further improved by providing additional clarification in the commentary to Article 16 as to what "knowledge of the circumstances" means and what constitutes the threshold of actual participation required by the phrase "aids or assists." We note that in both the commentary to the first reading Article 27 and in the Special Rapporteur's discussion of this article in his Second Report, it has been stressed that the intent requirement must be narrowly construed. An assisting state must be both aware that its assistance will be used for an unlawful purpose and so intend its assistance to be used. The United States believes that Article 16 should cover only those cases where "the assistance is clearly and unequivocally connected to the subsequent wrongful act." *Id.* at para. 178. The inclusion of the phrase "of the circumstances" as a qualifier to the term "knowledge" should not undercut this narrow interpretation of the intent requirement, and the commentary to Article 16 should make this clear.

As to the threshold of participation required by the phrase "aids or assists," the commentary to first reading Article 27 drew a distinction between "incitement or encouragement" which Article 27 did not cover, and noted that aid or assistance must

make it "materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act." *See* Commentary to Article 27 at para. 17. The United States urges the Commission to fully develop the issue of what threshold of participation is required by the phrase "aids or assists" in the commentary to Article 16, as the current draft of Article 16 provides little guidance on this issue.

D. Assurances and guarantees of non-repetition.

Article 30(b) requires the state responsible for an internationally wrongful act "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." The United States urges the deletion of this provision because it does not codify customary international law, and there is fundamental skepticism, even among the Commission itself, as to whether there can be any legal obligation to provide assurances and guarantees of non-repetition. *See* Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10 p. 29, para. 88). There are no examples of cases in which courts have ordered that a state give assurances and guarantees of non-repetition. *Id.* With regard to state practice, assurances and guarantees of non-repetition appear to be "directly inherited from nineteenth-century diplomacy," and while governments may provide such assurances in diplomatic practice, it is questionable whether such political commitments can be regarded as legal requirements. *Id.* In fact, use of the term "appropriate" to modify "assurances and guarantees" is a further indication that Article 30(b) does not reflect a legal rule, but rather a diplomatic practice. Finally, even the Third Report raises the question as to whether assurances and guarantees can properly be formulated as obligations. *See Third Report on State Responsibility*, International Law Commission, 52nd Sess., at para. 58, U.N. Doc. A/CN.4/507 (2000). The United States submits that assurances and guarantees of non-repetition cannot be formulated as legal obligations, have no place in the draft articles on state responsibility, and should remain as an aspect of diplomatic practice. The United States also notes that under Article 49(2)(a) states other than injured states may seek from the responsible state assurances and guarantees of non-repetition in addition to cessation of the internationally wrongful act. For the reasons expressed above with respect to Article 30(b), the United States believes that the "assurances and guarantees of non-repetition" provision of Article 49(2)(a) should likewise be deleted.

E. Moral damages

The United States welcomes the Commission's removal of moral damages from Article 38 concerning satisfaction. The United States notes that moral damages are encompassed by a responsible state's duty to make full reparation under Article 31(2) which provides that "injury consists of any damage, whether material or moral." The United States urges the Commission to make explicit that moral damages are likewise included in a responsible state's duty to provide compensation for damage to injured states by clarifying in Article 37(2) that moral damages are "financially assessable damage[s]". The United States also believes it would be important to clarify in this

article that moral damages are limited to damages for mental pain and anguish and do not include "punitive damages."

F. Exhaustion of local remedies

Article 45 addresses the admissibility of claims and provides that state responsibility may not be invoked if (a) a claim is not brought in accordance with applicable rules relating to nationality of claims and (b) the claim is "one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted." The Special Rapporteur's comments to this provision make clear that exhaustion of local remedies is "a standard procedural condition to the admissibility of the claim" rather than a substantive requirement. *See Second Report on State Responsibility*, International Law Commission, 51st Sess., at para. 143, U.N. Doc. A/CN.4/498 (1999). The United States welcomes this clarification by the Special Rapporteur, and further notes that the precise parameters of this procedural rule should be dealt with in detail under the topic of Diplomatic Protection. *See Third Report on State Responsibility*, International Law Commission, 52nd Sess., at para. 241, U.N. Doc. A/CN.4/507/Add.2 (2000).

G. Joint and several liability

The United States is concerned that Article 48, which deals with invocation of responsibility against several states, could be interpreted to allow joint and several liability. Under common law, persons who are jointly and severally liable may each be held responsible for the entire amount of damage caused to third parties. As noted by the Special Rapporteur in his Third Report, states should be free to incorporate joint and several liability into their specific agreements, but apart from such agreements, which are *lex specialis*, states should only be held liable to the extent the degree of injury suffered by a wronged state can be attributed to the conduct of the breaching state. *See Third Report on State Responsibility*, International Law Commission, 52nd Sess., at para. 277, U.N. Doc. A/CN.4/507/Add.2 (2000). To clarify that Article 48 does not impose joint and several liability on states, the United States proposes that Article 48(1) be redrafted to read as follows: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State's conduct."

H. Final Form

The United States believes that the draft articles on state responsibility should not be finalized in the form of a Convention. Because the draft articles reflect secondary rules of international law, a Convention is not necessary, as it might be with respect to an instrument establishing primary rules. Additionally, finalizing the draft articles in a form other than a Convention would facilitate the Commission's efforts to complete its work and avoid contentious areas, such as the dispute settlement provisions currently omitted

from the second reading text. Such an approach would make the draft articles amenable to wider agreement during negotiation.

Conclusion

The United States is pleased with the substantial progress the Commission has made in revising the draft articles to more accurately reflect existing customary international law. However, we believe that the particular provisions we have discussed continue to deviate from customary international law and state practice. In order to enhance prospects for broadest support of the Commission's work in this important area, we believe it critical that the Commission better align the provisions with customary international law in the areas discussed above.