TRADE COUNTERMEASURES FOR BREACHES OF INTERNATIONAL LAW OUTSIDE THE WTO

I. INTRODUCTION

In 2017, Qatar initiated consultations with Saudi Arabia, Bahrain and United Arab Emirates ('UAE') concerning measures that allegedly violate numerous WTO covered agreements. Saudi Arabia, Bahrain and UAE invoked security exceptions and stated that their measures are taken in response to Qatar's involvement in financing terrorism in breach of United Nations ('UN') Security Council Resolutions and of agreements under the Gulf Cooperation Council.[1] Two of these procedures led to the establishment of a Panel,[2] but only the Panel in *Saudi Arabia—IP Rights* (2020)[3] has adopted a Report, at the time of this study. This is the second Panel Report applying security exceptions, after the historic first Panel Report, in *Russia—Traffic in Transit* (2019).[4]

There is no evidence that Saudi Arabia argued before the Panel that its trade restrictions were lawful countermeasures under customary international law ('CIL'), although the measures by Saudi Arabia (and others) could qualify as paradigmatic countermeasures. In relation to similar facts, Saudi Arabia along with Bahrain, Egypt, and UAE argued before the International Court of Justice ('ICJ'), where they brought an appeal procedure relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation,[5] that their restrictive measures in breach of that Convention against Qatar were lawful countermeasures owing to Qatar's prior alleged breach of the above anti-terrorism obligations.[6] The very fact that the respondent WTO Members have not argued countermeasures as a defence in the WTO procedures, while they did so explicitly in other *fora*, raises a pivotal question. Are countermeasures permissible in the form of suspending compliance with WTO obligations in response to prior breaches of international law obligations outside the WTO, such as anti-terrorism obligations, the law of the sea, human rights, and so on?

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[1] See also statement quoted in: *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)* [2020] <https://www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> accessed 14 September 2021 [8].

[2] The one other than *Saudi Arabia—IP Rights* is: *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526, <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm> accessed 14 September 2021.

[3] *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*, Panel Report (16 June 2020) WT/DS567/R ('*Saudi Arabia—IP Rights*') < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm> accessed 14 September 2021.

[4] *Russia—Measures Concerning Traffic in Transit*, Panel Report (5 April 2019) WT/DS512/R ('*Russia—Traffic in Transit*') < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm> accessed 14 September 2021.

[5] *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (n 1) [46]-[50].

[6] ibid, [43] (emphasis added), [48]-[49].

From a WTO point of view, this question seems to have been answered negatively by the Appellate Body ('AB') in *Mexico—Soft Drinks* (2006).[7] In that case, Mexico sought to justify its measures against the US under GATT Article XX(d) on the basis that its measures were allegedly intended to secure compliance with the United States' ('US') obligations under NAFTA, a regional trade agreement. The AB upheld the Panel's finding that Mexico's measures did not constitute measures 'to secure compliance with laws or regulations' within the meaning of GATT Article XX(d), and accepted the US's additional argument that Mexico's interpretation 'would allow WTO Members to adopt WTO-inconsistent measures based upon a unilateral determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the [Dispute Settlement Understanding ('DSU')]…'[8] It also stated that Mexico's interpretation implies 'that, in order to resolve the case, WTO panels and the [AB] would … have to assess whether the relevant international agreement has been violated [thus becoming] adjudicators of non-WTO disputes …', which 'is not [their function] as intended by the DSU.'[9]

In 1991, in relation to 1947 GATT, Hahn had argued that such countermeasures would endanger the stability in international economic relations.[10] But, there is a particular need to deconstruct *today* the AB's twofold argument in *Mexico—Soft Drinks* (2006) against such countermeasures, i.e. that they contradict DSU Articles 22-23 and that WTO adjudication does not have jurisdiction to address whether a WTO Member has violated a non-WTO obligation. Psychologists and sociologists suggest that 'cultural shocks', a state of disorientation brought about by sudden subjection to an unfamiliar culture,[11] may lead to 'introvert' outcomes, such as close to 'nationalism' rejecting an interface with 'alien influences'.[12] The WTO is experiencing what can be called a 'cultural shock', which may lead to such an 'introvert' result against international law and may cement the *Mexico—Soft Drinks* (2006) mantra. More specifically, until the early 2000s, WTO law 'managed a relative insulation from the "outside" world of international relations'.[13] Yet, since 2017, the invocation of security exceptions has

[7] *Mexico—Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report ('AB Report') (24 March 2006) WT/DS308/AB/R ('*Mexico—Soft Drinks*') < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm> accessed 14 September 2021.

[8] ibid, [77].

[9] ibid, [78].

[10] MJ Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT Security Exceptions' (1991) 12 Michigan Journal of International Law 558, 604. Alvarez Jimenez (dealing with the AB's position on jurisdiction in *Mexico-Soft Drinks*, not countermeasures) praises the AB for its self-restraint when the Dispute Settlement Body ('DSB') was 'still a nascent institution'. A Alvarez Jimenez, 'The WTO AB Report on Mexico – Soft Drinks, and the Limits of the WTO Dispute Settlement System' (2006) 33 Legal Issues of Economic Integration 319, 333.

[11] Oxford English Dictionary (online).

[12] C Ward, S Bochner, and A Furnham, *The Psychology of Culture Shock* (2nd edn, Routledge 2015) 31.

[13] JH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement' in RB Porter and others (eds), *Efficiency, Equality, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings, 2001) 336-337. See also: R Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading System' (2002) 96 American Journal of International Law 94, 98.

increased,[14] including vis-à-vis trade disputes that WTO Members frame as security disputes,[15] and has led to the establishment of WTO Panels and the adoption of their reports. Many of these cases involve measures in response to what the WTO Member taking them considers to be a breach of non-WTO obligations other than regional trade agreements, such as NAFTA in *Mexico—Soft Drinks*. They concern security-related or human rights issues (and in some instances prior breaches of such obligations). *Russia—Traffic in Transit* (2019) involved Russia's measures against the context of the its armed conflict with Ukraine in Crimea (unlawfully annexed by Russia). *Saudi Arabia—IP Rights* (2020) is one of numerous disputes brought by Qatar for similar measures to those complained of in *Saudi Arabia—IP Rights*; and in 2019, Venezuela requested consultations with the US for the latter's allegedly WTO-inconsistent measures in response to Venezuela's alleged human rights violations.[16] The increase in invoking security exceptions has prompted some authors to argue that WTO adjudication should avoid addressing 'sensitive matters'.[17] This demonstrates a likely reluctance vis-à-vis unilateral WTO restrictions in response to non-WTO breaches.

Further, the WTO AB's 'demise' has partly been explained by a criticism (at times unpersuasively) that the AB has engaged in 'judicial activism'.[18] At the same time, the EU, in light of the WTO AB 'paralysis', has been criticized for encouraging unpredictability and

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[14] Communications from the United States, *United States—Certain Measures on Steel and Aluminium Products* (15 October 2018) WT/DS564/9-14; Communications from the United States, *United States—Certain Measures on Steel and Aluminium Products* (31 August 2018) WT/DS556/9-14; Communications from the United States, *United States—Certain Measures on Steel and Aluminium Products* (31 August 2018) WT/DS554/10-15; Communication from the United States, *United States—Certain Measures on Steel and Aluminium Products* (6 July 2018) WT/DS552/9; Communication from the United States, *United States—Certain Measures on Steel and Aluminium Products* (6 July 2018) WT/DS551/10; Communication from the United States, *United States—Certain Measures on Steel and Aluminium Products* (6 July 2018) WT/DS548/13. See analysis: YS Lee, 'Are Retaliatory Trade Measures Justified under the WTO Agreement on Safeguards?' (2019) 22 Journal of International Economic Law 439. H Farrell and A Newman, 'Japan and South Korea Are Being Pulled into a Low Level Economic War' *Washington Post* (1 August 2019); B Baschuk, 'India Withdraws Trade Preferences to Pakistan; Cites WTO Clause' *Bloomberg Law* (15 February 2019); S Lester and H Zhu, 'A Proposal for Rebalancing to Deal with National Security Trade Restrictions' (2019) 42 Fordham International Law Journal 1451, 1451.

[15] White House, 'Economic security is national security' (National Security Strategy of the United States of America, December 2017) <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>, 17-21.

[16] Request for the Establishment of a Panel by Venezuela, *United States—Measures relating to trade in goods and services* (14 March 2019) WT/DS574/2; Revised Request for the Establishment of a Panel by Venezuela, *United States—Measures relating to trade in goods and services* (16 March 2021) WT/DS574/2/Rev.1.

[17] R McDougall, 'The Crisis in WTO Dispute Settlement' (2018) 52 Journal of World Trade 867. Earlier scholarship encouraging to the same direction: JL Dunoff, 'The Death of the Trade Regime' (1999) 10 European Journal of International Law 733, 734.

[18] A Bahri, ''Appellate Body Held Hostage': Is Judicial Activism at Fair Trial?' (2019) 53 Journal of World Trade 293; United States Statement, Meeting of the Dispute Settlement Body (27 August 2018) <https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf>, items 4 and 15, 23-24. See also: M Matsushita, TJ Schoenbaum and PC Mavroidis, *The World Trade Organization* (2nd edn, OUP 2006), 130-131.

undermining multilateralism,[19] because it proposed amendments in its legislation that permit it to take CIL countermeasures for breaches of *WTO law*.[20] Against this background, trade countermeasures for breaches of non-WTO law may be seen as a threat to the predictability in the WTO, and an argument that they are prohibited may become appealing to some, as it appeases those critical vis-à-vis WTO adjudication.

To support the reluctance against CIL trade countermeasures in response to breaches of non-WTO law, three alternatives may be invoked. First, enforcing non-WTO obligations could be addressed by interpreting the text of the general exceptions (e.g. GATT Article XX), so as to include countermeasures that are WTO consistent.[21] However, relying on GATT Article XX may be possible only for *some* countermeasures in response to breaches of *some* international law obligations, such as some obligations of human rights law or environmental law. Even then, the restrictive thresholds of necessity in GATT Article XX(a)-(b) and of proportionality in that Article's chapeau make such an option unwelcoming.[22] Second, enforcing non-WTO obligations can be addressed by relying on security exceptions. But, GATT Article XXI prohibits a significant number of countermeasures outside the exceptional situation of an armed conflict, which was the background of *Russia—Traffic in Transit*,[23] or of complete severance of diplomatic and economic relations, which was the background of *Saudi Arabia—IP Rights*.[24] Third, the rules on countermeasures may be read into GATT Article XXI by virtue of 'systemic integration' (reflected in Article 31(3)(c) of the Vienna Convention on the Law of Treaties ('VCLT')).[25] However, an effort to include countermeasures in the requirement of 'times of war or other emergency in international relations' waters down the strict requirements in that provision set out in *Russia—Traffic in Transit* and *Saudi Arabia—IP Rights*. Additionally, reading in this provision the CIL conditions of lawfulness of countermeasures replaces (rather than interprets) the text of GATT Article XXI with the extraneous rules on countermeasures.[26]

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[19] W Weiss and C Furculita, The EU in Search of Stronger Enforcement Rules, (2020) Journal of International Economic Law 865-884, 877-878.

[20] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules (12 December 2019) COM(2019) 623, 4.

[21] DS Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor' (1995) 20 Yale Journal of International Law 361; L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 Journal of World Trade 353.

[22] SH Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' (2002) 5 Journal of International Economic Law 133, 158-181. See restrictive approach: *US—Restrictions on Imports of Tuna*, GATT Panel Report (3 September 1991) DS21/R; *US—Restrictions on Imports of Tuna*, GATT Panel Report (16 June 1994) DS29/R.

[23] *Russia—Traffic in Transit* (n 4).

[24] *Saudi Arabia—IP Rights* (n 3).

[25] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), Article 31(3)(c). C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279. G Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 Journal of World Trade 5.

[26] Criticizing this approach: *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 16, Separate Opinion of Judge Kooijmans [23]-[26]; *Oil Platforms*, Separate Opinion of Judge Higgins [49].

This article after explaining the function of countermeasures under CIL (Part II), argues that the claim that WTO Members intended to prohibit countermeasures for breaches of non-WTO has the potential to undermine the enforcement and normative integrity of international law outside the WTO, and it should not be easily presumed that this was the intention of WTO Members. The article argues that the WTO Agreement has not displaced trade countermeasures in response to breaches of obligations outside the WTO (Part III). It argues that the predictability of trade affairs would not be undermined by the availability of such countermeasures (Part IV). It explains that WTO adjudication has jurisdiction over disputes where a defence of countermeasures under CIL is made; trade disputes involving a defence of countermeasures (for prior breaches of non-WTO obligations) are subject to legal argumentation by WTO Members and judicial scrutiny. Finally, the article concludes that trade countermeasures for breaches of non-WTO law may support multilateral obligations outside the WTO, since they enable their enforcement and ensure their normative preservation, while not undermining the predictability of the WTO system, since they are subject to WTO adjudication and stringent conditions under CIL (Part V).

II. THE FUNCTION OF CIL COUNTERMEASURES

This section explains the function of countermeasures under the law of State responsibility and their relationship to *lex specialis* (Section II.A), their wider function in enforcing and preserving the integrity of primary rules of international law (Section II.B), and the conditions of lawfulness of countermeasures under CIL (Section II.C).

A. Countermeasures as Circumstances Precluding Wrongfulness and Lex Specialis

In the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ASR'), which reflect CIL in relation to the function of countermeasures, the latter have a dual function. They are a means of implementing responsibility for a breach of international obligations. They are intended to induce the responsible State to comply with its obligation to cease the wrongful act and to make reparation.[27] They involve the breach of international law. But because they are taken in response to a prior wrongful act their wrongfulness is precluded.[28] The ASR classify rules on countermeasures in the same way as all other rules on State responsibility: namely not as primary rules that prescribe the conduct of States, but as secondary rules concerned with the consequences of a breach of primary rules.[29]

Circumstances precluding wrongfulness are concerned with the second element of an internationally wrongful act: the breach of an international obligation. When a rule on a circumstance precluding wrongfulness applies, the conduct is *prima facie* in breach of an international obligation, and the wrongfulness of that *prima facie* breach is precluded. Thus,

[27] ILC, 'Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries thereto' (2001) 2(II) YBILC 30 ('ILC ASR' / 'ILC ASR Commentary'), Article 49 and commentary, 130 at [1] and [4].
[28] ibid, 129 at [6], 135 at [7].
[29] ibid, 31 at [3]. However, since countermeasures are circumstances precluding wrongfulness (of prima facie wrongful conduct), they deal with the existence of breach and are thus primary rules, not secondary rules. H Aust, 'Circumstances Precluding Wrongfulness' in A Nollkaemper et al (eds) *Principles of Shared Responsibility in International Law* (CUP 2014), 178. In this study, the approach of the ILC is followed, but even if the rules on countermeasures were classified as primary rules, the study argues that there is no overlap in terms of content and aims between countermeasures and security exceptions.

the conduct is lawful. This function has also been termed 'justification' of an otherwise wrongful conduct.[30] Scholarship,[31] State practice[32] and international jurisprudence[33] support that countermeasures are circumstances precluding wrongfulness (or justifications).

CIL rules on State responsibility, including those on countermeasures, can be displaced by treaty *lex specialis* (ASR Article 55). For this to be the case, there needs to be an overlap in subject-matter between the two rules, and the intention to deviate from general rules.[34] The established view in WTO practice and literature is that unilateral responses to *breaches of WTO law*, such as countermeasures, and responses under the CIL on the law of treaties have been displaced by WTO *lex specialis*: the DSU, especially its Article 23 and its system of 'WTO countermeasures' for implementing responsibility for breaches of WTO law.[35] But, in relation to trade restrictions in response to breaches of *extra-WTO law*, the question is whether WTO law displaces countermeasures as circumstances that preclude wrongfulness. The answer to this question is a matter of interpreting the WTO Agreement (discussed in Part III).

B. Countermeasures as a Means of Enforcing and Preserving Primary Rules of International Law

Countermeasures enable and strengthen the enforcement and normative integrity of international law outside the WTO. Countermeasures are *not* the only or the most effective way

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[30] V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 European Journal of International Law 405.

[31] H Lesaffre, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility Countermeasures' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 469.

[32] Algeria (Sixth Committee (55th Session) 'Summary record of the 18th meeting' (4 December 2001) UN Doc A/C.6/55/SR.18, [3]); Croatia (Sixth Committee (55th Session) 'Summary record of the 16th meeting' (25 October 2000) UN Doc A/C.6/55/SR.16, [72]); China (Sixth Committee (56th Session) 'Summary record of the 11th meeting' (29 October 2000) UN Doc A/C.6/56/SR.11, [62]); Finland on behalf of Nordic countries (Sixth Committee (56th Session) 'Summary record of the 11th meeting' (29 October 2000) UN Doc A/C.6/56/SR.11, [28]); United Kingdom (Sixth Committee (55th Session) 'Summary record of the 14th meeting' (23 October 2000) UN Doc A/C.6/55/SR.14, [33]); United States (ILC, State Responsibility, Comments and observations received by Governments (25 March, 30 April, 4 May, 20 July 1998) UN Doc A/CN.4/488, 154). Contra: France has stated in the Sixth Committee that countermeasures constitute excuses of responsibility: Sixth Committee (56th Session) 'Summary record of the 11th meeting' (29 October 2001), UN Doc A/C.6/56/SR.11, [70].

[33] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 ('*Gabčíkovo-Nagymaros*') [82].

[34] ILC ASR Commentary, 140 at [4].

[35] J Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 232; B Simma and D Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 523; P.J. Kuyper, 'The Law of GATT as A Special Field of International Law' (1994) 25 Netherlands Yearbook of International Law 227; *United States—Sections 301-310 of the Trade Act of 1974*, Panel Report (27 January 2000) WT/DS152/R [7.43]; *United States—Import Measures on Certain Products from the European Communities*, AB Report (10 January 2001) WT/DS165/AB/R [111]; *European Communities—Measures Affecting Trade in Commercial Vessels*, Panel Report (20 June 2005) WT/DS301/R, [7.75], [7.91], [7.173]–[7.174], [7.195]-[7.196].

of enforcing international law.[36] However, in the often cases where State consent to international adjudication is lacking (including by virtue of reservations), countermeasures are the only effective and at times the only available means of self-help against a responsible State. This is further exacerbated by the fact that, in recent years, some States seem keener to withdraw from treaties establishing the compulsory jurisdiction of international courts and tribunals.[37] The ICJ is witnessing a rise of *erga omnes (partes)* claims: *Gambia v. Myanmar* is the most recent example.[38] However, such claims are exceptional and rare. They presuppose that the ICJ has jurisdiction and often it does not; they also depend on the discretion of the State that has standing to bring the complaint.

More generally, the scope of WTO trade obligations is comprehensive in the sense that a significant variety of trade activities is governed by WTO covered agreements. In addition, the membership of the WTO has expanded to over 164 Members out of over 190 States. In the UN era, where forcible countermeasures are prohibited, countermeasures are a persuasive means for enforcing international obligations. If trade countermeasures are unavailable to 164 WTO Members, the enforcement of international law, including *jus cogens* norms, will be threatened.

Further, removing the entitlement of trade countermeasures may affect the likelihood that a responsible State will participate in dispute resolution processes (including adjudication) in relation to other areas of international law. Under CIL, unilateral countermeasures have to be ceased once an international court or tribunal is seized and the responsible State has ceased the wrongful conduct. Until then, countermeasures are a significant tool for injured States, especially to preserve their rights and also to convince the responsible State to participate to international adjudication.

Countermeasures also play a role in 'normative dynamics' (law-making).[39] In relation to the latter role, the silence of States may (under some conditions) entail acceptance thus enabling normative change vis-a-vis CIL rules, through treaty interpretation[40] or treaty modification. Instead, countermeasures are a type of protest against conduct that deviates from existing norms. International law is agnostic as to the form of protest.[41] As a means of protest, countermeasures can prevent the weakening (and eventual change or termination) of

[36] DT Shapiro, 'Be Careful What You Wish For; US Politics and the Future of the National Security Exception to the GATT' (1997) 31 George Washington Journal of International Law and Economics 97, 113-117.

[37] C McLachlan, 'The Assault On International Adjudication and the Limits Of Withdrawal' (2019) 68 International and Comparative Law Quarterly 499.

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Request for the indication of provisional measures: Order of 23 January 2020) [2020] ICJ Rep 3 [42].

[39] M Hakimi, 'Unfriendly Unilateralism' (2014) 55 Harvard International Law Journal 105. See also L Fisler Damrosch, 'Enforcing International Law Through Non-Forcible Measures' (1997) 269 Recueil des cours de l'Académie de La Haye 9, 99.

[40] On customary international law ('CIL'): ILC, 'Draft conclusions on the identification of customary international law, with commentaries' (2018) UN Doc A/73/10 122, Conclusion 10(3) and 149 at [4]. On treaty interpretation: ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) UN Doc A/73/10 ('ILC Conclusions on SASP'), Conclusion 10(2).

[41] E Suy, *Actes Juridiques Unilatéraux* (Librairie générale de droit et de jurisprudence 1962), 49-53.

international law norms and they can establish and maintain a persistent objector position vis-à-vis new CIL.[42]

Suggesting that WTO Members have alternative means at their disposal (than trade countermeasures) to enforce and preserve the normative integrity of their rights, because they can rely on diplomatic protest and retorsion, undermines especially the capacity of small and developing countries to enforce international obligations. The influence of diplomatic protest and retorsion over the responsible State (with a view to ceasing its wrongful conduct and making reparation) will depend heavily on the power dynamics between the responsible State and the reacting State. Although small States have similar concerns when deciding whether to resort to countermeasures, small States - owing to inequality in the economic, political and institutional capacities of States - are in reality left with less persuasive means in enforcing and preserving the normative integrity of their rights, because means available to them other than countermeasures are even less persuasive.

Suggesting that WTO Members can take countermeasures in other fields means that they would be encouraged to focus their countermeasures primarily to other fields thus aggravating significantly international relations in specific fields of international law. It might also have an effect on actual trade flows by implication (e.g. the law of the sea governs numerous economic activities at sea, including navigation) without the WTO system being able to have a say on such restrictive effect, as WTO law may not apply in some maritime zones.

The proposition that trade countermeasures in response to breaches of non-WTO law are unavailable means that over 160 WTO Members have intended to curtail extensively (in terms of the type of countermeasures available to them) their general ability and entitlement to enforce and preserve the normative content of international law obligations outside the WTO. For this reason, arguments that the WTO Agreement has displaced this type of countermeasures should be approached with caution.

C. Conditions of Lawfulness of CIL Countermeasures

This section sets out the conditions of lawfulness of countermeasures under CIL. Under the ASR, countermeasures have to fulfil some conditions in order to be lawful. First, they may be taken by an injured State (specially affected by the breach).[43] There is a question whether States other than the injured State, in the case of breach of *erga omnes (partes)* obligations are entitled to resort to countermeasures against the responsible State. [44] This is important because all *jus cogens* norms (such as the prohibition of torture or of genocide) are of such nature. In 2001, the ILC explained that some practice by States other than the injured State taking measures against

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[42] IC McGibbon, 'Some Observations on the Part of Protest in International Law' (1953) 30 British Yearbook of International Law 293, 317; CG Guldahl, 'The Role of Persistent Objection in International Humanitarian Law' (2008) 77 Nordic Journal of International Law 51, 55. Contra: JA Green, *The Persistent Objector Rule in International Law* (OUP 2016), 76-77. For Green, verbal protest (rather than physical acts) is not necessary to establish objection. However, trade countermeasures (as physical acts) can count as objections.

[43] *Gabčíkovo-Nagymaros* (n 33) [83].

[44] These are obligations owed to all or to a group of States (respectively) that transcend the individual interests of the States to which they are owed, such as those for the protection of human rights, or of the environment. *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Second Phase, Preliminary Objections) [1970] ICJ Rep 3 [33]-[34]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [155]; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ Rep 422 [68] and [99].

the responsible State was embryonic.[45] However, since 2001, others demonstrate that there is abundant practice of 'third party countermeasures.[46]

Second, countermeasures must be targeted only against the responsible State – they presuppose the existence of an internationally wrongful act: a breach of an international obligation attributed to that State.[47] Third, the injured State must call upon the wrongdoing State to comply with its obligations of cessation and reparation, notify it of the decision to take countermeasures, and offer to negotiate.[48] Fourth, countermeasures have to be temporary and reversible.[49] Fifth, they have to be proportionate to the injury suffered taking into account the gravity of the breach and the rights in question.[50] Sixth, countermeasures are not forcible and may not affect 'fundamental human rights' obligations, humanitarian character obligations prohibiting reprisals, and *jus cogens* norms.[51] Seventh, countermeasures may not be taken, if the internationally wrongful act has ceased and the dispute is pending before a court which has the authority to make decisions binding on the parties.[52]

III. WTO Agreement and Countermeasures in Response to Breaches of Non-WTO Obligations

Having explained the function and conditions of lawfulness of countermeasures under CIL (Part II), this Part considers and rejects two *lex specialis* arguments in support of the proposition that trade countermeasures for breaches of non-WTO obligations have been displaced. First, that GATT Article XXI entitled 'Security Exceptions' displaced such countermeasures (Section A). Second, that the WTO Agreement in general displaced such countermeasures (Section B).

A. Security Exceptions and Countermeasures Do Not Overlap in Subject Matter

This Section counters Hahn's argument (1991) that countermeasures have been superseded by the GATT security exceptions.[53] The following analysis focuses on GATT Article XXI(1)(b)(iii), as an example of a security exception in a WTO covered agreement that could overlap in content with situations of countermeasures under CIL.[54] GATT Article XXI(1)(b)(iii) reads:

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[45] ILC ASR Commentary (n 27) 137-139.
[46] M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017).
[47] ASR Articles 2 and 49(1).
[48] ASR Article 52(1). *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) 18 RIAA 417 [85]-[87] ('*Air Services Agreement*'); *Gabčíkovo-Nagymaros*, (n 33) [84]. The obligation to call for reparation is a CIL rule: Y Iwasawa and N Iwatsuki, 'Procedural Conditions' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1151.
[49] ILC ASR (n 27) Articles 49(2)–(3) and 53. ILC ASR Commentary (n 27) 130–131 at [7]; ibid, [164]; *Gabčíkovo-Nagymaros* (n 33) [87].
[50] ILC ASR (n 27) Article 51. *Air Services Agreement* (n 48) [83]; *Gabčíkovo-Nagymaros* (n 33) [85]. ILC ASR Commentary (n 27) 134–135.
[51] ILC ASR (n 27) Article 50.
[52] ILC ASR (n 27) Article 52(3)(b).
[53] Hahn (n 10) 604.
[54] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 528, Dissenting opinion of Judge Sir Robert Jennings, 541.

'1. Nothing in this Agreement shall be construed …
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests …
(iii) taken in time of war or other emergency in international relations …'

The ordinary meaning of the terms in GATT Article XXI(b)(iii) - 'nothing shall be construed to prevent […] from taking any action' - suggests that the conduct falling within the security exception is not prohibited. Instead, countermeasures are premised on the idea that there is an obligation, and that there is conduct that is *prima facie* inconsistent with that obligation.

No GATT/WTO case has specifically dealt with whether the provision on security exceptions (GATT Article XXI) is *lex specialis* vis-à-vis countermeasures suspending compliance with GATT obligations in response to breaches of obligations outside the WTO. The two recent Reports of two Panels in *Russia–Traffic in Transit* (2019) and in *Saudi Arabia-IP Rights* (2020) both applied security exceptions. However, as it will be shown in Sections III.A.1 and III.A.2 respectively, they provide no conclusive evidence that countermeasures under CIL overlap with and are displaced by security exceptions in WTO covered agreements. Section III.A.3 argues that despite the fact that security exceptions may be interpreted as justifications, as GATT Article XX has been interpreted, the overlap of rules in terms of their function is not the sole criterion for determining overlap for identifying whether a rule is *lex specialis*. Security exceptions (as well as general exceptions) have different content and aims from countermeasures under CIL. Section III.A.4 argues that the subsequent practice in the application of 1994 GATT and of 1947 GATT do not provide support that countermeasures (for breaches of non-WTO obligations) overlap with and have been intended to be excluded by virtue of security exceptions.

1. Russia–Traffic in Transit *(Panel, 2019)*

In 2019, a Panel on *Russia–Traffic in Transit* issued a historic Report that for the first time deals with the content and operation of a security exception in a WTO covered agreement, and more specifically GATT Article XXI (as well as security exceptions referred to in Russia's Working Party Report). The Panel found that it had jurisdiction to review Russia's invocation of GATT Article XXI(b)(iii),[55] and to assess whether Russia, as the invoking WTO Member, has satisfied the requirements enumerated in subparagraphs of GATT Article XXI(b).[56] Having found that 'the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of [GATT Article XXI(b)(iii)]',[57] and that Russia's measures had been taken during an emergency in international relations within GATT Article XXI(b)(iii),[58] the Panel examined whether the conditions in the chapeau of GATT Article XXI(b) have been satisfied. It addressed whether the terms 'which it considers' in the chapeau 'qualifies both the determination of the invoking Member's essential security interests and the necessity of the measures for the protection of those interests, or simply the determination of their necessity.'[59] It found that (a) it is left to every WTO Member to define what it considers to be its essential security interests,[60] but that this discretion is limited by an obligation to interpret and apply

[55] *Russia—Traffic in Transit* (n 4) [7.56], [7.102]-[7.103].
[56] ibid, [7.100].
[57] ibid, [7.123].
[58] ibid, [7.124].
[59] ibid, [7.128].
[60] ibid, [7.131].

GATT Article XXI(b)(iii) in good faith,[61] which entails an obligation of the invoking State 'to articulate the essential security interests … sufficiently enough to demonstrate their veracity',[62] and that there has to be a connection between the essential security interests invoked and the measures at issue.[63] Additionally, it found (b) that 'it is for Russia to determine the "necessity" of the measures for the protection of its essential security interests.'[64]

The Panel was not asked to and did not consider the relationship between GATT Article XXI(b)(iii) and countermeasures or any other circumstance precluding wrongfulness under CIL. However, its reasoning may give guidance as to the relationship of this provision with CIL countermeasures.

First, the Panel considered whether the measures complained of fell within the scope of GATT Article XXI. It explained that it would only examine whether the measures allegedly breached GATT provisions, if the requirements of GATT Article XXI had not been met. This sequence gives the impression that the Panel considered that when Article XXI applies, there is no GATT obligation. This means that it did not consider GATT Article XXI as a justification, as previous Panels and the AB have done in relation to GATT Article XX. The Panel explained this choice of sequence by virtue of the 'particularity of the exceptions specified in GATT Article XXI(b)(iii)' as compared to GATT Article XX:[65]

> 'This provision acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated. [A]n evaluation of whether measures are covered by Article XXI(b)(iii), … *(unlike measures covered by the exceptions under Article XX)* does not necessitate a prior determination that they would be WTO-inconsistent if they had been taken in normal times … because … there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure …'[66]

Given the sequence in reasoning and its explanation of the specialness of GATT Article XXI comparing to GATT Article XX, the Panel's Report does not support the argument that GATT Article XXI(b)(iii) is a justification that operates in the same way as GATT Article XX, which as is explained in Section III.A.3 below, has been considered by the AB to be a justification. In any event, there is no evidence in the Panel's report that countermeasures are excluded owing to this provision – irrespective of the function of this provision as a justification or not.

2. Saudi Arabia–IP Rights *(Panel, 2020)*

In *Saudi Arabia–IP Rights*, Qatar complained that Saudi Arabia failed to provide adequate protection of intellectual property ('IP') rights held by or applied for entities based in Qatar, thus violating the TRIPS Agreement. Saudi Arabia invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement. There is no indication in the Panel's Report that Saudi Arabia argued that its measures were countermeasures, since they were taken against Qatar's alleged violation of the Gulf Cooperation Council Agreement. The Panel found that the

[61] ibid, [7.132].
[62] ibid, [7.134].
[63] ibid, [7.138].
[64] ibid, [7.146].
[65] ibid, [7.108].
[66] ibid (emphasis added).

requirements for invoking Article 73(b)(iii) were met in relation to the inconsistency with Articles 42 and 41.1 of the TRIPS Agreement, but not in relation to the inconsistency with Article 61.[67]

Contrary to the approach in *Russia–Traffic in Transit*, the Panel in *Saudi Arabia–IP Rights* followed 'the traditional approach' of first examining the consistency of the complained conduct with WTO provisions, and then considering the exceptions. This was expressly because the parties to the dispute agreed on this matter.[68] This implicitly supports the argument that the security exceptions are justifications overlapping with the function of countermeasures as circumstances that preclude wrongfulness.

Further, because the background of *Saudi Arabia–IP Rights* is not an armed conflict, as was that of *Russia–Traffic in Transit*, it lends itself for reflection on whether the term 'emergency in international relations' can encompass the situations where countermeasures would be taken. *Saudi Arabia–IP Rights* involved the complete severance by Saudi Arabia of all diplomatic and economic relations with Qatar. The Panel expressly took into account the exceptional character of such measures when it decided that the measures were taken in an 'emergency in international relations'.[69] If this type of situation is considered to be the minimum threshold of 'emergency in international relations', countermeasures outside such extreme context would not meet this requirement. If this provision is taken to exclude (trade) countermeasures, a significant number of trade countermeasures would be prohibited, since often countermeasures do not take place in the extreme scenario of complete severance of diplomatic and economic relations. However, besides the sequence of reasoning, there is no evidence in *Saudi Arabia–IP Rights* to support that the security exceptions in TRIPS (or GATT) overlap with and exclude countermeasures under CIL.

3. 'Function' is not the Only Criterion for Determining Overlap in Subject-Matter

Panels and the AB consider that GATT Article XX (general exceptions) includes justifications of *prima facie* breaches of GATT (i.e. that they contain circumstances that preclude wrongfulness, as is the function of countermeasures under CIL). For instance, in *China—Audio-visual Products*, the AB found that regulatory requirements adopted by WTO Members may be consistent with WTO rules in two ways. 'First, they may simply not contravene any WTO obligation. Second, *even if they contravene a WTO obligation*, they may be *justified* under an applicable exception.'[70] Since the general exceptions (GATT Article XX) are the immediate context of the security exceptions (GATT Article XXI), the latter should be attributed the same function as justifications. In such case, GATT Article XXI(b)(iii) and countermeasures under CIL would overlap in subject-matter, because they share function (as circumstances that preclude wrongfulness), and since they overlap and they differ, the argument would go that WTO Members intended to deviate from and exclude countermeasures.

This argument also implies that the mere inclusion of *general* exceptions entails that WTO Members consented to losing a central – if not, in some cases, the *only* – means of enforcing international obligations, including *jus cogens* norms, even though States know that as a default compulsory international dispute settlement that would allow them to otherwise pursue the implementation of responsibility for breaches of such obligations. There would be no need to

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[67] *Saudi Arabia—IP Rights* (n 3) [7.294].
[68] ibid, [7.6].
[69] ibid, [7.257]-[7.262], especially [7.260].
[70] *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, AB Report (19 January 2010) WT/DS363/AB/R, [223] (emphasis added).

include security exceptions in order to achieve such exclusion; mere overlap in terms of function would suffice.

But, attributing to general exceptions such extreme exclusionary effect should not be based only on the silence of the treaty text. Countermeasures and GATT Article XXI differ substantially in content and aims. This means that they do not overlap in subject-matter. Function is not the sole criterion for determining overlap in subject-matter between rules when assessing whether a rule is *lex specialis*. Support for this reasoning can be found in the annulment Committee's reasoning in *CMS v. Argentina* about whether state of necessity under CIL and treaty exceptions overlap. The annulment Committee pointed out that there are substantive differences between them.[71]

GATT Article XXI protects the 'essential security interests' of the invoking State in times of 'war or other emergency in international relations'. In *Russia–Traffic in Transit*, the Panel explained that 'essential security interests' 'refer[s] to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally'.[72] In contrast, countermeasures are concerned with inducing compliance of a responsible State with its obligations to cease the wrongful conduct and to make reparation, *irrespective* of whether the 'essential security interests' of the State taking the countermeasure are being protected, and *irrespective* of whether they are taken in time of war or other emergency in international relations.

A WTO Member may violate international obligations outside the WTO, but the situation created by such a violation does not give rise to the need to protect another WTO Member's territory or population from external threats, and the maintenance of its internal legal and public. For instance, a WTO Member has seized contrary to CIL in its territorial sea a commercial vessel carrying the flag of another WTO Member and arrested its crew, during the vessel's innocent passage;[73] or a WTO Member commits genocide against its own population.[74] In these examples, the measures do not call for the protection of territory, population or legal or public order of the WTO Member resorting to trade restrictions. GATT Article XXI(b)(iii) does not apply in these latter cases. In such situations, countermeasures under CIL are available to WTO Members.

4. Subsequent Practice in the Application of 1994 GATT and of 1947 GATT, and Subsequent Interpretative Agreements of 1947 GATT

a) Subsequent Practice in the Application of 1994 GATT

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[71] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) ('CMS v Argentina'), [130] ('The first covers measures necessary for [protecting] each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions, [some of] which [are] foreign to Article XI.').

[72] *Russia—Traffic in Transit* (n 4) [7.130].

[73] It could be argued that this situation meets 'essential security interests', because the vessel can be assimilated with population or territory (or the crew as population). This could be contested.

[74] It could be argued that genocide in a WTO Member's territory raises the need for neighbouring WTO Members to maintain the public order within their own territory, e.g. owing to mass refugee flows.

Under the CIL rules of treaty interpretation, the subsequent practice of treaty parties in the treaty's application that establishes the agreement of all treaty parties as to the treaty's interpretation shall be taken into account together with the context for the interpretation of the treaty (VCLT Article 31(3(b)).[75] However, in three disputes in the WTO, where the security exceptions were invoked *and* the facts could have involved countermeasures – the Helms-Burton Act dispute between Cuba and the US (1996-2016)[76], the *Colombia/Nicaragua* dispute (2000)[77] and *Russia–Traffic in Transit* (2019)[78] – the practice of WTO Members does not establish an agreement of all WTO Members that GATT Article XXI(b)(iii) operates as a circumstance precluding wrongfulness and that it excludes countermeasures under CIL. Other practice in relation to security exceptions in the context of situations which cannot be

[75] ILC Conclusions on SASP (n 40) Conclusion 2(3) and Conclusion 4(2). *Japan-Taxes on Alcholic Beverages*, AB Report (1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Section E ('subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation').

[76] In 1996, Cuba circulated to WTO Members a Communication complaining about the adoption by the US of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act). Further, in the Council for Trade in Goods, Cuba argued that the Helms-Burton Act was incompatible with various provision of GATT 1994 and other WTO Agreements. Cuba did not suggest that these measures could be (unlawful) countermeasures under CIL or whether they fell in GATT Article XXI. However, the US responded that the measures were taken in response to the shooting down of two unarmed US civilian aircraft by Cuba suggesting the US understanding that at least partly its measures were countermeasures in response to Cuba's prior breaches of CIL obligations owed to the US outside the WTO. Communication from Cuba, *United States—Cuban Liberty and Democratic Solidarity Act of 1996* (4 April 1996) WT/L/142; Council for Trade in Goods, 'Minutes of Meeting held on 19 March 1996' (10 April 1996) G/C/M/9, 3-4, 6.

[77] In 2000, Colombia requested consultations with Nicaragua concerning Nicaragua's 1999 law imposing inter alia taxes on goods and services from Honduras and Colombia, which allegedly violated GATT. Nicaragua notified the WTO Secretariat that it was taking measures pursuant to GATT Article XXI (and GATS Article XIV*bis*), explaining that Honduras and Colombia by concluding in 1986 a Treaty on Maritime Delimitation in the Caribbean Sea infringed Nicaragua's sovereign rights. Irrespective of whether there had been an extra-WTO law breach, Nicaragua considered that it was taking countermeasures under CIL against Colombia and Honduras for the latter's breach of obligations outside the WTO. Request for Consultations by Colombia, *Nicaragua—Measures Affecting Imports from Honduras and Colombia* (20 January 2000) WT/DS188/1; Nicaragua, Notification pursuant to Article XXI of the GATT 1994 and Article XIVbis of the GATS (21 February 2000) S/C/N/115 and G/C/4, [7]; DSB, Minutes of Meeting held on 7 April 2000 (12 May 2000) WT/DSB/M/78 [60]; DSB, Minutes of Meeting held on 18 May 2000 (26 June 2000) WT/DSB/M/80, [40] and [32].

[78] Ukraine and Russia – the disputing parties – and numerous third party intervening WTO Members arguing about the interpretation of GATT Article XXI. These are summarized in the Panel's Report: Australia, Brazil, Canada, China, EU, Japan, Moldova, Singapore, Turkey, and the US. *Russia—Traffic in Transit* (n 4) [7.35]-[7.52].

'translated' into countermeasures, do not furnish clarifications about the question examined here.[79]

Further, although individual understandings as to the interpretation of a treaty provision do not meet the requirements of the interpretation rule in VCLT Article 31(3)(b), according to the ILC, they may be relied upon as a supplementary means of interpretation (VCLT Article 32).[80] In the above disputes, three WTO Members used the term 'justified' in relation to GATT Article XXI.[81] This may suggest their individual understanding that this provision is a justification, i.e. a circumstance that precludes wrongfulness. However, the use of the word 'justified' by the US, Nicaragua and Japan in these three cases does not clearly appear to be used in its legal sense.[82] Only the position of the EU in its third-party submission in *Russia-Traffic in Transit*

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[79] India v. Pakistan (2002): Trade Policy Review Body, Pakistan (11 April 2002) WT/TPR/M/95/Add.1 and (16 April 2008) WT/TPR/M/193/Add.1. USA v. Brazil (2003): Trade Policy Review Body, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum (11 April 2002) WT/TPR/M/95/Add.1. EU v. Brazil (2013): Trade Policy Review Body, Brazil, Minutes of Meeting held on 24 and 26 June 2013, Addendum (16 October 2013) WT/TPR/M/283/Add.1; Committee on Import Licensing, Minutes of Meeting Held on 5 April 2014 (22 August 2014) G/LIC/M/39; Committee on Import Licensing, Import Licensing System of Brazil, Follow-Up Questions from the European Union to Brazil (5 April 2018) G/LIC/Q/BRA/18.

[80] I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 138; MK Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités' (1976) 151 Recueil des Cours 1, 52; ILC, 'Documents of the sixteenth session including the report of the Commission to the General Assembly' (1964) ILCYB 1, 204 at [13]; ILC Conclusions on SASP (n 75) Commentary to Draft Conclusion 4(3) at [23].

[81] For US position in *Helms-Burton* dispute: Council for Trade in Goods, 'Minutes of Meeting held on 19 March 1996' (10 April 1996) G/C/M/9, 3-4, 6. In *Colombia/Nicaragua*, Nicaragua and Japan mentioned that the measures were justified: Nicaragua, Notification pursuant to Article XXI of the GATT 1994 and Article XIVbis of the GATS (21 February 2000) S/C/N/115 and G/C/4 [7]; DSB, Minutes of Meeting held on 7 April 2000 (12 May 2000) WT/DSB/M/78 [60]; DSB, Minutes of Meeting held on 18 May 2000 (26 June 2000) WT/DSB/M/80 [40], and [32]. In *Russia-Traffic in Transit*, the US and the EU used the language 'justified' as it appears in their publicly available interventions: Third-Party Oral Statement of the USA (25 January 2018) <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>, [27]-[31]. EU Third Party Written Submission (8 November 2017) <https://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3#_eu-submissions>, [14] (emphasis added); Third Party Oral Statement by the European Union (25 January 2018) <https://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3#_eu-submissions>, [4].

[82] In *Helms-Burton*, the US mentioned that the measures were 'justified' under GATT exceptions. The US did not explain the reasoning behind the use of the term 'justified'. Council for Trade in Goods, 'Minutes of Meeting held on 19 March 1996' (10 April 1996) G/C/M/9, 3-4, 6. In *Colombia/Nicaragua*, Nicaragua and Japan mentioned that the measures were justified: Notification pursuant to Article XXI of the GATT 1994 and Article XIVbis of the GATS (21 February 2000) S/C/N/115 and G/C/4, [7] (according to Nicaragua its measures are '*justified* in the [context] of serious international tension in the region')(emphasis added); Dispute Settlement Body, 'Minutes of Meeting held on 7 April 2000' (12 May 2000) WT/DSB/M/78, [60] measures 'were fully *justified* under [GATT Article XXI and GATS Article XIVbis]' and

(2019) uses the term in its legal sense. More specifically, the EU indicated that 'Article XXI … is an *affirmative defence, which may be invoked to justify a measure that would be otherwise inconsistent* with any of the obligations imposed by the GATT 1994.'[83] However, none of the statements in the context of these disputes suggest that security exceptions are exclusive of countermeasures under CIL.

Overall, no common understanding of WTO Members can be detected that countermeasures overlap with and are excluded by GATT Article XXI. Only the individual understanding of one WTO Member may be detected in a legal sense. At best the practice of four WTO Members (EU, Japan, Nicaragua, US) might be taken to mean that security exceptions include justifications in their legal sense, but there is no evidence of an individual understanding that countermeasures are to be excluded.

b) Subsequent Practice in the Application of 1947 GATT

The subsequent practice of 1947 GATT Contracting Parties concerning the interpretation of GATT Article XXI may constitute a supplementary means of interpreting this provision (VCLT Article 32). This section examines the practice of GATT Contracting Parties where they either invoked countermeasures or they invoked security exceptions and the facts could have been understood as countermeasures. Bartels implies that the fact that GATT Contracting Parties invoked GATT security exceptions where they could have instead invoked countermeasures proves that countermeasures CIL are excluded.[84] Yet, his argument suggests that States should at all times invoke their rights under CIL if they want to be presumed not to have lost them, even when they have other avenues available to them for vindicating their conduct. This latter approach would not only be burdensome especially for small States, but it would aggravate international relations.

In the three cases under 1947 GATT, where the security exception was invoked and the situation could factually be explained as one of countermeasures – *US/Czechoslovakia* (1951),[85]

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that Article XXI constituted an exception to the provisions in the GATT with global effect that *measures taken under Article XXI could, under no circumstances, constitute a violation of GATT* 1994' (emphasis added); DSB, 'Minutes of Meeting held on 18 May 2000' (26 June 2000) WT/DSB/M/80, [40] and [32] (Japan called for caution regarding 'any measure *justified* under [GATT Article XXI]'). In *Russia-Traffic in Transit*, in its oral statement, the US used the term 'justify' in relation to GATT Article XXI, but it is unclear if it gave this term the legal meaning of justification. This is doubted when taking into account that the US has also included references of State practice that refers to 'justification' where the term clearly is not intended to have this legal meaning, Third-Party Oral Statement of the USA (25 January 2018) <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>, [27]-[31].

[83] European Union Third Party Written Submission (8 November 2017) <https://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3#_eu-submissions>, [14] (emphasis added).

[84] L Bartels (n 21) 399.

[85] In 1951, the US requested (successfully) the GATT Council to formally dissolve its reciprocal obligations with Czechoslovakia under GATT 1947, and to withdraw the benefits of trade-agreement tariff concessions from Czechoslovakia. The US did not refer to GATT Article XXI or CIL countermeasures. It explained that because Czechoslovakia had persecuted American firms, imprisoned American citizens, and confiscated their property without compensation, the assumption that it was in the US and Czechoslovakia's mutual interests to

Iceland/Germany (1974-1975),[86] *Argentina/EEC*, Australia and Canada (1982) [87] – no common understanding of GATT Contracting Parties can be detected that countermeasures under CIL overlap and are excluded by virtue of the security exceptions provision.[88] In *Iceland/Germany*

promote the movement of goods, money and people between them was no longer valid. This reasoning is akin to fundamental change of circumstances. See VCLT (n 25) Article 62. However, given the facts, the US could have contemplated that it was taking countermeasures to protect its nationals abroad. GATT Contracting Parties (Sixth Session), Statement by the United States (20 September 1951) GATT/CP.6/5, 1; GATT Contracting Parties (Sixth Session) (24 September 1951) GATT/CP.6/5/Add.2. Czechoslovakia considered the US attempted 'to achieve political ends by means of economic pressure', and that GATT 'should not be misused for the enforcement of political intentions' and for 'forceful, unilateral imposition of a foreign will, by means of the violation of agreements'. GATT Contracting Parties (Sixth Session), Statement by Czechoslovakia (11 September 1951) GATT/CP.6/5/Add.1, 2-3.

[86] GATT Council, 'Minutes of Meeting Held on 3 and 7 February 1975' (18 February 1975) C/M/103, 13-15.

[87] In 1982, the EEC, Australia and Canada imposed import restrictions against Argentina, in response to the use of force on the Malvinas/Falkland Islands. As such, their measures could have qualified as countermeasures taken by the injured State (the UK) and 'countermeasures taken by international subjects other than the injured State' (EEC, Australia and Canada). The EEC, Australia, and Canada explained that these measures were taken (a) in the light of the situation addressed in UNSC Resolution 502/1982 and (b) on the basis of their 'inherent rights' of which GATT Article XXI was a reflection. 'Reflection of the inherent right' implies their understanding that Article XXI overlapped to some extent with countermeasures under CIL. But, it is unclear if they considered that GATT Article XXI(b)(iii) excluded countermeasures under CIL. Communication from EEC, Australia and Canada, 'Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons' (18 May 1982) L/5319.Rev.1; Council, 'Minutes of Meeting Held on 29-30 June 1982' (10 August 1982) C/M/159, 14 (emphasis added). See also similar language used in Council, Minutes of Meeting Held on 7 May 1982 (22 June 1982) C/M/157, 4, 9-10. See also Hungary's statement: Council, 'Minutes of Meeting Held on 7 May 1982' (22 June 1982) C/M/157, 9.

[88] The practice in the other disputes that the facts could not be relevant to countermeasures do not furnish evidence relevant for the analysis here. United States–Imports of Dairy Products (1951): GATT Contracting Parties (Sixth Session), Memorandum by the Netherlands (19 September 1951) GATT/CP.6/26; GATT Contracting Parties (Sixth Session), Memorandum submitted by the United States, Addendum (24 September 1951) GATT/CP.6/28/Add.1. United States–Section 232 of the Trade Expansion Act (1968): Committee on Industrial Products (30 August 1968) COM.IND/4; Committee on Trade in Industrial Products (10 September 1969) COM.IND/W/7; Committee on Trade in Industrial Products (17 November 1969) COM.IND/W/12. Austria–Penicillin and Other Medicaments (1970): Joint Working Group on Import Restrictions (3 April 1970) L/3377; Committee on Trade in Industrial Products (8 June 1970) COM.IND/W/28. Sweden–Import Restrictions on Certain Footwear (1975): Communication from Sweden (17 November 1975) L/4250; GATT Council (10 November 1975) C/M/109; GATT Council of Representatives, Thirty-First Session (25 November 1975) L/4254. United States–Imports of Sugar from Nicaragua (1983): GATT Panel Report, *US–Sugar Quota* (2 March 1984) L/5607; Communication from Nicaragua, *US–Sugar Quota* (16 May 1983) L/5492 and (1 July 1983) L/5513; GATT Council (10 August 1983) C/M/170 and (18 October 1983) C/M/171; GATT Council, Minutes of Meeting held on 6-8 and 20 November

(1974-1975), Germany expressly argued that it took countermeasures, and in *Argentina/EEC*, Australia, Canada, and other GATT Contracting Parties argued that the measures taken did not have to meet the requirements of GATT Article XXI – implying that these were available to them despite this provision. Since these may provide evidence of their individual understandings that may be relied as a supplementary means of interpretation, they are discussed here in further detail.

In *Iceland/Germany* (1974-1975), in 1974, Germany imposed port restrictions against fish from Iceland. In the GATT Council, Iceland complained that Germany violated GATT. Germany did not invoke GATT Article XXI. It stated that its conduct did not violate GATT and that it took countermeasures against Iceland's prior violation of the freedom of the high seas and the prohibition of use of force under CIL, as well as of an ICJ Judgement.[89] Iceland responded that Germany's conduct was a GATT violation, and not a permissible countermeasure under international law, and that 'the GATT could only be concerned with the application or functioning of the [GATT] and not with any other international principles.'[90] Germany stated that if its 'ban was *justified* as a countermeasure under generally recognized rules of international law it could not be illegal under the GATT.'[91] Germany's explanation suggests that that countermeasures in the form of suspending compliance with GATT obligations in response to breaches of international law outside the GATT are available. Since the position of Germany and Iceland contradict each other, and no other GATT Contracting Party made a relevant statement, these two statements neutralize each other.

In *Argentina/EEC*, Australia and Canada (1982), Argentina complained that 'in order to *justify* restrictive measures a contracting party invoking Article XXI [was] required to state reasons of national security', and that this was not the case here, which involved measures 'applied generally and without any reference to … Article XXI.'[92] Subsequently it stated that the 'exercise of [their inherent rights, of which Article XXI of the General Agreement was a reflection] required neither notification, *justification*, nor approval'.[93] Against the context in

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1984 (10 December 1984) C/M/183. European Communities v. Czechoslovakia (1985): Group on Quantitative Restrictions and Other Non-Tariff Measures (2 May 1985) NTM/INV/I-V/Add.10 and (23 September 1986) NTM/INV/I-V/Add.12. United States v. Nicaragua (1985): Communication from the United States, US–Nicaraguan Trade (9 May 1985) L/5803; GATT Council, Minutes of Meeting held on 29 May 1985 (28 June 1985) C/M/188. European Communities v. Yugoslavia (1991): Communication from EEC (2 December 1991) L/6948; Communication from Yugoslavia (26 November 1991) L/6945; Recourse to Article XXIII:2 by Yugoslavia, EEC-Trade Measures Taken For Non-Economic Reasons (18 February 1992) DS27/2; GATT Council, Minutes of Meeting held on 18 February 1992 (10 March 1992) C/M/254 and (10 April 1992) C/M/255.

[89] GATT Council, 'Minutes of Meeting Held on 3 and 7 February 1975' (18 February 1975) C/M/103, 13-15 (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* (Merits) [1974] ICJ Rep 175).

[90] ibid 15.

[91] ibid 16.

[92] GATT Council, 'Minutes of Meeting Held on 29-30 June 1982' (10 August 1982) C/M/159, 14 (emphasis added). See also similar language used in GATT Council, 'Minutes of Meeting Held on 7 May 1982' (22 June 1982) C/M/157, 4. GATT Council, 'Minutes of Meeting Held on 29-30 June 1982' (10 August 1982) C/M/159, 14. See also similar language used in GATT Council, Minutes of Meeting Held on 7 May 1982 (22 June 1982) C/M/157, 4, 9-10. See also Hungary's statement: Council, 'Minutes of Meeting Held on 7 May 1982' (22 June 1982) C/M/157, 9.

[93] GATT Council, 'Minutes of Meeting Held on 7 May 1982' (n 92) 10 (emphasis added).

which the term 'justification' appears in the EEC's statement, it is not being used in the legal (explained in Section II.A); rather it is used in the sense of 'explanation'. Additionally, this statement may imply that the EEC considered that unilateral countermeasures find treaty reflection in GATT Article XXI. However, there is no evidence that this treaty 'reflection' is exclusive of CIL countermeasures. Norway stated the EEC, Australia and Canada 'in taking the measures …, *did not act in contravention of the [GATT]*.'[94] Canada stated that its 'actions were *consistent* with Canada's *international obligations, including those under [GATT]*'.[95] New Zealand stated that it 'had an inherent right to take such action as a sovereign State and that … these actions were in conformity with New Zealand's rights and obligations under the [GATT]' – without making reference to GATT Article XXI(b)(iii).[96] None of these statements indicates that CIL defences have been excluded by GATT Article XXI.

Overall, up to mid-1982, the practice of GATT Contracting Parties does not indicate a common understanding that security exceptions exclude CIL countermeasures. At best, it points to an individual understanding that security exceptions are justifications. But, it does not point to an individual understanding that they are *exclusive* justifications.

B. A 'Diffuse' Argument that the WTO Agreement has Displaced Trade Countermeasures in response to Breaches of Non-WTO Obligations

It might be argued that the WTO Agreement in general has displaced countermeasures in response to breaches of non-WTO obligations. This section considers whether the DSU may offer grounds for a *lex specialis* argument (Section III.B.1), as well as two instances of potential supplementary means of interpretation of the WTO Agreement, the Havana Charter (Section III.B.2) and the 1982 GATT Ministerial Declaration (Section III.B.3).

1. The DSU

The DSU displaces countermeasures under CIL in response to breaches of the WTO Agreement—this is not disputed here.[97] But, the DSU does not overlap with the function of CIL countermeasures that are taken *in response to breaches of violations of law outside the WTO*. *Mexico—Soft Drinks* concerned Mexico's countermeasures against the U.S. in the form of suspending compliance with WTO obligations in response to the US alleged prior breaches of NAFTA.[98] Mexico argued that its countermeasures were justified under GATT Article XX(d). The AB rejected Mexico's defence, because the terms 'secure compliance with laws and regulations' in GATT Article XX(d) 'refer to the rules […] of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member'. It added that:

> …Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a unilateral determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU...[99]

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[94] ibid (emphasis added).
[95] ibid (emphasis added).
[96] ibid 9.
[97] See n 35.
[98] *Mexico—Soft Drinks* (n 7).
[99] ibid, [77]. Footnotes omitted.

Drawing such a conclusion merely on the basis of the DSU that has a different purpose and function is based on the silence of the WTO Agreement's text. Instead, it can be argued that while WTO Members were aware of how to create *lex specialis* vis-à-vis responses to the former, they did not include comparable provisions designed to displace the latter. The following sections concern supplementary means of interpretation of the WTO Agreement.

2. The Havana Charter

In 2002, Bartels argued that 'on the assumption that the intentions of the drafters of the [International Trade Organization] were consonant with their intentions for GATT, […] it was not considered possible for countermeasures [in the form of suspending trade obligations] to be taken outside the [UN] system'.[100] He bases his argument on Article 86(3) of the Havana Charter on 'Relations with the United Nations',[101] and the fact that a negotiating State proposed that it would be subject to a condition: 'provided that this paragraph shall not be construed as permitting unilateral use of sanctions.'[102] However, Bartels' interpretation can be contested.

First, the negotiations of the Havana Charter of the International Trade Organization ('ITO')[103] are not part of the preparatory works of the 1947 GATT. Given that the 1947 GATT would be revised to be consistent with the Havana Charter (albeit the Havana Charter never entered into force), they can be taken as a supplementary means of interpreting 1947 GATT only to the extent that there is an understanding that there would be no departure from the existing 1947 GATT. Bartels does not furnish such evidence. Second, the Report of the Sub-Committee indicates that when the proposal about the interpretation of draft Article 83A, which became Article 86 of the Havana Charter, was made by the Union of South Africa (not by the UK, as Bartels suggests),[104] no other negotiating State objected or accepted it. A clear conclusion cannot be drawn solely from a proposal of one negotiating State.

Further, even if one were to accept that such silence in the negotiations of the Havana Charter means that unilateral countermeasures were excluded, and that this supplementary means of interpreting 1947 GATT is a supplementary means of interpreting the 1994 WTO Agreement, the negotiations of the Havana Charter took place in 1948. These were the early years of the functioning of the UN and the Security Council ('UNSC'). Subsequent experience has shown that the UNSC can be 'paralysed' by way of veto (of its permanent members) and that not all disputes concerning breaches of international law find their way or are sufficiently addressed before the UN system of Chapters IV and VI. Instead, in practice countermeasures can be instrumental in convincing the responsible State to participate in peaceful means of settlement (set out in Article 33 of the UN Charter Chapter VI).[105]

In parallel with the negotiations of the WTO Agreement, the ILC was considering whether dispute settlement obligations prohibited resort to countermeasures. In 1992, during the

[100] Bartels (n 21) 398.

[101] '[I]n order to avoid conflict of responsibility between the [UN] and the [ITO] with respect to [political] matters, any measure taken by a Member directly in connection with a political matter brought before the [UN] in accordance with the provisions of Chapters IV or VI of the [UN] Charter […] shall not be subject to the provisions of this Charter'.

[102] Bartels (n 21) 398.

[103] Havana Charter for an International Trade Organization (adopted 24 March 1948, not in force) UN Doc E/CONF.2/78 ('Havana Charter').

[104] UN Conference on Trade and Employment, Sixth Committee: Organization, 'Report of Sub-Committee I (Article 94)' (2 March 1948) E/CONF.2/C.6/93, 4-5.

[105] ILC, 'Report of the International Law Commission on the work of its 44th Session' (4 May-24 July 1992) UN Doc A/47/10, 28 at [188] and [191]. See also analysis in Part II.B.

Uruguay Round negotiations, the ILC focused on courts and tribunals able to issue binding interim measures as a condition for the countermeasures to be unavailable.[106] The ILC did not consider that the powers of the UNSC excluded countermeasures altogether.[107] WTO negotiators were aware of this since the Sixth Committee was discussing the work of the ILC on this matter during that period. The ILC adopted Article 48 in the Draft ASR on first reading (1996), which set out that 'Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that [the responsible State fulfils its obligations in relation to dispute settlement procedure set out in the Draft Articles or any other binding dispute settlement procedure in force] in good faith […] and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.'[108] This article was also retained in the ILC ASR adopted on second reading (2001) but was renumbered as Article 52(3).[109]

Negotiating States were aware of the modern realities of the UN system, and of the parallel discussions in the ILC and in the Sixth Committee which indicated that the UN Charter did not altogether exclude unilateral countermeasures (an assumption that they might have made in 1948 during the negotiations of the ITO, as Bartels points out). Whatever the ITO preparatory works may offer as supplementary evidence for interpreting the WTO Agreement, in this case, the proposal of one negotiating State in 1948 would be inconsistent with and could not prevail over the circumstances surrounding the negotiations of the latter agreement as well as the assumptions that negotiators made about the relationship between the UN and unilateral countermeasures during the negotiations of the WTO Agreement.

3. The 1982 GATT Ministerial Declaration and Practice Subsequent to It

On 29 November 1982, the 1947 GATT Contracting Parties adopted a Ministerial Declaration according to which

> '7. In drawing up the work programme and priorities for the 1980's, the contracting parties undertake, individually and jointly […] (iii) to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement […].'[110]

Given the wording of this part of the Ministerial Declaration, it constitutes a subsequent agreement of GATT Contracting Parties concerning the interpretation of 1947 GATT (VCLT Article 31(3)(a)).[111] However, vis-à-vis 1994 GATT and the WTO Agreement, this Ministerial Declaration qualifies as a supplementary means of interpretation (VCLT Article 32). The declaration uses open-ended wording. It focuses on GATT inconsistent measures taken 'for

[106] See ibid 27-29.
[107] ibid, 28 at [186].
[108] The Commentary makes no reference to dispute resolution through the political organs, such as the UNSC. ILC, 'Report of the work of the International Law Commission on the work of its 48th Session' (6 May-26 July 1996) UN Doc A/51/10, 310.
[109] The ILC explained that 'the reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure [but does not] refer to political organs such as the Security Council.' ILC ASR Commentary (n 27) 137 at [8].
[110] GATT Contracting Parties (Thirty-Eighth Session), 'Ministerial Declaration' (29 November 1982) L/5424, 3.
[111] Bartels argues that this Ministerial Declaration might be taken as '*opinio juris*'. Bartels (n 21) 400. However, the assessment here is not about CIL identification.

reasons of a non-economic character'. It covers and excludes countermeasures under CIL taken in response to the breach of any non-GATT obligation.

However, the practice of GATT Contracting Parties subsequent to the 1982 Ministerial Declaration focuses on economic coercion. In relation to *Nicaragua v. US*, in 1983, Nicaragua (along Venezuela, Mexico and Argentina) considered that the US action contravened the 1982 Ministerial Declaration,[112] as did in 1985, Nicaragua, Cuba, Argentina, Peru, Brazil, Spain, Czechoslovakia, Romania, Yugoslavia and Portugal.[113] All statements object to economic measures for exerting political pressure.[114] A decade after the Ministerial Declaration (1992), when the EC adopted against Yugoslavia regarding the civil war,[115] Yugoslavia complained invoking the Ministerial Declaration,[116] but no other GATT Contracting Party did.[117]

The chapeau of the quoted paragraph of the 1982 Declaration states that this undertaking relates to the circumstances that existed in the 1980s. However, the circumstances surrounding the conclusion of the WTO Agreement differed from those in 1982. The WTO Agreement was negotiated in the end of the Cold War and was concluded after it, when Western liberalism became a beacon for many countries, and enthusiasm for multilateralism and liberalism was prevalent.[118] A rejection of such unilateral countermeasures may not have been of continued concern to the drafters of the WTO Agreement, because this was not the prevalent background of that period (as it was in the 1980s).

Additionally, while it could be argued that until 1992 GATT Contracting Parties were concerned about economic coercion and countermeasures alike, the law on countermeasures became increasingly clearer during that decade and since 2001. In parallel with the Uruguay Round, the ILC prepared the ASR, which included rules on countermeasures. Although they were adopted on first reading (1996) and second readings (2001) after the conclusion of the Marrakesh Agreement, negotiating States were aware that the work of the ILC was ongoing and subjected countermeasures to strict and clear conditions of lawfulness (as discussed in Part II above) in an effort to minimize abuse.[119] Even if the 1982 Ministerial Declaration is a

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[112] GATT Council, 'Minutes of Meeting held on 13 March 1984' (10 April 1984) C/M/176, p. 9.

[113] GATT Council, 'Minutes of Meeting held on 29 May 1985' (24 June 1985) C/M/188.

[114] The 1983 US legislation that was complained of had been explained as 'hop[ing] to reduce the resources available to [Nicaragua] for financing its military build-up, and its support for subversion and extremist violence in the region'. The measures of 1985 were likely disproportionate.

[115] This practice is mentioned as an instance of measures by States other than the injured State in case of breaches of *erga omnes* obligations in the ILC commentary to ASR Article 54. ILC ASR Commentary (n 27) 139.

[116] Recourse to Article XXIII:2 by Yugoslavia, *European Communities—Trade Measures Taken for Non-Economic Reasons* (10 February 1992) DS27/2, 2.

[117] Bartels (n 21) cites Pakistan's statement, but this statement does not appear in the document that he cites. For India, 'trade measures for non-economic reasons *should* be taken only within the framework of a decision by the UN Security Council, in the absence of which there was a serious risk that such measures would be unilateral and arbitrary, and would undermine the multilateral trading system.' But, India did not state that the UN Charter or the GATT prohibited such unilateral countermeasures. GATT Council, 'Minutes of Meeting Held on 18 February 1992' C/M/254, 36.

[118] I Krastev and S Holmes, *The Light that Failed* (Allen Lane 2020).

[119] Further, considering *lex specialis* in ASR Article 55, the ILC refers to the WTO as an example of *lex specialis* concerning compensation and reparation, mentioning DSU Article 22,

supplementary means of interpreting the WTO Agreement, the assessment of WTO Members as to the law on countermeasures may have changed their position about whether the WTO Agreement excludes countermeasures specifically (even if it excludes economic coercion). This assumption is consistent with the above assessment of the WTO Members' practice, examined in Section V.A.4.a above, which does not indicate the common or individual understanding of WTO Members that countermeasures are excluded by the WTO Agreement (or security exceptions in particular).

IV. THE PREDICTABILITY OF THE WTO SYSTEM

Scholars and GATT Contracting Parties during the 1947 GATT era considered that unilateral trade restrictions as countermeasures for breaches of obligations outside the GATT undermine the predictability of the trade system.[120] Further, because countermeasures are closely related to national security, there is a concern today that, if permitted, they would open the Pandora's box for further politicisation of trade affairs.[121] This line of reasoning is based on three premises, which are countered in this Part in the following sequence: (a) prioritizing particular objectives of the WTO Agreement over others; (b) the perceived abuse and number of CIL countermeasures that would be available to WTO Members; and (c) that the systemic and long-term risk coming from the unavailability of CIL countermeasures for breaches of non-WTO obligations pose a threat to the predictability of the WTO. Instead, it is argued here that such countermeasures do not pose a real threat, as long as they are subject to stringent conditions under CIL and to the scrutiny of WTO adjudication, and that the unavailability of such countermeasures may lead to a backlash in the form of 'expanding' the narrow limits of the security exceptions.

A. No Priority of Objectives of the WTO Agreement

The purposes of the WTO Agreement include raising standards of living and the use of the world's resources, as well as the underlying objectives of 1947 GATT to bring peace and to enhance world economic welfare.[122] The proposition that countermeasures for enforcing international obligations that protect these other objectives are excluded owing to the need for predictability of the WTO system would mean that there is a priority given to the predictability of the WTO system over the other objectives of the WTO Agreement. Yet, there is no evidence in the WTO Agreement that such priority has been given to 'predictability' over the Preamble's express objectives.

B. Countermeasures are subject to Stringent Conditions Limiting the 'Opening of the Pandora's Box' Scenario

The proposition that CIL countermeasures would lead to rampant politicization and unpredictability of trade affairs presumes that WTO Members would be allowed to rely on

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rather than countermeasures as circumstances precluding wrongfulness. ILC ASR Commentary (n 27) Commentary to Article 55, 140 and fn 818.

[120] Hahn (n 10) 604.

[121] Some argue that security exceptions politicize trade affairs, see: A Roberts, H Choer Moraes and V Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655, 658.

[122] JH Jackson, 'Afterword: The Linkage Problem–Comments on Five Texts' (2002) 96 American Journal of International Law 118, 122.

unilateral CIL countermeasures in an unlimited and abusive manner. Yet, countermeasures only apply if and when general and security exceptions are not met and do not apply,[123] *and* they are subject to strict conditions under CIL (stricter than the requirements of security exceptions). Countermeasures are available only against a responsible State; they have to be proportionate to the injury suffered; and they cannot affect fundamental human rights obligations (as discussed in Part II above). The requirement of proportionality may also take into account the effect of the suspended obligations owed to individuals (beyond human rights obligations).

Indeed, countermeasures under CIL involve a risk – the State taking countermeasures determines for itself whether the target State has violated international law and whether its measures meet the conditions of lawfulness of countermeasures under CIL. But, as argued in Part V below, WTO adjudication has jurisdiction over claims about violations of the WTO covered agreements and over defences raised by the respondent, such as countermeasures under CIL. In such scenario, the margin of political narrative and abuse in relation to unilateral countermeasures can be minimized. Overall, since a limited number of such countermeasures would be permissible, it is unlikely that the 'floodgates' of politicization will open specifically owing to the availability of such countermeasures.

C. Unavailability of Trade Countermeasures May Lead to Long-Term Unpredictability of the WTO System

In the long-run, the *unavailability* of CIL trade countermeasures can bring about more unpredictability and more politicization to the WTO system. If such countermeasures are unavailable, WTO Members may be encouraged to justify their conduct through security exceptions, such as GATT Article XXI(b)(iii). WTO Members can establish an agreement through their subsequent practice in the application of the WTO covered agreements over time (VCLT Article 31(3)(b)) pursuant to which the correct interpretation of GATT Article XXI(b)(iii) involves a lower threshold of 'emergency in international relations' and 'essential security interests' than those established in *Russia-Traffic in Transit* and *Saudi Arabia-IP Right*s.

An additional incentive to this direction is the fact that once WTO Members find themselves within the scope of GATT Article XXI(b)(iii), they do not have to meet the stringent requirements of proportionality, the prohibition of affecting human rights and the requirement of targeting the responsible State.[124] A WTO Member invoking security exceptions does not have to target a responsible WTO Member, but can take measures under the security exception which may have an effect vis-à-vis all WTO Members. There is no requirement that security exceptions have to be applied so as not to affect fundamental human rights obligations of the WTO Member taking them and/or of the WTO Members affected. Trade restrictions may affect the right to health, life or the right to be free from inhuman treatment.[125] The interruption of

[123] For instance, they would apply when measures cannot meet the GATT Article XXI(b)(iii) requirements that 'essential security interests' of the WTO Member taking them are at stake and that 'times of war and other emergencies in international relations' exist.

[124] The CIL rule on systemic integration (VCLT Article 31(3)(c)) allows the provisions of a treaty to be interpreted by taking into account extraneous rules, here those on the lawfulness of CIL countermeasures. Given the wording of GATT Article XXI(b)(iii) and its interpretation by the Panels in *Russia-Traffic in Transit* and in *Saudi Arabia-IP Rights*, the CIL conditions on countermeasures would contradict the thresholds of GATT Article XXI(b)(iii) and they would be read into the provision, which exceeds the function of interpretation.

[125] Regarding energy trade restrictions and effect on human rights: D Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasure*s (OUP 2015), 232-247.

trade in water, energy or even some stapled foods necessary for human survival (and sanitation) could be affected (extraterritorially) by export or transit restrictions for instance.[126] While such measures could – under certain factual circumstances – entail that countermeasures are not lawful, GATT Article XXI is agnostic to and indifferent about such effects.[127] Neither *Russia-Traffic in Transit* nor the subsequent *Saudi Arabia-IP Rights* have recognized a proportionality requirement in GATT Article XXI(b)(iii).[128] Further, the measures under GATT Article XXI(b)(iii) only have to meet a minimum requirement of plausibility in relation to the proffered essential security interests.[129] Finally, GATT Article XXI(b)(iii) leaves exclusively to the discretion of the WTO Member invoking the security exception significant parts of that provision, including the necessity of the measures.[130] Instead, the CIL rule that countermeasures have to be proportionate to the injury suffered is subject to third party determination.[131]

Overall, arguing that CIL countermeasures have been displaced may encourage WTO Members to water down the strict 'entry thresholds' in GATT Article XXI(b)(iii). It encourages reliance on increasingly wider interpretations of GATT Article XXI(b)(iii),[132] and contributes to an approach that 'enforce[s] little actual cooperation over time',[133] and to politicization through the backdoor. This is not a 'science fiction' scenario'. A trend of wide (and abusive) interpretations of security exceptions appears in the practice of WTO Members in relation to measures that are taken for commercial purposes.[134]

V. WTO Adjudication Can Assess Whether the Trade Restrictions Are Lawful Countermeasures under Custom

This section confronts the second argument of the AB in *Mexico–Soft Drinks* (2006) against the availability of such countermeasures: that these would entail that WTO adjudication would assess whether a breach outside WTO law has taken place, and this has not been the intention of the DSU. It is argued here that WTO adjudication has jurisdiction over a dispute about a breach of a WTO covered agreement and over a defence of countermeasures; and that it can apply CIL on countermeasures and assess through this avenue whether there has been a breach of an extra-WTO obligation for this sole purpose.

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[126] Regarding extraterritorial application of human rights in this context, ibid, 237-244.

[127] The Arbitrator in *EC—Bananas* (Article 22.6) took into account 'the level of socio-economic development' of Ecuador when considering 'broader economic consequences'. But, there is no requirement that an effect on fundamental human rights has to be avoided by such measures authorized by the DSB. Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (4 March 2000) WT/DS27/ARB/ECU [86].

[128] *Russia—Traffic in Transit* (n 4) [7.132], [7.134].

[129] ibid, [7.138].

[130] ibid, [7.146].

[131] *Gabčíkovo-Nagymaros* (n 33) [85].

[132] Roberts, Choer Moraes and Ferguson (n 121) 672-673.

[133] BP Rosendorff and H Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape' (2001) 55 International Organization 829, 835.

[134] See n 14-15.

WTO adjudication has compulsory jurisdiction only over claims regarding the WTO covered agreements.[135] In the scenario considered here, a claimant WTO Member would complain that the conduct of the respondent WTO Member is inconsistent with the WTO Agreement. The respondent would invoke countermeasures under CIL as a *defence*.

One could argue that in such cases, the dispute overall falls entirely outside the jurisdiction of WTO adjudication. However, such an approach would deprive the DSU system of its effectiveness. A disputing party could set aside the jurisdiction of WTO adjudication over WTO Agreement disputes merely by invoking a different legal rule as the basis for its conduct. Another option would be to separate different parts of the dispute: WTO adjudication deals *only* with the aspect of the dispute that concerns the application of the WTO Agreement.[136] However, DSU Article 11 foresees that other findings can be made so as to assist the DSB in making a ruling about the WTO covered agreements; implying that other aspects of the dispute should not be excluded. Additionally, declining jurisdiction over CIL defences produces incoherent results: lawful conduct under CIL, will be found in breach of a WTO covered agreement. This may lead to non-compliance with WTO adjudication decisions.

The better argument is that WTO adjudication has jurisdiction over claims about a breach of the WTO covered agreements, where the defence of countermeasures is raised by the respondent.[137] However, the defence is a matter of applicable law, not of jurisdiction.[138] In any event, that the defence of countermeasures directs WTO adjudication to make a determination about whether there has been a violation of an extraneous rule of international law (as a condition of lawfulness of countermeasures)[139] can be covered by the implied or incidental

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[135] *Brazil–Measures Affecting Desiccated Coconut*, AB Report, (20 March 1997) WT/DS22/AB/R, 21; *European Communities and Certain member States—Measures Affecting Trade in Large Civil Aircraft*, Panel Report (1 June 2011) WT/DS316/R, [7.88]. See Dispute Settlement Understanding, Annex 2 to the Marrakesh Agreement establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 2002) 1869 UNTS 401 ('DSU'), Articles 1.1, 3.2, 7.1, 17.6. WTO adjudication may decide claims outside the WTO Agreement, only if the disputing parties grant it jurisdiction by ad hoc consent (DSU Articles 7.3 and 25).

[136] Implicitly *Mexico—Soft Drinks* (n 7) [56]. Contra: L Gradoni, 'Four Corners Doctrine' in HR Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2018), [25].

[137] J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 American Journal of International Law 535, 556-558 and 560. Similar position regarding ICJ jurisdiction: E Cannizzaro and B Bonafé, 'Fragmenting International Law through Compromissory Clauses?' (2005) 16 European Journal of International Law 48, 486. Recent international jurisprudence (with wider jurisdiction than WTO adjudication) has taken this approach. *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (n 1) [49] ('[t]he prospect that a respondent would raise a defence based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council's jurisdiction [under] Article 84 of the Chicago Convention.'). Earlier jurisprudence: *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* [1980] ICJ Rep 3 [36] ('no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important').

[138] J Pauwelyn, 'The Jurisdiction of the World Trade Organization' 2004 ASIL Proceedings (98) 135, at 136.

[139] NAFTA investment arbitral tribunals have assessed other conditions of lawfulness of countermeasures, such as the measure's objective or proportionality, as a solution to their

jurisdiction of WTO adjudication allowing it to decide all matters linked to the exercise of its main jurisdiction and inherent to judicial function (such as due process and international responsibility matters),[140] and to make ancillary findings about a rule of international law necessary in order to be able to exercise their jurisdiction over the WTO dispute.[141]

Finally, outright rejection of jurisdiction on the basis of 'judicial propriety', because WTO adjudication would address extra-WTO rules, is inappropriate.[142] It is reasonable that WTO adjudication should suspend its proceedings in the exceptional situation where the decision on the countermeasures defence rests on the existence of a previously wrongful act outside the WTO, *and* a dispute is pending before another international tribunal which has jurisdiction over a claim about whether there has been a breach of the international obligation in response to which the WTO Member is resorting to trade countermeasures.[143] Suspension is part of the inherent judicial function of WTO adjudication. WTO adjudication would avoid reaching a contradictory result and would promote consistency in international law. In all other cases, WTO adjudication should exercise jurisdiction.

Once jurisdiction over the defence of countermeasures is established, the question is whether WTO adjudication can *apply* extra-WTO rules to determine whether there is a breach of international law outside the WTO.[144] In this case, WTO adjudication is not resolving a dispute outside the WTO (as the AB suggested in *Mexico-Soft Drinks*).[145] Rather, it is taking a preliminary step to make a finding about whether the wrongfulness of suspending compliance

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assessment that their jurisdiction did not cover a determination whether a breach of another NAFTA Chapter had taken place. However, this option offers partial solutions: if WTO adjudication finds that all other conditions of lawfulness of countermeasures under CIL are met, it would have to determine whether there has been a breach of an extra-WTO obligation: *Corn Products International, Inc. v. United Mexican States* ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008) [182]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* ICSID Case No ARB(AF)/04/5, Award (21 November 2007) [131], [134]-[160]; *Cargill, Incorporated v. United Mexican* States ICSID Case N. ARB(AF)/05/2, Final Award (18 September 2009) [4]. As a separate matter, the argument that there is no need for WTO adjudication to establish that there has been a previously wrongful act outside the WTO, but only to establish the *belief* of the State taking countermeasures that a prior wrongful act has been committed (based on the reasoning of the Tribunal in *Air Service Agreement* (n 48) [81] has been rejected. See ILC ASR Commentary (n 27) 130 at [3].

[140] *Northern Cameroons (Cameroon v. UK)* [1963] ICJ Rep 15, 29; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, 259-260 at [23].

[141] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* Award (18 March 2015) [221] ('in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the [Law of the Sea] Convention'); *Certain German Interests in Polish Upper Silesia* (Preliminary Objections) PCIJ Rep Series A No 6, 18.

[142] See *mutatis mutandis*: *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (n 1) [61].

[143] See *mutatis mutandis*, *MOX Plant (Ireland v United Kingdom),* PCA Case No 2002-01, Procedural Order No 3 (24 June 2003), [29]-[30]. Contra: WJ Davey and A Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8 World Trade Review 5, 15.

[144] See in support: Davey and Sapir (n 143) 18; Pauwelyn (n 137) 556-558 and 560.

[145] See above text followed by n 9.

with a WTO obligation can be precluded by applying CIL.[146] DSU Article 11 implies that WTO Members contemplated that international law beyond the WTO would be applicable. While WTO judiciary is 'known for [its] reticence to apply non-WTO law as a substantive defense for an alleged violation of WTO rules',[147] WTO jurisprudence has not excluded extra-WTO rules from the applicable law and has applied them in some cases.[148]

VI. CONCLUSIONS

Not all problems of enforcement of international law should be addressed through the WTO system[149] or through trade countermeasures. Nor does this article encourage WTO Members, WTO adjudication or scholarship to this direction. Rather, this article cautions that arguing that trade countermeasures in response to breaches of non-WTO obligations are unavailable has wider implications for international law and for multilateralism, because they are a significant (albeit not the only) means of enforcing and of preserving the normative integrity of international obligations outside the WTO, including *erga omnes* and *erga omnes partes* obligations. The alleged 'displacement' of trade countermeasures in response to breaches of non-WTO obligations especially disadvantages smaller States in enforcing their rights under international law and in having a meaningful way of 'breaking their silence' against the erosion of fundamental rules of international law. In light of these wider implications, arguments supporting their 'displacement' have to be based on clear evidence.

This article showed that there is no strong evidence in the WTO Agreement to this effect. It also attempts to soothe the (understandable but perhaps exaggerated) 'fear' that such countermeasures may undermine the predictability of the WTO system. Trade countermeasures for breaches of extra-WTO obligations are subject to stringent conditions under CIL and to the jurisdiction of and thus judicial scrutiny by WTO adjudication, both of which minimize the space for abuse and the risk of unpredictability within the WTO.

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[146] See discussion about application of extra-WTO rules: Isabelle Van Damme, Jurisdiction, Applicable Law and Interpretation, in Daniel Bethlehem, Donald McRae, Rodney Neufeld, Isabelle Van Damme, *The Oxford Handbook of International Trade Law* (OUP 2009) 319-321.

[147] Weiss and Furculita, (n 19) 875.

[148] *Korea—Measures Affecting Government Procurement*, Panel Report (19 June 2000) WT/DS163/R, [7.96] (accepting the application of the CIL rule on *pacta sunt servanda*); *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, Panel Report (19 May 2003) WT/DS241/6, [7.38] (the Panel did not find that estoppel cannot apply, but that Argentina had not met the requirements of estoppel); *European Communities and Certain member States—Measures Affecting Trade in Large Civil Aircraft*, Panel Report (1 June 2011) WT/DS316/R, [6.22] (The US maintained that VCLT Article 28 could only for interpreting the WTO Agreement through VCLT Article 31(3)(c), while the EU argued that VCLT Article 28 may be given effect as a general principle of international law, independently of VCLT Article 31(3)(c). The Panel did not reject that it can apply the rule in VCLT Article 28: it found it 'unnecessary to engage in this debate'); *Peru—Additional Duty on Imports of Certain Agricultural Product*, AB Report (31 July 2015) WT/DS457/AB/R, [5.111]-[5.112] (The AB did not find that the CIL rule in VCLT Article 41 is not applicable law or that the FTA would not be applicable law before it. It found that there are special provisions in the WTO Agreement, and these prevail over VCLT Article 41).

[149] S Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95 American Journal of International Law 792, 818.