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TRADE COUNTERMEASURES FOR BREACHES OF INTERNATIONAL LAW OUTSIDE THE WTO

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Abstract This article challenges the widely held view that WTO Members are not permitted to impose trade restrictions on other WTO Members in the form of countermeasures for breaches of international law. It cautions that this generally held view has wider implications for international law and multilateralism because countermeasures are a significant means of enforcing and preserving the normative integrity of international obligations outside the WTO, including *erga omnes* and *erga omnes partes* obligations. Arguments supporting their 'displacement' must be based on clear evidence, which this article shows to be lacking. This article also attempts to allay the (understandable but perhaps exaggerated) concern that such countermeasures might undermine the predictability of the WTO system. Trade countermeasures for breaches of extra-WTO obligations are subject to stringent conditions under customary international law and to judicial scrutiny by means of WTO adjudication, both of which minimise the space for abuse and the risk of unpredictability.

Keywords: countermeasures, WTO law, public international law, security exceptions.

I. INTRODUCTION

In 2017 Qatar initiated consultations with Saudi Arabia, Bahrain and the United Arab Emirates (UAE) concerning measures that allegedly violated numerous WTO-covered agreements. Saudi Arabia, Bahrain and UAE invoked security exceptions and stated that their measures were 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

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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] ICJ Rep 81, para 8 <https://www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-00-EN.pdf>.

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Panel,[2] but only the Panel in *Saudi Arabia–IP Rights* (2020)[3] has adopted a Report at the time of writing. This is only the second time a WTO Panel has interpreted and applied the security exceptions under a WTO-covered agreement, following the historic first in the 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, although the measures taken by Saudi Arabia (and others) could be seen as paradigmatic countermeasures. In relation to similar facts, Saudi Arabia, along with Bahrain, Egypt, and UAE, argued before the International Court of Justice (ICJ) in an appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation[5] that their restrictive measures against Qatar in breach of that Convention were lawful countermeasures owing to Qatar's prior breach of the above anti-terrorism obligations.[6] The fact that the respondent WTO Members did not raise countermeasures as a defence in the WTO procedures, but did do so in other fora, raises a pivotal question: Are countermeasures in the form of suspending compliance with WTO obligations permissible in response to prior breaches of international law concerning non-WTO obligations, such as the prohibition of use of force, anti-terrorism obligations, the law of the sea, human rights, and so on?

From a WTO perspective, this question seems to have been answered negatively by the Appellate Body (AB) in *Mexico—Soft Drinks* (2006).[7] In that case, Mexico adopted measures that were inconsistent with its WTO obligations in response to alleged violations by the US of international obligations under NAFTA. Mexico sought to justify its measures against the US as a general exception under GATT Article XX(d) on the basis that they were intended to secure compliance with the US's international obligations. Article XX(d) reads as follows:

> … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> …

[2] The other Panel 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>.

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

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

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

[6] ibid paras 43, 48–49.

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

> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies …, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

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). The AB held that '"laws or regulations" within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of another WTO Member.'[8] In other words, countermeasures in response to a violation of international obligations by another WTO Member cannot be justified under the general exception in Article XX(d).

Moreover, the AB accepted the US's additional argument that if WTO Members were permitted to invoke Article XX(d) to justify unilateral measures taken to secure compliance with another Member's international obligations, that 'would logically imply' they could also invoke Article XX (d) to justify unilateral measures to secure compliance with another Member's WTO obligations. Mexico's interpretation would thus '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 [Dispute Settlement Understanding]'.[9] It can be inferred from this that the AB considered that permitting unilateral trade countermeasures for breaches of international obligations might undermine the WTO's dispute settlement system.

The AB also stated that Mexico's interpretation implies 'that, in order to resolve the case, WTO panels and the Appellate Body 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'.[10] In other words, since the WTO bodies are not competent to make determinations of breaches of non-WTO obligations, a Member State cannot rely on the defence that it suspended compliance with its WTO obligations as a trade countermeasure in response to a violation of non-WTO international law obligations.

In 1991, in relation to 1947 GATT, Hahn argued that unilateral trade countermeasures would endanger stability in international economic relations.[11] But there is a particular need to revisit the AB's twofold

[8] ibid para 75. [9] ibid para 77. [10] ibid para 78.

[11] MJ Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT Security Exceptions' (1991) 12 MichJIntlL 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.

argument in *Mexico—Soft Drinks* (2006) against unilateral countermeasures for breaches of international obligations outside the WTO, ie that they open the door to unilateral countermeasures for breaches of WTO obligations, contrary to DSU Articles 22–23, and that WTO adjudication bodies do 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,[12] may lead to 'introvert' outcomes, just as 'nationalism' can be a reaction to 'alien influences'.[13] The WTO is experiencing what can be called a 'cultural shock', which may lead to such an 'introvert' reaction against international law and which may cement the *Mexico—Soft Drinks* (2006) mantra.

Until the early 2000s WTO law 'managed a relative insulation from the "outside" world of international relations'.[14] However, since 2017, the invocation of security exceptions has increased,[15] including in relation to trade disputes that WTO Members have framed as security disputes.[16] This has led to the establishment of WTO Panels in respect of these disputes and the adoption of two reports so far.

Many of these cases involve measures taken in response to what the WTO Member concerned considers to be a breach of non-WTO obligations that are not based on regional trade agreements (and as such can be distinguished from

[12] Oxford English Dictionary (online).

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

[14] JH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement' in RB Porter *et al.* (eds), *Efficiency, Equality, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings 2001) 336–7. See also: R Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading System' (2002) 96 AJIL 94, 98.

[15] Communications from the United States, *United States—Certain Measures on Steel and Aluminium Products*, WT/DS564/9-14, 15 October 2018; Communications from the United States, *United States—Certain Measures on Steel and Aluminium Products*, WT/DS556/9-14, 31 August 2018; Communications from the United States, *United States—Certain Measures on Steel and Aluminium Products*, WT/DS554/10-15, 31 August 2018; Communication from the United States, *United States—Certain Measures on Steel and Aluminium Products*, WT/DS552/9, 6 July 2018; Communication from the United States, *United States—Certain Measures on Steel and Aluminium Products*, WT/DS551/10, 6 July 2018; Communication from the United States, *United States—Certain Measures on Steel and Aluminium Products*, WT/DS548/13, 6 July 2018. See analysis: YS Lee, 'Are Retaliatory Trade Measures Justified under the WTO Agreement on Safeguards?' (2019) 22 JIEL 439. H Farrell and A Newman, 'Japan and South Korea Are Being Pulled into a Low Level Economic War' *The Washington Post* (1 August 2019) <https://www.washingtonpost.com/politics/2019/08/01/japan-has-weaponized-its-trade-relationship-with-south-korea/>; B Baschuk, 'India Withdraws Trade Preferences to Pakistan; Cites WTO Clause' *Bloomberg Law* (15 February 2019) <https://news.bloomberglaw.com/international-trade/india-withdraws-trade-preferences-to-pakistan-cites-wto-clause>; S Lester and H Zhu, 'A Proposal for Rebalancing to Deal with National Security Trade Restrictions' (2019) 42 FordhamIntlLJ 1451, 1451.

[16] White House, 'Economic Security Is National Security' (National Security Strategy of the United States of America, December 2017) 17–21 <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

Mexico—Soft Drinks which concerned breaches of NAFTA). They concern security-related or human rights issues (and in some instances prior breaches of such obligations). *Russia–Traffic in Transit* (2019) involved Russian measures taken in the context of its conflict with Ukraine over Crimea (unlawfully annexed by Russia). *Saudi Arabia–IP Rights* (2020) is one of numerous disputes brought by Qatar concerning measures taken against it by Saudi Arabia; and, in 2019, Venezuela requested consultations with the US concerning allegedly WTO-inconsistent measures which it had taken in response to Venezuela's alleged human rights violations.[17]

This increased invocation of security exceptions means that WTO bodies are increasingly confronted with scenarios that are outside their traditional areas of competence and this has prompted some authors to argue that WTO adjudication should avoid addressing 'sensitive matters',[18] including unilateral WTO restrictions taken in response to non-WTO breaches.

Concerns about WTO adjudication expanding into sensitive areas are exacerbated by long-term criticisms, from some quarters, that WTO adjudicators have become too interventionist. Indeed, the WTO AB's 'demise' has been blamed (at times unpersuasively) on its alleged tendency to engage in 'judicial activism'.[19]

At the same time, the EU, in light of the WTO AB's 'paralysis', has been accused of encouraging unpredictability and undermining multilateralism,[20] by proposing amendments which would permit it to take unilateral countermeasures under customary international law for breaches of WTO law.[21] Against this background, unilateral trade countermeasures for breaches of non-WTO law may also be seen to threaten the predictability of the WTO. Thus, their prohibition may be appealing to those in favour of WTO adjudication.

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

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

[19] A Bahri, '"Appellate Body Held Hostage": Is Judicial Activism at Fair Trial?' (2019) 53 JWT 293; 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body' (27 August 2018) items 4 and 15, 23–4 <https://gpa-mprod-mwp.s3.amazonaws.com/uploads/sites/25/2021/07/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf>. See also: M Matsushita, TJ Schoenbaum and PC Mavroidis, *The World Trade Organization* (2nd edn, Oxford University Press 2006) 130–1.

[20] W Weiss and C Furculita, 'The EU in Search of Stronger Enforcement Rules' (2020) 23 JIEL 865, 865–84, 877–8.

[21] 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' COM(2019) 623 final, 4.

Among the arguments against permitting unilateral trade countermeasures under customary international law in response to breaches of non-WTO law is the fact that there are three alternative avenues:

First, non-WTO obligations could be enforced by interpreting the text of the general exceptions (eg GATT Article XX) so as to include countermeasures that are WTO-consistent.[22] 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 unlikely.[23]

Second, non-WTO obligations could be enforced by relying on security exceptions. GATT Article XXI (and security exceptions in other WTO-covered agreements) provides that WTO Members may take measures 'in times of war or other emergency in international relations', a term which captures situations where countermeasures under customary international law may be taken. However, in *Russia–Traffic in Transit* and *Saudi Arabia–IP Rights*, the Panels considered that the term 'emergency in international relations' must be understood as 'a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state', eliciting 'defence and military interests, as well as maintenance of law and public order interests'.[24] Urgent or serious 'political or economic differences' between WTO Members are insufficient of themselves to constitute an emergency in international relations, unless they give rise to defence and military interests, or maintenance of law and public order interests.[25] The narrow scope of 'emergency in international relations' means that the security exception does not cover numerous situations where countermeasures would be allowed.

Third, the customary international law 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)).[26] However, including countermeasures in the requirement of 'times of war or other

[22] DS Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor' (1995) 20 YJIntlL 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 JWT 353.

[23] SH Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' (2002) 5 JIEL 133, 158–81. See restrictive approach: GATT Panel Report, *US—Restrictions on Imports of Tuna*, DS21/R, adopted 3 September 1991; GATT Panel Report, *US—Restrictions on Imports of Tuna*, DS29/R, adopted 16 June 1994.

[24] *Russia–Traffic in Transit* (n 4) paras 7.74–7.76; *Saudi Arabia–IP Rights* (n 3) para 7.246.

[25] *Russia–Traffic in Transit* (n 4) paras 7.74–7.75; *Saudi Arabia–IP Rights* (n 3) paras 7.245 and 7.263–7.267.

[26] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3)(c). C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279. G Marceau, 'A

emergency in international relations' waters down the strict requirements of this provision set out in *Russia–Traffic in Transit* and *Saudi Arabia–IP Rights*. Additionally, reading into this provision the customary international law conditions of lawfulness of countermeasures replaces (rather than interprets) the text of GATT Article XXI with the extraneous rules on countermeasures.[27]

This article, after explaining the function of countermeasures under customary international law (Part II), argues that prohibiting unilateral trade countermeasures for breaches of non-WTO obligations has the potential to undermine the enforcement and normative integrity of international law outside of the WTO, and it should not easily be presumed that this outcome was the intention of WTO Members.

This article argues that the WTO Agreement has not displaced unilateral trade countermeasures in response to breaches of non-WTO obligations (Part III) and that the predictability of trade is not threatened by the availability of such countermeasures (Part IV). It explains that the WTO dispute settlement system has jurisdiction over trade disputes in which the respondent invokes as a defence the right to take lawful countermeasures under customary international law for prior breaches of non-WTO obligations. Thus such defences 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 (Part V).

II. THE FUNCTION OF COUNTERMEASURES IN CUSTOMARY INTERNATIONAL AW

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 customary international law (Section II.C).

A. Countermeasures as Circumstances Precluding Wrongfulness and Lex Specialis

As set out in the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), countermeasures 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 its

Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 JWT 5.

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

wrongful act and to make reparation.[28] Countermeasures involve conduct that is itself prima facie in breach of international law but because they are taken in response to a prior wrongful act their wrongfulness is precluded.[29] Thus, the conduct is lawful. This has also been termed 'justification' of otherwise wrongful conduct.[30] Scholarship,[31] State practice[32] and international jurisprudence[33] support the conclusion that countermeasures are circumstances precluding wrongfulness (or justifications). The ARSIWA 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.[34]

Customary international law rules on State responsibility, including those on countermeasures, can be displaced by treaty *lex specialis* (ARSIWA Article 55). For this to be the case, there must be an overlap in subject matter between the customary international law rules and the rules established in the treaty, as well as a discernible intention by the treaty parties to deviate from the customary international law rules.[35]

The established view in WTO practice and literature is that unilateral responses (such as countermeasures) to breaches of WTO law have been displaced by WTO *lex specialis* in the form of the DSU, especially its Article

[28] ILC, 'Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries thereto' in *Yearbook of the International Law Commission 2001* (United Nations 2007) vol II(2) 30 (ILC ARSIWA/ILC ARSIWA Commentary) art 49 and commentary, 130 at paras 1 and 4.

[29] ibid 129 at para 6, 135 at para 7.

[30] V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 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* (Oxford University Press 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, para 3); Croatia (Sixth Committee (55th Session) 'Summary record of the 16th meeting' (25 October 2000) UN Doc A/C.6/55/SR.16, para 72); China (Sixth Committee (56th Session) 'Summary record of the 11th meeting' (29 October 2000) UN Doc A/C.6/56/SR.11, para 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, para 28); United Kingdom (Sixth Committee (55th Session) 'Summary record of the 14th meeting' (23 October 2000) UN Doc A/C.6/55/SR.14, para 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, para 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, para 70.

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

[34] ILC ARSIWA/ILC ARSIWA Commentary (n 28) 31 at para 3. 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. 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.

[35] ILC ARSIWA Commentary (n 28) 140 at para 4.

23 and its system of 'WTO countermeasures'.[36] However, a less settled question is whether WTO law has displaced unilateral trade countermeasures in response to breaches of extra-WTO law. 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 of the WTO. Countermeasures are *not* the only or the most effective way of enforcing international law.[37] However, in the frequent cases where State consent to international adjudication is lacking (including by virtue of reservations), countermeasures may be the only effective, and at times the only available, means of self-help against a responsible State. The position is further exacerbated by the fact that, in recent years, some States have seemed keener to withdraw from treaties establishing the compulsory jurisdiction of international courts and tribunals.[38] While the ICJ is witnessing a rise in *erga omnes (partes)* claims, *Gambia v Myanmar* being the most recent example,[39] such claims are still 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, with 98 per cent of world trade being governed by WTO-covered agreements. In addition, the membership of the WTO has expanded to 164 Members and a further 20 States are seeking to join.[40] In the UN era, where forcible countermeasures are prohibited, trade countermeasures are a persuasive means for enforcing international obligations. If trade countermeasures are

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

[37] 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, 113–17.

[38] C McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 ICLQ 499.

[39] *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, para 42.

[40] 'The WTO' (*World Trade Organization*, 2022) <https://www.wto.org/english/thewto_e/thewto_e.htm>.

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unavailable to over 160 States, the enforcement of international law, including *jus cogens* norms, will be threatened.

Further, removing the right to take 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 customary international law, unilateral countermeasures must cease once an international court or tribunal is seised 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 to convince the responsible State to participate in international adjudication.

Countermeasures also play a role in 'normative dynamics' (law-making).[41] If States fail to respond to conduct that violates existing norms, that silence may (under certain conditions) constitute acceptance of the conduct, thus enabling normative change vis-à-vis customary international law rules, through treaty interpretation or treaty modification.[42] Thus countermeasures provide an important means of protest against conduct that deviates from existing norms.[43] As a means of protest, countermeasures can prevent the weakening and eventual change or termination of international law norms and they can establish and maintain a persistent objector stance vis-à-vis new customary international law.[44]

The argument that WTO Members have alternative means at their disposal (other than trade countermeasures) to enforce and preserve the normative integrity of their rights, because they can rely on diplomatic protest and retorsion, fails to consider the limited capacity of small and developing countries to enforce international obligations. Resorting to countermeasures depends on the resources of the particular State, and its trade relationship and power dynamics with the target State. Inequalities in the economic, political and institutional capacities of States mean that countermeasures by small and developing countries are unlikely to be feasible and thus unlikely to be taken.

[41] M Hakimi, 'Unfriendly Unilateralism' (2014) 55 HarvIntlLJ 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.

[42] On customary international law: 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 para 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).

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

[44] IC McGibbon, 'Some Observations on the Part of Protest in International Law' (1953) 30 BYBIL 293, 317; CG Guldahl, 'The Role of Persistent Objection in International Humanitarian Law' (2008) 77 NordJIntlL 51, 55. Contra: JA Green, *The Persistent Objector Rule in International Law* (Oxford University Press 2016) 76–81. For Green, verbal protest alone (rather than physical acts) is sufficient to establish objection. However, trade countermeasures (as physical acts) can count as objections. In any event, countermeasures are normally required to be preceded by notice (verbal communication) by the invoking State to the target State of the former's claim. See ARSIWA arts 52(1) and 43.

However, the influence of diplomatic protest also depends heavily on the power dynamics between the responsible State and the reacting State. If countermeasures are not available to small and developing countries they are unlikely to only protest verbally, because they risk aggravating their relationship with a powerful responsible State without the possibility of taking action that might persuade the responsible State to cease the wrongful conduct (such as countermeasures).

Suggesting that WTO Members may not take trade countermeasures but may still take countermeasures in other fields risks significantly aggravating international relations in specific fields of international law. Furthermore, countermeasures in other fields can still have an effect on trade flows but without the WTO system being able to review the restrictive measures. For example, the law of the sea governs numerous economic activities at sea, including navigation, but WTO law may not apply in some maritime zones.

The argument that trade countermeasures in response to breaches of non-WTO obligations are unavailable rests on the proposition 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 non-WTO international law obligations. For this reason, arguments that the WTO Agreement has displaced this type of countermeasures should be approached with caution.

C. *Conditions of Lawfulness of Countermeasures under Customary International Law*

This section sets out the conditions for the lawfulness of countermeasures under customary international law. Under the ARSIWA, countermeasures have to fulfil certain conditions in order to be lawful. First, countermeasures must be taken in response to a previous internationally wrongful act and it is axiomatic that they may be taken by an injured State.[45] Where the internationally wrongful act is a breach of *erga omnes (partes)* obligations, there has been much debate on whether States other than the injured State are entitled to resort to countermeasures against the responsible State.[46] 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 there was embryonic practice of States other than the injured State taking lawful

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

[46] 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, paras 33–34; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, paras 68 and 99.

measures against the responsible State.[47] However, since 2001, some argue that there has been abundant practice of 'third party countermeasures'.[48]

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.[49] Third, the injured State must call upon the State acting wrongfully to comply with its obligations of cessation and reparation, notify it of the decision to take countermeasures, and offer to negotiate.[50] Fourth, countermeasures have to be temporary and reversible.[51] Fifth, they have to be proportionate to the injury suffered taking into account the gravity of the breach and the rights in question.[52] Sixth, forcible countermeasures are prohibited and countermeasures may not affect 'fundamental human rights' obligations, obligations of a humanitarian character prohibiting reprisals, or obligations derived from *jus cogens* norms.[53] 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.[54]

III. THE WTO AGREEMENT AND COUNTERMEASURES IN RESPONSE TO BREACHES OF NON-WTO OBLIGATIONS

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

[47] ILC ARSIWA Commentary (n 28) 137–9.

[48] M Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017); L-A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1146–7.

[49] ILC ARSIWA (n 28) arts 2 and 49(1).

[50] ibid art 52(1). *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) 18 RIAA 417, paras 85–87 (*Air Services Agreement*); *Gabčíkovo-Nagymaros* (n 33) para 84. The obligation to call for reparation is a customary international law rule: Y Iwasawa and N Iwatsuki, 'Procedural Conditions' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1151.

[51] ILC ARSIWA (n 28) arts 49(2)–(3) and 53. ILC ARSIWA Commentary (n 28) 130–1 at para 7; ibid para 164; *Gabčíkovo-Nagymaros* (n 33) para 87.

[52] ILC ARSIWA (n 28) art 51. *Air Service Agreement* (n 50) para 83; *Gabčíkovo-Nagymaros* (n 33) para 85. ILC ARSIWA Commentary (n 28) 134–5.

[53] ILC ARSIWA (n 28) art 50.

[54] ILC ARSIWA (n 28) art 52(3)(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.[55] The following analysis focuses on GATT Article XXI(1)(b)(iii), this being an example of a security exception in a WTO-covered agreement that could overlap in content with situations of countermeasures under customary international law.[56] GATT Article XXI(1)(b)(iii) reads:

> 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 conduct falling within the security exception is not prohibited. In contrast, countermeasures involve conduct that is prima facie inconsistent with an obligation (ie prohibited), but the wrongfulness of the conduct is precluded. Thus, the two play different roles: countermeasures are a justification for breaking the rules; Article XXI is an exception to the rules.

No GATT/WTO case has specifically considered whether GATT Article XXI is *lex specialis* as regards countermeasures suspending compliance with GATT obligations in response to breaches of non-WTO obligations. The two recent Reports of the Panels in *Russia–Traffic in Transit* (2019) and in *Saudi Arabia–IP Rights* (2020) both applied security exceptions. However, as will be shown in Sections III.A.1 and III.A.2 respectively, they provide no conclusive evidence that countermeasures under customary international law overlap with and are displaced by security exceptions in WTO-covered agreements.

Section III.A.3 argues that even if security exceptions can be understood as providing justifications for breach similar to countermeasures under customary international law, this does not mean that they are a form of *lex specialis*. Security exceptions have different aims and different content from countermeasures under customary international law.

Section III.A.4 argues that the subsequent practice concerning the application of 1994 GATT and of 1947 GATT does not provide support for the proposition that countermeasures for breaches of non-WTO obligations overlap with and are intended to be excluded by security exceptions.

[55] Hahn (n 11) 604.

[56] *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. Russia–Traffic in Transit (Panel, 2019)

In 2019, the Panel in *Russia–Traffic in Transit* issued an historic Report that for the first time dealt with the content and operation of a security exception in a WTO-covered agreement, 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),[57] and to assess whether Russia, as the invoking WTO Member, had satisfied the requirements enumerated in the subparagraphs of GATT Article XXI(b).[58] Having found that 'the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b)',[59] and that Russia's measures had been taken 'in time of' this emergency,[60] the Panel examined whether the conditions in the chapeau of GATT Article XXI(b) had been satisfied.

The Panel considered whether 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'.[61] It found that (a) it is left to every WTO Member to define what it considers to be its essential security interests,[62] but that this discretion is limited by an obligation to interpret and apply GATT Article XXI(b)(iii) in good faith,[63] which entails an obligation upon the invoking State 'to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity'.[64] There also has to be a connection between the essential security interests invoked and the measures at issue.[65] Additionally, it found (b) that 'it is for Russia to determine the "necessity" of the measures for the protection of its essential security interests'.[66]

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 customary international law. However, its reasoning may give guidance as to the relationship of this provision with customary international law 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 sequencing 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 for what would otherwise have been a breach, as previous Panels and the AB have done in relation to the general exceptions in

[57] *Russia–Traffic in Transit* (n 4) paras 7.56, 7.102–7.103. [58] ibid para 7.100.
[59] ibid para 7.123. [60] ibid para 7.124. [61] ibid para 7.128. [62] ibid para 7.131.
[63] ibid para 7.132. [64] ibid para 7.134. [65] ibid para 7.138. [66] ibid para 7.146.

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GATT Article XX. The Panel explained this choice of sequencing by virtue of the 'particularity of the exceptions specified in GATT Article XXI(b)(iii)' as compared to GATT Article XX:[67]

> 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 … .[68]

Given the sequence of reasoning and the explanation of the special nature of GATT Article XXI, the Panel's Report does not support the argument that GATT Article XXI(b)(iii) is a justification for breach that operates in the same way as GATT Article XX. In any event, there is no evidence in the Panel's report that countermeasures are excluded owing to this provision—irrespective of whether this provision functions 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 or applied for by entities based in Qatar, thus violating the TRIPS Agreement. Saudi Arabia invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement (the wording of which is identical to GATT Article XXI(b)(iii)). There is no indication in the Panel's Report that Saudi Arabia argued that its measures were countermeasures, taken in response to Qatar's alleged violation of the Gulf Cooperation Council Agreement. The Panel found that the requirements for invoking Article 73(b)(iii) were met in relation to the inconsistency with Articles 42 and 41.1 of the TRIPS Agreement, which require fair and equitable procedures, and enforcement procedures permitting effective action against any act of infringement of intellectual property rights respectively. However, they were not met in relation to the inconsistency with Article 61 in relation to criminal procedures.[69]

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 impugned conduct with WTO provisions, and then considering the exceptions. This was because the parties to the dispute had expressly agreed on this approach.[70] It implicitly supports the argument that the security exceptions are justifications for conduct which would otherwise

[67] ibid para 7.108.
[68] ibid (emphasis added).
[69] *Saudi Arabia–IP Rights* (n 3) para 7.294.
[70] ibid para 7.6.

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be wrongful, and thus overlapping with the function of countermeasures as circumstances that preclude wrongfulness.

The background of *Saudi Arabia–IP Rights* was not an armed conflict, as in *Russia–Traffic in Transit*, but a complete severance by Saudi Arabia of all diplomatic and economic relations with Qatar. The Panel in *Saudi Arabia–IP Rights* did not find that only complete severance of diplomatic and economic relations meets the 'emergency in international relations' requirement. The Panel repeated the reasoning in *Russia–Traffic in Transit* that 'emergency in international relations' is 'a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state', eliciting 'defence and military interests, as well as maintenance of law and public order interests'.[71] It is clear from this narrow definition that security exceptions apply to a much narrower range of circumstances than have traditionally given rise to countermeasures. If the security exception disallows countermeasures under customary international law, then there will be many situations in which WTO Members will not be able to engage lawfully in any form of response.

However, apart from the sequencing of the reasoning, there is no evidence in *Saudi Arabia–IP Rights* to support the conclusion that the security exceptions in TRIPS (or GATT) exclude countermeasures under customary international law.

3. 'Function' is not the only criterion for determining overlap in subject matter

It is well established in the jurisprudence of Panels and the AB that GATT Article XX (general exceptions) provides justifications for prima facie breaches of GATT; ie that it contains circumstances that preclude wrongfulness, as is the function of countermeasures under customary international law. 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.'[72]

Since the general exceptions (GATT Article XX) are the immediate context of the security exceptions (GATT Article XXI), it is arguable that the latter should have the same function as justifications. On such a reading, GATT Article XXI(b)(iii) and countermeasures under customary international law overlap because they fulfil the same function, as circumstances that preclude wrongfulness, and WTO Members intended to exclude the applicability of the general law of countermeasures.

[71] *Russia–Traffic in Transit* (n 4) paras 7.74–7.76; *Saudi Arabia–IP Rights* (n 3) paras 7.246 and 7.257.

[72] AB Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, para 223 (emphasis added).

However, if overlap in function is sufficient to exclude countermeasures, this would imply that the mere inclusion of *general* exceptions in GATT and other covered agreements also 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. Attributing such extreme exclusionary effects to exceptions should not be based only on the silence of the treaty text.

Furthermore, function is not the sole criterion when determining whether there is overlap for the purposes of determining if a rule is *lex specialis*. This is supported by the Annulment Committee's finding in *CMS v Argentina* that a state of necessity under customary international law and treaty exceptions do not overlap as there are substantive differences between them.[73]

GATT Article XXI and countermeasures differ substantially in content and aims. 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 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'.[74] 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.

Consider the situation where a WTO Member violates non-WTO international obligations without generating external threats to another WTO Member's territory or population or undermining the maintenance of legal and public order in another WTO Member State. For instance, where a WTO Member has seised a commercial vessel carrying the flag of another WTO Member during the vessel's innocent passage;[75] or where a WTO Member commits genocide against its own population.[76] In these examples, the

[73] *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*) para 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.').

[74] *Russia–Traffic in Transit* (n 4) para 7.130.

[75] Even if the State of nationality of crew members could make a connection to the protection of its population (thus justifying reliance on 'essential security interests'), an argument that the vessel is assimilated with the flag State's territory (thus justifying the same) would be untenable, since the ground for which a flag State has jurisdiction over a vessel is nationality, not territorial jurisdiction. Since the crew does not usually have the flag State's nationality, the flag State is unlikely to be able to rely on essential security interests in this instance.

[76] It could be argued that genocide in a WTO Member's territory gives rise to a need for neighbouring WTO Members to take steps to maintain public order within their own territory, eg owing to mass refugee flows. But, this would not be the case for all States.

measures do not call for the protection of the territory, population or legal or public order of another WTO Member and, therefore, GATT Article XXI(b)(iii) does not apply. Where a WTO Member uses force against another WTO Member, it is likely that the 'essential security interests' of some WTO Members other than the victim WTO Member are threatened, owing for instance to proximity or ensuing massive refugee flows. But GATT Article XXI(b)(iii) would not apply in relation to a number of WTO Members whose essential security interests would not be threatened. In all such situations trade restrictions are available to WTO Members only and to the extent that they are permissible countermeasures under customary international law.

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

Under the customary international law rules of treaty interpretation, subsequent practice 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 (VCLT Article 31(3(b)).[77] In the three WTO disputes where security exceptions were invoked *and* the facts could have involved countermeasures—the Helms-Burton Act dispute between Cuba and the US (1996–2016),[78] the *Colombia/Nicaragua* dispute (2000)[79] and *Russia–Traffic*

[77] ILC Conclusions on SASP (n 42) Conclusion 2(3) and Conclusion 4(2). AB Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, Section E ('subsequent practice in interpreting a treaty has been recognised as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation').

[78] 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 customary international law 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 customary international law obligations owed to the US outside the WTO. Communication from Cuba, *United States—Cuban Liberty and Democratic Solidarity Act of 1996*, WT/L/142, 4 April 1996; Council for Trade in Goods, 'Minutes of Meeting held on 19 March 1996' (10 April 1996) G/C/M/9, 3–4, 6.

[79] 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 customary international law 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*, WT/DS188/1, 20 January 2000; Nicaragua, 'Notification pursuant to Article XXI of

in Transit (2019)[80]—the practice of WTO Members does not establish an agreement by all WTO Members that GATT Article XXI(b)(iii) operates as a circumstance precluding wrongfulness and that it excludes countermeasures under customary international law.

Furthermore, 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).[81] In the above disputes, three WTO Members used the term 'justified' in relation to GATT Article XXI.[82] This may suggest their individual understandings that this provision acts as a justification, ie a circumstance that precludes wrongfulness.

However, the use of the word 'justified' by the US, Nicaragua and Japan in these three cases does not appear to be used in its legal sense.[83] Only the EU in

the GATT 1994 and Article XIV*bis* of the GATS' (21 February 2000) S/C/N/115 and G/C/4, para 7; DSB, 'Minutes of Meeting held on 7 April 2000' (12 May 2000) WT/DSB/M/78, para 60; DSB, 'Minutes of Meeting held on 18 May 2000' (26 June 2000) WT/DSB/M/80, paras 40 and 32.

[80] In *Russia—Traffic in Transit*, Ukraine and Russia—the disputing parties—and numerous third party intervening WTO Members arguing about the interpretation of GATT Article XXI. These are summarised in the Panel's Report: Australia, Brazil, Canada, China, EU, Japan, Moldova, Singapore, Turkey, and the US. *Russia–Traffic in Transit* (n 4) paras 7.35–7.52. In *Saudi Arabia—IP Rights*, Article 73(b)(iii) TRIPS, not GATT Article XXI, applied. The parties to the dispute and numerous other WTO Members that intervened made arguments about the interpretation of Article 73(b)(iii) TRIPS. None of the positions referred to in the Panel's Report gives evidence of a common or individual understanding that countermeasures have been excluded by Article 73(b)(iii) TRIPS. *Saudi Arabia—IP Rights* (n 3) paras 7.232–7.293.

[81] 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' in *Yearbook of the International Law Commission 1964* (United Nations 1965) vol II, 204 at para 13; ILC Conclusions on SASP (n 42) Commentary to Draft Conclusion 4(3) at para 23.

[82] 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 XIV*bis* of the GATS' (21 February 2000) S/C/N/115 and G/C/4, para 7; DSB, 'Minutes of Meeting held on 7 April 2000' (12 May 2000) WT/DSB/M/78, para 60; DSB, 'Minutes of Meeting held on 18 May 2000' (26 June 2000) WT/DSB/M/80, paras 40 and 32. In *Russia–Traffic in Transit*, the US and the EU used the language 'justified' as can be seen in their publicly available interventions: 'Third-Party Oral Statement of the USA' (25 January 2018) paras 27–31 <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>; 'EU Third Party Written Submission' (8 November 2017) para 14 (emphasis added) <https://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3#_eu-submissions>; 'Third Party Oral Statement by the European Union' (25 January 2018) para 4 <https://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3#_eu-submissions>.

[83] 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 XIV*bis* of the GATS' (21 February 2000) S/C/N/115 and G/C/4, para 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,

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its third-party submission in *Russia–Traffic in Transit* (2019) definitively 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.'[84] However, none of the statements made in the context of these disputes suggest that security exceptions exclude the applicability of countermeasures under customary international law.

Overall, there is no common understanding of WTO Members that countermeasures overlap with and are excluded by GATT Article XXI. At best, the practice of four WTO Members (EU, Japan, Nicaragua, US) might evidence their individual understanding that security exceptions are justifications in the legal sense. However, there is no evidence of any individual WTO Member taking the view 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 in situations where, on the facts, they 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 under customary international law are excluded.[85] Yet, his argument suggests that States should at all times invoke their rights under customary international law 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

para 60 (Nicaragua considered the measures 'were fully *justified* under [GATT Article XXI and GATS Article XIVbis]' and 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, paras 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. Indeed, this is doubtful considering that the US also relied on views expressed by other States in which the term 'justification' was used and clearly was not intended to have this legal meaning: 'Third-Party Oral Statement of the USA' (25 January 2018) paras 27–31 <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>.

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

[85] L Bartels (n 22) 399.

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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),[86] *Iceland/Germany* (1974–75),[87] *Argentina/EEC, Australia and Canada* (1982)[88]—no common understanding of GATT Contracting Parties can be detected that countermeasures under customary international law are excluded by virtue of the security exceptions provision.[89]

[86] 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 customary international law 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 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 26) 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 that the US had 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.

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

[88] 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' (the 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 customary international law. But, it is unclear if they considered that GATT Article XXI(b)(iii) excluded countermeasures under customary international law. 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.

[89] 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*

In *Iceland/Germany* (1974–75), 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 statements may provide evidence of their individual understandings that may be relied upon as a supplementary means of interpretation, they are discussed here in further detail.

In 1974, Germany imposed port restrictions against fish from Iceland. In the GATT Council, Iceland complained that Germany was violating 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 violations of the freedom of the high seas and the prohibition of use of force under customary international law, as well as of an ICJ Judgment.[90] 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'.[91] Germany stated that if its 'ban was *justified* as a countermeasure under generally recognised rules of international law it could not be illegal under the GATT'.[92] Germany's explanation suggests that it considered that countermeasures in the form of suspending compliance with GATT obligations in response to breaches of international law outside the GATT were available to it. Since the positions of Germany and Iceland contradict each other, and no other GATT Contracting Party made a relevant statement, these two statements neutralise each other.

In 1982, Argentina complained against measures by EEC, Australia, Canada and other GATT Contracting Parties and stated 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 with the measures under discussion, which were applied generally and without any reference to …

Sugar from Nicaragua (1983): GATT Panel Report, *US–Sugar Quota*, L/5607, adopted 2 March 1984; Communications from Nicaragua, *US–Sugar Quota*, L/5492, 16 May 1983 and L/5513, 1 July 1983; 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 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*, L/5803, 9 May 1985; GATT Council, 'Minutes of Meeting held on 29 May 1985' (28 June 1985) C/M/188. *European Communities v Yugoslavia* (1991): Communication from EEC, L/6948, 2 December 1991; Communication from Yugoslavia, L/6945, 26 November 1991; Recourse to Article XXIII:2 by Yugoslavia, *EEC—Trade Measures Taken For Non-Economic Reasons*, WT/DS27/2, 18 February 1992; GATT Council, 'Minutes of Meeting held on 18 February 1992' (10 March 1992) C/M/254 and (10 April 1992) C/M/255.

[90] 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).

[91] ibid 15.

[92] ibid 16.

Article XXI',[93] The EEC stated that 'the EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, *justification* nor approval'.[94] Against the context in which the term 'justification' appears in the EEC's statement, it is not being used in the legal sense (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' excludes customary international law countermeasures. Norway stated the EEC, Australia and Canada 'in taking the measures … did not act in contravention of the [GATT]'.[95] Canada stated that its 'actions were consistent with Canada's international obligations, including those under [GATT]'.[96] 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]'.[97] None of these statements indicate that customary international law countermeasures 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 customary international law countermeasures. At best, it points to an individual understanding of some GATT Contracting Parties that security exceptions are justifications for breach. But it does not point to any 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 potentially supporting instances of 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).

[93] GATT Council, 'Minutes of Meeting Held on 29-30 June 1982' (10 August 1982) C/M/159, 14–15 (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.

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

[95] ibid. [96] Ibid. [97] ibid 9.

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1. The DSU

It is undisputed that the DSU displaces countermeasures under customary international law which are taken in response to breaches of the WTO Agreement.[98] But the DSU does not overlap with customary international law countermeasures that are taken in response to breaches of non-WTO obligations.

Mexico—Soft Drinks concerned Mexico's countermeasures against the US in the form of suspending compliance with WTO obligations in response to alleged prior breaches of NAFTA by the US.[99] 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'. In other words, Article XX(d) does not apply to breaches of international obligations by another WTO Member, which must also mean the provision does not overlap with the function of customary international law countermeasures.

The AB 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 … .[100]

Thus the AB made it clear that the DSU has expressly displaced the right to take unilateral countermeasures for breaches of WTO obligations. The argument that the DSU must, therefore, also have displaced countermeasures for breaches of non-WTO obligations is based on the silence of the WTO Agreement's text in respect of such countermeasures. However, if WTO Members wanted to exclude countermeasures under customary international law for breaches of non-WTO obligations, why did they not include provisions that displace such countermeasures, in the same way that they did for displacing countermeasures in response to breaches of WTO obligations? Their failure to do so suggests that they have not displaced countermeasures for breaches of non-WTO obligations. 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

[98] See (n 35). [99] *Mexico—Soft Drinks* (n 7). [100] ibid para 77 (footnotes omitted).

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suspending trade obligations] to be taken outside the [UN] system'.[101] He bases his argument on two grounds. First, Article 86(3) of the Havana Charter on 'Relations with the United Nations', which reads '[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.' Second, on 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, according to Article XXIX of the 1947 GATT (adopted 30 October 1947) Part II of the latter would be superseded by the Havana Charter of the International Trade Organization (ITO) (adopted 24 March 1948).[103] This means that the Havana Charter could have revised the provisions in Part II of 1947 GATT. For this reason, the Havana Charter, which never entered in force, and its preparatory works can be a supplementary means of interpreting Part II of the 1947 GATT, but only to the extent that there is an understanding that the final text agreed upon did not depart from the relevant 1947 GATT provisions. In the absence of evidence that Article 86(3) of the Havana Charter was not intended to revise provisions in 1947 GATT, it cannot be relied on as a supplementary means of interpreting GATT.

Second, the proposal that draft Article 83A, which became Article 86 of the Havana Charter, should not be construed as permitting unilateral sanctions was made after the GATT had been agreed. This proposal about the Charter's interpretation could have been intended to depart from the 1947 GATT. But even if this were not the case, the Report of the Sub-Committee indicates that when this proposal was made by the Union of South Africa,[104] no other negotiating State objected to it or accepted it. A clear conclusion about the common intention of 1947 GATT Contracting Parties 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 also 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

[101] Bartels (n 22) 398. [102] ibid.

[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) UN Doc E/CONF.2/C.6/93, 4–5.

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).[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 Uruguay Round negotiations, the ILC was focused on whether a State could resort to countermeasures once a dispute had been submitted to a court or tribunal with competence to impose interim measures.[106] With respect to the limitations placed on the use of unilateral countermeasures by the UN Charter, the ILC Special Rapporteur on State responsibility was of the view that the powers of the UNSC did not exclude countermeasures altogether.[107] WTO negotiators were aware of this position 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 ARSIWA 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 the 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 ARSIWA 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 States might have made in 1948 during the negotiations of the ITO. Thus, whatever the ITO preparatory works may offer as supplementary evidence for interpreting the WTO Agreement, with respect to the permissibility of countermeasures, the proposal of one negotiating State in 1948 would be inconsistent with and could not prevail over the circumstances surrounding the negotiations of the 1994 agreement and the assumptions that negotiators made about the relationship between the

[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 paras 188 and 191. See also analysis in Part II.B.

[106] See ibid 27–9.

[107] ibid 28 at para 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, 68.

[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 ARSIWA Commentary (n 28) 137 at para 8.

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, as regards the 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 reasons of a non-economic character' and thus excludes countermeasures under customary international law taken in response to the breach of any non-GATT obligation.

However, the subsequent practice of GATT Contracting Parties in relation to the 1982 Ministerial Declaration focused on economic coercion, not on countermeasures.[112] In relation to *Nicaragua v US*, at a meeting of the GATT Council in 1984, Nicaragua (along with Venezuela, Mexico and Argentina) expressed the opinion that a reduction in the sugar import quota allocated by the US to Nicaragua contravened the 1982 Ministerial Declaration.[113] This view was reiterated by Nicaragua (along with Cuba, Argentina, Peru, Brazil, Spain, Czechoslovakia, Romania, Yugoslavia and Portugal) at a 1985 meeting of the Council.[114] The statements condemned 'economic coercion', 'coercive political measures', 'economic measures for the purpose of exerting political pressure', and measures that were inconsistent with the principle of

[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 22) 400. However, the assessment here is not about customary international law identification.

[112] Although economic coercion is not clearly defined in international law, recent research suggests that coercive measures are best understood as those 'aimed at subordinating a state's sovereign rights' and are distinct from countermeasures. R Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 ICLQ 343, 364.

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

[114] GATT Council, 'Minutes of Meeting held on 29 May 1985' (24 June 1985) C/M/188, 2–4 (Nicaragua), 5 (Cuba), 6 (Argentina, Peru), 7 (Brazil), 8 (Poland, Chile, Uruguay), 9 (Spain), 10 (Sweden, Czechoslovakia).

non-intervention.[115] A decade after the Ministerial Declaration (1982), when the EC adopted trade restrictions against Yugoslavia regarding the civil war,[116] Yugoslavia complained, invoking the Ministerial Declaration.[117] No other GATT Party did.[118] In none of these instances, did GATT Parties condemn countermeasures specifically.

The chapeau of the quoted paragraph of the 1982 Declaration makes clear that this was an undertaking related to the circumstances that existed in the 1980s. However, the circumstances surrounding the conclusion of the WTO Agreement, which constitute a supplementary means of the latter's interpretation, differed radically from those in 1982. The WTO Agreement was negotiated at the end of the Cold War and was concluded after it, a time when Western liberalism became a beacon for many countries and enthusiasm for multilateralism and liberalism was prevalent.[119] Against this background, it may be argued that the rejection of unilateral countermeasures might not have been of continued concern to the drafters of the WTO Agreement.

Additionally, while it could be argued that until 1992 GATT Contracting Parties were concerned about both economic coercion and countermeasures alike, the law on countermeasures became increasingly clear throughout the 1990s, culminating in the ILC's adoption of the ARSIWA in 2001. Indeed, the ILC was preparing the ARSIWA, including the rules on countermeasures, while the Uruguay Round negotiations were ongoing.

Although the ARSIWA were adopted after the conclusion of the Marrakesh Agreement, negotiating States were aware that the work of the ILC was ongoing and that countermeasures were subjected to strict and clear conditions of lawfulness (as discussed in Part II above) in an effort to minimise abuse. The conditions relating to countermeasures were considered by the ILC (and its Report was submitted to the UNGA Sixth Committee) in 1992.[120]

[115] In 1986, the ICJ found that it was 'unable to regard such action on the economic plane as … a breach of the customary-law principle of non-intervention'. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 ('Nicaragua') para 245.

[116] This practice is mentioned as an instance of measures taken by States other than the injured State in response to breaches of *erga omnes* obligations in the ILC commentary to ARSIWA Article 54. ILC ARSIWA Commentary (n 28) 139.

[117] Communication from Yugoslavia, *European Communities—Trade Measures Taken for Non-Economic Reasons*, L/6945 (26 November 1991) 2.

[118] Bartels (n 22) 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' (10 March 1992) C/M/254, 36.

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

[120] ILC, *Yearbook of the International Law Commission 1992* (United Nations 1994) vol II(2) 17. Further, considering *lex specialis* in ARSIWA Article 55, the ILC refers to the WTO as an example of *lex specialis* concerning compensation and reparation, mentioning DSU Article 22,

Therefore, even if the 1982 Ministerial Declaration is a supplementary means of interpreting the WTO Agreement, the increasing clarity of the law on countermeasures may have led WTO Members to change their position on whether the WTO Agreement excluded countermeasures specifically. 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 in general, or by the security exceptions in particular.

IV. THE PREDICTABILITY OF THE WTO SYSTEM

Scholars and GATT Contracting Parties during the 1947 GATT era feared that unilateral trade restrictions, such as countermeasures for breaches of non-GATT obligations, would undermine the predictability of the trade system.[121] Today, the close relationship between countermeasures and national security, gives rise to concerns that, if permitted, they would open a Pandora's box of further politicisation of trade affairs.[122]

This line of reasoning is based on three flawed premises: (a) unwarranted prioritisation of particular objectives of the WTO Agreement over others; (b) inaccurate perceptions of the risks of abuse and of the number of customary international law countermeasures that would be available to WTO Members; and (c) the mistaken belief that banning customary international law countermeasures for breaches of non-WTO obligations will ensure the predictability of the WTO system.

It is argued here that such countermeasures do not pose a real threat, as long as they are subject to stringent conditions under customary international law and to the scrutiny of WTO adjudication. On the contrary, the unavailability of such countermeasures may lead to a backlash in the form of 'expanding' the narrow limits of the security exceptions.

A. The Prioritisation of WTO Agreement Objectives

The purposes of the WTO Agreement include raising standards of living and the sustainable use of the world's resources, as well as the underlying objectives of 1947 GATT to bring peace and to enhance world economic welfare.[123] The proposition that countermeasures taken to enforce international obligations

rather than countermeasures, as circumstances precluding wrongfulness. ILC ARSIWA Commentary (n 28) Commentary to Article 55, 140 and fn 818.

[121] Hahn (n 11) 604.

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

[123] JH Jackson, 'Afterword: The Linkage Problem – Comments on Five Texts' (2002) 96 AJIL 118, 122.

that protect these objectives must be excluded due to the need for predictability of the WTO system would amount to prioritising the predictability of the system over the other objectives of the WTO Agreement. Yet there is no evidence in the WTO Agreement that such a priority is to be given to 'predictability' at the expense of the Preamble's express objectives.

B. Countermeasures Are Subject to Stringent Conditions

The proposition that customary international law countermeasures would lead to rampant politicisation and unpredictability of trade affairs presumes that WTO Members would be allowed to rely on unilateral customary international law 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,[124] *and* they are subject to strict conditions under customary international law. 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).[125]

Indeed, countermeasures under customary international law 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 customary international law. But, as argued in Part V below, the WTO Panels and the AB have jurisdiction over claims of violations of WTO-covered agreements and over defences raised by respondents, such as countermeasures under customary international law. Thus, the room for political narrative and abuse in relation to unilateral countermeasures can be minimised. Moreover, since only a limited number of countermeasures would be permissible, it is unlikely that the 'floodgates' of politicisation would have the opportunity to open.

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

In the long run, the unavailability of customary international law trade countermeasures would risk bringing more unpredictability and politicisation into the WTO system. If such countermeasures were unavailable, WTO Members might be encouraged to justify their conduct through security

[124] 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 the measures are taken in 'times of war and other emergency in international relations'.

[125] The requirement of proportionality may also encompass taking into account the effect that suspending WTO obligations will have on internationally-guaranteed rights of individuals (other than human rights). *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) para 158.

exceptions, such as GATT Article XXI(b)(iii). Increased reliance on these exceptions in the subsequent practice of WTO Members in the application of WTO-covered agreements could, over time, result in lowering the thresholds of 'emergency in international relations' and 'essential security interests' below those established in *Russia–Traffic in Transit* and *Saudi Arabia–IP Right*s.

An additional incentive in 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 on affecting human rights and the requirement of only targeting the responsible State.[126] 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 on 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 invoking them and/or of the WTO Members affected. Thus trade restrictions justified by security exceptions may affect the right to health, life or the right to be free from inhuman treatment.[127] For instance, trade in water, energy or even staple foods necessary for human survival could be affected by export or transit restrictions.[128] While such measures could—under certain factual circumstances—render countermeasures unlawful, GATT Article XXI is agnostic to such effects.[129] Neither *Russia–Traffic in Transit* nor the subsequent *Saudi Arabia–IP Rights* have recognised a proportionality requirement in GATT Article XXI(b)(iii).[130]

Furthermore, 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.[131] The interpretation of significant elements of GATT Article XXI(b)(iii) is left exclusively to the discretion of the WTO Member invoking the security exception, including the necessity of the measures taken.[132] Whereas, the customary international law rule that

[126] The customary international law 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 customary international law 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 customary international law conditions on countermeasures would contradict the thresholds of GATT Article XXI(b)(iii) and they would be read into the provision, which would arguably exceed the function of interpretation.

[127] Regarding energy trade restrictions and effects on human rights: D Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasure*s (Oxford University Press 2015) 232–47.

[128] Regarding extraterritorial application of human rights in this context, ibid 237–44.

[129] 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 authorised by the DSB. Decision by the Arbitrators, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB/ECU, adopted 4 March 2000, para 86.

[130] *Russia–Traffic in Transit* (n 4) paras 7.132, 7.134.

[131] ibid para 7.138.

[132] ibid para 7.146.

countermeasures have to be proportionate to the injury suffered is subject to third party determination.[133]

Overall, arguing that customary international law countermeasures have been displaced may encourage WTO Members to water down the strict thresholds in GATT Article XXI(b)(iii). It encourages reliance on increasingly wide interpretations of GATT Article XXI(b)(iii),[134] and contributes to an approach that reduces cooperation[135] and increases politicisation. This is not hyperbole. One can already observe a trend in the practice of WTO Members to interpret security exceptions broadly to include measures taken for commercial purposes.[136]

V. WTO ADJUDICATION CAN ASSESS WHETHER TRADE RESTRICTIONS ARE LAWFUL COUNTERMEASURES UNDER CUSTOM

This section confronts the second argument of the AB in *Mexico–Soft Drinks* (2006): that the DSU was not intended to enable WTO adjudication of whether a breach of non-WTO law has taken place. It is argued here that WTO bodies have jurisdiction to assess the lawfulness of customary international law countermeasures when they are raised as a defence in a dispute concerning a breach of a WTO-covered agreement. To make such an assessment, WTO bodies must be able to determine whether there has been a breach of an extra-WTO obligation that precludes wrongfulness.

The WTO dispute settlement system only has compulsory jurisdiction over claims regarding agreements annexed to the WTO Agreement.[137] One could argue that in cases where the respondent invokes countermeasures under customary international law as a defence, 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 the WTO over a WTO Agreement dispute merely by invoking a different legal rule as the basis for its conduct. Another option would be to separate different parts of the dispute, ie limit WTO adjudication to the aspect of the dispute that concerns the application of the WTO Agreement.[138] However, DSU Article 11 foresees that other findings can be

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

[134] Roberts, Choer Moraes and Ferguson (n 122) 672–3.

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

[136] See (nn 14–15).

[137] AB Report, *Brazil–Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 20 March 1997, 21; Panel Report, *European Communities and Certain member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, 1 June 2011, para 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) arts 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 arts 7.3 and 25).

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

made 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 customary international law defences produces incoherent results: lawful conduct under customary international law 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 the WTO dispute settlement system has jurisdiction over claims concerning breaches of WTO-covered agreements, including where the defence of countermeasures is raised by the respondent.[139] That the defence of countermeasures directs WTO adjudicators 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)[140] can be covered by the implied or incidental jurisdiction of the WTO body to decide all matters linked to the exercise of its main jurisdiction and inherent to its judicial function (such as due process and international responsibility matters),[141] and to make ancillary findings about a rule of international law necessary in order to be able to exercise jurisdiction over the WTO dispute.[142]

[139] J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL 535, 556–8 and 560. Similar position regarding ICJ jurisdiction: E Cannizzaro and B Bonafé, 'Fragmenting International Law through Compromissory Clauses?' (2005) 16 EJIL 481, 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) para 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, para 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').

[140] 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 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 customary international law 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) para 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) paras 131, 134–160; *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Final Award (18 September 2009) para 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 50) para 81) has been rejected. See ILC ARSIWA Commentary (n 28) 130 at para 3.

[141] *Northern Cameroons (Cameroon v UK)* [1963] ICJ Rep 15, 29; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, 259–60 at para 23.

[142] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Award (18 March 2015) para 221 ('in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of

Finally, outright rejection of jurisdiction on the basis of 'judicial propriety', because WTO adjudication would address extra-WTO rules, is inappropriate.[143] It is reasonable that WTO adjudication proceedings should be suspended in the exceptional situation where a) the decision on the countermeasures defence rests on the existence of a previously wrongful act outside the WTO, *and* b) the existence of that previously wrongful act is already the subject of proceedings pending before another international tribunal.[144] Suspension is part of the inherent judicial function of WTO adjudication bodies in order to avoid reaching contradictory results and to promote consistency in international law. In all other cases, WTO adjudicators should exercise jurisdiction.

Once jurisdiction over the defence of countermeasures is established, the question is whether WTO adjudicators can *apply* extra-WTO rules to determine whether there is a breach of international law outside the WTO.[145] In this case, WTO adjudication is not resolving a dispute outside the WTO (as the AB suggested in *Mexico-Soft Drinks*).[146] Rather, it is taking a preliminary step that is essential to determining whether the wrongfulness of suspending compliance with a WTO obligation can be precluded by applying customary international law.[147] DSU Article 11 implies that WTO Members contemplated that international law beyond the WTO would be applicable. While WTO adjudicators are 'known for [their] reticence to apply non-WTO law as a substantive defense for an alleged violation of WTO rules',[148] WTO jurisprudence has not excluded extra-WTO rules from the applicable law and has applied them in some cases.[149]

the [Law of the Sea] Convention'); *Certain German Interests in Polish Upper Silesia* (Preliminary Objections) PCIJ Rep Series A No 6, 18.

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

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

[145] See in support: Davey and Sapir (n 143) 18; Pauwelyn (n 139) 556–8 and 560.

[146] See above text followed by (n 9).

[147] See discussion about application of extra-WTO rules: I Van Damme, 'Jurisdiction, Applicable Law and Interpretation' in D Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 319–21.

[148] Weiss and Furculita (n 20) 875.

[149] Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, 19 June 2000, para 7.96 (accepting the application of the customary international law rule on *pacta sunt servanda*); Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/6, 19 May 2003, para 7.38 (the Panel did not find that estoppel cannot apply, but that Argentina had not met the requirements of estoppel); Panel Report, *European Communities and Certain member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, 1 June 2011, para 6.22 (The US maintained that VCLT Article 28 could only be used 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'); AB Report, *Peru—Additional Duty on Imports of Certain Agricultural*

VI. CONCLUSIONS

Not all problems of enforcement of international law should be addressed through the WTO system[150] or through trade countermeasures. This article does not seek to encourage WTO Members, WTO adjudication or scholarship to move in 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 countermeasures 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, such as the prohibition of use of force.

In light of these wider implications, arguments supporting the 'displacement' of trade countermeasures have to be based on clear evidence. This article shows 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 customary international law and to the jurisdiction of and thus judicial scrutiny by WTO adjudication bodies, both of which minimise the space for abuse and the risk of unpredictability within the WTO.

Product, WT/DS457/AB/R, 31 July 2015, paras 5.111–5.112 (The AB did not find that the customary international law 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).

[150] S Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95 AJIL 792, 818.