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ON THE WORK OF ITS SIXTIETH SESSION**

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CHAPTER VII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Revision

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CHAPTER VII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

1. The Commission, at its fifty-fourth session (2002), decided to include the topic “Responsibility of international organizations” in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.¹ At the same session, the Commission established a Working Group on the topic. The Working Group in its report² briefly considered the scope of the topic, the relations between the new project and the draft articles on “Responsibility of States for internationally wrongful acts”, questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.³
2. From its fifty-fifth (2003) to its fifty-ninth (2007) sessions, the Commission had received and considered five reports from the Special Rapporteur,⁴ and provisionally adopted draft articles 1 to 45 [44].⁵

¹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10 and Corr.1)*, paras. 461-463. At its fifty-second session (2000), the Commission decided to include the topic “Responsibility of international organizations” in its long-term programme of work (*ibid.*, *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 729). The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission’s decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission’s 2000 report. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic “Responsibility of international organizations”.

² *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10 and Corr.1)*, paras. 465-488.

³ *Ibid.*, para. 464.

⁴ A/CN.4/532 (first report), A/CN.4/541 (second report), A/CN.4/553 (third report), A/CN.4/564 and Add.1 and 2 (fourth report), and A/CN.4/583 (fifth report).

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/597), as well as written comments received so far from international organizations.⁶

4. The Commission considered the sixth report of the Special Rapporteur at its 2960th to 2964th meetings from 9 to 16 May 2008. At its 2964th meeting, on 16 May 2008, the Commission referred draft articles 46 to 51 to the Drafting Committee. At the same meeting, the Commission established a Working Group for the purpose of considering the issue of countermeasures as well as the advisability of including in the draft articles a provision relating to admissibility of claims.

5. Upon the recommendation of the Working Group, the Commission, at its 2968th meeting, on 29 May 2008, referred an additional draft article 47 *bis* on admissibility of claims to the Drafting Committee.⁷

⁵ Draft articles 1 to 3 were adopted at the fifty-fifth session (2003), draft articles 4 to 7 at the fifty-sixth session (2004), draft articles 8 to 16 [15] at the fifty-seventh session (2005), draft articles 17 to 30 at the fifty-eighth session (2006), and draft articles 31 to 45 [44] at the fifty-ninth session (2007).

⁶ Following the recommendations of the Commission (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, and corrigendum (A/57/10 and Corr.1), paras. 464 and 488; and *ibid.*, *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52), the Secretariat, on an annual basis, has been circulating the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations, see A/CN.4/545, A/CN.4/547, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, and A/CN.4/593 and Add.1.

⁷ Draft article 47 *bis*, as drafted by the Special Rapporteur, reads as follows:

Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

6. A majority of its members being in favour of including in the draft articles provisions regulating the issue of countermeasures, the Working Group dealt with a number of related issues. It first considered whether, and to what extent, the legal position of members and non-members of an international organization should be distinguished in that respect. It came to the conclusion that a new draft article should be included, stating that an injured member of an international organization may not take countermeasures against the organization so long as the rules of the organization provide reasonable means to ensure compliance of the organization with its obligations under Part Two of the draft articles. Secondly, the Working Group agreed that the draft articles should specify the need for countermeasures to be taken in a manner respecting the specificity of the targeted organization. Finally, the Working Group recommended that the draft articles should not address the possibility for a regional economic integration organization to take countermeasures on behalf of one of its injured members.

7. At its 2978th meeting, on 15 July 2008, the Commission received the oral report of the Working Group, which was delivered by the Chairman of the Working Group. The Commission referred draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the recommendations of the Working Group.

8. The Commission considered and adopted the report of the Drafting Committee on draft articles 46 to 53 at its 2971st meeting, on 4 June 2008 (sect. C.1 below).

9. At its ... to ... meetings, on ... 2008, the Commission adopted the commentaries to the draft articles ... (sect. C.2 below). [...]

10. At its ... meeting on ... July 2008, the Commission considered the report of the Drafting Committee and took note of draft articles 54 to 60 on countermeasures.

2. An injured State or international organization may not invoke the responsibility of another international organization if the claim is subject to any applicable rule on the exhaustion of local remedies and any available and effective remedy has not been exhausted.

1. Introduction by the Special Rapporteur of his sixth report

11. Before introducing his sixth report, the Special Rapporteur indicated that his seventh report would address certain outstanding issues such as the final provisions of the draft articles and the place of the chapter concerning the responsibility of a State in connection with the act of an international organization. The seventh report would also provide the opportunity to respond to comments made by States and international organizations on the draft articles provisionally adopted by the Commission and, as necessary, to propose certain amendments thereto.

12. The sixth report of the Special Rapporteur, dealing with the implementation of the responsibility of international organizations, followed, like the previous reports, the general pattern of the articles on Responsibility of States for internationally wrongful acts. Consistently with the approach adopted in Part Two of the draft articles, the draft articles relating to the implementation of international responsibility only addressed the invocation of the responsibility of an international organization by a State or another international organization. Moreover, the implementation of the responsibility of a State towards an international organization was outside the scope of the draft articles.

13. Draft article 46⁸ provided a definition of an “injured” State or international organization, in line with the criteria laid down in article 42 on State responsibility.

⁸ Draft article 46 reads as follows:

Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured party to invoke the responsibility of another international organization if the obligation breached is owed to:

- (a) That State or the former international organization individually;
- (b) A group of parties including that State or that former international organization, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State or that international organization; or
 - (ii) Is of such a character as radically to change the position of all the parties to which the obligation is owed with respect to the further performance of the obligation.

14. Draft articles 47⁹ and 48¹⁰ replicated, with minor adjustments, the corresponding provisions on State responsibility. The question arose whether the draft articles should contain a provision, similar to article 44 on State responsibility, dealing with nationality of claims and exhaustion of local remedies. In the view of the Special Rapporteur, since the situations in which such requirements would apply in relation to the implementation of the responsibility of an

⁹ Draft article 47 reads as follows:

Draft article 47

Notice of claim by an injured State or international organization

1. An injured State which invokes the responsibility of an international organization shall give notice of its claim to that organization.
2. An injured international organization which invokes the responsibility of another international organization shall give notice of its claim to the latter organization.
3. The injured State or international organization may specify in particular:
 - (a) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of Part Two.

¹⁰ Draft article 48 reads as follows:

Draft article 48

Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

- (a) The injured State or international organization has validly waived the claim;
- (b) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

international organization were much more limited than in the context of inter-State relations, a provision on nationality of claims and exhaustion of local remedies could be omitted in the present draft articles.

15. Draft articles 49¹¹ and 50,¹² concerning, respectively, plurality of injured entities and plurality of responsible entities, were aligned on the corresponding articles on State responsibility, with a specific reference, however, to the case in which the responsibility of a member of an international organization was only subsidiary.

¹¹ Draft article 49 reads as follows:

Plurality of injured entities

Where several entities are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization which has committed the internationally wrongful act.

¹² Draft article 50 reads as follows:

Plurality of responsible entities

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each responsible entity may be invoked in relation to that act. However, if the responsibility of an entity is only subsidiary, it may be invoked only to the extent that the invocation of the primary responsibility has not led to reparation.

2. Paragraph 1:

(a) Does not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse that the entity providing reparation may have against the other responsible entities.

16. Draft article 51,¹³ dealing with the invocation of responsibility by an entity other than an injured State or international organization, was based on article 48 on State responsibility. However, some adjustments had been made concerning the right of an international organization to invoke the responsibility of another international organization for a breach of an obligation owed to the international community as a whole. In the light of comments received from States and international organizations, the existence of such a right seemed to

¹³ Draft article 51 reads as follows:

**Invocation of responsibility by an entity other than
an injured State or international organization**

1. Any State or international organization other than an injured State or organization is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to a group of entities including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.
2. Any State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.
3. Any international organization that is not an injured organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and if the organization that invokes responsibility has been given the function to protect the interest of the international community underlying that obligation.
4. Any State or international organization entitled to invoke responsibility under the preceding paragraphs may claim from the responsible international organization:
 - (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 33;
 - (b) Performance of the obligation of reparation in accordance with Part Two, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.
5. The requirements for the invocation of responsibility by an injured State or international organization under articles 47 and 48 apply to an invocation of responsibility by a State or international organization entitled to do so under the preceding paragraphs.

depend on whether the organization had a mandate to protect the general interests underlying the obligation in question. This limitation was reflected in paragraph 3 of draft article 51.

17. Draft articles 52,¹⁴ 53,¹⁵ 54,¹⁶ 55¹⁷ and 56¹⁸ on countermeasures were based on the

¹⁴ Draft article 52 reads as follows:

Draft article 52

Object and limits of countermeasures

1. An injured State or international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.
4. Where an international organization is responsible for an internationally wrongful act, an injured member of that organization may take countermeasures against the organization only if this is not inconsistent with the rules of the same organization.
5. Where an international organization which is responsible for an internationally wrongful act is a member of the injured international organization, the latter organization may take countermeasures against its member only if this is not inconsistent with the rules of the injured organization.

¹⁵ Draft article 53 reads as follows:

Draft article 53

Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.

2. A State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between the injured State or international organization and the responsible international organization;

(b) To respect the inviolability of the agents of the responsible international organization and of the premises, archives and documents of the same organization.

¹⁶ Draft article 54 reads as follows:

Draft article 54

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

¹⁷ Draft article 55 reads as follows:

Draft article 55

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) Call upon the responsible international organization, in accordance with article 47, to fulfil its obligations under Part Two;

(b) Notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

corresponding articles on State responsibility. There seemed to be no reason for excluding, in general terms, that an injured State could take countermeasures against a responsible international organization. Moreover, while practice offered some examples of countermeasures by international organizations against responsible States, several States had taken the view, in their comments addressed to the Commission, that an injured organization could resort, in principle, to countermeasures under the same conditions as those applicable to States. However, in the relations between an international organization and its members, countermeasures were unlikely to be applicable. Therefore, an exception was made in paragraphs 4 and 5 of draft article 52.

18. Draft articles 57¹⁹ addressed two separate issues. Paragraph 1, which corresponded *mutatis mutandis* to article 54 on State responsibility, was a “without prejudice” clause dealing with “lawful measures” taken against a responsible international organization by a State or another

¹⁸ Draft article 56 reads as follows:

Draft article 56

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Two in relation to the internationally wrongful act.

¹⁹ Draft article 57 reads as follows:

**Measures taken by an entity other than an injured State
or international organization**

1. This chapter does not prejudice the right of any State or international organization, entitled under article 51, paragraph 1, to invoke the responsibility of an international organization, to take lawful measures against the latter international organization to ensure cessation of the breach and reparation in the interest of the injured party or of the beneficiaries of the obligation breached.

2. Where an injured State or international organization has transferred competence over certain matters to a regional economic integration organization of which it is a member, the organization, when so requested by the injured member, may take on its behalf countermeasures affecting those matters against a responsible international organization.

international organization that were not “injured” within the meaning of draft article 46. In the text of draft article 57, paragraph 1, the reference to “article 51, paragraph 1” should read “article 51, paragraphs 1 to 3”.

19. Paragraph 2 of draft article 57 concerned the case of a regional economic integration organization to which exclusive competence over certain matters had been transferred by its members. Since the members of the organization would no longer be in a position to resort to countermeasures affecting those matters, the organization would be allowed, at the request of an injured member and on its behalf, to take countermeasures against another organization while respecting the requirement of proportionality.

20. After the adoption of the draft articles on countermeasures, the Commission would be able to fill a gap deliberately left in the chapter relating to circumstances precluding wrongfulness, whereby the drafting of article 19 had been postponed until the examination of the issues relating to countermeasures in the context of the implementation of the responsibility of an international organization. In his seventh report, the Special Rapporteur would examine the additional question of whether draft article 19 should also cover countermeasures by an injured international organization against a responsible State - a question that was not addressed in the context of the implementation of responsibility of international organizations.

2. Summary of the debate

(a) General comments

21. Some members agreed with the suggestion by the Special Rapporteur that, before completing the first reading, the texts of the draft articles provisionally adopted would be reviewed in the light of all available comments from States and international organizations. According to another view, it was not appropriate for the Commission to do so, since the Commission should focus, for the time being, on the elaboration of a coherent set of draft articles without being influenced by political considerations.

22. It was suggested by some members that a meeting be organized between the Commission and legal advisers of international organizations in order to engage in a concrete discussion of the issues raised by the present topic, including the question of countermeasures.

(b) Countermeasures

(i) General remarks

23. Different opinions were expressed by the members as to the conditions under which international organizations may be the target of, or resort to, countermeasures. While certain members were against the inclusion of draft articles on countermeasures, other members supported their elaboration by the Commission. Several members supported the idea of establishing a Working Group for the purpose of considering the issue of countermeasures.

24. According to some members, there was no reason why countermeasures ought to be confined to inter-State relations. In this regard, it was stated that certain rules applicable to inter-State relations could be extended by analogy to the relations between States and international organizations, or between international organizations. A suggestion was made that the draft articles also cover countermeasures taken by an international organization against a State. However, several members called for a cautious approach with respect to countermeasures by and against international organizations, in view of the limited practice, the uncertainty surrounding their legal regime and the risk of abuse that they would entail. It was also stated that countermeasures should remain exceptional. Some members were of the opinion that countermeasures should not be made available in the situations covered by the present draft articles, as they also believed that countermeasures should not have been accepted in the articles on State responsibility. It was also suggested that the possibility for an international organization to resort to countermeasures appeared to be limited to non-compliance with contractual obligations in a treaty relationship involving that organization.

25. Some members were of the view that the relationship between an international organization and its members should be treated differently, as regards countermeasures, from the relationship between an international organization and non-members.

26. Some members pointed to the fact that the practice within the European Union and in its relations with the WTO could not constitute the basis for drawing general rules on the matter. This was due, in particular, to the peculiar nature of the European Union as a highly economically integrated organization whose members had lost the capacity to impose countermeasures or to react to countermeasures in the economic field. In the view of some

members, retaliations within the WTO system were contractual in nature and belonged to a special legal regime; it was also stated that such retaliations were subject to the law of treaties rather than to the regime on countermeasures.

27. Divergent views were expressed on whether sanctions imposed by the United Nations Security Council could be regarded as countermeasures. According to several members, such sanctions were subject to a different regime and should therefore remain outside the scope of the topic. In support of this position, reference was made to their punitive character and to their main purpose which was the maintenance of international peace and security rather than the enforcement of obligations under international law. According to another view, sanctions by the Security Council could be regarded, in certain situations, as countermeasures in their essence, since they were directed against States that had breached international law and were frequently aimed at stopping internationally wrongful acts. The question was also raised as to whether, in case of unlawful sanctions imposed by the Security Council, the targeted States would be entitled to take countermeasures against the organization and those States that implemented them.

28. It was suggested that measures taken by an international organization, in accordance with its internal rules, against their members were to be regarded as sanctions rather than countermeasures. It was also observed that countermeasures must be distinguished from other types of measures, including those taken in the event of a material breach of a treaty obligation, which were governed by the law of treaties.

(ii) Specific comments on the draft articles

29. Some members expressed support, in general terms, for draft articles 52 to 56.

Draft article 52. Object and limits of countermeasures

30. With respect to draft article 52, several members emphasized the decisive role of the rules of the organization in determining whether an organization could resort to countermeasures against its members or be the target of countermeasures by them. It was suggested that disputes between an international organization and its members should, as far as possible, be settled in accordance with the rules and through the internal procedures of the organization. It was also emphasized that the existence and proper functioning of an international organization must not be jeopardized by unilateral countermeasures adopted by their members. As regards

countermeasures taken by an injured organization, doubts were raised as to whether the concept of implied powers would constitute a sufficient basis for the right of an international organization to resort to countermeasures.

31. Some members expressed support for the reference to the rules of the organization contained in paragraphs 4 and 5 of draft article 52. However, it was suggested that draft article 52, paragraph 4, should be redrafted in order to clarify that a member of an international organization which considered itself injured by the organization could not, as a general rule, resort to countermeasures except if this conformed with the character and the rules of the organization; the same formulation should be included, *mutatis mutandis*, in paragraph 5. According to another proposal, the words “not inconsistent with” should be replaced by the word “allowed”. It was also suggested that a paragraph 1 *bis* be added, limiting the power of an injured organization to resort to countermeasures to those situations in which such a power was enshrined in its constitutive instrument or in its internal rules. In the event that the rules of the organization were silent on countermeasures, a proposal was made to enunciate, in draft article 52, paragraphs 4 and 5, the prohibition of countermeasures that would significantly prejudice the position of the targeted organization, or threaten its functioning or existence.

32. According to another view, draft article 52 should be substantially reconsidered with a view to limiting countermeasures by international organizations to cases where competences have been transferred to an international organization and the organization resorts to countermeasures in the exercise of such competences.

33. While some members agreed with the Special Rapporteur that the internal rules of an international organization were only relevant to the relations between that organization and its members, other members of the Commission were of the view that respect by an international organization of its internal rules while taking countermeasures could also be claimed by non-members. In particular, it was proposed that draft article 52 enunciate that the targeted State or international organization, whether or not a member of the international organization resorting to countermeasures, should be able to contest the legality of such measures if the functions of that organization did not allow it to adopt countermeasures or if the organ that resorted to such measures acted *ultra vires*.

Draft article 53. Obligations not affected by countermeasures

34. With respect to paragraph 2 (*b*) of draft article 53, the question was raised whether this provision corresponded to the *lex lata* or to the *lex ferenda*, and whether it applied to all international organizations.

Draft article 55. Conditions relating to resort to countermeasures

35. With respect to subparagraph 3 (*b*) of draft article 55, it was proposed that the scope of this exception be extended to situations in which a dispute was pending before a body other than a court or a tribunal, provided that such body had the power to make decisions binding on the parties. This would also cover mechanisms possibly available within an international organization for the settlement of disputes between the organization and its members.

**Draft article 57. Measures taken by an entity other than
an injured State or international organization**

36. With respect to draft article 57, it was stated that the two paragraphs dealt with questions that were too different in nature to be included in the same provision. Some members expressed support for draft article 57, paragraph 1, dealing with lawful measures that a non-injured State or international organization could take against a responsible international organization. It was suggested that the draft article include the requirement, enunciated in draft article 51, paragraph 3, that the organization invoking responsibility has been given the function to protect the interest of the international community underlying the obligation in question. However, it was also stated that replicating article 54 on State responsibility was not the only option for the Commission; in particular, the question was raised whether the Commission could go a step further and replace the expression “lawful measures” by “countermeasures”.

37. Some members supported draft article 57, paragraph 2, dealing with countermeasures taken against a responsible international organization by a regional economic integration organization at the request of an injured member that had transferred to that organization exclusive competence over certain matters. However, according to some members, there was no valid reason to restrict the scope of this provision to regional economic integration organizations, and a suggestion was made that the scope of this provision be expanded so as to cover all cases in which member States had transferred to an international organization competence to act on

their behalf. Other members expressed concern about this provision, indicating, in particular, that it would entail a serious risk of abuse and would produce the effect of bringing in more States than those initially injured by an internationally wrongful act. It was proposed that the draft article limit the right of an international organization to adopt countermeasures to those situations where such a right was expressly allowed by the mandate of the organization. It was also proposed that the right of an organization to adopt countermeasures in accordance with paragraph 2 of draft article 57 be limited to those measures that would have been lawfully possible for the member, had it taken those measures itself. If no consensual formulation of this paragraph could be found, a proposal was made either to delete it or to replace it by a “without prejudice” clause concerning regional economic integration organizations.

3. Special Rapporteur’s concluding remarks

38. The Special Rapporteur observed that the Commission was divided as to whether the draft articles should include a chapter on countermeasures and, in the affirmative, as to what extent international organizations should be considered entitled to resort to countermeasures. A Working Group may attempt to reach a consensus on these issues. If only a “without prejudice” clause was adopted, there would be no opportunity to state, as the current wording of draft article 52, paragraphs 4 and 5 implies, that as a general rule countermeasures had no place in the relations between an international organization and its members. Such a general statement, the aim of which was to curb countermeasures, was nowhere explicitly spelled out in practice or in the literature.
