Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law

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<tr>
<td>AB</td>
<td>Appellate Body (WTO)</td>
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<td>ASR</td>
<td>International Law Commission’s Articles on State Responsibility</td>
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<td>DCs</td>
<td>Developing Countries</td>
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<td>DSB</td>
<td>Dispute Settlement Body (WTO)</td>
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<td>Dispute Settlement Understanding (WTO)</td>
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<td>EC</td>
<td>European Communities</td>
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<td>ECIVs</td>
<td>External Countermeasures for Internal Violations</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>ICJ</td>
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<td>ILC</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>International Trade Organization</td>
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<td>LDCs</td>
<td>Least Developed Countries</td>
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<td>MFN</td>
<td>Most-Favoured Nation</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>SCM</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
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<td>SPS</td>
<td>Agreement on the Application of Sanitary and Phytosanitary Measures</td>
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<td>TBT</td>
<td>Agreement on Technical Barriers to Trade</td>
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<td>TRIPS</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<td>WTO</td>
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FOREWORD

The creation of the WTO dispute settlement system has been called a major achievement by observers and its importance has been echoed from all sides of the multilateral trading system. The Dispute Settlement Understanding (DSU), the agreement that governs the WTO dispute settlement mechanism, seeks to ensure an improved prospect of compliance, given its provisions on compensation and retaliation, and thus constitutes a central element in providing security and predictability to the multilateral trade system.

With more constraining procedures, and a fast-growing jurisprudence, the dispute settlement system has, however, become significantly more legalized and consequently more complex. This, in turn, has raised the demands on the capacity of Member countries interested in engaging the system to protect or advance their trade rights and objectives. While developing countries’ participation in trade disputes has increased tremendously since the time of the GATT, most disputes are still confined to a small number of ‘usual suspects’ - countries such as the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina. So far, 76% of all WTO disputes have been launched among this group of Members. This begs the question of engagement of other Members, and in particular of developing countries which may be facing undue trade restrictions.

Developing countries relying on the DSU are particularly troubled by the ineffectiveness of countermeasures as a means to ensure compliance by major trading partners. Members with large economies, in general, are unimpressed by the prospect of retaliation imposed by developing countries due to the difference in market size. Engraving the problem, the difference in trade value often proves suspension of concessions to be detrimental to the retaliating developing country’s domestic market leaving countermeasures not only ineffective but even counterproductive.

It is also important to note that currently, it is possible for the DSB to allow WTO-inconsistent measures in retaliation to a countermeasure deemed lawful by a court or tribunal which has jurisdiction over the other Treaty involved.

As a means to address this problem developing countries are striving to create an incentive for DSU reform proposals in the negotiating process, relying strongly on enhanced and collective countermeasures; however, the ideas regarding DSU reform submitted have been criticized for being too ambitious and it is unlikely that the necessary consensus will be met. This paper further explores extra-systemic countermeasures such as, the possibility to suspend WTO Agreement obligations if the non complying Member is in material breach of its Treaty obligations by refusing to uphold a DSB ruling.

This paper is produced under ICTSD’s research and dialogue programme on Dispute Settlement Legal Aspects of International Trade which aims to explore realistic strategies to maximise developing countries’ capability to engage international dispute settlement systems to defend their trade interest and sustainable development objectives. The authors are Professor Andrea Bianchi (Professor at the Graduate Institute of International and Development Studies in Geneva) and Dr. Lorenzo Gradoni (Lecturer in International Law, University of Bologna).

We hope that you will find this study a useful contribution to the on-going debate.

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EXECUTIVE SUMMARY

Developing-country Members’ discontent with the World Trade Organization (WTO) Dispute Settlement Understanding (DSU) enforcement mechanism, perceived as biased in favour of the organisation’s ‘big players’, has been a dominant theme in the negotiating process on the reform of the DSU. In particular, developing countries maintain that the present mechanism is structurally incapable of inducing compliance with the recommendations and rulings of the DSB, when the losing party is a developed country, unimpressed by the prospects of retaliation. The reform proposals set forth by developing countries - sometimes qualified as too ambitious, ‘maximalist’ or radical - not only have failed to gather the necessary consensus to make their way into the negotiating process, but they have also met with scepticism in academic circles, due to their excessive reliance on enhanced and collective countermeasures as a means to redress the imbalances of the WTO enforcement process.

In fact, most of these proposals intersect certain areas of WTO law the interpretation of which is still unsettled or highly controversial. This paper provocatively submits that an interpretation of the extant texts against the background of public international law may open up new perspectives, which could be favourable to developing countries. In other words, many of the objectives pursued by developing countries could be achieved, short of any institutional reform and formal amendment, by interpreting the relevant provisions of the DSU in good faith and in accordance with the ordinary meaning to be given to the terms of the WTO Agreement ‘in their context and in the light of its object and purpose’, as provided by Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).

Most reform proposals set forth by developing countries stand for the suppression of the ‘equivalence standard’, as a reaction to the fact that arbitral panels established under Article 22(6) DSU have until now construed that standard rather narrowly. Article 22(4) DSU, as currently construed, limits the permissible amount of suspension to such a point that a countermeasure risks being ineffective when taken by them against developed-country Members. We refer to this problem as the external dimension of the imbalance within the WTO enforcement process. In fact, the current interpretation of the equivalence standard is not warranted by the ordinary meaning of Article 22(4) DSU and the effects of developing countries’ reform proposals could be brought about by a different, albeit perfectly plausible, interpretation of that provision. WTO arbitrators have simply assumed that the impairment suffered by the injured Member is expressed by the value of lost trade. A contextual and teleological reading of that provision could lead to substantially different interpretive results: ‘nullification or impairment’ could be taken to refer not so much to lost trade per se but, rather, to the latter’s impact on the economy of the complainant. Lost trade can then be said to result in different levels of impairment depending on the impact that the WTO-inconsistent measure has on the economy of the Member that has won the case. In this respect, it is submitted that the actual impact could be quantified by multiplying the value of lost trade by a macroeconomic parameter that captures the difference in ‘size’ between the Member that intends to take countermeasures and the targeted Member.

Even if the equivalence standard were to be interpreted in such a way as to raise the level of permissible suspension, single developing countries could rarely afford retaliating up to that level without inflicting upon themselves severe economic damage. We refer to this problem as the internal dimension of the imbalance in the WTO enforcement process. In order to overcome this difficulty, some form of burden sharing among developing-country Members is required. In particular, one needs to wonder whether collective countermeasures are available within the WTO system vis-à-
vis a Member’s refusal to comply with the rulings of the DSB. The question can be answered in the affirmative on the basis of the WTO Agreements as they currently stand. If the obligation to comply with the recommendations and rulings of the DSB is construed as being collective in nature, all WTO Members may lodge a complaint against a non-complying Member, regardless of whether they would have had legal standing in the main proceedings. From that moment on, all Members will have to be regarded as ‘having invoked the dispute settlement proceedings’ within the meaning of Article 22(2) DSU. Hence, they would be entitled to ‘request authorisation from the DSB’ to take countermeasures against the wrongdoer, with a view to joining forces with the developing Member concerned in the effort of inducing compliance. Article 22(4) DSU does not expressly state, nor does it imply, that ‘nullification or impairment’ must be suffered by each and every Member wishing to take countermeasures in the context of a collective action. While the permissible level of suspension is linked to the impairment suffered by the injured Member, nothing in the DSU prevents other Members to seek authorisation to retaliate against the wrongdoer, provided that they have invoked the dispute settlement proceedings vis-à-vis the latter’s refusal to comply with the recommendations and rulings of the DSB. The right to take countermeasures is by no means restricted to materially injured Members.

Should WTO adjudicating bodies be unwilling to endorse the interpretive solutions just advocated, other avenues may be available to developing countries to redress the current imbalance in the WTO dispute settlement process. In particular one may wonder whether a developing-country Member may resort to extra-systemic countermeasures, within the limits provided for under general international law, when a developed-country Member refuses to comply with a ruling made by the DSB and intra-systemic means of redress, including suspension of concessions or other obligations, have failed. Writers usually describe this kind of situation as a ‘fall-back’ from treaty onto general international law. The policy rationale of fall-back is relatively clear: it consists of avoiding that the participants to a treaty-based regime - which was endowed with its own, in principle exclusive, system of remedies against breach - become helpless victims of that system’s ineffectiveness. However, scholarly opinion differs considerably as regards the legal foundation of fall-back.

The most plausible legal justification of fall-back onto general international law appears to be the one that relies on the law of treaties. More specifically, one needs to consider whether WTO Members have relinquished their right to suspend the WTO Agreement in whole or in part in response to a material breach thereof. In this respect, it is worth noting that the DSU does not expressly derogate from suspension proper as a means of restoring the contractual balance. The right to invoke a material breach as a ground for suspending the treaty in whole or in part is an important principle of customary international law, which - as the International Court of Justice once aptly put it - cannot be held to have been tacitly dispensed with, in the absence of any express wording making clear an intention to do so. Since the refusal to abide by a ruling of the DSB may be regarded as a material breach, within the meaning of Article 60(3) VCLT, fall-back onto general international law through suspension should in principle be permitted as soon as the wrongdoing Member declares its intention not to abide by the ruling of the DSB or countermeasures have been authorised and the wrongful conduct is not immediately discontinued. The developing countries concerned should then seek to suspend those DSU provisions, which may stand in the way of an effective enforcement action vis-à-vis the wrongdoing Member. The target should be, in particular, Article 22(4) DSU, setting the equivalence standard. Should WTO adjudicating bodies accept our interpretation of the DSU with regard to the permissibility of collective countermeasures, while rejecting our alternative reading of the equivalence standard as set out in Article 22(4) DSU, fall-back onto general international law - while obviously futile with respect to collective countermeasures - might come in handy to lift up the ceiling of permissible suspension, thereby paving the way for a stronger collective reaction against a refusal to abide by the DSB recommendations and rulings.
With regard to countermeasures taken in response to a prior violation of WTO law, we contend that developing-country Members may and should use general international law as a sword to free themselves of the shackles - real or imagined - of WTO special rules. The issue of whether WTO law has derogated from the right to take WTO-inconsistent measures in response to a prior violation of norms external to the system calls for a different analysis. In this respect, it is submitted that developing countries should rather plead in favour of the special character of WTO law, which can be used as a shield against the economic pressure that developed countries may wish to exert on them.

Some commentators have argued that if a WTO-inconsistent act can be characterised as a lawful countermeasure under general international law, WTO adjudicating bodies should dismiss any claim alleging a breach of WTO obligations. If this contention proved to be correct, developing country Members would be prevented from enforcing their rights under WTO law against any other Member, if the latter has adopted trade sanctions on grounds of a prior violation by the former of any obligation under international law, ranging from human rights and environmental law to foreign investment law. While the issue has never been raised before the WTO adjudicating bodies, a survey of WTO Members’ practice tends to give support to the view that recourse to ‘internal countermeasures against external violations’ (ICEVs) is perceived to be at variance with some fundamental principles or objectives of WTO law. In the absence of any strong textual argument to the contrary, reference to practice may be important for the purposes of interpretation. Regardless of whether it meets the strict requirement laid down in Article 31(3)(b) VCLT, the practice of the members of the GATT and, later, the WTO seems to purport that recourse to such countermeasures is regarded as impermissible under WTO law. This finding helps buttressing up the argument relying on a teleological interpretation of the WTO Agreements. In particular, it could be argued that a contrary interpretation would run counter to the stated objectives of the DSU, namely the need for ‘providing security and predictability to the multilateral trading system.’

In the recent Soft Drinks case, Mexico sought to justify a measure inconsistent with Article III GATT as a lawful countermeasure taken in response to prior violations of the North American Free Trade Agreement by the United States. Mexico did not ground its argument directly on general international law. It argued instead that Article XX(d) GATT allows for the adoption of countermeasures, i.e. WTO-inconsistent measures applied by a Member to secure compliance with another Member’s obligations under international law. The Appellate Body did more than reject Mexico’s arguments. It further held that even if Article XX(d) GATT were to be interpreted as enabling ICEVs, an assessment of Mexico’s defence would have overstepped WTO jurisdictional limits as laid down in the DSU, for it would have required WTO adjudicating bodies to settle a dispute arising out of an alleged violation of a non-WTO norm.

Since WTO adjudicating bodies are prevented, given the restricted scope of their jurisdiction, from considering defences based on previous violations of non-WTO norms, the DSB may authorise suspension of concessions or other obligations in reaction to a WTO-inconsistent conduct, which could be qualified as a lawful countermeasure by a court or tribunal endowed with a wider jurisdiction. If requested, the authorisation to retaliate will be automatically granted, as panels established under Article 22(6) would not be able to stop the process, for they surely lack jurisdiction to hear a claim based on non-WTO law. The WTO is arguably in need of an exit-strategy from this uncomfortable situation. A possible solution lies in the WTO adjudicating bodies pronouncing against the right to resort to ICEVs on the basis of general international law. Developing-country Members must be aware of the risks inherent in the presently ‘unstable equilibrium’ of the dispute settlement mechanism with regard to the issue of ICEVs and should coalesce on their outlawing.
INTRODUCTION

The Dispute Settlement Understanding (DSU),¹ one of the most significant systemic outcomes of the Uruguay Round, is often described as the ‘crown jewel’ of the World Trade Organization (WTO). The adjudicatory mechanism thereby established is widely regarded as the most effective one on the international scene.² Nonetheless, this mechanism has been under review for more than half of its existence. At the conclusion of the Uruguay Round the decision was taken to review the DSU in four years time, after which Members were supposed to decide ‘whether to continue, modify or terminate the DSU’.³ Discussions began in early 1998 but it soon became obvious that this review would require substantial work and time to attain the status of a real reform.

At the outset, the DSU review process was particularly concerned with issues of implementation, mainly due to the contingencies of the EC – Bananas dispute. Indeed, this case, more than others, unveiled the inadequacies and structural rigidities of the remedies available to small countries and developing countries. The dissatisfaction of developing countries regarding the enforcement provisions of the DSU has become critical since. The system is perceived as being particularly unfair towards small economies. In particular, the use of countermeasures appears to be ineffective both as a remedy and as an incentive for compliance. Its inefficacy, from the perspective of developing countries, has progressively generated a credibility problem for the whole system.

In fact, a developing country is unlikely to be able to suspend concessions in a way that effectively puts pressure on a non-complying developed country. Even if it attempts to do so, it may well damage its own economy thus ‘shooting itself in the foot’. In sum, not only do developing countries lack retaliatory power because of their insufficient market size, but they may even prejudice their own economic development prospects by making their imports more expensive. According to the arbitrators in EC - Bananas, the ‘present text of the DSU does not offer a solution’ for cases in which the complaining party is ‘in a situation where it is not realistic or possible’ to suspend concessions effectively.⁴

Unable to conclude negotiations by the 1 January 1999 deadline, Members approved an extension until July 1999, which ended with no result. In Doha, Members decided on the launching of a new review process in order to clarify and improve the DSU with a specific deadline set for 31 May 2003. The negotiations gained real momentum when the Special Session of the Dispute Settlement Body (DSB) started in March 2002. In this framework, Members initially put on the table a large number of proposals during 2002 and 2003. Proposals submitted in 2002 were mainly conceptual while those submitted in 2003 suggested concrete amendments to the DSU.⁵ Developing countries (DCs) and least-developed countries (LDCs) became very active in the process. No less than 18 proposals from DCs and LDCs were submitted to the negotiating group. Implementation issues were at the heart of their claims.⁶

Proposals from developing countries, some of which have been qualified as too ambitious, ‘maximalist’ or ‘radical’,⁷ were intended to seek alternatives to the current modalities of countermeasures authorised through the dispute settlement mechanism. Some proposals have built on the existing remedies while others have sought to introduce new ones.

The Chairman’s text of 28 May 2003, known as the ‘Balás text’,⁸ tried to consolidate the various proposals, including those aiming at reinforcing WTO remedies, in particular through financial compensation or provisional measures. However, some proposals were excluded as they did not command enough support for future agreement. The prevailing sense among delegates was that the chances to reach an agreement on this text were little. The initial deadline was continuously extended until 2004, before it was finally decided to...
negotiate without a deadline. Special sessions of the DSB are still held on this issue, but no proposal has been made by developing countries since 2003. Though these negotiations are not part of the Doha package deal, it seems that the difficulties faced in the Development Round have hampered the attainment of good results on the review process.

The reform proposals set forth by developing countries not only have failed to find their way into the negotiating process, but they have also met with scepticism in academic circles, due to their excessive reliance on enhanced and collective countermeasures as a means to rebalance the WTO enforcement process. It has been observed, for instance, that ‘in many ways, the DSU provisions on remedies, especially the temporary measures of compensation and suspension, are deeply flawed, and even dysfunctional’ and that ‘the reactivation of power politics [...] may make compliance very hard to achieve’. Some authors have even surmised that to enhance retaliation power, as opposed to monetary compensation, is by now regarded as a red herring by developing countries themselves. However, scholarly opinion is not unanimous in this respect. The point has been made, for instance, that trade-restrictive countermeasures are irreplaceable as a means of last resort for inducing compliance, since they are, unlike compensation, self-enforcing, and may even turn out to be more rational than monetary damages from the standpoint of interest-group analysis. Be that as it may, a policy assessment of the reform proposals advanced by developing-country Members falls beyond the scope of our study. We will analyse these proposals in as much as they help understand the developing countries’ outlook on the WTO enforcement process.

Given the political contingencies it is unlikely that the proposals set forth by developing countries will have a good chance of getting approved in the short term. All the more so, given the heterogeneous character of such proposals, which has certainly contributed to dispersing forces and lowering the political leverage that a united front might have had à-vis developed Members. Quite apart from the fact that these proposals stand little chance of gaining widespread approval, it should be stressed that they intersect certain areas of WTO law the interpretation of which is still unsettled or highly controversial. A recurrent theme in our analysis will be that some crucial aspects of these proposals, although perceived as ‘radical’ in some quarters, are nothing but reasonable, good faith interpretations ‘in accordance with the ordinary meaning to be given to the terms’ of the WTO Agreement ‘in their context and in the light of its object and purpose’, as provided by Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).

This study presents several frameworks of analysis. First, the limits of current interpretations of WTO law on countermeasures, which is generally held to derogate from general international law on the matter, arguably to the detriment of developing countries, will be critically assessed. In particular, it will be submitted that developing countries should expect more from the texts as they stand at present rather than staking on the results of the DSU negotiating process. Second, the relationship between WTO law and general international law will be revisited in a wider perspective. By bringing into focus alternatively the international law of State responsibility and the law of treaties, the boundaries of the alleged derogation of WTO law from general international law will be more accurately mapped. On the one hand, the possibility of a temporary fall-back from the system’s rules onto general international law in cases where the former hinders developing countries’ actions aimed at inducing compliance with the recommendations and rulings of the DSB, will be taken into account. In this respect, developing countries could use general international law as a sword to free themselves from the shackles of WTO law. On the other hand, the issue of whether WTO law has derogated from the right to take WTO-inconsistent measures in response to a prior violation of norms external to the system - which is currently not part of the reform agenda - will be examined at length. In this context, it is submitted that developing countries should rather plead in favour of the
special character of WTO law, which can be used as a shield against the economic pressure that developed countries may wish to exert on them.

The negotiations of the DSU review process have gone hand in hand with the doctrinal debate on the relationship between WTO law and general international law. A significant number of writings have been produced, from multifarious perspectives, to assess the different legal facets of the dispute settlement within the WTO and in relation to general international law. Not always the legal categories of analysis which are being used in international trade scholarship are the same and the debate risks turning into a dialogue where intellectual categories and types of discourse are as numerous as their proponents. Against this background, starting from the premise that the WTO remains an international treaty, this study attempts to re-appraise the debate on the relationship between general international law and WTO law as regards issues of enforcement. Given that reliance on general international law could enhance the effectiveness of international trade law remedies, such re-appraisal may be useful also in a political perspective.

In Part I the issue of how to improve the fairness and effectiveness of the WTO enforcement process as it currently stands is examined. Internal Countermeasures for Internal Violations (ICIVs) as well as External Countermeasures for Internal Violations (ECIVs) will be broached. In Section I.2 the question of what is the permissible level of suspension will be tackled to verify whether the current interpretation given to Article 22(4) reflects the logic of the WTO regime as well as its systemic needs. In Section I.3 the controversial issues of whether collective countermeasures can be allowed under the system will be analysed. It is apt to state from the outset that by the term ‘collective’ we shall broadly refer to measures taken by subjects other than the materially injured Member, thus leaving unprejudiced the question whether some form of coordination among the reacting Members would be desirable or indeed required under WTO law or general international law. In Section 1.4 consideration is given to theories which envisage the possibility of falling back onto the general system of international law under certain circumstances. Finally the distinction between the concept of ‘suspension’ under the law of treaties and that of ‘countermeasures’ under the law of state responsibility is evaluated with a view to establishing whether there could be a residual application of Article 60 VCLT to trigger fall-back onto general international law on countermeasures.

In Part II the possibility of having recourse to Internal Countermeasures for External Violations (ICEVs) will be considered. The extent to which WTO Members may resort to countermeasures within the WTO system for violations of non-WTO obligations is an issue which has emerged in practice. The specificity of the WTO regime in this case seems to counsel against using internal remedies for external violations, were it not but for the jurisdictional constraints to which WTO adjudicating bodies are subjected. It is to be hoped that this study will help provide a framework of analysis for assessing the legal viability of interpretive solutions, which might improve the fairness and the effectiveness of the dispute settlement mechanism as it currently stands. To see whether the system, short of institutional reform, has been fully exploited and all possibilities exhausted, particularly in terms of interpretative solutions, might be a useful contribution to a debate which risks stagnating after the initial momentum.
I. COUNTERMEASURES TAKEN IN REACTION TO A PRIOR VIOLATION OF WTO LAW (ICIVS AND ECIVS)

1. Introduction

The WTO Agreements derogate from general international law as regards countermeasures taken in reaction to a prior violation of WTO law, regardless of whether the measures in question consist of conduct inconsistent with WTO law itself (ICIVs) or with rules external to the system (ECIVs). The lex specialis character of WTO law in this area is clearly established by Article 23 DSU, paragraphs 1 and 2(c), which provide that:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered [WTO] agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

   [...]

   (c) follow the procedures set forth in Article 22 [DSU] to determine the level of suspension of concessions or other obligations and obtain DSB authorisation in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings [of the DSB] within the reasonable period of time.

Article 23 DSU refers to ‘suspension of concessions or other obligations’ rather than ‘countermeasures’. However, it is undisputed that in WTO law, the term ‘suspension’, although reminiscent of the law of treaties, indicates ‘countermeasures’ within the meaning of Article 22 of the International Law Commission (ILC)’s Articles on state responsibility (ASR).

Whether the derogation also extends to suspension under the law of treaties remains an open question, to which we shall revert in Section I.4.2.

Under WTO law ECIVs are prohibited altogether, whereas recourse to ICIVs is only permitted as a means of last resort in cases where the wrongdoing Member refuses to comply with the recommendations and rulings of the DSB. The limits placed by Article 23 DSU on the right to take ICIVs are both procedural and substantive. With regard to the former, countermeasures may be taken only if authorised by the DSB at the request of the complainant. Authorisation is in practice automatic since the DSB may reject the request only by consensus, i.e. with the requesting Member’s assent. Nonetheless, the consistency of the proposed countermeasures with the substantive requirements set out in Article 22 DSU will be assessed by an arbitral panel, if the respondent Member so requests.

As regards the substantive requirements, Article 22(4) DSU states that ‘[t]he level of suspension of concessions or other obligations shall be equivalent to the level of nullification and impairment’ (hereinafter: ‘the equivalence standard’). Article 22(3) DSU narrows down even further the margin of manoeuvre of the complainant by establishing the ‘general principle’ that suspension should first be sought ‘with respect to the same sector(s) as that in which the panel or the Appellate Body has found a violation or other nullification or impairment.’ Cross-retaliation is nevertheless permitted at varying degrees depending on the circumstances of the case. Despite some opinions to the contrary, WTO rules on cross-retaliation are less liberal than those available under general international law. Some developing-country Members have proposed to modify Article 22(3) DSU with a view to easing up the constraints to which cross-retaliation is presently submitted. Since the substance of these proposals cannot be inferred from the DSU by means of interpretation, their assessment falls beyond the scope of the present study.
Most reform proposals set forth by developing countries stand for the suppression of the equivalence standard. Presumably, this stance was taken as a reaction to the narrow construction of that standard by arbitral panels established under Article 22(6) DSU. Developing countries are of the opinion that Article 22(4) DSU, as currently construed, limits the permissible amount of suspension to such a point that a countermeasure risks being ineffective when taken by them against developed-country Members. This problem will be referred to as the ‘external dimension’ of the imbalance within the WTO enforcement process. In Section I.2 we will submit, however, that the current interpretation of the equivalence standard is not warranted by the ordinary meaning of Article 22(4) DSU.

Even if the equivalence standard were to be interpreted so as to raise the level of permissible suspension, individual developing countries could rarely afford retaliating up to that level without inflicting upon themselves severe economic damage. We shall refer to this problem as the ‘internal dimension’ of the imbalance in the WTO enforcement process. In order to overcome that difficulty, some form of burden sharing among developing-country Members is required. In Section I.3 the issue of whether collective countermeasures are available within the WTO system vis-à-vis a Member’s refusal to comply with the rulings of the DSB will be broached. This question will be answered in the affirmative on the basis of the WTO Agreements as they currently stand.

Should WTO adjudicating bodies be unwilling to endorse such interpretations, other avenues will be explored. In particular, the question will be raised in Section 4 of whether a fall-back from the WTO rules on countermeasures onto those of general international law could be effected as a means of last resort.

2. The permissible level of suspension

As noted earlier, Article 22(4) DSU provides that ‘the level of suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of nullification and impairment.’ If the disputing parties disagree on the permissible level of suspension, the matter may be referred to arbitration pursuant to Article 22(6) DSU. When the arbitrators find that the suggested amount of suspension is too high, it is for them to determine the level of suspension that matches the impairment suffered. In so doing, they may not question ‘the nature of the concessions or other obligations to be suspended’, unless it is alleged by the losing Member that the request submitted to the DSB is inconsistent with the rules on cross-retaliation. Such ‘qualitative assessment’, as opposed to the quantitative determination of the overall level of suspension, lies ‘outside the arbitrators’ jurisdiction.’

As will be shown in Section I.2.1., despite their limited jurisdiction, arbitral panels have interpreted the notion of ‘equivalence’ in such a way as to curb the reaction to a continuing wrongful conduct more than the proportionality standard would require, so much so that the essential objective of countermeasures - i.e. to induce compliance - may end up being frustrated, especially when the non-complying Member is a ‘big player’ and the victim of the violation is a developing-country Member. Developing countries have responded to this state of affairs by advancing a series of reform proposals, which would, if accepted, drastically reshape Article 22 DSU. These proposals will be examined in Section I.2.2. In Section I.2.3, however, it will be argued that the interpretation of the equivalence standard and that of the cognate concept of ‘nullification or impairment’, as developed by arbitral panels, are replete with contradictions and, therefore, highly disputable. Against this background, one may wonder whether any major institutional reform is actually needed. All the more so when one realises that some of the key elements of...
the proposed reforms could be brought about by way of interpretation of the relevant texts as they currently stand.

2.1. Interpreting the ‘equivalence standard’

There can be little doubt that the term ‘equivalent’ in Article 22(4) DSU was meant to introduce a more rigorous standard than the one prescribed by general international law with regard to countermeasures. Under the heading ‘Proportionality’, Article 51 ASR provides that countermeasures ‘must be commensurate with the injury suffered’. The language of Article 22(4) DSU suggests that WTO law requires a closer fitting or symmetry between the wrongful act and the reaction thereto. The strictness of the standard is confirmed by the case law. The first arbitral panel established under Article 22(6) DSU observed that:

the ordinary meaning of “equivalent” implies a higher degree of correspondence, identity or stricter balance between the level of proposed suspension and the level of nullification or impairment’, in comparison with ‘the degree of scrutiny that the standard of appropriateness, as applied under the GATT 1994, would have suggested.27

The standard of appropriateness enshrined in Article XXIII(2) GATT,28 although now generally superseded by the equivalence criterion, remains applicable to the situations covered by the Agreement on Subsidies and Countervailing Measures (SCM). Article 4(10) SCM directs the DSB to authorise the complaining Member ‘to take appropriate countermeasures’. A footnote to that provision specifies that the term ‘appropriate’ is not to be interpreted as allowing ‘countermeasures that are disproportionate.’ Arbital panels have often referred to the general international law standard of proportionality when interpreting the concept of ‘appropriateness’ in Article 4(10) SCM.29 At the same time, both have served as an interpretative foil to the equivalence standard. As the arbitral panel seized of the US - FSC case put it:

There can be no presumption [...] that the drafters intended the standard under Article 4.10 [SCM] to be necessarily coextensive with that under Article 22.4 [DSU] so that the notion of “appropriate countermeasures” under Article 4.10 would limit such countermeasures to an amount “equivalent to the level of nullification or impairment” suffered by the complaining Member.30

It should also be noted that whereas ‘equivalence’ is univocally defined through the notion of ‘nullification or impairment’, the standards of appropriateness and proportionality may operate in conjunction with a plurality of benchmarks:

Appropriateness [...] entails an avoidance of disproportion between the proposed countermeasures and [...] either the actual violating measure itself, the effects thereof on the affected Member, or both.31

In the US - CDSOA cases, Brazil,32 Canada,33 Chile,34 the EC,35 India,36 Japan,37 Korea38 and Mexico,39 all maintained that, for the purposes of Article 22(4) DSU, the concept of nullification and impairment should be understood as relating not only to the economic effects imputable to the breach but also to the violation itself, i.e. to the way in which the latter upsets the balance of rights and obligations. These Members thus advocated a partial alignment of the equivalence standard with that of appropriateness,40 yet they failed to persuade the arbitrators. In the latter’s view:

If violation was conceptually equated by Article 3.8 [DSU] to nullification or impairment, there would be no reason to provide for a possibility to rebut the presumption. The theoretical possibility to rebut the presumption established by Article 3.8 can only exist because violation and nullification or impairment are two different concepts.41

Outside the SCM Agreement, the extent of permissible reaction by way of countermeasures must therefore be determined solely by
reference to the concept of nullification and impairment. However, since the WTO Agreements leave that concept undefined, it has been for the arbitral panels to spell it out.

In the Hormones case, the level of nullification or impairment was defined by the arbitrators as being equal to the value of US and Canadian exports of hormone-treated beef that would have entered the European market had the EC withdrawn the ban on 13 May 1999, i.e. when the ‘reasonable period of time’ expired.\(^\text{42}\) The estimate of the impairment suffered is therefore based on a counterfactual hypothesis (obtained by removing the WTO-inconsistent measure from the picture) and is crucially expressed as the value of trade lost due to the persistence of the wrongful act after the expiry date.

As previously noted, this reading of Article 22(4) tends to exacerbate the power imbalance between developed and developing-country Members in the enforcement process. For present purposes, this imbalance can be conceptualised as having a double dimension, ‘internal’ and ‘external’. For developing countries whose economies heavily depend upon imports from developed countries, resort to trade-restrictive countermeasures against the latter may simply not be an option.\(^\text{43}\) Developing countries could try to overcome this difficulty by acting either individually, by having recourse to cross-retaliation\(^\text{44}\) – as did Ecuador in the Bananas case, when it chose to target European companies’ intellectual property rights in lieu of EC exports\(^\text{45}\) –, or collectively, by sharing the burden of retaliation among themselves. An assessment of the general viability of collective countermeasures as a means of overcoming the ‘internal’ dimension of the imbalance will be made in the next Section. Here, the analysis is taken up only with the ‘external’ dimension of the imbalance.

The core issue is perfectly captured by a passage taken from the arbitrators’ decision in the Bananas case:

> given the fact that Ecuador, as a small developing country, only accounts for a negligible proportion of the EC’s exports of these products, the suspension of concessions by Ecuador vis-à-vis the European Communities is unlikely to have any significant effect on demand for these EC exports.\(^\text{46}\)

The self-evident asymmetry in terms of economic power among countries, coupled with the current interpretation of ‘nullification and impairment’, may lead to situations in which the WTO-inconsistent measure severely harms a developing country’s economy, whereas the countermeasure - whose trade effects must be of equal magnitude in absolute terms, i.e. not related to the size of the targeted Member’s economy - has a negligible impact on the developed country which persists in its wrongful conduct. It is therefore not surprising that developing-country Members wish to enhance their retaliation power. In this regard, various negotiating proposals have been put forward.

2.2. Reform proposals advanced by developing countries

Most reform proposals advanced by developing countries insist on a redefinition of the permissible level of suspension. All these proposals start from the assumption that, in cases where a developing country faces a developed country’s refusal to comply with a decision rendered by the DSB, the said level of suspension should be higher than that set by arbitral panels in their practice. The proposals differ, however, with regard to the determination of the level of impairment.

According to the Africa Group’s proposal, when collective countermeasures have been authorised against a developed-country Member, the level of suspension apportioned to each authorised Member, ‘shall be such as to secure’, inter alia, ‘the timely and effective implementation of the recommendations and rulings’ of the DSB.\(^\text{47}\) This proposal ties in the amount of suspension with the objective of inducing compliance - which is typical of countermeasures - but omits any reference to the countervailing criterion of proportionality provided for in general international law. Other
proposals set more or less precise quantitative limits to the permissible level of suspension.

Mexico has suggested that those limits be moved upwards by following the indirect route of ‘anticipating’ the date from which nullification or impairment should be calculated. While Article 22(4) DSU, as presently drafted, is silent on this issue, arbitral panels have interpreted it as implying that the starting date coincides with the expiry of the reasonable period of time. In Mexico’s view, a new version of that provision should specify that the critical date is either that of the entry into force of the WTO-inconsistent measure, that of the request for consultations or that of the establishment of the panel. Other Members have opted for a more straightforward approach.

In a first proposal, Ecuador maintained that the level of nullification or impairment suffered by a developing country should be deemed to be at least twice as high as the value of lost trade opportunities. Should the wrongdoing State not yield to this ‘doubled’ pressure, Ecuador sees ‘no alternative’ to the ‘suspension of the right of the Member concerned to invoke the DSU’ or to the authorisation of ‘large-scale retaliation’, if one wants to preserve the integrity of the dispute settlement process and the functioning of the multilateral trading system.

Subsequently, Ecuador has formally proposed that a new paragraph 3bis be added to Article 21 DSU. The new provisions should read, in the relevant part:

If the complaining party is a developing country and the Member concerned is a developed country, the complaining party may request that the arbitrator, in addition to determining the level of nullification or impairment on the basis of the trade affected by the challenged measures, make an estimate of the impact of those measures on its economy. That estimate shall include the determination of the level of injury and the recommendation that [...] in case of non-compliance [...] the said estimate be taken into account in proceeding with the compensation or suspension of concession or other obligations under Article 22. Ecuador has thus replaced the somewhat artificial and probably ineffective parameter of ‘doubled retaliation’ with the obligation for the WTO adjudicating bodies to carry out a comprehensive assessment of the impact of lost trade on the economy of the injured developing-country Member. We shall revert to this aspect of Ecuador’s proposal in due course.

Unlike the Africa Group’s, the LDC group’s proposal seems to suggest that collective countermeasures should only be used in cases where the complaint has been brought by a least-developed country against a developed-country Member. According to the LDCs, the level of nullification or impairment should be determined by the arbitrators ‘taking into account the legitimate expectations of the least-developed country Member’ as well as ‘any impediment to the attainment of the development objectives of the WTO Agreement and as further elaborated by the least-developed country Member concerned.’ Admittedly, this is not as clear as Ecuador’s reference to the impact of the WTO-inconsistent measure on the injured country’s economy, but it is in all likelihood equivalent to it. As for the calculation of the total amount of suspension, a new Article 22(6)(b)(iii) DSU should provide that:

Where the DSB grants authorisation to all Members to suspend concessions or other obligations, the level of suspension for each Member shall be an appropriate percentage of the nullification and impairment determined under arbitration.

According to the same proposal, the level of suspension could be higher in cases brought by a least-developed country Member:

the level of suspension for each Member shall be the level determined under arbitration to have been suffered by the least-developed country Member.

It is admittedly difficult to grasp the meaning
of the first phrase of proposed Article 22(6)(b) (iii), unless one presupposes that the right to take collective countermeasures was not meant to be limited to cases where the complainant is a least-developed country. Be that as it may, it should be noted that the second phrase of the same Article, which identifies the outer limit of permissible suspension with the level of impairment multiplied by the number of Members willing to act collectively, would pave the way for a potentially massive retaliation.

We should now consider whether some of the key elements of the foregoing proposals could be inferred from a reasonable reading of the DSU, regardless of any formal amendment to its text. A preliminary step in this direction will consist of deconstructing the interpretation of the equivalence standard which has thus far prevailed in arbitral practice.

2.3. Is reform really needed?

The restrictive interpretation that the arbitral panels have given to the concept of ‘nullification or impairment’ finds little support in the text of Article 22(4) DSU. The arbitrators have simply assumed that the impairment suffered by the injured Member corresponds to the value of lost trade and that the latter must be calculated starting from the expiry date of the reasonable period of time. These two assumptions have nothing in common except that they have been drawn from unspecified sources. This approach appears not only unusual, but also at variance with the interpretative techniques used by arbitral panels as regards countermeasures under the SCM Agreement.

Interestingly enough, in the US - FSC case, the arbitrators held that there can be no ‘inherent presumption’ that the term ‘appropriate’, when referred to countermeasures, ‘must be contorted to fit some kind of Procrustean bed in the proportions of a formula when it is manifestly not present in the text itself.’56 This scathing remark could be an accurate illustration of the way in which other arbitral panels have constantly interpreted Article 22(4) DSU. In the same case, the arbitrators also noted that ‘nothing in the plain language’ of Article 4(10) SCM ‘dictates that the term “appropriate countermeasures” must be limited in its meaning to “equivalence” or correspondence (or some synonym) with the “trade impact” on the complaining Member.’57 In fact, no reference to the ‘trade impact’ can be found in Article 22(4) DSU either. While this panel considered that ‘it [was] not [its] task to read into the treaty text words that are not there’,58 this is precisely what its fellow-panels have been doing as regards Article 22(4) DSU.

Until now, arbitral panels have interpreted Article 22(4) DSU almost in isolation. What could be argued instead is that a contextual and teleological reading of the same provision, as mandated by Article 31(1) VCLT, would lead the interpreter to substantially different results from those reached by the arbitral panels.

Should the opportunity arise to reappraise the meaning of ‘nullification or impairment’ in a case filed by a developing country against a developed country, it is suggested that Article 21(8) DSU should be considered as relevant ‘context’ for the purpose of interpretation. That provision states that:

\[
\text{[i]f the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.}
\]

This provision alone would warrant an interpretation of Article 22(4) DSU to the effect that ‘nullification or impairment’ refers not so much to lost trade per se but, rather, to the latter’s impact on the economy of the complainant. If that is the case, one of the key elements of Ecuador’s reform proposal could be more easily achieved by insisting on a systematic interpretation of Article 22(4) DSU than by pressing forward controversial amendments to the treaty text.

Developing countries have probably underestimated the interpretative potential of Article 21(8) DSU.59 For instance, Jamaica has
proposed that, in order to make that provision more effective, panels and the Appellate Body should expressly be required, by a new provision, to consider, in making their rulings, the impact of the WTO-inconsistent measure on the economy of the developing country concerned.\(^{60}\) It may be argued, however, that the WTO adjudicating bodies - including arbitral panels established under Article 22(6) DSU - are already bound to consider Article 21(8) DSU as relevant ‘context’ to the interpretation of the equivalence standard.

Turning now to teleological interpretation, it should be noted that the attitude of arbitral panels with regard to the rationale of countermeasures has been until now ambiguous and, more recently, even wavering.\(^{61}\) It may of course be argued that the undeclared assumption behind the arbitrator’s restrictive reading of the equivalence standard is that retaliatory trade barriers are wealth reducing, hence undesirable from a systemic, free-trade-oriented perspective.\(^{62}\) There are, however, other systemic objectives that arbitral panels should take into account, particularly in situations where some Members ‘can hurt the others but some of the others cannot really hurt them.’\(^{63}\) Paramount among these objectives is that of obtaining compliance with the WTO Agreements. Article 3(7) DSU states in relevant part that:

\[
\text{[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement system is usually to secure the withdrawal of the measures [...] found to be inconsistent with the provisions of any of the covered agreements.}
\]

The arbitrators’ adherence to that objective has been almost unfailing but somewhat insincere, as some have noted.\(^{64}\) In the first proceedings held under Article 22(6) DSU, the arbitrators considered that the ‘temporary nature’ of suspension ‘indicates that it is the purpose of countermeasures to induce compliance.’\(^{65}\) In a separate proceeding concerning the same case, the arbitral panel went as far as suggesting that if ‘the objective of inducing compliance could not be accomplished [...] the enforcement mechanism of the WTO dispute settlement system could not function properly.’\(^{66}\) However, there can be little doubt that the current interpretation of ‘nullification or impairment’ would frustrate that objective if it were to be applied in a case where the imbalance between the disputing Members is significant in terms of economic power.

In this context, it is of note that an arbitral panel observed that the ‘thrust’ of cross-retaliation consists in ‘empower[ing] the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.’\(^{67}\) An overly restrictive interpretation of ‘nullification and impairment’ may then frustrate not only the general objective of inducing compliance, but also the more specific ‘thrust’ of other DSU provisions. There is no point in authorising cross-retaliation, and then curbing it by precluding the attainment of an adequate level of suspension.

The ambiguity of the case law concerning the permissible level of suspension is underscored by the argument, which often recurs in arbitral decisions, that the equivalence standard (as interpreted by the arbitrators) is an antidote against the temptation of resorting to punitive retaliation. In the Hormones case, the arbitrators declined the invitation, made by the US and Canada, to interpret ‘nullification or impairment’ as including trade opportunities that were lost prior to the expiry of the reasonable period of time – a contention similar to Mexico’s negotiating proposal. The arbitral panel could not reasonably find that the hormone ban had been illegal since 1989 (the date of its enactment), for the WTO SPS Agreement only entered into force on 1 January 1995, and no legal findings were made either by the panels or the Appellate Body on alleged violations of GATT 1947. However, when the arbitrators set out to explain their refusal to consider 1 January 1995 as the critical date, their reasoning
became somewhat confused. They recalled that ‘suspension of concessions [...] is only a temporary measure of last resort to be applied until such time as full implementation or a mutually agreed solution is obtained’;\(^6\) and that the purpose of countermeasures is ‘to induce compliance’, whereas nothing in the DSU can ‘be read as a justification for countermeasures of a punitive nature.’\(^6\) The arbitrators, by qualifying as punitive any reaction exceeding the equivalence standard - a standard which they have themselves arbitrarily construed as implying a reference to the expiry of the reasonable period of time\(^7\) - simply evaded the issue of the effectiveness of countermeasures as a means to induce compliance.

In a subsequent case, the arbitrators stressed the ‘critically important point’ that ‘the concept of “equivalence”, as embodied in Article 22.4, means that obligations cannot be suspended in a punitive manner.’\(^7\) In their view, ‘any suspension of obligations in excess of the level of nullification or impairment would be punitive.’\(^7\) These statements muddle up the distinction between enforcement of rights through proportionate countermeasures and punishment.\(^7\) Moreover, they stand in sharp contrast with a previous decision rendered pursuant to Article 22(6) DSU. In the Brazil - Aircraft case, the arbitrators had in fact considered that:

\[\text{[a] countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations bring its conduct into conformity with its international obligations, but contains an additional dimension meant to sanction the action of the State. Since we do not find [the proposed countermeasure] to be disproportionate, we conclude that, a fortiori, it cannot be punitive.}\(^4\)

To add up to the confusion, in the latest decision rendered pursuant to Article 22(6) DSU, the arbitrators seem to have had second thoughts on the real objective of countermeasures within the WTO system. They noted that the purpose of inducing compliance is not expressly referred to in any part of the DSU and we are not persuaded that the object and purpose of the DSU - or of the WTO Agreement - would support an approach where the purpose of suspension of concessions or other obligations pursuant to Article 22 would be exclusively to induce compliance. Having regard to [...] the context of Articles 22.4 and 22.7, we cannot exclude that inducing compliance is part of the objectives behind suspension of concessions or other obligations, but at most it can be only one of a number of purposes in authorising the suspension of concessions or other obligations. By relying on “inducing compliance” as the benchmark for the selection of the most appropriate approach we also run the risk of losing sight of the requirement of Article 22.4 that the level of suspension be equivalent to the level of nullification or impairment.’\(^7\)

By so arguing, the arbitrators failed to realise that the objective of inducing compliance and the equivalence standard can be either harmonious or dissonant elements depending on the meaning that one attributes to the concept of ‘nullification or impairment.’ If the latter is interpreted in the way in which the arbitral panel have hitherto done, the two elements are bound to remain disharmonious, especially when the complaining party is a developing country seeking to force a developed country into compliance. The fact that such an interpretation rests on a flimsy base, has been eventually recognised by the same arbitrators:

\[\text{We agree [...] that the term “trade effect” is found neither in Article XXIII of GATT 1994, nor in Article 22 of the DSU. Previous arbitrators’ decisions based on direct trade impact are not binding precedents. [...] However [...] the “trade effect” approach has been regularly applied in other Article 22.6 arbitrations and seems to be generally accepted by Members as a correct application of Article 22 of the DSU.}\(^\)\]

In fact, the ‘trade-effect approach’ to the concept of ‘nullification or impairment’ does not exclude the possibility of understanding
the latter in a different way. The risk that a
general practice accepted by Members as being
the correct interpretation of Article 22(4) DSU might
crystallise a situation detrimental to the
interests of developing countries should not be
overlooked. By advancing reform proposals such
as those mentioned above, developing-country
Members may give the impression of sharing the
conviction that the current interpretation of the
concept of ‘nullification or impairment’ springs
directly from the texts, thereby contributing
to giving legitimacy to the afore-mentioned
practice. As the arbitrators have said in the US
- CDSOA case:

We believe [...] from the extensive discussion
of this concept by the parties, that the
actual meaning of [Article 22(4) DSU] is
disputed and needs to be addressed in the
appropriate forum.78

While negotiations are still pending, developing
countries should better reserve their position
concerning the interpretation of the texts as
they currently stand. What could appear as a
radical reform proposal against the background
of a still wavering arbitral practice may turn
out to be just a reasonable interpretation of
the DSU, perfectly consonant with the rules of
interpretation laid down in the VCLT.

In fact, the ordinary meaning of ‘nullification
and impairment’ does not necessarily imply that
what has to be quantified under the equivalence
standard is the value of lost trade. Lost trade
can also be said to result in different levels of
impairment depending on the impact that the
WTO-inconsistent measure is having on the
economy of the Member that has won the case.79
That impact could be quantified by multiplying
the value of lost trade by a macroeconomic
parameter that captures the difference in ‘size’
between the Member which intends to take
countermeasures and the targeted Member. In
that respect, the simplest way of index-linking
the level of permissible suspension would
be to employ, as the multiplying factor, the
ratio of the latter Member’s GDP to the GDP
of the former. Once equivalence is calculated
in terms of economic impact, the level of the
permissible reaction would be proportionate to
the effects of the wrongful act and the ‘size’
of the wrongdoer. A developing country could
then be allowed to hit back more strongly in
absolute terms, but in such a way that the
reaction could be said to be, in relative terms,
equivalent to the effects that the wrongful
conduct of a developed country is having on
its economy. This interpretation of the concept
of ‘nullification or impairment’ accounts for
and keeps together the equivalence standard,
the objective of inducing compliance, and the
general principle that developing countries must
be accorded differential and more favourable
treatment, reflected in Article 21(8).

Since no individual developing country would
typically be in a position to deploy such a strong
reaction - which could be even very strong and still
proportionate to the impairment suffered by the
developing country concerned - the alternative
interpretation which we have just sketched
out inevitably intersects with the issue of the
permissibility of collective countermeasures.

Postscript

After completion of this paper, the issue of the
multiplier was raised by Antigua and Barbuda in
the US - Gambling case. Antigua and Barbuda
asked the arbitral panel to determine the level
of nullification and impairment by multiplying the
value of forgone trade by an appropriate factor,
in order to take account of the wider effects that
the United States’ WTO-inconsistent measure was
having on its economy.80 The US objected to such
a request, arguing that the equivalence standard
‘would not be respected if just the level of
nullification and impairment was increased by a
multiplier.’81 The US view eventually prevailed but
only as a result of a somewhat baffling judgment,
in which the arbitral panel held:

[i]t is one of the rare points of agreement
between the parties to calculate the level
of nullification or impairment on the basis
of the difference between actual and
counterfactual Antiguan exports of remote
gambling services to the United States that is
due to the non-compliance by the defending party. In other words, parties agree on the use of a “trade effects” approach that has also been used in previous arbitrations. 

3. Collective countermeasures

Given that the very claim by Antigua and Barbuda clearly excluded that there was such an agreement between the parties, the judgment leaves the reader with a sense of puzzlement.

In his speech at the 2006 ESIL Conference in Paris, Pascal Lamy hinted at the ‘communitization’ (sic) of the WTO by way of ‘an institutionalisation of international responsibility’ which would be ‘under way’. Although the purport of Lamy’s remarks is far from being clear, particularly from the perspective of international law, the overall impression conveyed by his speech seems to be in tune with developing countries’ increasing demand for a re-orientation of the dispute settlement mechanism. The emphasis placed on the common interest that all States would have in redressing violations of WTO law might be taken to mean that the WTO system should be naturally geared towards forms of collective enforcement. This echoes the concerns voiced by developing countries that the enforcement system as it currently stands is unfair and ineffective and may lend some support to the view of those who advocate a ‘principle of collective responsibility’ in the WTO. The emphasis placed on the common interest that all States would have in redressing violations of WTO law might be taken to mean that the WTO system should be naturally geared towards forms of collective enforcement. This echoes the concerns voiced by developing countries that the enforcement system as it currently stands is unfair and ineffective and may lend some support to the view of those who advocate a ‘principle of collective responsibility’ in the WTO.

In fact, this is not an entirely novel plea. Early attempts within the GATT to introduce similar mechanisms were eventually set aside given that the diplomatic nature of the GATT dispute settlement system hardly allowed for such radical thinking. In the Uruguay Round, negotiators made a clear move towards a legalistic model. The ‘judicialization’ of the dispute settlement system gave rise to a fairly elaborate mechanism geared towards inducing compliance with the system’s rules. However legitimate and desirable from an economic and practical perspective, this plea for resorting to collective countermeasures needs to be addressed in legal terms. In particular, the issue of whether collective countermeasures can be used within the WTO system has been the object of a lively debate in academic and practitioners’ circles.

The doctrinal debate has primarily hinged on the nature of WTO obligations. On the one hand, some commentators have maintained that any such plea for collective enforcement is not only politically unrealistic but also legally unjustifiable by reason of the bilateral nature of most, if not all, WTO obligations. In this perspective, enforcement is conceived in purely bilateral terms and collective countermeasures, short of a formal treaty amendment, would just not be an available option. On the other, some authors have taken the opposite stance by arguing that the collective nature of the WTO treaty obligations would allow States to take collective countermeasures. The relevance of this debate should not be underestimated since the characterisation of obligations as bilateral or collective may have consequences in terms of locus standi before the WTO adjudicating bodies. However, as we shall see, the sometimes abstract discussion about the nature of WTO obligations has also diverted the attention from the nitty-gritty of treaty interpretation, especially as regards the issue of locus standi and the way in which the latter relates to the right to take countermeasures.

Section I.3.1 offers a brief account of the current doctrinal debate on the nature of WTO obligations. Section I.3.2 explores the possibility of promoting an actio popularis against a Member who refuses to comply with the DSB recommendations and rulings. Our analysis will be confined to the general WTO rules on legal standing, thus leaving aside special rules such as those contained in the SCM Agreement. It is commonly held that the broad definition of legal
standing in WTO law is somewhat frustrated by the bilateral structure of the enforcement process stricto sensu, as only the Member who has suffered a material injury may resort to countermeasures (with the notable exception of countermeasures authorised under Article 4(10) SCM). In Section I.3.3, it will be submitted that such a presumption can be rebutted on a plain reading of the DSU and the GATT. The proposals set forth by developing-country Members clearly start from the assumption that no general collective enforcement process can be envisaged within the WTO system as it stands at present. Even though it reflects a widespread belief, this assumption may eventually prove to be incorrect.

3.1. The nature of WTO obligations

A useful starting point and an almost universally shared base of analysis is the distinction between bilateral obligations, i.e. obligations owed by one State towards another, and obligations erga omnes, i.e. obligations owed either to the international community as a whole or to the other contracting parties collectively (obligations erga omnes partes). This distinction, reflected in Articles 42 and 48 ASR, is echoed in the recent discussion among WTO lawyers.

Some scholars have argued that WTO obligations are of a bilateral nature, since the WTO multilateral framework can be considered as a ‘bundle of bilateral relations’ shaped by the principle of reciprocity. This bilateralism paradigm would be inherent in WTO law for a variety of reasons. First, unlike human rights or disarmament treaties, WTO obligations are always legally divisible: ‘the origin of a WTO obligation resting on a particular WTO Member - even those obligations that are the same for all WTO Members - lies primarily in a promise made by that Member towards each and every other WTO Member individually.’ This divisible character of WTO obligations has been highlighted by several commentators. Relevant examples of the bilateral nature of WTO obligations would include the MFN treatment, tariff concessions, quota and other barriers to market access as well as the special and differential treatment accorded to developing countries. The bilateral/contractual nature of WTO law is a recurrent theme in scholarly writings, as well as in Member States’ official statements.

At the opposite pole of the spectrum lies the position of those scholars who maintain that WTO obligations are collective in nature. Perhaps, the more far-reaching contention is that submitted by Carmody in a recent article, which strongly objects to the bilateralism paradigm. Carmody maintains that the WTO system would not be about trade per se, but rather about trade expectations accruing from it and benefitting all Members. By developing an intellectual framework in which the protection of collective ‘expectations’ about the trade-related behaviour of States and the necessary adjustments to the ‘realities’ of international trade are regarded as the essential components of ‘a law of interdependence’, Carmody underscores the collective nature of WTO obligations and the ‘common interest’ pursued by the organisation. Against this background, Carmody maintains that recourse to collective enforcement is consonant to the collective nature of all WTO obligations.

Although even the most fervid proponents of the bilateralism paradigm are ready to acknowledge that some WTO obligations might have a collective nature, to characterise as such the whole of WTO obligations would be too far-fetched. A look at the extant legal texts of the WTO suffices to realise that their alleged erga omnes character is not as self-apparent as it would be in the case of human rights and disarmament treaty obligations. Most of the WTO obligations can be suspended through the operation of the enforcement mechanism without affecting the position of other States as regards the performance of their obligations. However, if this holds true, generally, for most WTO obligations, the nature of some of the legal obligations laid down in the DSU may warrant different considerations.

Of particular note is the obligation to comply with DSB recommendations and rulings, which could be aptly characterized as an obligation erga omnes partes by reason of its importance.
for the integrity and stability of the whole system. According to Article 21(1) DSU, ‘prompt compliance with recommendations and rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all Members.’ Article 21(6) DSU further states that ‘the issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption.’ Against the background of these provisions, a refusal to comply with DSB recommendations after the reasonable period of time could be plausibly considered as a breach of an obligation erga omnes partes.

The importance we attach to this finding will soon become apparent. For the time being, suffice it to note that to discuss about the nature of WTO obligations in the abstract is hardly conducive to providing a solution to the query whether collective enforcement is an option under WTO law as it stands at present. In fact, the right of each and every WTO Member to invoke the responsibility of the wrongdoer in case of breach of an obligation erga omnes partes should not be conflated with the right of instituting WTO proceedings: the right to invoke the responsibility and locus standi are two distinct legal issues. In this regard, it should be kept in mind that according to Article 22(2) DSU only the Member ‘having invoked the dispute settlement procedures’ may request the authorisation from the DSB to retaliate against the wrong-doing Member. The issue of legal standing to bring a claim before the WTO is therefore crucial in order to determine which Members may react by way of countermeasures. Instead of focusing on the nature of WTO obligations, let us then have a closer look at the WTO provisions on locus standi.

3.2. Legal standing to enforce ‘systemic obligations’

Discussions about the doctrine of locus standi in WTO law has mainly - and misleadingly - focused on the EC - Bananas case. In that case, the EC had called into question the right of the US to bring a claim concerning trade in a product of which the US was not, and could not be expected to become, an exporter. According to the EC, the US claim, insofar as it alleged an infringement of the multilateral agreements on trade in goods, should have been declared inadmissible for lack of legal interest. The Appellate Body famously replied that it did ‘not accept that the need for a “legal interest” is implied in the DSU or in any other provision of the WTO Agreement.’ However, almost in the same breath, the Appellate Body stressed ‘the need to consider the question of standing [...] by referring to the terms of the treaty’, particularly those of Article XXIII(1) GATT.

While the Appellate Body recognized that WTO Members ‘ha[ve] broad discretion in deciding whether to bring a case against another Member under the DSU’, it also crucially observed: (i) that ‘a potential export interest’ by the US could not be excluded, the latter being a producer of Bananas; (ii) that ‘[t]he internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effect of that regime on world supplies and world prices of bananas’; (iii) that due to ‘the increased interdependence of the global economy ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely then ever to affect them, directly or indirectly’; and (iv) that the EC did not challenge the standing of the US under the GATS, whereas ‘the claims under the GATS and the GATT 1994 relating to the EC import licensing regime [were] inextricably interwoven.’ In the Appellate Body’s view,

[t]aken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case.

Some authors have opined that such a broad doctrine of legal standing opens the door to some kind of actio popularis. This observation is potentially confusing since, as the Appellate Body’s decision in EC - Bananas clearly demonstrate, a preliminary showing by the
applicant of some material interest in the case is still a prerequisite for legal action, however broad the WTO conception of locus standi may be.\textsuperscript{107} Otherwise, the Appellate Body could have dismissed the EC objection out of hand, whereas it ultimately justified its decision by hinting at some form of nullification and impairment of the applicant’s benefits within the meaning of Article XXIII(1) GATT.\textsuperscript{108}

The exercise of actio popularis (properly so called) is clearly admissible under WTO law. This is not so, however, on the basis of the broad doctrine of standing expounded in the EC–Bananas case. A firm legal basis for collective enforcement of WTO law against recalcitrant wrongdoers is, rather, to be found in the too often overlooked provision laid down in Article XXIII(1) GATT, according to which a Member may initiate proceedings before the WTO adjudicating bodies whenever it considers ‘that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of the failure of another contracting party to carry out its obligations under this Agreement.’\textsuperscript{109}

Article XXIII(1) GATT allows for two types of violation complaints. The first and more familiar one is premised on the notion of ‘nullification or impairment’. This is the kind of complaint which the Appellate Body’s dealt with in EC–Bananas. The second type of complaint, aimed as it is at redressing a violation which impedes the attainment of an objective of the WTO system, does not require any showing of material injury, either actual or potential, in order to be considered admissible.

Since the duty to comply with the recommendations and rulings of the DSB can be characterized as an obligation erga omnes partes - i.e., a ‘systemic obligation’ established in the collective interest of the WTO Members - by definition its infringement impedes the attainment of an objective of the WTO system.

Not every author failed to notice this ‘avenue to collective enforcement’, as one could aptly call it. Some have belatedly discovered it.\textsuperscript{110} Others have turned it down on account of the fact that only a negligible amount of complaints of that kind was lodged during the GATT era,\textsuperscript{111} or due to the WTO Member’s failure to engage in this sort of collective action.\textsuperscript{112} It is submitted, however, that a negative conclusion on the current viability of collective enforcement through systemic complaints should not be too hastily drawn from the GATT experience. The context has dramatically changed since the establishment of the WTO. Collective actions had no prospect of success in a dispute settlement system where the wrongdoer itself could eventually veto the authorization to adopt countermeasures. As is known, the DSU removed this obstacle to the enforcement process. It must be conceded, however, that to have legal standing does not automatically translate into a right to take countermeasures against the wrongdoer.

3.3. Collective enforcement by way of countermeasures

In the EC–Bananas case, the European Community, reflecting a widespread opinion, contended that a Member which is not suffering any material injury ‘would have no effective remedy under Article 22 of the DSU.’\textsuperscript{113} As we noted in Section I.2, the permissible level of suspension is linked via the operation of Article 22(4) DSU to the level of ‘nullification and impairment’, a notion which has been interpreted by arbitral panels as referring exclusively to the value of the trade flows hindered by the WTO-inconsistent measure. Therefore, even though a Member may be allowed to take part in a ‘collective suit’, it may be prevented from joining in the enforcement action, if it turns out that it is not suffering any ‘nullification or impairment’ within the meaning of Article 22(4) DSU. In other words, it could be maintained that recourse to countermeasures is not available to Members who have not suffered a material injury, since countermeasures must be ‘equivalent’ to the level of ‘nullification or impairment’ suffered by the complaining Member. Also in this case, however, the obstacle represented by the trade-related definition of ‘nullification or impairment’ is more apparent than real. It may in fact be persuasively argued that even a Member whose exports are not
affected by the WTO-inconsistent measure may take countermeasures against the wrongdoer.

If the breach of the obligation to comply with the DSB recommendations and rulings is construed, as we think it should, as an impediment to the attainment of a systemic objective, all WTO Members may lodge a complaint against a non-complying Member, regardless of whether they would have had legal standing in the main proceedings. From that moment on, all Members will have to be regarded as ‘having invoked the dispute settlement proceedings’ within the meaning of Article 22(2) DSU. Hence, they would be entitled to ‘request authorisation from the DSB’ to take countermeasures against the wrongdoer, with a view to joining forces with the developing Member concerned in the effort of inducing compliance. At this point, one may object that the intervening Members cannot be authorised to have recourse to countermeasures unless they suffer ‘nullification or impairment’ within the meaning of Article 22(4) DSU. This objection, however, is not warranted by the text of Article 22(4).

Article 22(4) DSU merely provides that the level of suspension of concessions or other obligations shall be equivalent to the level of nullification or impairment. That provision does not expressly state, nor does it imply, that ‘nullification or impairment’ must be suffered by each and every Member wishing to take countermeasures in the context of a collective action. While the permissible total level of suspension is linked to the value of trade opportunities lost by the injured Member, nothing in the DSU prevents other Members from seeking authorisation to retaliate against the wrongdoer, provided that they have ‘invoked the dispute settlement proceedings’ vis-à-vis the latter’s refusal to comply with the DSB recommendations and rulings. The DSU sets the ceiling of permissible suspension with reference to the situation of the materially injured Member. This is an objective limit. The right to take countermeasures is by no means subjectively restricted to materially injured Members. Therefore, collective countermeasures are possible within the WTO system as it stands at present.

As previously noted, due to the power imbalance between developed and developing States, only rarely will an individual developing-country Member be in a position to implement a level of suspension equivalent to the trade impairment which it is suffering. Collective enforcement is therefore essential to force the system’s ‘big players’ into compliance. The right to take collective countermeasures is all the more compelling against the background of the interpretation of the equivalence standard outlined in Section I.2 above - which aims at overcoming the external dimension of the imbalance by lifting up the ceiling of permissible suspension. If, as submitted, collective enforcement is already permitted under WTO law, developing countries’ allegedly ‘radical proposals’ are in fact redundant and, arguably, counter-productive as they risk legitimising an interpretation of the DSU which runs against their interests.

4. Fall-back onto general international law on countermeasures?

Should WTO adjudicating bodies not endorse the interpretive solutions envisaged in the preceding Sections, other avenues may be available to developing countries to redress the current imbalance in the WTO dispute settlement process. In particular one may wonder whether a developing-country Member may resort to countermeasures under general international law, when a developed-country Member refuses to comply with a ruling made by the DSB and intra-systemic means of redress, including suspension of concessions or other obligations, have failed. Writers usually describe this kind of situation as a ‘fall-back’ from treaty rules onto general international law.114 The policy rationale of fall-back is relatively clear: it consists of avoiding that the participants to a treaty-based regime – which was endowed with its own, in principle exclusive, system of remedies against breach - become helpless victims of that system’s ineffectiveness. As regards the legal foundations of fall-back theories, however, scholarly opinion differs considerably.
In Section I.4.1 we consider three competing (but to some extent overlapping) fall-back theories as well as the consequences which may arise from their application to WTO law. The question intersects the wider issues of the nature of ‘self-contained regimes’115 and the fragmentation of international law.116 We will argue that the most plausible legal justification of fall-back onto general international law is to be found in the law of treaties. Accordingly, in Section I.4.2 we will consider whether WTO Members have relinquished their right to suspend the WTO Agreement in whole or in part in response to a material breach of the treaty.

In fact, one may legitimately wonder whether the provisions of the DSU on countermeasures may be suspended vis-à-vis a non-complying Member, thereby causing a temporary fall-back on the general international law of countermeasures. While the language of Article 23 DSU - ‘suspension of concessions or other obligations’ - is clearly reminiscent of the law of treaties,117 subsequent practice clearly attests to a moving away of WTO rules from the field of the law of treaties to that of the law of State responsibility. In other words, within the WTO system, ‘suspension’ would be synonymous with ‘countermeasure’. This, however, leaves the relationship between WTO law and general rules on the suspension of treaties rather undefined and in need of clarification.

4.1. Fall-back theories

WTO law is regarded by many as being eligible for the controversial status of ‘self-contained regime’.118 Even those who reject as ‘chimerical’ the idea of treaty-based systems completely insulated from general international law have employed WTO law as a case study to demonstrate that self-contained regimes do not in fact exist.119 The proposal recently advanced by the ILC Study Group on the fragmentation of international law well reflects the widespread diffidence towards characterising self-contained regimes as a distinct legal category. As noted by the Study Group, Article 42 VCLT, which provides, inter alia, that the validity of a treaty may be impeached only through the application of the Convention itself, ‘is the “minimum level” at which the Vienna Convention regulates everything that happens in the world of regime-building and regime-administration’, so that at least ‘[t]hrough it [...] every special regime links up with general international law.’120 Accordingly, the Study Group proposed to drop the misleading expression ‘self-contained regimes’ and start using that of ‘special regimes’ in its stead.121

At any rate, WTO law owes its reputation as a special regime not so much to an alleged ‘self-validation’, but mostly to Article 23 DSU, which apparently seals off intra-systemic remedies against violations of WTO norms. No fall-back theory denies that subjects of international law may derogate by treaty from general rules on responsibility (also referred to as ‘secondary rules’).122 On the contrary, special regimes are classically defined by fall-back theorists as ‘a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules.’123 It is indeed a common feature of these theories that special secondary rules must be given priority over general ones, but only insofar as the situation remains ‘normal’. When special rules prove to be inadequate for the purpose of inducing compliance with the system’s primary rules, the regime must be deemed to have ‘failed’, and the aggrieved parties would be entitled to invoke general international law anew.124 Fall-back theories thus become theories of regime failure and bear a resemblance to the logic of the exhaustion of local remedies rule.125 But how could fall-back be justified in legal terms?

Three main explanations have been offered.126 Simma and Pulkowski have recently expounded a theory based on principles of interpretation. Arangio-Ruiz considered fall-back as a corollary of some structural features of the international legal order. Finally, the ILC Study Group on the fragmentation of international law hinted at the possibility of justifying fall-back by the suspension of the treaty in question. We will consider these fall-back theories in turn.

4.1.1. Fall-back and the principle of effective interpretation

According to Simma and Pulkowski, the solution to the fall-back puzzle lies in principles of interpretation. They regard self-contained
regimes as a strong form of lex specialis, whereby ‘the application of the general regime of state responsibility’ is altogether excluded, ‘either by explicit provision or by implication, that is, by virtue of a regime’s particular structure or its object and purpose.’127 Besides conveying the idea of a regime derogating from general international law, the notion of lex specialis encapsulates, in their view, an interpretative maxim closely related to, and requiring the application of, the principle of effective interpretation. Key to their argument is a particular reading of a passage drawn from Emerich de Vattel’s classic treatise on international law:

ce qui est spécial souffre moins d’exceptions que ce qui est général; il est ordonné plus précisément, & il paraît qu’on l’a voulu plus fortement (Le droit des gens ou principes de la loi naturelle (1758), Liv. II, Ch. XVII, § 316).

Applying this ‘insight’ to modern self-contained regimes, the authors query: ‘are there reasons why obligations in special regimes should be considered ‘softer’ than other international law? If Vattel is right, the contrary is the case.’128 Of course, Simma and Pulkowski believe that Vattel – as interpreted by them – is right. From this, the authors draw the ‘presumption’ that treaty-based regimes ‘embody a particularly strong commitment’ to comply with, and effectively enforce the regime’s own rules. As the authors put it:

Among several possible constructions, the principle of effective interpretation requires adopting the interpretation that best gives effect to the norm in question. Effectiveness includes the notion of enforceability [...]. If states create new substantive obligations along with special enforcement mechanisms, they merely relinquish their facultés under general international law in favour of a special regime’s procedures to the extent that and as long as those procedures prove efficacious. When such procedures fail, enforcement through countermeasures under general international law becomes an option.129

The authors’ argument lays the foundations of a general theory of fall-back, i.e. one that applies to any treaty-based system. As it is premised on interpretative principles, the theory seems to come down to a rebuttable presumption against derogation from general rules on responsibility.130 Simma and Pulkowski had previously examined some treaty-based systems, usually presented as examples of self-contained regimes. From that survey – which includes WTO law - the authors draw the following conclusion:

None of the treaty regimes presented as candidates for self-contained regimes contains an explicit provision regarding the applicability vel non of the rules of state responsibility. [...] Textual arguments in favour of either the open or closed nature of the [...] regimes are as numerous as they are inconclusive.131

Since traditional principles of interpretation, as codified in Articles 31 through 33 VCLT, do not, in their view, lead to any definite solution, the authors turn to the principle of effective interpretation - which is no less traditional, although not codified in the Vienna Convention. They then use that principle as a blasting charge in order to prise self-contained regimes open from within. As we understand it, the authors’ reasoning can be summarised as follows. Self-contained regimes present themselves as strong forms of special law. Lex specialis, understood as an interpretative maxim, requires effective interpretation. This, in turn, should lead to giving priority to the interpretation which makes the effective enforcement of the regime’s primary rules possible. Fall-back onto general international law may be necessary, and must be permissible under international law in order to avoid that the special regime becomes ineffective.

In our view, the authors’ thesis suffers from two shortcomings. The first one lies in their general theory of fall-back while the other concerns the application of that theory to WTO law. Simma and Pulkowski do not explain why the principle of effective interpretation should apply to primary rules but not to secondary rules on responsibility. De Vattel’s lex
specialis argument is by no means circumscribed to primary rules, nor could it be so, since at the time the distinction was obviously unknown.

The principle of effective interpretation is usually seen as closely related both to teleological interpretation and to the maxim ut res magis valeat quam pereat, which directs the interpreter to give meaning and effect to every term contained in a treaty. There is no evident reason why that maxim should be applied to primary rules and disregarded as far as secondary ones are concerned. The object and purpose of a treaty must be ascertained in the light of all the provisions contained in the treaty itself, including secondary rules derogating from general international law. In an earlier and much praised work on treaty-based regimes, Simma had himself argued that ‘the readiness to concede a fall-back on the general rules ought in each case to depend upon a careful evaluation of the raison d’être behind a “self-contained regime”.’ Special secondary rules may reflect the rationale of a treaty-based system no less than the latter’s primary rules. To describe the rationale of a special regime solely in terms of effectiveness of primary rules and to conceive of secondary rules as merely instrumental is not persuasive.

Their fundamental contention is that the principle of effective interpretation raises a strong, yet rebuttable, presumption against the continued applicability of special rules in cases of regime failure in the case of WTO law, however, that presumption would be rebutted, contrary to what the authors maintain, by a textual reading of the DSU. Article 23 DSU derogates from general international law on countermeasures in terms that could not be clearer. What the authors characterise as regime failure - i.e. a situation in which a Member, undeterred by WTO-authorised countermeasure, disregards a ruling of the DSB - is nothing but a violation of the DSU, namely an infringement of one of the ‘covered agreements’ to which Article 23 DSU applies to the exclusion of general international law on countermeasures. In other words, claims of ‘regime failure’ fall within the scope of application of Article 23 DSU. Let us now turn to the fall-back theory proposed some fifteen years ago by Arangio-Ruiz, then ILC special rapporteur on state responsibility.

4.1.2. Fall-back as a corollary of a structural feature of the international legal order

In his Fourth Report on state responsibility, Arangio-Ruiz expressed ‘serious doubts as to the very admissibility in abstracto of the concept of self-contained regimes as “subsystems” of the law of State responsibility.’ In his view, the mandatory nature of certain rules of general international law on the consequences of wrongful acts derives from a structural feature of international law as a legal order of sovereign states:

Indeed, no derogation from [the] essential rules and principles on the consequences of internationally wrongful acts that are inherent to international relations and international law could be conceivable, unless the implementation of those rules brought about a degree of union that would lead to the surrender of the international legal personality of the participating States and their integration within a “national” (constitutional) system.

Arangio-Ruiz seems to consider recourse to countermeasures in the last resort as permitted by one of those ‘essential rules and principles’, when he states that ‘no treaty-based provisions would be admissible that would involve derogation from [...] the rule under which the lawfulness of any unilateral measure must be assessed in the light of its ultimate legal function.’ Later, Arangio-Ruiz maintained that the indispensable legal function of extra-systemic countermeasures consists of inducing compliance also with intra-systemic rules. Therefore, even if the treaty-based system may be deemed to have ‘suspended’ the parties’ right to take countermeasures under general international law, that right revives as soon as intra-systemic remedies have proven incapable of redressing the situation created by the wrongful act. In this respect, Arangio-Ruiz
identified two hypothesis in which ‘the injured State may lawfully resort to measures which, although not covered by the “system”, are available to it […] under general international law’. This would occur in cases where the wrong-doing state refuses to abide by a decision on reparation, issued by the dispute settlement organs established under the treaty in question, or when the wrongful conduct persists while the dispute settlement procedures are in progress and interim measures of protection are either unavailable or have been disregarded by the wrong-doing state. These two hypotheses notwithstanding, Arangio-Ruiz’s opinion remains cautious as to the way in which mandatory rules on the consequences of breach would operate. As he noted, the integrity of a special regime may be regarded by its participants ‘as a bien juridique of major importance’, so much so that:

“External” unilateral measures should [...] be resorted to only in extreme cases, namely, only in response to wrongful acts of such gravity as to justify a reaction susceptible of jeopardising a bien juridique very highly prized by both the injured and the law-breaking State.

According to Arangio-Ruiz, it is only when the system is drawn on the verge of self-destruction by its own ineffectiveness that the system’s special secondary rules must be set aside despite a clearly expressed will to the contrary:

the effects of the treaty-based derogation would not survive a violation of the system which was of such gravity and magnitude as to justify, as a proportional measure against the wrong-doing State, the suspension or termination of the treaty-based system as a whole.

Arangio-Ruiz did not mean to say that fall-back onto general international law is excluded in situations of lesser gravity. However, when broaching the question whether fall-back is admissible or not, the interpreter should always proceed from a strong presumption against derogation:

for a true derogation from the general rules to take effect, the parties to the instrument must expressly indicate that by entering the treaty-based system they exclude the application of certain or all the general rules of international law on the consequences of internationally wrongful acts, rather than confining themselves to dealing globally with the consequences of the violation of the regime.

These statements lend themselves to different interpretations. At first glance, the first statement may be taken to mean that the only remedy available in extreme circumstances is termination or suspension of the whole treaty. In that case, the incompressible core of the general rules on the consequences of breach would belong to the law of treaties as opposed to the law of responsibility. At closer scrutiny, however, Arangio-Ruiz may have meant termination or suspension as mere examples of the consequences which may flow from a serious violation of the system’s rules. The violations that he had in mind are so grave as to justify the suspension or termination of the whole treaty. But their consequences are defined in broader terms: those violations would discontinue ‘the effects of the treaty-based derogation’. As a result, the injured state would be entitled to pick from a wide array of possible reactions, ranging from the termination or suspension (partial or total) of the treaty in question to countermeasures proper.

In circumstances of lesser gravity, fall-back would still be possible unless expressly ruled out by the treaty in question. In such circumstances, then, the question would be one of interpretation, even though the margin of appreciation left to the interpreter would be minimal, given the afore-mentioned presumption against derogation.

Whatever one may think about the existence of such a presumption, there can be little doubt that Article 23(2)(c) rebuts it as far as the right to take unilateral countermeasures against a prior violation of WTO law is concerned. In fact, the DSU not only appears to deal ‘globally’ with the consequences flowing from violations of WTO law. It also states explicitly - in article 23 - that the system’s rules must be regarded as exclusive, at
least within the field of state responsibility. When applied to WTO law, Arangio-Ruiz’s theory leads to the conclusion that the right to take extra-systemic countermeasures is generally precluded (by express derogation) but may be revived in cases of extremely grave violations of the system’s rules by virtue of the incompressible core of the general rules applicable in case of breach. Therefore, albeit in a very limited (and difficult to define) set of circumstances, Article 23 DSU could be set aside.

Arangio-Ruiz’s fall-back theory is not entirely persuasive. At the heart of that theory lies the contention that the right to take extra-systemic countermeasures in response to exceptionally grave violations must be deemed to survive even express derogation because that right is an essential guarantee of states’ sovereignty. But the essential or necessary character of that guarantee is postulated rather than demonstrated. Even assuming that there must be an essential guarantee of state sovereignty, withdrawal from the treaty, even if not expressly permitted by the treaty itself, appears to be more suitable a solution than fall-back. States should either play by the rules that they have themselves accepted or withdraw from the game.

We should now consider whether fall-back may be brought about through the suspension of the treaty (or parts thereof) on which the special regime is based.

4.1.3. Fall-back as a consequence of suspension of treaty

This particular fall-back theory, originally expounded by Simma, has been recently reasserted in a slightly different manner by the ILC Study Group on fragmentation of international law. Interestingly, the Report of the Study Group started from the assumption that the ILC had not treated the issue of regime failure in the context of its works on state responsibility. While Crawford, acting as special rapporteur on state responsibility, had referred to WTO law as an example of a closed system of remedies, the Study Group thought that the ILC had ‘left open [...] whether “exclusivity” [in that case] meant exclusive and final replacement of the general law or merely its substitution at an initial stage with the possibility of “fall-back” if the self-contained regime had [...] “failed”.’

The Study Group seems to consider that Article 55 ASR deals with the static dimension of the relationship between treaties and general international law, whereas the dynamic aspects of that relationship would require further clarification. In fact, which fall-back theory the Study Group subscribes to is not entirely clear. Its general premise seems to be the same as that of effectiveness-based theories:

if instead of enhancing the effectiveness of the relevant obligations the regime serves to dilute existing standards [...] then the need of a residual application, or a “fall-back” onto the general law of State responsibility may seem called for.

Apart from this general framing of the issue, however, the Study Group goes no further than indicating material breach of treaty and fundamental change of circumstances as possible triggers for fall-back:

Inasmuch as the failure can be articulated as a “material breach” under Article 60 [VCLT], then the avenues indicated in that article should be open to the members of the regime. It cannot be excluded, either, that the facts relating to regime failure may be invoked as a “fundamental change of circumstances” under Article 62 of the [same Convention].

The prospect for a fall-back theory centred on the law of treaties is indeed attractive, in that it points to a seemingly ‘vulnerable side’ of self-contained regimes. These regimes are usually defined as treaty-based systems which derogate from general rules on responsibility, while leaving those on suspension of treaties untouched. It should be noted, however, that also general rules on suspension of treaties can be contracted out or derogated from. In the next Section we shall examine whether the WTO Agreements have ruled out suspension as a reaction to a material breach or as a consequence of a fundamental change of circumstances.
4.2. Suspension of treaty and countermeasures

Article 60(2)(b) VCLT provides that ‘[a] material breach of a multilateral treaty by one of the parties entitles [...] a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.’ In order to assess whether WTO Members have relinquished their right to suspend the WTO Agreements in whole or in part in response to a material breach thereof, we should consider Article 60(2)(b) VCLT against the background of Article 22(2) DSU. It will be recalled that the latter provides that, in cases where all other means of redress have failed, the Member:

having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned [i.e. the defaulting Member] of concessions or other obligations under the covered agreements.

Also, by virtue of Article 23(2)(c), ‘suspension of concessions or other obligations’ must be implemented in conformity with the substantive and procedural conditions set out in Article 22 DSU.

Prima facie, the language of Article 22 DSU - which was ostensibly meant to keep up with the GATT tradition\(^{153}\) - seems to ‘absorb’ suspension (understood as a means of redress otherwise available under the law of treaties) within the system. If this were to be the case, the right to suspend the WTO Agreements in whole or in part would have been derogated from, irrespective of the grounds invoked in order to justify the suspension, be it a material breach or a fundamental change of circumstances caused by such a breach. However, as we shall see, this might not necessarily be the case if one accepts the distinction between suspension and countermeasures that the ILC’s eventually endorsed in its commentary to the ASR.

According to some commentators, the enforcement mechanism set out in Article XXIII(2) GATT - whose language is almost identical to that of Article 22(2) DSU - ‘was largely, if not exclusively, a mechanism based on the law of treaties’.\(^{154}\) Therefore, if fall-back onto general international law on responsibility, including resort to countermeasures, ‘remain[ed] an option’ for GATT parties, it was ‘not so much because of the ineffectiveness of the treaty-based mechanism, but because of the absence of contracting out of the law on state responsibility.’\(^{155}\) In Pauwelyn’s view, the ‘situation has’, however, ‘changed dramatically with the conclusion and subsequent interpretation of the WTO treaty, in particular the DSU’, by which the drafters intended that ‘the provisions in the WTO treaty on suspension of treaty obligations [be] shifted into the area of state responsibility.’\(^{156}\) As a result, fall-back onto general international law would no longer be permitted insofar as recourse to countermeasures is concerned. What happened then to ‘suspension’ under the law of treaties? Has the aforesaid ‘shift’ restored the applicability of the law of treaties or has it stretched WTO lex specialis so as to cover not only the law on responsibility but also the law of treaties? Pauwelyn’s short answer to these questions is as follows:

Also in terms of treaty-based remedies, the WTO offers remedies that are as good as those under general international law. Pursuant to Art. XV of the Marrakesh Agreement, a WTO Member can withdraw from the WTO (e.g. in response to breach by others) on the mere condition of six months’ notice.\(^{157}\)

This contention is unpersuasive. Withdrawal from the WTO on six-month notice cannot be regarded as a functional equivalent of suspension, since the former is a much more rigid and costly instrument than the latter. To begin with, there is no such thing as partial withdrawal from the WTO. Moreover, whereas resumption of performance is at the discretion of the suspending party, withdrawal is reversible only through readmission to the organisation, which requires the approval of the Ministerial Conference by a two-thirds majority of the
The question therefore requires further investigation.\textsuperscript{159}

As already noted, Pauwelyn believes that with regard to the consequences of breach, the GATT only derogated from the law of treaties as opposed to the law on responsibility (including the right to take countermeasures). However, when the GATT was drafted, the distinction between suspension and countermeasures (then referred to as ‘peaceful reprisals’\textsuperscript{160}) was in all likelihood unknown and has remained somewhat hazy for a long time since.\textsuperscript{161} In the Naulilaa case, an act of reprisal was defined as one consisting ‘of taking the law into its own hands by the injured State […] in response - after an unfulfilled demand - to an act contrary to the law of nations by the offending State’, the effect of which was ‘to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations.’\textsuperscript{162} In his second report on the law of treaties, Waldock pointed out that in cases of material breach of a treaty, the injured state should have been entitled ‘to suspend the performance of its own obligations under the treaty.’\textsuperscript{163} It may be noted that nowadays these terms could be regarded as a description of the effects of a countermeasure.

As the debate provoked by Waldock’s proposal demonstrates, in the early ‘60s, ‘suspension’ was far from being a well-established term of art, let alone one which was distinct from ‘countermeasure’. In particular Rosenne raised doubts about the very concept of suspension. In his view, suspension meant that ‘the innocent party or parties would temporarily refrain from carrying out their obligations under the treaty following a breach of the same treaty by the offending party.’\textsuperscript{164} In this respect, he stated that:

\textquote{If the Commission felt that the situation caused by a breach of a treaty come within the application of the contemporary law on reprisals, then it should say something explicit in that regard rather than devise some other formula which might only confuse the issue.\textsuperscript{165}}

If one looks at the question from the standpoint of the ILC works on state responsibility, it is interesting to note that, in 1984, Paul Reuter recalled that the concept of suspension ‘had occupied only a minor place in international law’ before its inclusion in the Vienna Convention.\textsuperscript{166} It should also be mentioned that as late as 1992, the then special rapporteur Arangio-Ruiz contemplated the possibility of suspending a treaty by way of countermeasure.\textsuperscript{167} A clear-cut distinction between suspension and countermeasures could hardly be envisaged when the GATT was drafted.\textsuperscript{168}

The foregoing observations lend support to the view that the GATT derogated from the right to take countermeasures on the basis of general international law, since that right was not at the time clearly distinguished from that of suspending a treaty or parts thereof in cases of breach of the same treaty. However, even though the DSU has reproduced the language of GATT as regards ‘suspension of concessions or other obligations’, the same conclusion, i.e. ‘double derogation’ from the law of treaties and the law on responsibility, is not necessarily warranted in relation to WTO law. This is so because the distinction between suspension and countermeasures has recently become somewhat neater, particularly as a result of the completion of the ILC’s works on State responsibility under the guidance of special rapporteur James Crawford.

In the context of our analysis to consider the two doctrines as distinct may have important practical consequences. Since WTO clearly contracts outs of general international law on countermeasures, suspension could be used to ‘remove’ the contracting out clauses and trigger fall-back on countermeasures under general international law.

As is well known, the ILC has recently endorsed a highly technical notion of countermeasures, which, inter alia, aims at distinguishing them from suspension under the law of treaties.\textsuperscript{169} In its commentary to the ASR, the ILC considered that:
[w]here countermeasures are taken in accordance with Article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure.170

In a subsequent part of the commentary, the ILC stated that ‘[w]here a treaty is [...] suspended [...], the substantive legal obligations of the States parties will be affected’, whereas countermeasures ‘involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken.’171

If the way in which the ILC understands the distinction between suspension and countermeasures were correct, then Articles 22(2) and 23(2)(c), which refer to ‘suspension of … obligations’, could be interpreted as derogating from general international law not only with regard to countermeasures, but also with respect to suspension: according to the ILC, suspension, as opposed to countermeasures, affects ‘obligations’. At closer scrutiny, however, one realises that the ILC and its special rapporteur may have used the term ‘obligation’ as a metonymy for ‘treaty norm’ or ‘treaty provision’.172 In its Third Report, Crawford made the following remarks about the distinction between suspension and countermeasures, where no reference to ‘obligation’ appears:

The suspension of a treaty [...] places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation. By contrast, conduct inconsistent with terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts.173

The legal nature of Crawford’s metaphorical ‘limbo’ is described in plain terms by Article 72(1)(a) VCLT, according to which suspension ‘releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension.’174

The object of ‘suspension’ under the law of treaties may therefore be said to be the treaty (or parts thereof) as an instrument and not, directly, the individual obligations derived from the treaty or some of its parts.175 Obligations are indeed affected by suspension, yet only indirectly, i.e. as a consequence of the treaty (or parts thereof) having been suspended. Under the law of treaties, suspension means temporary non-application of the treaty or of some of its provisions in the mutual relations between the party affected by the violation and the author of the breach. Suspension of the obligations of the injured state vis-à-vis the wrongdoer is rather the hallmark of countermeasures under the law on responsibility. The obligation otherwise incumbent upon the injured state is ‘suspended’ by way of countermeasure until the wrongful act against which that measure was taken does not cease. Most notably, contrary to countermeasures, suspension proper entails that the wrongdoing state is released from the observance of the suspended treaty or provision as long as the suspension lasts.

Unlike suspension under the law of treaties, ‘suspension of concessions or other obligations’ in WTO law does not affect the obligations of the wrongdoing Member. Moreover, under Article 22(8) DSU, suspension of obligations, just like countermeasures, may only be applied ‘until such time as the measure found to be inconsistent with a covered agreement has been removed’, whereas according to the Vienna Convention, the decision as to when performance must be resumed seems to rest with the suspending party (at any rate, it was not made subject to the same stringent limits).176 Therefore, on a textual and contextual reading of the relevant WTO provisions, the terms ‘suspension of concessions or other obligations’, as employed in the DSU, may well be understood as referring
to countermeasures and not to suspension proper. Also teleological arguments can be found that point in the same direction.

As previously noted, WTO arbitral panels have consistently held that the objective of suspension of concessions or other obligations is to induce compliance with the DSB recommendations and rulings. The somewhat inconsequent interpretation of the equivalence standard given by the arbitral panels and, more recently, the hesitation by the arbitrators in the US - CDSOA case in determining the ‘real objective’ of suspension within WTO law, do not significantly detract from the validity of this characterisation.177 As is known, to induce compliance is the sole legitimate purpose of countermeasures.178 The objective of suspension under the law of treaties is admittedly less clear. One cannot exclude that suspension may, like countermeasures, be resorted to in order to force the wrongdoer into compliance. Nonetheless, it is sometimes recognised that suspension may also serve a different purpose, i.e. that of rebalancing the contractual relationship between the injured party and the author of the breach.179 The refusal of a Member to comply with a ruling of the DSB even in the face of WTO-authorised countermeasures may be characterized as an instance of contractual imbalance.

A Member which refuses to abide by a ruling of the DSB not only persists in the original violation, it also acts in breach of the DSU. The DSU, however, excludes non-performance of its provisions by way of countermeasure in response to such a breach.180 In those cases, then, the function of rebalancing the contractual relationship may be taken up by suspension under the law of treaties. In other words, it could be argued that while the DSU regulates resort to countermeasures, thus contracting out of general international law on the matter, it does not expressly derogate from suspension proper as a means of restoring the contractual balance. In this regard, the right to invoke a material breach as a ground for suspending the treaty in whole or in part may be usefully characterized as ‘an important principle of customary international law’ which could not ‘be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so’, as the ICJ once stated.181

If this pragmatic interpretation were to be accepted by the WTO adjudicating bodies, then fall-back onto general international law by means of suspension under the law of treaties would be permitted as soon as (i) the wrong-doing Member declares its intention not to abide by the ruling of the DSB; or (ii) countermeasures have been authorised and the wrongful conduct is not immediately discontinued. As we shall see later, this is without prejudice to the procedural steps that the Member seeking suspension should preliminarily take, were a dispute to arise between it and the losing Member with regard to the permissibility of suspension.

Having said that, we should now consider whether the continued refusal to abide by a ruling of the DSB may be regarded as a ‘material breach’ within the meaning of Article 60(3) VCLT. As is well known, the Vienna Convention defines ‘material breach’ for the purposes of Article 60 either as ‘a repudiation of the treaty not sanctioned’ by the Convention itself or as a ‘violation of a provision essential to the accomplishment of the object or purpose of the treaty.’ While aware of the difficulty of sorting out fundamental provision by reference to the treaty’s object and purpose,182 we believe nevertheless that the question should be answered affirmatively.

If the question is looked at from the standpoint of WTO law, the answer is relatively clear. Article 21(1) DSU provides that ‘[p]rompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolutions of disputes to the benefit of all Members.’ Effective resolution of disputes is in turn defined as an essential purpose of the WTO system by Article 3(3) DSU:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is
essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

An interpretation of general international law as reflected in Article 60(3) VCLT leads to the same result. The records of the ILC works on the law of treaties show that the very proponent of the notion of ‘material breach’ - the then special rapporteur Waldock - regarded the latter as including the refusal to abide by a jurisdictional decision taken pursuant to arbitration clauses contained in a treaty. In his Second Report, Waldock suggested that Article 20, which later became Article 60 VCLT, be drafted so as to include, within the concept of ‘material breach’, any:

refusal to accept an award or judgement rendered under [...] a provision of the treaty binding upon all the parties and requiring the submission of any dispute arising out of the interpretation or application of the treaty to arbitration or judicial settlement. 183

The ILC subsequently agreed to rephrase Article 20 along the lines proposed by Castrén. In the latter’s view, Waldock’s definition of ‘material breach’ was overburdened by unnecessary details, amongst which the explicit reference to conduct in defiance of arbitral awards. While Castrén regarded such conduct as undoubtedly constitutive of a material breach, he considered that such an hypothesis was covered by Article 20(4)(b) as modified in accordance with his amendment:

A breach of a treaty shall be deemed to be material if it is tantamount to setting aside any provision [...] the failure to perform which is not compatible with the effective fulfilment of the object and the purpose of the treaty. 184

Castrén’s Article 20(4)(b) is clearly the precursor of Article 60(3)(b) VCLT. Moreover, neither the transcripts of other ILC meetings nor the travaux préparatoires of the Vienna Convention indicate that defiance of arbitral awards has ever been contested as an example of material breach within the meaning of Article 60 VCLT. At the very least, WTO law should be considered as not derogating from general international law in this respect.

Once intra-systemic countermeasures have proven to be ineffective, the WTO Member which has taken them could therefore be entitled to invoke ‘material breach’ as a ground to suspend the WTO Agreements in whole or in part in its relation with the Member which refuses to abide by a ruling issued by the DSB. However, the determination as to the existence of a material breach is not something that the aggrieved Member may make unilaterally. 185 Under Article 23(1) DSU, WTO Members are bound to ‘have recourse’ to the rules and procedures of the DSU whenever they ‘seek redress of a violation’ of WTO law. Since suspension is indeed a means of redress, WTO adjudication may not be circumvented even in cases where a Member defies the authority of the DSB. 186 Nor could it be of any avail to invoke material breach as a ground to suspend Article 23(1) DSU itself with immediate effect. As the ICJ made clear in the ICAO Council case, the mere assertion by one party that a treaty containing a jurisdictional clause has been lawfully terminated is insufficient to make that clause ineffective. 187 The same obviously applies to the unilateral suspension of clauses such as Article 23(1) DSU.

We should finally consider which provisions of the DSU a developing country should choose as the ‘targets’ of suspension. The answer to that question may seem self-evident: the developing countries concerned should seek to suspend those DSU provisions which may stand in the way of an effective enforcement action vis-à-vis the wrongdoing Member. The targets should be, in particular, Article 22(4) DSU, setting out the equivalence standard. Under general international law, as reflected in Article 60(2) (b) VCLT, the Member which continues to suffer ‘nullification or impairment’ due to the refusal of another Member to comply with a ruling of the DSB would be certainly entitled to suspend Article 22(4) DSU vis-à-vis the wrongdoer. Once
those provisions of the DSU contracting out of the law of State responsibility have been put aside, ‘fall-back’ onto customary international law relating to countermeasures would become possible. In particular, the principle of proportionality would be revived.

Should WTO adjudicating bodies endorse our interpretation of the DSU with regard to the permissibility of collective countermeasures, while rejecting our alternative reading of the equivalence standard as set out in Article 22(4) DSU, fall-back onto general international law might come in handy to lift up the ceiling of permissible suspension, thereby paving the way for a stronger collective reaction against a refusal to abide by the DSB recommendations and rulings.

II. COUNTERMEASURES TAKEN IN RESPONSE TO VIOLATIONS OF NON-WTO NORMS (ICEVS)

1. Introduction

The present section addresses the controversial question of ‘trade sanctions’ against violations of non-WTO law. In particular, consideration is given to the issue of whether an act, inconsistent with WTO law and carried out by a WTO Member by way of countermeasure against a prior violation of a non-WTO rule, can be considered as lawful. As these acts entail the breach of obligations within the WTO system in response to prior violations of norms outside that system, we shall henceforward refer to them as ‘internal countermeasures for external violations’ (ICEVs).

Some commentators have argued that if a WTO-inconsistent act can be characterised as a lawful countermeasure under general international law, WTO adjudicating bodies should dismiss any claim alleging a breach of WTO obligations. If this contention proved to be correct, developing countries would be prevented from enforcing their rights under WTO law against Members adopting trade sanctions on grounds of a prior violation by the former of any obligation under international law, ranging from human rights and environmental law to foreign investment law. In Section II.2, we consider whether the WTO Agreements have expressly or impliedly derogated from the right to resort to ICEVs. In Section II.3 we shall examine the Soft Drinks case, where Mexico sought to justify a measure inconsistent with Article III GATT as a lawful countermeasure taken in response to prior violations of the North American Free Trade Agreement (NAFTA) by the United States. Mexico did not ground its argument directly on general international law. It argued instead that Article XX(d) GATT allows for the adoption of countermeasures, i.e. WTO-inconsistent measures applied by a Member to secure compliance with another Member’s obligations under international law. The Appellate Body did not limit itself to rejecting Mexico’s arguments. It further held that even if Article XX(d) GATT were to be interpreted as enabling ICEVs, an assessment of Mexico’s defence would have overstepped WTO jurisdictional limits as laid down in the DSU, for it would have required WTO adjudicating bodies to settle a dispute arising out of an alleged violation of a non-WTO norm. Some WTO Members took advantage of the Soft Drinks case to expound their views on the subject. In Section II.4, due heed will be paid to these stances taken by States, with a view to assessing the extent to which they can be relevant for the purposes of treaty interpretation. The Soft Drinks case also raises the issue of how the jurisdictional boundaries of the WTO dispute settlement process and the right to take trade countermeasures may interplay. Since WTO adjudicating bodies are prevented, given the restricted scope of their jurisdiction, from considering defences based on previous violations of non-WTO norms, the DSB may authorise suspension of concessions or other obligations in reaction to WTO-inconsistent conduct which could be characterised as a lawful countermeasure by a court or tribunal endowed with a wider jurisdiction. The issue of the extent tension between, on the one hand, the need to preserve the specificity of the system and, on the other, the quest to harmonise the modalities of its functioning with general international law, will be broached in Section II.5.
2. Did WTO Members relinquish their right to take ICEVs?

The WTO Agreements contain no express derogation from the right to resort to trade countermeasures in response to prior violations of extra-systemic rules of international law. Article 23(1) DSU provides that WTO Members, when they ‘seek redress of a violation’ of WTO law, ‘shall have recourse to, and abide by, the rules and procedures’ set out in the DSU itself. As previously noted, this provision works as a safety valve which, in principle, prevents any falling-back from WTO special secondary norms onto general international law.\(^189\) However, the scope of this clause is indisputably confined to situations where a redress for a breach of WTO law is being sought.\(^190\) Hence, countermeasures aimed at redressing a violation of a non-WTO norm fall outside the scope of that provision.

Article 23(2)(c) DSU, which specifically refers to the right to ‘suspend concessions or other obligations’, brings further support to this argument. While providing that WTO Members ‘shall follow the procedures set forth in Article 22 [DSU]’ before resorting to countermeasures, Article 23(2)(c) exclusively applies to acts that a Member may take in response to the failure of another Member to implement the recommendations and rulings of the DSB in a reasonable period of time. Moreover, paragraph 2 in its entirety is applicable only to cases where redress is sought within the meaning of paragraph 1.\(^191\) The fact that most authors hold that WTO law does not prevent States from resorting to ICEVs is therefore unsurprising.\(^192\) However, one should still consider the hypothesis of an implied derogation from general international law. As the ILC put it in its commentary to Article 55 ASR:

> For the lex specialis to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus the question is essentially one of interpretation.\(^193\)

This view finds support in the ELSI case, where a Chamber of the International Court of Justice (ICJ) found itself ‘unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.’\(^194\)

This dictum is often relied on in support of a strict presumption against derogation. It has to be conceded that the same dictum might also convey the idea that no such derogation need be made expressis verbis. What the words of a treaty must make clear is the intention to derogate by the contracting parties.\(^195\) Such an intention may be implied when it can be clearly and reasonably inferred from the text to be interpreted.\(^196\) In this perspective, a reference to the ICJ advisory opinion in the Namibia case is particularly apt:

> The silence of a treaty as to the existence of [...] a right cannot not be interpreted as implying the exclusion of a right which has its source outside the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.\(^197\)

On this basis, one may wonder whether the GATT contracting parties or, subsequently, the Members of the WTO, may be held to have implicitly waived their right to act inconsistently with WTO as a reaction to a previous violation of a non-WTO norm. Or, to approach the same issue from a slightly different perspective, the issue can be raised of whether the system’s ‘exceptions’ - for instance those provided for in Articles XX and XXI GATT - may be regarded as a self-contained set of justifications which somewhat prevent general rules on circumstances precluding wrongfulness, including the right to resort to countermeasures, from coming into play.

At least in theory, a distinction could be drawn between the said ‘exceptions’, on the one hand, and circumstances precluding wrongfulness, on the other. As the ILC Commentary to the Articles on state responsibility makes clear, those circumstances ‘are to be distinguished from the constituent requirements of the
obligation, i.e., those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligations itself.¹⁹⁸ Against this backdrop the GATT exceptions definitely appear as ‘constituent requirements of the obligation’, even though they are negatively worded.¹⁹⁹ The exceptions feed into the construction of the obligation. Exceptions and circumstances precluding wrongfulness operate at different levels: an act not covered by any of the former may nevertheless turn out to be lawful by virtue of one of the latter. As a consequence, an intention to waive the right to adopt countermeasures inconsistent with WTO law cannot be inferred from the mere existence of ‘exceptions’ in the WTO Agreements.

The fact that the GATT was endowed with its own set of exceptions does not betray an intention to waive the right to resort to trade measures in order to force compliance with international law norms external to the system.²⁰⁰ This contention, which finds its roots in the interpretive maxim expressio unius est exclusio alterius, would be unpersuasive for two reasons. First, whereas under general international law resort to countermeasures is permitted in order to induce compliance with any norms of international law, irrespective of their subject matter, the scope of the exceptions is much narrower. Furthermore, the general purport of the exceptions suggests that they were not expressly meant to waive the right to adopt trade sanctions to redress violations committed outside the multilateral trading system. Through the exceptions, the contracting parties reserved their right to pursue legitimate policy objectives (in such diverse domains as health, environmental protection, public morals, national security, fair competitive practices, etc.), their trade obligations notwithstanding. The issue of international law enforcement by means of countermeasures is an entirely distinct question. Had the drafters wished to address it, they would have done so by a different and clearer language. Moreover, had the contracting parties wanted to waive their right to resort to countermeasures, one would expect to find the echo of such an important discussion in the travaux préparatoires of the GATT.

The preparatory works show that the negotiators were aware of the issue of trade-restrictive measures adopted in response to prior violations of extra-systemic rules, yet they disposed of it quite rapidly at an early stage of the negotiations. During the discussion concerning a provision similar to Article XX GATT,²⁰¹ India proposed the insertion of a paragraph which would have allowed any Member of the International Trade Organisation (ITO):

to discriminate against the trade of another Member when this [was] the only effective measure open to it to retaliate against discrimination practised by that Member in matters outside the purview of the Organization, pending a settlement of the issue through the United Nations.²⁰²

The fact that the proposal was, for unrecorded reasons, rejected,²⁰³ may lend itself to conflicting interpretations. If the negotiating states had no intention to relinquish their right to retaliate against extra-systemic violations, then the Indian proposal was probably turned down as redundant. If, on the contrary, their intention was that of waiving their right, it is reasonable to speculate that they rejected the proposal because its acceptance would have disrupted a negotiating deal excluding the possibility to invoke the violation of a non-ITO norm in order to justify an act not in conformity with the ITO Charter. However, not only the existence of any such deal remains unsubstantiated, but it is also highly unlikely that States would have been able to strike it at an early stage of the negotiations without much ado.

Other writers have suggested a different interpretation of the relationship between the exceptions and the right to adopt ICEVs. It has been argued that the WTO Member’s right to adopt trade-restrictive measure with a view to redress violations of non-WTO norms finds its source not in general international law, but in WTO law itself, namely in Article XXI(b)(iii) GATT, which provides that the GATT:

shall not be construed to prevent any contracting party from taking any action which it considers necessary for the
protection of its essential security interests [...] in time of war or other emergency in international relations.

The notion of ‘emergency’ has been interpreted as including any situation ‘serious enough to permit States under general international law to resort to [...] economic reprisals’. Such situations would materialise whenever ‘a violation of a treaty or a customary law obligation’ is committed.\(^{204}\) This contention presupposes an unduly broad reading of the terms ‘essential security interests’, underlying the notion of ‘emergency in international relations’.\(^{205}\) Furthermore, the above construction starts from the assumption that the right to adopt countermeasures under general international law was completely pre-empted by WTO law. The soundness of the assumption, however, is yet to be proved.

As mentioned earlier, arguments similar to those which we have just examined were recently advanced in the context of the Soft Drinks case. Since Mexico could not plausibly invoke Article XXI GATT in order to justify its reaction to prior violations of the NAFTA allegedly committed by the United States, it chose to rely on Article XX(d) GATT. A more detailed analysis of this case may now be apt.

3. The Soft Drinks Case

In 2005, the United States decided to challenge before the WTO certain tax measures and other requirements recently imposed by Mexico on soft drinks and other beverages containing sweeteners other than cane sugar. The United States claimed that the new Mexican legislation entailed discriminatory treatment in violation of Articles III:2 and III:4 GATT. Mexico objected that the claims raised under Article III GATT were inextricably linked to a broader dispute unleashed by the United States’ decision to impede market access to Mexican cane sugar in breach of certain provisions of the NAFTA. Mexico alleged that while it had formally raised the issue within the NAFTA, the United States obstructed the proceedings by refusing to nominate panellists. Mexico’s main substantive argument was that even if the panel had found the challenged measures inconsistent with the GATT, these measures were nevertheless justified as lawful reprisals aimed at redressing the continuous violation by the United States of its substantive and procedural obligations under the NAFTA. Quite interestingly, instead of grounding its argument directly on general international law, Mexico ventured into the uncharted route of Article XX(d) GATT, which reads in the relevant part:

> nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...] necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement.

By so doing, Mexico set for itself the uneasy task of persuading the panel that the words ‘laws and regulations’ encompass international agreements, and that GATT-inconsistent measures may be ‘necessary to secure compliance’ with treaties other than the WTO Agreements.

The panel began its analysis of Article XX(d) by noting that the words ‘to secure compliance’ encapsulate the idea of enforcement.\(^{206}\) As ‘the notion of enforcement contains a concept of action within a hierarchical structure that is associated with the relation between the state and its subjects’,\(^{207}\) reasoned the panel, Article XX(d) must be deemed to be ‘concerned with action at domestic rather than international level.’\(^{208}\) The panel further observed that one may not regard countermeasures as a means to secure compliance within the meaning of Article XX(d), since the effects of retaliation are ‘inherently unpredictable.’\(^{209}\) By implication, the panel also held that the terms ‘laws or regulations’ refer exclusively to domestic law.\(^{210}\) Mexico’s argument was thus dismissed.

The Appellate Body upheld the panel’s findings on this particular point but modified the underlying reasoning.\(^{211}\) In particular, the Appellate Body refused to interpret Article
XX(d) to the effect that ‘the measure sought to be justified results in securing compliance with absolute certainty’.\(^{212}\) It then went on to consider the expression ‘laws or regulations’, observing that the term ‘laws’ in the plural would have been a rather unusual way to refer to international law norms.\(^{213}\) In fact, when the GATT makes a renvoi to international law, as in Articles X:1 and XX(h), it does so in unambiguous terms.\(^{214}\) On the other hand, the illustrative list of ‘laws or regulations’ set out in Article XX(d) confirmed, in the Appellate Body’s view, that the concept ‘involve the regulation by a government of activity undertaken by a variety of economic actors […] as well as by government agencies’.\(^{215}\) All these indicia led the Appellate Body to conclude that Article XX(d) refers ‘to 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’.\(^{216}\)

In this regard, it should be noted that more than twenty years ago a GATT panel had reached the same conclusion with respect to Article XX as a whole, albeit in an obiter dictum:

The Panel also noted that the United States prohibition of imports of all tuna and tuna products from Canada had been imposed in response to Canadian arrest of United States vessels fishing albacore tuna. The Panel could not find that this particular action would in itself constitute a measure of a type listed in Article XX.\(^{217}\)

The Appellate Body thus confirmed that Article XX GATT contains no loopholes through which a right to resort to trade countermeasures in order to induce compliance with extra-systemic norms can make its way into the system. Nonetheless, the outcome of the Soft Drinks case leaves the question which we had raised at the outset of Part II open. Since Mexico refrained from invoking general international law as a basis for its countermeasure-related argument, the panel and the Appellate Body were not required to, and did not answer that question. The Appellate Body made clear, however, that should a Member raise such a contention, WTO adjudicating bodies would lack jurisdiction to entertain the claim. In a rather far-reaching obiter dictum, the Appellate Body considered that even if Mexico were correct in assuming that the expression ‘laws and regulations’ in Article XX(d) GATT refers to both national and international law,

Mexico’s interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. [T]his is not the function of panels and the Appellate Body as intended by the DSU.\(^{218}\)

The Appellate Body laid great emphasis on the wording of Article 3(2) DSU, which states that the WTO dispute settlement system ‘serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements.’\(^{219}\) In its view, that provision rules out the possibility that the system ‘could be used to determine rights and obligations outside the covered agreements.’\(^{220}\) According to the Appellate Body’s dictum, WTO adjudicating bodies would thus be prevented from ascertaining any violations of non-WTO norms. Arguably, the same argument would equally apply to defences directly grounded on the right to resort to countermeasures under general international law. It should be stressed, however, that the purport of the Appellate Body’s findings is exclusively jurisdictional in character. What the Appellate Body made clear is that it will have no jurisdiction over the settling of a dispute involving ICEVs. Admittedly, this does not solve the substantive question, i.e. whether or not WTO law debar States from adopting ICEVs. It is to be expected that, sooner or later, the panels and the Appellate Body will be called on to answer this question, which remains open. Be that as it may, the Soft Drink case has shed light on two important and closely related points.
First, as a matter of substance, to assert the right to resort to trade countermeasures in order to redress the violation of an extraneous systemic norm is no defence before the WTO adjudicating bodies. Second, as a matter of procedure, the merely incidental assertion of such a right will not induce a panel to dismiss the case on jurisdictional grounds. It should be noted that Mexico’s main defensive argument in the Soft Drinks case was not its supposed right to retaliate on the basis of Article XX(d) GATT. Rather, Mexico had invited the panel to find and declare by way of a preliminary ruling that the dispute as a whole went beyond WTO jurisdiction, since only a NAFTA panel could have done justice to Mexico’s grievance against the United States of its market access obligations under the NAFTA. In answering that claim in the negative, the panel considered that the DSU gave it no discretion to dismiss a complaint for lack of jurisdiction once a request concerning the violation of Member’s right under the WTO Agreement had been properly put before it.\textsuperscript{221} The Appellate Body confirmed that finding.\textsuperscript{222}

4. The practice of WTO Members

Article 31(3)(b) VCLT directs the interpreter to take into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’ An analysis of the practice of GATT contracting parties and WTO Members is therefore necessary for a better understanding of the interpretative issue that we raised at the beginning of Part II. For the purposes of the following survey, we assume a broad notion of practice, which includes statements made by delegates of states as well as instances of actual recourse to countermeasures.\textsuperscript{224}

4.1. Pre-WTO practice

It should be noted at the outset that state practice dating back to the GATT 1947 gives no clear answer to our question. It may of course be argued that the GATT contracting parties generally failed to give expression to their opinio juris on this subject-matter because their right to adopt ICEVs under general international law was somewhat taken for granted. Be that as it may, we know of only one case in which that right was clearly asserted.

While an assessment of the soundness of this solution falls outside the scope of the present study, some of its possible implications regarding the enforcement of the DSB recommendations and rulings in situations similar to that of the Soft Drinks case can be considered.\textsuperscript{223} In fact, as long as the WTO adjudicating bodies strictly confine themselves to questions of WTO law, the issue of the lawfulness of ICEVs under general international law will continue haunting the WTO dispute settlement process. The fundamental question remains that of establishing whether the DSB may authorise the suspension of concessions or other obligations as a reaction against a WTO-inconsistent act, when the very same act is characterised either by its author, unilaterally, or even by a court or tribunal endowed with a wider jurisdiction than that of the WTO adjudicating bodies, as a lawful countermeasure. Only if one could convincingly establish that WTO Members are prevented from resorting to ICEVs, would this question become irrelevant. Let us then have a look at WTO Members’ practice.

In 1975, Iceland challenged Germany’s decision to stop direct landings of Icelandic fish in its ports. Germany sought to justify the allegedly GATT-inconsistent ban as a ‘countermeasure fully in line with the general principles and rules of international law’, as it had been taken in response to the seizure of a German trawler fishing off the coasts of Iceland.\textsuperscript{225} Interestingly, Germany considered that there was no need for it to invoke GATT exceptions: in its view, general international law alone sufficed to ground its claim. While Germany’s position seems to forerun contemporary critiques against the ‘clinical isolation’ of WTO law,\textsuperscript{226} Iceland viewed the multilateral trading system as a kind of self-contained regime, which ‘could only be concerned with the application and the functioning of the [GATT] and not with any other international principles.’\textsuperscript{227}
resort to ICEVs explicitly asserted by Germany was not clearly denied by Iceland. The dispute never reached the panel stage.

In other cases, trade-restrictive measures, although perhaps defensible also on the basis of general international law, have been justified exclusively by reference to GATT security exceptions, as did the United States with regard to the embargo against Nicaragua, and other GATT parties in various circumstances. From this practice, however, one cannot automatically infer an opinio juris to the effect that recourse to GATT exceptions was deemed inevitable since general international law would not have allowed the adoption of trade-restrictive measures in response to prior violation of extra-GATT norms. Equally inconclusive is the assertion once made by the United States that its import restrictions on tuna fished by Canadian vessels was imposed ‘in response to actions by Canada to implement its laws in areas of Canadian jurisdiction not recognized by the United States’, given that the latter – as noted by the panel seized of the dispute – eventually based its defence ‘entirely on Article XX(g).’

The stance adopted by Australia, Canada, the EC and its member states in the context of the Falklands/Malvinas crisis is more ambiguous. In this case, the trade sanctions inflicted upon Argentina were purportedly adopted ‘on the basis of [an] inherent right of which Article XXI GATT is a reflection’. While this statement is not explicitly accompanied by the assertion of a general right to resort to countermeasures, it nevertheless suggests the authors’ belief in the existence of a right to retaliate independent from, and possibly wider than, the GATT exceptions. In the ensuing debate within the GATT Council, New Zealand joined in this position by arguing that it ‘had an inherent right to take such action as a sovereign state.’ On the same occasion, though, at least Colombia, Cuba, the Dominican Republic, Ecuador, Peru and Uruguay considered the sanctions not only unjustifiable under Article XXI GATT, but also irremediably illegal under general international law. It is not always easy, however, to establish whether the blame was then directed against the adoption of collective countermeasures, as opposed to countermeasures tout court. Brazil, for instance, made it clear that its criticism ‘did not apply to the United Kingdom’. But even here it is nearly impossible to say whether Brazil alluded to the existence of a right by the United Kingdom under general international law or to the possibility of justifying the latter’s trade sanctions on the basis of the relevant GATT exceptions.

In other cases, the legal aspects of the dispute were so closely intertwined with political considerations that one may not draw from them any clear inferences. For instance, when the United States was asked to justify the decision to redistribute sugar quotas in favour of El Salvador, Honduras and Costa Rica, much to the detriment of Nicaragua, it explained that it ‘hoped to reduce the resources available to that country for financing its military build-up, and its support for subversion and extremist violence in the region’. The United States made it clear that it was not ‘invoking any exceptions’ under the GATT, for it considered that ‘its action in reducing the Nicaraguan quota was fully justified in the context in which it was taken.’ No specific legal argument was set forth by the United States. Similar considerations apply to the US attempt at justifying trade sanctions taken in response to Poland’s repressive policy against political dissent and General Jaruzelski’s decision to outlaw the trade union Solidarity. Nicaragua, on the contrary, expressed the view that the redistribution of sugar quotas could find no legal justification either within or outside the GATT system. In support of its contention, Nicaragua relied on the GATT Ministerial Declaration of November 1982. By that declaration, the contracting parties ‘under[took]’, individually or jointly, ‘to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.’ Even if one were to concede that an ‘undertaking to abstain’ is tantamount to a prohibition, the declaration begs the question of whether the contracting parties considered GATT-inconsistent countermeasures to be lawful.
As already noted, a survey of pre-WTO practice is fairly inconclusive. In most of the disputes analysed above, the availability of security exceptions within the GATT system contributed to cloud the issue; all the more so if one considers the tendency to characterise the said exceptions as ‘political’, almost entirely ‘self-judging’, and thus hardly amenable to legal considerations.244

At the same time, practice highlights a widespread political aversion vis-à-vis trade countermeasures. Commenting on the aforementioned Ministerial Declaration, the panel seized of the Nicaragua II case found that ‘embargoes such as the one imposed by the United States, independent of whether or not they were justified under Article XXI, ran counter the basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the less-developed contracting parties and to reduce uncertainty in trade relations.’245

Though never adopted, the panel report hints at a possible argumentative strategy for those wishing to plead against the existence of a right to adopt ICEVs under general international law. Since WTO law does not explicitly derogate from this right, the argument must heavily rely on teleological interpretation. An analysis of state practice within the WTO shows that the argument may carry some force with it. Most of that practice has been occasioned by Mexico’s countermeasures-related claim in the Soft Drinks case.

4.2. Recent practice

In the Soft Drinks case Mexico could have invoked general international law instead of choosing the narrow path of Article XX(d) GATT. Had Mexico’s argument succeeded, the outcome would have been the same as that of a general recognition that WTO law - including the conditions set out in Article XX - may be lawfully disregarded in response to a previous violation of a non-WTO norm. In fact, general international law sets limits to the adoption of countermeasures which are at least equivalent to the constraints imposed by Article XX(d), such as the necessity requirement.246 This is the reason why developing countries probably held their breath while waiting for the outcome of Mexico’s claim concerning countermeasures. Nonetheless, the Soft Drink case may be the object of a different reading. At closer scrutiny, Mexico’s argument on countermeasures could be meant to achieve another goal.

First of all, it may be argued that Mexico did not pursue its countermeasures-related claim with much conviction. Mexico must have known from the start that its reliance on Article XX(d) as a vehicle for asserting a right to retaliate had little chances of success in light of the plain wording of the provision. And yet it refrained from founding its claim on general international law. Such self-restraint by Mexico can be taken as evidence of the fact that Mexico believed that WTO Members are not allowed, outside the framework of Article XX GATT or of other ‘exceptions’, to act in breach of WTO law in response to a violation of a non-WTO norm.247 More generally, Mexico’s attitude can be taken to mean that the WTO Member’s right to adopt countermeasures is comprehensively regulated by the system, i.e. by WTO law itself.

It might be objected to this contention, that the seriousness of Mexico’s countermeasures argument is indirectly attested by its willingness to plead it all the way through the proceedings, including before the Appellate Body. However, this can be explained on several grounds. For one thing, the panel’s interpretation of Article XX(d) was defective, or at least disputable, in many respects, not necessarily related to the contested right to breach WTO law in retaliation. One example might be the panel’s finding that a trade-restrictive measure cannot be justified under Article XX(d) unless its effectiveness is not proven with absolute certainty, which the Appellate Body aptly reversed. Moreover, one has to keep in mind that Mexico’s principal argument was a jurisdictional one based on some sort of forum non conveniens doctrine, not the right to adopt countermeasures. Last but not least, Mexico was probably aware that its countermeasures-related claim was bound
to fail before the Appellate Body and knew very well that a ruling rendered by the latter would have carried much more weight than a finding by a panel. In fact, the Appellate Body even took the opportunity to clarify - obiter - that invoking the same right on the basis of general international law would be of no avail, at least within the framework of the WTO dispute settlement mechanism. It would be probably far-fetched to argue that Mexico intentionally used the claim concerning countermeasures as a decoy, so that an important issue of law could be clarified in the general interest of developing countries. Be that as it may, it is a fact that Mexico’s claim occasioned an authoritative ruling which will keep at bay possible threats of unilateral trade sanctions in the future.

Even if it may look odd at first sight, the line of reasoning followed by the United States in the Soft Drinks case goes in the same direction. In fact, the arguments by which the United States resisted Mexico’s attempt to justify under Article XX(d) GATT the right to act inconsistently with WTO law in order to induce compliance with non-WTO norms, would be equally applicable to a reasoning based on general international law. It may be aptly recalled at this stage that whether the right to adopt ICEVs is asserted on the basis of WTO law itself, i.e. by means of Article XX(d) GATT, or is found in general international law, the consequences are strictly the same. According to the United States, Mexico’s reading of Article XX(d) would have undermined Articles 22 and 23 DSU, for it would have opened the door to the suspension of concessions or WTO obligations ‘outside the rules of the DSU.’ Furthermore, such interpretation, if upheld, would have turned the WTO ‘into a forum of general dispute settlement resolution for all international agreements’, that is to say, ‘a forum for WTO Members to allege and obtain findings as to the consistency of another Member’s measure with any non-WTO agreement.’248 Of course, one may opine that these arguments - simple reflections of the United States’ mounting mistrust towards any form of international compulsory dispute settlement - are essentially procedural in nature; that they were not meant to deny the existence, under general international law, of a substantive right to adopt ICEVs. However, the United States’ assertions do not touch solely upon jurisdictional issues, including consideration of the propriety of its exercise. In fact, the arguments based on Articles 22 and 23 DSU are by themselves insufficient to substantiate the contention that unilateral, WTO-inconsistent measures aimed at countering the violation of external norms are not an option for WTO Members in their reciprocal relations. Presumably mindful of this, the United States framed its claim in much broader terms by maintaining that Mexico’s interpretation would have undermined not only Articles 22 and 23 of the DSU, but also the very logic of the dispute settlement system, which would consist of ruling out the adoption of any WTO-inconsistent measures except from those duly authorised through the procedures set out in the DSU. Even though the legal basis of the US argument - which is not a purely textual one - remains unspecified, its underlying contention aims at underscoring a discrepancy between Mexico’s claim based on Article XX(d) GATT and its engagements under the DSU. Indirectly, one can infer that the United States would be bound to maintain the same line of reasoning were it to address the issue from the perspective of general international law.

It is interesting to note that not long ago the United States seemed to take a different stance. When explaining the rationale of the trade-restrictive measures contained in the Cuban Liberty and Democratic Solidarity (Libertad) Act 1996 (better known as ‘Helms-Burton Act’), the US Congress referred not only to national security imperatives, i.e. reasons which could have been tested against the ‘security exceptions’ provided for by GATT law, but also to the need to respond to, inter alia, the ongoing violations of human rights perpetrated by the Cuban government.249 The importance of this reference in the statute should not be overrated though. As is well known, the EC challenged the WTO legality of certain aspects of the Helms-Burton Act. In late 1996, it also requested the DSB, and obtained, that a panel be seized of the matter,250 before dropping
its complaint one year later. Interestingly for our purposes, while the United States showed dismay for the EC’s decision to bring such complex and intensely political dispute before the WTO, it never tried to justify its legislation as a countermeasure resorted to on the basis of general international law, as hinted at in the statute. Rather, it invited the EC and its member states ‘to reflect on the fact that certain measures included in its request for the establishment of a panel had [...] been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of essential US security interests.’

Hence, the United States chose to argue and justify its position from ‘within’ the multilateral trading system, rather than invoking an alleged right to retaliate under general international law. At any rate, even if the United States’ stance may have been different in 1996, it would have been superseded by the contrary position that that country implicitly adopted in the Soft Drink case.

The Helms-Burton Act controversy caused other WTO Members to express their views on the matter. During a meeting of the DSB, Bolivia, speaking on behalf of the members of the Rio Group - which at the time comprised 18 Latin American countries as well as the Caribbean Community - characterised the Helms-Burton Act as a violation of ‘WTO principles’. On the same occasion, Cuba more explicitly stated that the US legislation, by questioning ‘the rejection of the unilateral and extra-territorial practices in international trade’, jeopardised ‘the preservation of basic principles of the multilateral trading system’.

Other interesting views were expressed by China, Guatemala and the EC acting as third parties in the Soft Drinks case. China has strongly disputed Mexico’s interpretation of Article XX(d) as a possible justification for the adoption of trade sanctions aimed at redressing violations of non-WTO norms. Such ‘scenario’, according to China, ‘is not consistent with the object and purpose of the GATT 1994’. Although, once again, no specific provision is cited in support of this contention China’s opinion is straightforward. It can be fairly inferred from it that China would be equally opposed to admitting of a right to retaliate, even if the latter were to be justified on the basis of general international law.

Similar views were expressed by Guatemala. According to that country, even if a violation of a regional agreement, such as the NAFTA, ‘cannot in itself be “isolated” or “exempt” from repercussions in the multilateral trading system’, it is all the same ‘impermissible for Members to adopt unilateral measures to try and correct the situation.’ As may be noted, Guatemala’s opinion is cast in terms broad enough to encompass unilateral countermeasures irrespective of their legal basis.

The EC’s position is more nuanced and not so easy to evaluate. Before the panel, the EC expressed its view in the following terms:

“At a systemic level, Mexico’s interpretation would transform Article XX(d) of the GATT 1994 into an authorisation of countermeasures within the meaning of public international law. It must be assumed, however, that if the contracting parties had intended such an interpretation, they would have expressed this in a clearer way.”

This statement, which encapsulates the EC’s main argument against Mexico’s reading of Article XX(d), is most interesting for what it says implicitly. Quite obviously, the statement implies that the contracting parties were, in the EC’s view, convinced that the GATT 1947 pre-empted recourse to ICEVs and that any contrary intention would have needed to be expressed in clear terms in the treaty text. However, the EC does not seem to have fully taken into account the implications of its statement. In a subsequent passage of its declaration, the EC described the issue at hand as a ‘difficult’ or ‘complex question’, whose resolution depended on the possibility of qualifying ‘the WTO Agreements [...] as a lex specialis precluding the taking of countermeasures.’ According to the EC, the question had been ‘addressed in the report of the International Law Commission at its fifty-third session.’
to refer to the ILC’s Commentary to Article 55 ASR. However, since the Commentary does not give any definite answer to the question raised by the EC, it is hard to tell what the EC actually meant.

The EC intervened again during the debate accompanying the adoption of the report by the DSB. This time, the EC cautioned against a broad reading of the Appellate Body’s obiter dictum according to which the WTO is not the appropriate forum for adjudicating non-WTO disputes. In its opinion:

interpreting and applying non-WTO law and ruling on non-WTO obligations, where this is relevant for deciding a WTO dispute, not mean “adjudicating” a non-WTO dispute. It could even be required, as WTO law and dispute settlement practice show[s], for example in relation to the Vienna Convention, the Lomé Convention, the UN Charter and IMF Understandings.

The EC was not suggesting, however, that WTO obligations could be disregarded in response to a violation of non-WTO norms. The EC’s contention relates generally to jurisdiction and applicable law but leaves the substantive issue - i.e. what the applicable law provides for - untouched. More noteworthy is the fact that the EC raised no objections to the Appellate Body’s interpretation of Article XX(d). Quite the contrary, it praised the AB for its ‘careful analysis’. As previously noted, there is apparently no point in praising a reading of Article XX(d) which keeps countermeasures out of the system, if one were eventually to admit that countermeasures can be let in through the back door of general international law. It is then plausible to argue that the EC’s opinio juris is in line with the mainstream.

The foregoing survey demonstrates that the practice of WTO Members tends to give support to the view that recourse to ICEVs is perceived to be at variance with some fundamental principles or objectives of WTO law. In the absence of any strong textual argument to the contrary, reference to practice may be important for the purposes of interpretation. Regardless of whether it meets the strict requirement laid down in Article 31(3)(b) VCLT, the practice of the members of the GATT and, later, the WTO seems to purport that recourse to ICEVs is regarded as impermissible under WTO law. This finding helps buttress the argument relying on a teleological interpretation of the WTO Agreements. In particular, it could be argued that a contrary interpretation would run counter the stated objectives of the DSU, namely the need for ‘providing security and predictability to the multilateral trading system.

5. Counter-retaliation as a consequence of limited jurisdiction?

As long as the WTO adjudicating bodies keep themselves within the ‘four corners’ of WTO law without settling the issue of whether ICEVs are allowed under general international law, the losing Member may be tempted to consider the relevant dispute as unsettled and the relative DSB ruling as a partial award. A statement made by the panel in the Soft Drinks case seems to lend credibility to the partial award hypothesis:

any findings made by this Panel, as well as its conclusions and recommendations in the present case, only relate to Mexico’s rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law.

Mexico had opined that, since the case brought before the WTO was only a part of a wider and still unsettled dispute, the panel should have considered the option of not recommending the withdrawal of the measures found to be inconsistent with the GATT. In response, the panel stated that it had ‘no discretion’ to depart from the rule set out in Article 19(1) DSU, which provides, in the relevant part, that where ‘a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.’ This conclusion was probably inevitable, as the panel found itself cornered. On the one hand, had the panel declined to recommend the withdrawal of the measure, it would have opened the floodgates
to all sorts of abusive litigation, based on the right to resort to ICEVs. On the other, had it examined the merits of those assertions, it would have broken away from its jurisdictional mandate, as traditionally conceived, thus renouncing to a powerful judicial policy tool to keep off non-WTO-related litigation.

Nonetheless, given the applicability of the negative consensus rule to all stages of the WTO dispute settlement process, the direction the panel has taken risks triggering a chain reaction which could ultimately result in the winning party taking WTO-authorised countermeasures in response to an act which could be regarded as lawful under general international law. If requested, the authorisation to retaliate will be automatically granted, as panels established under Article 22(6) would not be able to stop the process, for they surely lack jurisdiction to hear a claim based on non-WTO law. The WTO is arguably in need of an exit-strategy from this uncomfortable situation. In this respect, at least four scenarios can be envisaged.

A possible solution lies in the WTO adjudicating bodies pronouncing against a right to resort to ICEVs based on general international law. If this happened, the problems entailed by a ‘partial’ resolution of a dispute and its consequences would disappear. Since it seems unlikely that any such determination will be made in the near future, other possible avenues may be thought of.

One other possibility is for the parties to the dispute to stipulate an agreement which derogates from the standard terms of reference of panels provided for in Article 7(1) DSU. Such agreement could explicitly endow the panel with the authority to ascertain whether the WTO-inconsistent conduct alleged by one party is being lawfully maintained in response to a prior violation of a non-WTO norm by that party. If the latter proves to be the case, the agreement should also direct the panel to avoid any recommendations that the Member acting in a WTO-inconsistent manner bring its measures into conformity with the relevant WTO norms; otherwise the panel would be bound by Article 19 DSU to issue such recommendation.

This particular arrangement would have the advantage of preventing the DSB from authorising countermeasures in reaction to internationally lawful conduct. Under Article 7(1) DSU, the standard terms of reference may be derogated from by mutual agreement within 20 days from the establishment of the panel. However, in the Soft Drinks case the Appellate Body seemed to suggest that standards terms of reference are not the only impediment for WTO adjudicating bodies deciding ‘non-WTO disputes.’ As the Appellate Body put it, settling such disputes ‘is not the function of panels and the Appellate Body as intended by the DSU.’

The preclusion is cast in general terms and seems to derive from the DSU as a whole. In principle, two or more WTO Members should be allowed to contract out from the DSU inter se, unless it is established that the DSU forms part of a treaty-based ordre public from which no deviation is permitted. In other words the Appellate Body could decide to state clearly that the DSU places objective limits ratione materiae on the availability of the WTO dispute settlement mechanism to the organisation’s Members. This brings us to the third possible scenario.

The development by the Appellate Body of an ‘objective limits doctrine’ might over time lead to amending the DSU and providing the latter with a proper legal basis to settle disputes involving aspects of general international law. This development is predicated on the assumption that the concurrent effect of the limitation ratione materiae of the dispute settlement process together with the nearly automatic drive of the system towards granting authorisation to adopt countermeasures in case of non-compliance would make the WTO dispute settlement mechanism irremediably incapable of processing disputes where the respondents seek to justify their WTO-inconsistent conduct by reference to their right to adopt ICEVs under general international law. Confronted with this state of affairs, the organisation’s Members may therefore consider the possibility of amending the DSU so as to bestow wider jurisdictional powers on the WTO adjudicating bodies. This way the panels and the Appellate Body would
acquire the legitimacy to pass judgment on general international law issues and become an international judicial body capable of enforcing international law rules other than WTO ones. But the course of events can take still another direction.

Sooner or later, WTO adjudicating bodies will be faced with the embarrassing claim of a Member which complains of having been unlawfully subjected to WTO-authorised countermeasures, not because its WTO-inconsistent conduct has ceased, but, rather, because such conduct is aimed at redressing a persisting violation of an extra-systemic norm by another Member. The panels or the Appellate Body might be tempted to draw the consequences from the attitude they have recently taken in the Soft Drinks dispute and dismiss the claim, arguing that they could not examine it without being dragged into a ‘non-WTO dispute’. Yet this would probably be a potentially de-legitimising attitude to take. Alternatively, the claim could be dismissed on the grounds of the lex specialis character of WTO law, by saying that while the claimant may well be right in stating that the wrongfulness of its WTO-inconsistent conduct is precluded under general international law, WTO adjudicating bodies need not address that question, for WTO law must be construed to the effect that the consequences of WTO-inconsistent conduct (including WTO-authorised suspension of obligations) follow in any case, irrespective of whether that conduct is internationally lawful. This solution is not as strange as it may seem at first sight. While the idea of countermeasures taken in response to lawful conduct may look outlandish to the generalist international lawyer, it may simply constitute an application of the WTO regime’s specificity. WTO law seeks to curb trade retaliations as much as possible through substantive and procedural parameters which are – as interpreted at present – significantly stricter than those applicable to countermeasures under general international law. The envisaged solution would be perfectly coherent with the overall aims and goals of the WTO regime, for it would deter WTO Members from taking trade countermeasures against prior violations of non-WTO law. In other words, ICEVs would be internationally lawful and yet come at a price, namely the risk of becoming the target of WTO-authorised ‘counter-retaliations’. It would then be for each WTO Member to assess whether that price is worth paying.

Developing-country Members must be aware of which direction the WTO system may take in a not too distant future as a consequence of the presently ‘unstable equilibrium’ of the dispute settlement mechanism with regard to the issue of ICEVs. Against this background, they should try to rally round the outlawing of ICEVs, and retain the fourth scenario – WTO authorised counter-retaliation as a means to deter recourse to ICEVs – as a second-best solution.
ENDNOTES


3. Ministerial Decision on the Application and Review of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (15 April 1994), in WTO, supra note 1 at 408 (inviting ‘the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures’).


5. For a detailed study of the DSU review negotiations, see T. A. Zimmermann, Negotiating the Review of the WTO Dispute Settlement Understanding (2006).


that the existing institutional possibility for countermeasures in case of non-compliance is not a big hit with developing countries’).


14. J. Nzelibe, ‘The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism’, 6 Theoretical Inquiries in Law (2005) 215 at 217 (‘As a compliance strategy, targeting export groups for retaliation is optimal because it is self-enforcing and it exacts the maximum political costs on politicians in the scofflaw state. In contrast, an alternative remedy like monetary compensation to the injured country for violations would not only lack a self-enforcing mechanism, it would also tend to deflect the costs of non-compliance from a well mobilized group to a weak, widely dispersed, interest group’).

15. As is well known, under Article 3(2) DSU, the WTO Members ‘recognize that’ the WTO dispute settlement system ‘serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.’ In its first decision, the Appellate Body has understood Article 3(2) DSU as referring above all to the general rule of interpretation enshrined in Article 31(1) VCLT. See United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WTO Doc. No. WT/DS2/AB/R (29 April 1996), at 16 and 23.


18. Article 22 ASR provides that ‘[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part III [ASR].’ Article 49(2) ASR states that countermeasures ‘are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.’

19. The situation may have been different in the pre-WTO era. In fact, the wording of Article XXIII GATT is not as ‘exclusive’ as that of Article 23 DSU. Cf. L. Boisson de Chazournes, Les contre-mesures dans les relations internationales économiques (1992) 183.

20. See Article 3(7) DSU: ‘The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to the authorization by the DSB of such measures.’

21. According to G. Marceau, ‘WTO Dispute Settlement and Human Rights’, 13 European Journal of International Law (2002) 753 at 775, ‘[t]he possibility of using cross-retaliation in case of impracticable situations seems evidence of a desire to increase the effectiveness of the general rules on state responsibility.’ But the author wrongly assumes that general international law
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prohibits ‘cross-retaliation’, whereas it allows it in principle. Article 23(3) DSU has therefore shrunk rather than widened the Members’ room for manoeuvre in taking countermeasures.

22. Dispute Settlement Body, Negotiations on the Dispute Settlement Understanding: Special and Differential Treatment for Developing Countries. Proposals on DSU by Cuba, Communication from Cuba on behalf of Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Zimbabwe, WTO Doc. No. TN/DS/W/19 (9 October 2002); Dispute Settlement Body, Dispute Settlement Understanding Proposals: Legal Text, Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica, Malaysia, WTO Doc. No. TN/DS/W/47 (11 February 2003).

23. If the arbitrators were to abstain from making their own estimate, the requesting Member would have to submit a new proposal to the DSB, which might again meet with objections from the losing party and therefore be referred back to arbitration. As the arbitral panel noted in the Hormones case, ‘to avoid this potentially endless loop, the arbitrators [...] have to come up with their own estimate, i.e. their own figure’ (European Communities – Measures Affecting Meat and Meat Products (Hormones) (Original Complaint by Canada), Recourse to Arbitration by the European Communities under Article 22.6 DSU, Decision by the Arbitrators, UN Doc. No. WT/DS48/ARB (12 July 1999), at para. 12).

24. Ibid., at para. 18 (emphasis original).

25. Certain restrictions apply, however: see EC – Bananas, supra note 4, at para. 102 (‘If we were to make detailed, product-specific determinations as to whether suspension of concessions should have been deemed not practicable or effective by Ecuador, we would run the risk of contravening the requirement that Arbitrators “shall not examine the nature of concessions or other obligations to be suspended” explicitly set out in Article 22.7’).


27. European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 DSU, Decision by the Arbitrators, WTO Doc. No. WT/DS27/ARB (9 April 1999), at para. 6.5.

28. The Article provides, in relevant part, that ‘[i]f the Contracting Parties consider that the circumstances are serious enough, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.’

29. See Brazil – Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision by the Arbitrators, WTO Doc. No. WT/DS46/ARB (28 August 2000), at para. 3.44; Canada – Export Credits and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision by the Arbitrator, WTO Doc. No. WT/DS222/ARB (17 February 2003), at paras. 3.6-3.14; United States – Tax Treatment for “Foreign Sales Corporations”, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision of the Arbitrator, WTO Doc. No. WT/DS108/ARB (30 August 2002), at para. 5.58.

30. US – FSC, supra note 29, at para. 5.47. See also Brazil – Aircraft, supra note 29, at para. 3.51, footnote 51: ‘the term “appropriate” [...] may allow more leeway that the word “equivalent” as long as [the countermeasure] is not disproportionate’ (emphasis original).

32. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Brazil), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS217/ARB/BRA (31 August 2004), at paras. 3.7-3.9 (‘the concept of nullification or impairment relates to the measure that is in breach of the WTO obligations. It cannot be restricted to its trade effects […]. If a Member fails [to fulfil its obligations], the violating measure directly nullifies and impairs benefits or other Members’).

33. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Canada), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS234/ARB/CAN (31 August 2004), at para. 3.11 (‘there is nothing in Article 22.4 [...] or elsewhere to support the United States’ position that nullification or impairment refers exclusively to the trade effect of the illegal measure. According to Canada, the benefits being impaired in this case are the rights of Members to expect that the United States will take no measure other than those authorized under the WTO Agreement to respond to dumping, and the corresponding obligation of the United States not to take such measures.’)

34. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Chile), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS217/ARB/CHL (31 August 2004), at para. 3.09 (‘with regard to [...] rules-related measures, it is not necessary to apply a trade effect test. In those cases nullification or impairment is tied with the unlawful measure as such and the benefits that were affected by the violation. Those benefits are part of the balance of rights and obligations negotiated and accepted by WTO Members. The CDSOA is a measure of this type’).

35. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by the European Communities), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS217/ARB/EEC (31 August 2004), at paras. 3.7-3.9.

36. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by India), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS217/ARB/IND (31 August 2004), at paras. 3.7-3.9.

37. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Japan), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS217/ARB/JPN (31 August 2004), at paras. 3.7-3.9.

38. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Korea), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the Arbitrator, WTO Doc. No. WT/DS217/ARB/KOR (31 August 2004), at paras. 3.7-3.9.

39. United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Mexico), Recourse to Arbitration by the United States under Article 22.6 DSU, Decision by the
Arbitrator, WTO Doc. No. WT/DS234/ARB/MEX (31 August 2004), at paras. 3.7-3.9.

40. US – CDSOA, supra note 32, at para. 3.14 (‘the approach defended by Brazil is, if one excludes the arbitrations carried out under Articles 4.10 and 4.11 of the SCM Agreement, novel in the context of Article 22.6 of the DSU’).

41. Ibid., at para. 3.23.

42. EC – Hormones, supra note 23, at para. 37.


44. See Article 22(3) DSU.


46. EC – Bananas, supra note 4, at para. 95.


49. Cf. Dispute Settlement Body, Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, Communication from Ecuador, WTO Doc. No. TN/DS/W/9 (8 July 2002), at 5 (‘The level of nullification or impairment should be multiplied by a factor that is at least twice the amount authorized by the DSB for the suspension of concessions or other obligations’).

50. Ibid., at 5.

51. Dispute Settlement Body, Negotiations on Improvements and Clarification of the Dispute Settlement Understanding, Proposal by Ecuador, WTO Doc. No. TN/DS/W/33 (23 January 2003), at 2 (emphasis added). Ecuador coherently suggested that also Article 22 be redrawn. The new Article 22(2) DSU should then be modified so as to provide, in relevant part, that the DSB shall authorise suspension ‘taking account of the level of nullification and impairment indicated by the complaining party or established by the arbitrator under Article 21.3bis concerning trade affected by the challenged measure, including, in addition, the level of impact of the said measures on the economy of the developing country in question as estimated by the arbitrator.’ (ibid., at 4).

52. Dispute Settlement Body, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti (on Behalf of the LDC Group), WTO Doc. No. TN/
DS/W/37 (22 January 2003), at 3 (new subparagraph b) of Article 22(6) DSU).

53. Ibid. (new subparagraph b(i) of Article 22(6) DSU).

54. Ibid. (1st phrase of new subparagraph b(iii) of Article 22(6) DSU).

55. Ibid. (2nd phrase of new subparagraph b(iii) of Article 22(6) DSU).

56. US - FSC, supra note 29, at para. 5.10.

57. Ibid., at para. 5.30 (emphasis added).

58. Ibid., at para. 5.34.

59. In this respect, the partial rewording of Article 21(8) proposed by the LDC Group does not seem to be particularly bold: ‘If the case is one brought by a developing-country Member or a least-developed country Member, in considering what appropriate action to take, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy and the development prospects of the developing-country Members or least-developed country Members concerned.’ (Proposal by the LDC Group, supra note 52, at para. 11 (emphasis original)). See also Contribution of Ecuador, supra note 49, at 4.


61. See infra, text at notes 75-78.

62. See, e.g., S. Charnovitz, ‘Rethinking WTO Trade Sanctions’, 95 American Journal of International Law (2001) 792 at 810 (‘In approving trade sanctions for commercial purposes, the WTO subverts the goal of open trade by allowing governments to ban trade in response to violation by others. International agencies do not generally sponsor actions that contradict the agency’s purpose’).


64. Matsushita et al., supra note 17, at 200 (‘[T]he objective function of countermeasures must be re-considered. As things stand, there is no connection between the legislative postulate (to induce compliance) and what happens in practice, except for reasons having to do more with the identity of the party taking the countermeasures, rather than the countermeasure as such’).

65. EC - Bananas, supra note 27, at para. 6.3.

66. EC - Bananas, supra note 4, at para. 76. The fact that the quoted passage refers to the necessity of authorising developing countries to cross-retaliate does not deprive it of its general significance.

67. Ibid., at para. 72.

68. EC - Hormones, supra note 23, at para. 38.

70. Mexico’s reform proposal (see supra, text at note 48) is nothing but a reasonable interpretation of Article 22(4) DSU, which is, as may be recalled, silent on the critical date for the purpose of calculating nullification or impairment. Proposals such as this one should not be confused with an attempt at introducing the idea of ‘compensatory retaliation’ within WTO law (cf. P. Grané, ‘Remedies under WTO Law’, 4 Journal of International Economic Law (2001) 760). They are actually alternative ways of index-linking the quantification of nullification or impairment, their underlying rationale being that a controlled asymmetry between the current trade effects of a WTO-inconsistent measure and the amount of suspension, with the latter exceeding the former, would be more efficient in inducing compliance as well as in dissuading from the commission of wrongful acts. Unless trade countermeasures are seen from a rather implausible mercantilist perspective, i.e. one from which imports are perceived as economic losses, there is no point in arguing that these measures may be used as compensatory remedies for lost export opportunities due to the imposition of an illegal trade barrier. Trade countermeasures are self-damaging means to induce compliance and cannot compensate the injured party in any meaningful way. See, however, A. Desmedt, ‘Proportionality in WTO Law’, 4 Journal of International Economic Law (2001) 441 at 449 (where it is argued that ‘the effect of [DSU rules on retaliation is] to compensate the party prevailing in a WTO dispute, rather than to “induce compliance”’).


72. Ibid., at para. 5.22. See also United States - Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU, Award of the Arbitrators, WTO Doc. No. WT/DS160/ARB25/1 (9 November 2001), at para. 4.27 (‘the Arbitrators shall ensure that their determination of the level of nullification or impairment of benefits does not lead to a situation where potential EC suspensions of concessions or other obligations under Article 22.7 would in fact be “punitive”, because the level of EC benefits nullified or impaired by the operation of [the measure at hand] would have been overestimated’). It is of note that the adjective ‘punitive’ is put in inverted commas.

73. Cf. para. 7 of the Commentary to Article 51 ASR (reproduced in J. Crawford, The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries (2002) at 296), where it is stated that a measure ‘may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in Article 49.’ (emphasis added).

74. Brazil - Aircraft, supra note 29, at para. 3.55.

75. US - CDSOA, supra note 32, at para. 3.74 (emphasis original).

76. Ibid., at para. 3.70-3.71 (emphasis added on ‘seems to be generally accepted by Members’).

77. See Article 31(3)(b) VCLT: ‘There shall be taken into account, together with the context […] any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation.’ As the stance adopted by the arbitrators in the US - CDSOA cases seems to purport, it could hardly be argued that the subsequent practice of WTO Members has attained a level of generality and uniformity sufficient to establish an ‘agreement’ on the interpretation of the equivalence standard by previous arbitral panels.
as being the correct one. When the arbitrators state that the current reading of Article 22(4) DSU is a correct interpretation of that standard, they probably mean that a different, and no less correct, interpretation thereof might be required in different circumstances, i.e. when the complaining Member is a developing country and the respondent Member is a developed country.

78. US - CDSOA, supra note 32, at para. 6.6 (emphasis added on ‘seems to be generally accepted by Members’).

79. Cf. K. Anderson, ‘Peculiarities of Retaliation in WTO Dispute Settlement’, 1 World Trade Review (2002) 123 at 133. Anderson wondered why, from an economic point of view, ‘the value of imports curtailed, rather than a valuation of the national economic welfare consequences of the import barriers, is used to determine equivalence in retaliation to nullification and impairment’. In his view, ‘[t]he reason probably has much less to do with an understanding of economics than with the relative simplicity of the traditional concept of trade equivalence.’ Subsequent arbitral practice has rendered this explanation implausible, since lost trade is now calculated on the basis of econometric modelling that is inaccessible to the reader not trained in economics. On the role of economic analysis in the application of the equivalence rule, see A. Keck, ‘WTO Dispute Settlement: What Role for Economic Analysis?’, 4 Journal of Industry, Competition and Trade (2004) 365. The index-linking method we propose later in the text is indeed quite simple and recourse to it is argued on a normative basis, not in terms of economic soundness. On the fallacious and instrumental use of economic analysis see, recently, H. Spamann, ‘The Myth of “Rebalancing” Retaliation in WTO Dispute Settlement Practice’, 9 Journal of International Economic Law (2006) 31.


81. Ibid., at para. 3.120.

82. Ibid., at para. 3.123.


84. Ibid., at 976: ‘It is no longer the interest of the adversely affected party that counts, but the common interest. Indeed, violation of the law that applies to the community is in itself an infringement of the rights of all of the States parties, which are all entitled to feel that they have been adversely affected. In other words, responsibility is generated by an objective “fact”: it is the result of non-compliance, whatever the consequences may be.’

85. See Dispute Settlement Body, Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, WTO Doc. No. TN/DS/W/17 (9 October 2002), at para. 15: ‘LDCs are of the view that one solution to this handicap is to adopt a “principle of collective responsibility” akin to its equivalent under the United Nations Charter’ (emphasis original).

86. The Africa Group has proposed to add to the DSU a new provision stating that ‘[i]n the resort to the suspension of concessions, all WTO Members shall be authorised to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of
benefits (Dispute Settlement Body, Negotiations on the Dispute Settlement Understanding, Proposal by the African Group, WTO Doc. No. TN/DS/W/15 (25 September 2002), at para. 6). In a subsequent and more detailed proposal, the Africa Group suggested to add a new Article 22(6)(c) DSU, providing that in cases ‘brought by a developing or least-developed country Member against a developed-country Member [...] in order to promote the timely and effective implementation of recommendations and rulings, the DSB, upon request, shall grant authorization to the developing or least-developed country Member and any other Members to suspend concessions or other obligations within 30 days.’ (Africa Group Proposal, supra note 47, at 4). The proposal tabled by the LDC Group differs from that of the Africa Group in two main respects. As previously noted (cf. supra text at notes 52-55), the LDCs proposal seems to suggest that collective countermeasures be available exclusively in the interest of least-developed country Members. In fact, the LDC Group has proposed the insertion of a new Article 22(6)(b) DSU to the effect that ‘[w]here the case is one brought by a least-developed country Member against a develop-country Member [...] in order to promote the timely and effective implementation of recommendations and rulings made in favour of least developed country Members, the DSB, upon request, shall grant authorization to all Members to suspend concessions or other obligations within 30 days unless the DSB decides by consensus to reject the request.’ (LDC Proposal, supra note 52, at 3). See, however, the Proposal by the LDC Group, supra note 85, at para. 15 (‘In cases where a developing or least-developed country Member has been a successful complainant, collective retaliation should be available automatically, as a matter of special and differential treatment’). A second difference lies in the fact that the LDC Group suggests that all Members be authorised to retaliate (apparently upon request of the aggrieved Member), whereas the African Group’s proposal seems more flexible in this respect (‘shall grant authorization to [...] any other Members) and should perhaps be read as implying that only the Members which formally request to share the burden of collective enforcement may be authorised to take countermeasures against the wrongdoer.


89. The latter objective of the DSU is challenged by some authors, who maintains that compliance with the WTO law is ‘elective’ from the standpoint of the losing party (see J. Bello, ‘The WTO Dispute Settlement Understanding: Less is More’, 90 American Journal of International Law (1996) 416). Strong scepticism regarding the binding character of DSB recommendations persists among trade law scholars. This view is based on the assumption that the WTO treaty is analogous to a private law contract. For instance, Sykes reaches the conclusion that DSB recommendations are non-binding on the premise that the WTO is comparable to a ‘multiparty contract’, which characterisation is conducive to the possible application of the ‘efficient breach’ theory. As is known, the efficient breach theory submits that in some cases it would be preferable, as a matter of economic strategy, not to perform the obligation of a contract and to pay damages instead. According to this line of thought, the WTO agreements are to be considered as ‘incomplete contracts’ in which non-compliance is an option (cf. A. Sykes, ‘The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding:
Damages or Specific Performance?’, in M. Bronckers and R. Quick (eds.), New Directions in International Economic Law: Essays in Honour of John Jackson (2000) 347 at 349-351). This opinion is not persuasive. Although the binding character of the DSU recommendations is not expressly stated in the treaty, it can be clearly inferred from several provisions of the DSU (cf. Articles 3(7), 21(1), 22(1) and 26(1) DSU). In a reply to Bello’s arguments, Jackson convincingly argued that the DSU is clearly geared towards ensuring compliance and not towards re-establishing a fair trade balance. This conclusion can be reached, according to Jackson, by means of a close analysis of the WTO/DSU texts and the policy underpinnings of the GATT/WTO. His textual analysis demonstrates that the WTO Charter and the DSU ‘overwhelmingly imply […] that the legal effect of an adopted panel report is the international law obligation to perform the recommendation or to comply with the rulings of the panel or appellate report.’ (See Jackson, supra note 10, at 115). It is thus quite clear that the objective of the DSU is not to rebalance interests between two Members as was the case under the GATT, but rather to induce compliance of one Member towards all other Members. According to some authors, evidence of this contention can be found in the fact that the ‘mootness doctrine’ is considered as non-applicable to the dispute settlement system (Y. Iwasawa, ‘WTO Dispute Settlement System as Judicial Supervision’, 5 Journal of International Economic Law (2002) 287 at 295).

90. The ASR suggest that in the typical bilateral relationship rights are linked to corresponding obligations. Article 42(a) ASR specifies that this obligation is owed in the first place to the “injured state”, the injured state being defined as “the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act”. With regard to collective obligations, Article 42(b) states that the obligation may be owed to the international community as a whole, or to a group of states specifically affected. Furthermore, Article 48 provides that responsibility may be invoked by a State other than an injured state provided that the obligation (erga omnes partes) is owed to a group of States and is established for the group’s collective interest, or is an obligation (erga omnes) owed to the international community as a whole. For an analysis of the consequences of the classification with regard to State responsibility, see L.-A. Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, 13 European Journal of International Law (2002) 1127. See also, for a clarifying discussion, C. Tams, Enforcing Obligations Erga Omnes in International Law (2005) 17-96.


93. See for instance Pauwelyn, supra note 91, at 909 and 938.

94. See, e.g. the statement by Brazil in European Communities - Measures affecting the importation of certain poultry products, Report of the Appellate Body, WT/DS69/AB/R (13 July 1998), at 15, where it described the WTO Agreement as ‘an international treaty laying down contractual obligations and not erga omnes obligations.’

96. Ibid., at 440. Carmody therefore relies on a very broad interpretation of legal standing and affirms that ‘the more appropriate provision on standing would be that applicable to collective obligations under ASR Arts. 42(b) and 48.1 (a)’.


98. Gazzini, supra note 92, at 727: ‘WTO obligations - and international trade obligations in general - are always legally divisible. They allow selective compliance and are capable of affecting or threatening to affect the rights of one or more - but not necessarily all - other Members. Since it is always possible to treat differently the products originating from or destined for certain Members or negatively to affect the trade interests of some - but not necessarily all - Members, these obligations can be split into a bunch of bilateral relationships.’ It should be noted, however, that such observations are not necessarily applicable to WTO institutional provisions such as those contained in the Agreement Establishing the WTO or the DSU.

99. Emphases added. Cf. Institut de droit international, 5th Commission: Obligations and Right Erga Omnes in International Law, Resolution on Obligations Erga Omnes in International Law, Krakow Session (27 August 2005), Article 1(b), stating that ‘an obligation erga omnes is [...] an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.’ (72 Annuaire de l’Institut de droit international (2006) 131).


101. Ibid., at para 133.

102. Ibid., at para 135.

103. Ibid., at para 136. Point (iii) is a quote from the panel report: European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, Report of the Panel, WT/DS/R/USA (22 May 1997), para. 7.50. .

104. Ibid., at para 137.

105. Ibid., at para 138.

106. Matsushita et al., supra note 17, at 26.

107. Cf. P. J. Kuyper, ‘The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?’, 25 Netherlands Yearbook of International Law (1994) 227 at 240 : ‘The GATT in practice comes very close to accepting an actio popularis. But one must admit that this is, in part, a consequence of the wide responsibility for lawmaking activities in GATT [...] and laws by nature can produce consequences vis-à-vis all contracting parties. Thus the impression is created that any contracting party can attack any law that is contrary to GATT before a panel.’ Kuyper concludes that the GATT system could not be construed as allowing actio popularis since under the GATT retaliation was the province of the party who had won the case: ‘though the GATT may be close, it still does not recognize a true actio popularis in the general interest’ (ibid., at 241).


110. This seems to be the case of the second edition of M. Matsushita, T. J. Schoenbaum and P. C. Mavroidis, The World Trade Organization. Law, Practice and Policy (2006) 114, where the authors add, in what looks like a ‘postscript’ footnote numbered ‘47a’, that Article XXIII(1) GATT ‘seems to suggest that a contracting party can bring a case before the WTO Dispute Settlement Body with regard to a measure of another contracting party to the WTO for a systemic reason even if there is no immediate nullification and impairment caused by it. In other words, a party can bring a case before the WTO Dispute Settlement Body with regard to a measure of another party in order to maintain the soundness of the WTO system even if there is no immediate trade effect on the claiming party.’ (emphasis added).


112. Iwasawa, supra note 89, at 294: ‘The WTO Agreement explicitly authorizes a member to bring a complaint alleging that the attainment of an objective of the WTO Agreement is being impaired. A member may do so even when it has suffered no direct injury. Thus, the WTO Agreement is one of the international agreements which explicitly allow an actio popularis. If members of the WTO make regular use of such power and bring complaints based on community interests, one may say that WTO dispute settlement functions as judicial supervision. In reality, few complaints of such a kind are brought to the WTO’.

113. EC – Bananas, supra note 103, at para. 7.47.

114. It is worth noting that Pauwelyn employed the term ‘fall-back’ in three different ways: a) ‘fall-back’ onto general international law as a consequence of a treaty not having contracted out expressly from general international law on remedies (in this case, ‘fall-back’ boils down to a strong presumption against derogation); b) ‘fall-back’ as interpretation of treaty rules in light of general international law; c) ‘fall-back’ onto general international law in spite of the fact that the treaty has derogated from it (J. Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (2003), 220, 231). Our discussion is limited to ‘fall-back’ under c). After all, using ‘fall-back’ in a triple meaning risks being misleading. If general international law is not derogated from, as in hypothesis a), there is nothing to fall-back from in the first place, whereas in hypothesis b), no fall-back takes place, if fall-back is properly understood as entailing the direct application of general international law.

115. As is well known, the International Court of Justice (ICJ) endorsed the notion of ‘self-contained regimes’ in the US Diplomatic and Consular Staff case, where it was stated that ‘[t]he rules of diplomatic law [...] constitute a self-contained regime’, in that they specify ‘the means at the disposal of the receiving State to counter any [...] abuse of diplomatic privileges and immunities, and ‘[t]hese means are by their nature, entirely efficacious.’ (Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment of 24 May 1980, ICJ Reports 3, at para. 40).

116. On these issues see, in addition to the writings cited below, P.-M. Dupuy, ‘L’unité de l’ordre
The text provided is a natural representation of the given document.
Decisions (2001) 29, ‘[n]othing in Article 23 of the DSU [...] amounts to an express derogation from the right to adopt countermeasures when a losing party fails to implement a decision of the dispute settlement organs and the remedies provided for in the treaty have been exhausted without any positive result.’ The author seemed to contend that, as WTO rules do not cover situations of regime failure, general international law continues to apply in those situations. This contention is unpersuasive. We recall that Article 23 DSU provides that, when WTO Members ‘seek the redress of a violation of obligations [...] under the covered agreements [...] they shall have recourse to, and abide by, the rules and procedures of this Understanding.’ A Member’s refusal to comply a DSB ruling is nothing but a violation of a covered agreement, given that DSU itself is a ‘covered agreement’, as Appendix 1(B) DSU makes clear. Therefore, Article 23 DSU applies also to situations of regime failure, i.e. when the ruling of the DSB is disregarded by the losing party. And since Article 23(2)(c) DSU derogates from general international law, at least as far as countermeasures are concerned, Garcia-Rubio’s argument fails (note that we interpret, and reject Garcia-Rubio’s argument in a way that partially differs from Pauwelyn’s, supra note 114, at 231, footnote 188).


128. Ibid., at 507.

129. Ibid., at 508-509.

130. Simma advanced similar ideas in his seminal ‘demystification’ of self-contained regimes. See Simma, supra note 123, at 135 (‘the adoption of “self-contained regimes” is to be welcomed if these leges speciales increase the effectiveness of the primary rules concerned and introduce orderly procedures and collective decisions’; hence, ‘the exclusion or modification through a “self-contained regime” of “normal” secondary rules which leads to a “softening” of the legal consequences of wrongful acts should not be easily presumed’).


132. Simma, supra note 123, at 136.

133. Cf. supra note 126.


135. Ibid.

136. Ibid. (emphasis added).

137. Ibid., at 40-41, para. 115.

138. Ibid., at 41, para. 117.

139. Ibid., at 42, para. 125 (c).

140. Ibid., at 42, para. 125 (b). Emphasis original.

141. In Arangio-Ruiz’s view suspension and termination can be regarded as particular forms of countermeasures. See ibid., at 41, para. 117 (‘suspension or termination by way of countermeasures’).
142. Such a strong presumption against derogation actually falls foul of case law according to which effect must be given to clearly implied intention to derogate, even when the rule allegedly derogated from is an ‘important’ one. See Elettronica sicula (ELSI) (United States v. Italy), Judgment of 20 July 1989, ICJ Reports 42, at para. 50.

143. Cf. infra, Part II (on trade-restrictive countermeasures taken in response to violation of non-WTO norms).

144. Cf. infra, section I.4.2.

145. Cf. Article 56 VCLT.

146. Simma, supra note 123, at 136 (‘By establishing “self-contained regimes”, States contract out of the general rules on the consequences of treaty violations on the expectation that these regimes will work to their mutual benefit. If the balance thus foreseen appears to them to be later destroyed, the principles of inadimplenti non est adimplendum or of the clausula rebus sic stantibus will work as strong rationales for a fall-back on the general regime’).

147. Report of the Study Group, supra note 120, at 80, para. 150.

148. Ibid., at 73, para. 137.

149. Ibid., at 98, para. 188.

150. Cf. Simma and Pulkowski, supra note 127, at 492-493 (‘the principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts as codified by the ILC, in particular the application of countermeasures by an injured state’).

151. Since withdrawal from the WTO is possible on six-month notice, our analysis can leave aside termination of treaties. See also infra, text at notes 157-159.

152. Article 42 VCLT provides that ‘[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.’ It may be argued that no derogation is possible from the clausula rebus sic stantibus, for even the derogation itself would be swept away by a fundamental change of circumstances within the meaning of Article 62 VCLT. It is submitted, however, that the parties to a treaty may relinquish at least their right to suspend the treaty in cases of fundamental change of circumstances. Since withdrawal from the WTO can be effected on six-month notice, we can leave here unprejudiced the question whether the parties to a treaty may also renounce their right to terminate the treaty in such cases.

153. Article XXIII(2) GATT provides, in relevant part: ‘If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate under the circumstances.’

154. J. Pauwelyn, supra note 114, at 228 (emphasis in the original).

155. Ibid., at 230.
Authorised waivers are only slightly more plausible than withdrawal as intra-systemic functional substitutes of suspension. In relevant part, Article IX(3) WTO provides that ‘[i]n exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members’. Waivers were not conceived of as a means to react against prior violations of WTO law. Moreover, unlike the decision to resort to suspension, their adoption requires a collective decision. Therefore, Article IX(3) WTO cannot be regarded as a clear, if implicit, derogation from the right to suspend the treaty or parts thereof in cases of material breach.

Cf. R. Pisillo Mazzeschi, Risoluzione e sospensione dei trattati per inadempimento (1984), passim. See also A. McNair, The Law of Treaties (1961) 573 (suspension is a form of peaceful reprisal); M. Akehurst, ‘Reprisals by Third States’, 44 British Yearbook of International Law (1970) 1 at 6 (relationship between suspension and countermeasures is one between species and genre).

Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (Portugal/Allemagne), Award of 31 July 1928, 12 Reports of International Arbitral Awards (1949) 1011 at 1026 (emphasis added).


Among recent writings giving little importance to the distinction, see A. Yahi, ‘La violation d’un traité : l’articulation du droit des traités et du droit de la responsabilité internationale’, 26 Revue belge de droit international (1993) 437 at 452 and 469 (suspension is but a form that countermeasures may assume); P. Weckel, ‘Convergence du droits des traités et du droit de la responsabilité internationale à la lumière de l’Arrêt du 25 septembre 1997 de la Cour internationale de Justice relatif au projet Gabčíkovo-Nagyamaros (Hongrie/Slovaquie)’ 102 Revue générale de droit international public (1998) 647 at 666 (‘Ce serait un pur artifice que de distinguer l’interruption de l’exécution de l’accord de la suspension de son application.'
En effet, la suspension est associée dans la Convention de Vienne à la terminaison parce que des motifs identiques peuvent les justifier, mais les deux actes n’ont pas la même portée, la suspension n’affectant pas la vigueur du traité. Par rapport à la terminaison, la suspension se présente donc comme une notion autonome relevant de l’application du droit et se rattachant cumulativement à la théorie des actes juridiques et à celle de la responsabilité’’; P.-M. Dupuy, ‘Droit des traités, codification et responsabilité internationale’, 43 Annuaire français de droit international (1997) 7 at 22-23 (‘L’article 60 de la convention de Vienne […] énonce […] une norme secondaire. Il se place également sur le même plan que le droit de la responsabilité. Ce dernier concerne en effet par excellence les conséquences de la violation du droit’’).

169. A. Gianelli, ‘Aspects of the Relationship Between the Law of Treaties and State Responsibility’, in Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz (2004) 757 at 793 (‘it has been mostly through the clarification of the concept of countermeasure that the ILC has come to propose a relation among the different concepts that appears convincing’).

170. Crawford, supra note 73, at 168, para. 4 (emphasis added). See also ibid., at 282, para. 5 (‘Where a treaty is […] suspended in accordance with Article 60 [of the Vienna Convention on the law of treaties], the substantive legal obligations’).

171. Ibid., at 282, para. 5. Among those sharing that view, S. Forlati, Diritto dei trattati e responsabilità internazionale (2005) 69.

172. There is indeed something illogical in the terminology employed by the ILC in its commentary to the ASR: as long as the wrongful act lasts, there is an obligation which does not oblige its addressee for the time being. In what sense can one speak of an existing ‘obligation’ during that period?


174. Emphasis added.


176. As is known, the Vienna Convention is silent on the issue.

177. See supra, Section I.2.3.

178. Cf. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, ICJ Reports 7, at para. 87 (‘purpose must be to induce the wrongdoing State to comply with its obligations under international law’).

179. In the commentary to Article 57 (the precursor of Article 60 VCLT), the ILC observed that ‘[t]he right to take this action [termination or suspension in cases of material breach] arises under the law of treaties independently of any right of reprisals, the principle being that a party cannot be called upon to fulfill its obligations under a treaty when the other party fails to fulfill those which it undertook under the same treaty.’ (Yearbook of the International Law Commission (1966), vol. II, 255, para. 6). As pointed out by L.-A. Sicilianos, ‘The Relationship Between Reprisals and Denunciation or Suspension of a Treaty’, 4 European Journal of
International Law (1993) 341 at 345, ‘although in most cases reprisals of a coercive character, denunciation and suspension of the application of a treaty generally have a corrective aim, which is called for by the imbalance caused by the breach in the complex of reciprocal rights and obligations of the parties.’ See also the classical contribution by B. Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law’, 20 Österreichische Zeitschrift für öffentliches Recht (1970) 5 at 20-21. Contra Mazzeschi, supra note 161, at 316. Cf. also Arbitral Tribunal, Case Concerning the Air Service Agreement of 27 March 1946 (United States v. France), Award of 9 December 1978, 54 International Law Reports (1979) 304 at 339, para. 90 (‘it is necessary carefully to assess the meaning of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution’).

180. Cf. Article 22(3) DSU: ‘In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: [...] (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s) [meaning ‘sectors’ of trade obligations ‘in which the panel of Appellate Body has found a violation or other nullification or impairment’], it may seek to suspend concessions or other obligations in other sectors under the same agreement; [...] (g) for purposes of this paragraph, “agreement” means: (i) with respect to goods, the agreement listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements; (ii) with respect to services, the GATS; (iii) with respect to intellectual property rights, the Agreement on TRIPS.’ (emphasis added). As may be noted, no suspension of obligations deriving from the DSU itself is envisaged.

181. ELSI, supra note 142, at para. 50.


185. Cf. Report of the Study Group, supra note 120, at 101, para. 194(3): ‘When a special regime “fails” cannot always be determined from within that regime, however. Inability to attain an authoritative determination of failure may be precisely one aspect of such failure - e.g. when a special dispute settlement system ceases to function.’ This does not seem to be the case of the WTO dispute settlement system, at least from a procedural point of view.

186. It should also be noted that the VCLT entitles the state specially affected by a material breach of a multilateral treaty to which it is a party, not to suspend, but to invoke that breach as a ground for suspending the operation of the same treaty in whole or in part vis-à-vis the wrongdoing state. Absent any other dispute settlement procedure, a state party to the VCLT which seeks suspension on grounds of material breach is bound to follow the procedure set out in Article 65 to 67 VCLT. As regards general international law on the matter, in Gabcikovo-Nagymaros the ICJ significantly took note of the fact that the disputing parties
agreed that ‘Articles 65 to 67 [VCLT], if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith’ (Gabcikovo-Nagymaros, supra note 178, at para. 109). At any rate, for disputes concerning alleged material breaches of WTO rules, the DSU derogates from these procedural principles as well as from Article 65 to 67 VCLT. Article 65(4) VCLT provides that ‘[n]othing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provision in force binding the parties with regard to the settlement of disputes.’ Article 66 and 67 VCLT applies only if paragraphs 1 to 3 of Article 65 VCLT are not derogated from in accordance with Article 65(4) VCLT. Therefore, even from the point of view of general international law as reflected in the Vienna Convention, the right to suspend the WTO Agreement and its Annexes in whole or in part may not stem from a unilaterally-ascertained material breach thereof. Claims of material breach must be brought before and adjudicated by the WTO dispute settlement organs.

187. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgement of 18 August 1972, ICJ Reports 46, at para. 32.

188. See, e.g, Pauwelyn, supra note 114, at 232.

189. See supra, Section I.4..

190. ‘...or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements’.

191. This interpretation is supported by the wording ‘in such cases’.

193. See Crawford, supra note 73, at 307 (emphasis added).

194. ELSI, supra note 142, at para. 50.

195. The interpretative principle expressed in ELSI seems to get stronger the higher the importance of the principle allegedly contracted out of. One may therefore think of an inverse relation between the importance attached to the principle in question and the level of circumspection required by the interpreter confronted with allegations that the same principle was implicitly derogated from by the treaty to be interpreted. At any rate, it could hardly be denied that the right to resort to trade countermeasures within the parameters set by customary international law is generally perceived as an important prerogative of states. Perceptions may change, however. See infra Section II.3.

196. Contra Garcia-Rubio, supra note 192, at 463-464. See, however, Korea - Measures Affecting Government Procurement, Report of the Panel, WTO Doc. No. WT/DS163/R (2000), at para. 7.96: ‘Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.’ (emphasis added). Cf. Picone and Ligustro, supra note 140, at 633.


198. Crawford, supra note 73, at 162.

199. Cf. Article XX GATT: ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...] necessary to protect public morals’, etc. (emphases added).

of any of the other exceptions pursuant to Article XX. Soft Drinks barred the first way [...] and the second remains possible but exceptional.

201. At that time Article 43 of the Draft Charter of the International Trade Organization.


205. As persuasively argued by Fernández Pons, supra note 192, at 98-99.


207. Ibid., at para. 8.178.

208. Ibid., at para. 8.179.

209. Ibid., at para. 8.186.

210. Ibid., at para. 8.194.

211. The Appellate Body noted, inter alia, 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 and Article XXIII:2 of the GATT 1994.’ (Mexico - Tax Measures on Soft Drinks and Other Beverages, Report of the Appellate Body, WTO Doc. No. WT/DS308/AB/R (6 March 2006), at para. 77). This argument could not be decisive, however. Mexico had in fact plausibly maintained that Articles 22 and 23 DSU could be read as lex specialis with respect to Article XX(d) GATT, so as to exclude the WTO Agreements from the scope of ‘laws or regulations’ within the meaning of Article XX(d) GATT.

212. Ibid., at para. 79.

213. Ibid., at para. 69.

214. Ibid., at para. 71.

215. Ibid., para. 70.

216. Ibid., at para. 75 (emphasis original). The Appellate Body made clear, however, that the concept of ‘rules that form part of the domestic legal order’ includes ‘rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member’s legal system.’ (ibid., at para. 79).

217. Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, Report of the Panel

219. Emphasis as added by the Appellate Body.

220. Ibid., at para. 56.

221. Mexico - Soft Drinks, Report of the Panel, supra note 206, at paras. 7.5-7.18.

222. Mexico - Soft Drinks, Report of the Appellate Body, supra note 211, paras. 51 (‘It is difficult to see how a panel would fulfil that obligation [to assist the DSB in accordance with Article 11 DSU] if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.’) and 52 (Members are ‘entitled to a ruling by a WTO panel.’).

223. See infra, Section II.5.

224. In doing so, we follow the approach of authors such as M. Akehurst, ‘Custom as a Source of International Law’, 46 British Yearbook of International Law (1974-75) 1; and M. H. Mendelson, ‘The Formation of International Customary Law’, 272 Recueil des cours de l’Académie de droit international de la Haye (1998) 157.


226. Germany opined that the GATT ‘did not represent an isolated legal system. Rather, it was embedded in general rules of international law.’ (ibid., at 16).

227. Ibid.


230. See, mutatis mutandis, ICJ, North Sea Continental Shelf (Germany/Denmark, Germany/Netherlands), Judgment of 20 February 1969, ICJ Reports 1, at para. 78 (‘the position is simply that in certain cases […] the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way be reason of a rule of customary law obliging them to do so - especially considering that might have been motivated by other obvious factors.’).

231. United States - Prohibition of Imports of Tuna and Tuna Products from Canada, Report of the

232. Ibid., at para. 4.7 (emphasis added).

233. GATT Council, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons - Communication to the Members of the GATT Council, GATT Doc. No. L/5319 (5 May 1982), at para. 2(b) (emphasis added).


235. Ibid., at 2-13.

236. Ibid., at 5.


238. Ibid., at paras. 3.10-3.11.

239. In fact, the United States raised an objection bordering on a forum non conveniens exception: ‘attempting to discuss the issue in purely trade terms within the GATT, divorced from the broader context of the dispute, would be disingenuous.’ (ibid., at para. 3.11).

240. Cleveland, supra note 292, at 181, note 191.

241. United States - Imports of Sugar from Nicaragua, supra note 237, at para. 3.5 (‘the United States could not invoke any special factor for justifying this reduction’).

242. Ibid., at para. 3.9.

243. GATT Doc. No. L/5424, at para. 7(iii).


246. Under general international law, countermeasures must be consistent with the principle of proportionality, i.e. ‘commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the right in question’, as stated in Article 51 ASR. An unnecessary countermeasure could hardly be considered ‘proportionate’.

247. It may be worth remembering that unlike several GATT parties in the past (cf. supra Section II.4.1), in the case at hand Mexico could not plausibly invoke the broadly-phrased security exceptions.


249. See Fernández Pons, supra note 192, at 103.

250. Dispute Settlement Body, Minutes of the Meeting of 20 November 1996, WTO Doc. No. WT/
DSB/M/26 (15 January 1997), item 1.


252. These are Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.


256. Ibid., at para. 5.54.

257. This observation would probably suffice to estop the EC from asserting the opposite before a panel.

258. Ibid., at para. 5.55 (emphasis added).

259. Reproduced in Crawford, supra note 73, at 306-308.

260. Provided that the issue was addressed at all by the ILC in its Commentary: ‘It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow. [...] An example [...] is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.’ (ibid., at 307). The terms ‘consequences’ referred to in the quoted passage are seemingly only those flowing from a breach of a treaty governed by the special rules, not those stemming from the violation of a norm external to the system. If, however, the ILC intended to refer also to the latter category of consequences, the vagueness of the expression (‘certain remedies’) used by the ILC to describe the extent to which WTO law derogates in that respect from general international law, do not permit to reach any firm conclusion on this point.


262. Ibid., at para. 6.

263. Cf., with specific reference to countermeasures aimed at redressing human rights violations, Cleveland, supra note 192, at 188: ‘National practice currently appears to be moving away from the use of unilateral trade measures in favor of non-trade options. This trend no doubt is in part a response to GATT requirements, and is beneficial to the extent that unilateralism can be replaced with effective GATT-compliant or multilateral responses to human rights abuse. Developments in international cooperation regarding the enforcement of human rights norms may eventually render the need for unilateral action obsolete. That day is some distance away, though’.

264. Claims premised on a pure textual reading are bound to fail due to the lack of specific provisions from which a derogation from the said right may be inferred.
265. Article 3(2) and 3(3).


268. Ibid., at 9.5.

269. Emphasis added.

270. As we noted earlier, Article 22(6) panels operate within strictly defined jurisdictional limits. See supra Section I.2.

271. In this respect, it should be noted that the practice of keeping the jurisdictional compromis within the ‘four corners’ of the multilateral trading system has been consistently observed during the GATT era. See, e.g., Canada – Administration of the Foreign Investment Review Act, Report of the Panel (adopted), GATT Doc. No. L/5504 - 30S/140), at para. 1.4 (where the panel takes note of the GATT Council decision ‘that the terms of reference remain as they stood, […] and that it be presumed that the Panel would be limited in its activities and findings to within the four corners of GATT.’). At that time, however, both the establishment of a panel and recourse to countermeasures could be authorised only by consensus, that is, only if the losing party did not raise formal objections thereto. Hence, within the GATT, the issue of ICEVs had no chance to develop into a jurisdictional conundrum. The situation is quite different with regard to the WTO.

272. In thinking of possible scenarios, we started from the premise that the Appellate Body will not backtrack on the issue of jurisdiction. The Appellate Body’s obiter dictum, according to which WTO adjudicating bodies lack jurisdiction with respect to alleged violations of non-WTO norms, will not please all commentators. According to T. Schoenbaum, ‘WTO Dispute Settlement: Praise and Suggestions for Reform’, 47 International and Comparative Law Quarterly (2000) 647 at 653, Article 11 DSU should be seen as ‘an implied powers clause which should be interpreted broadly so that the panels and Appellate Body can decide all aspects of a dispute.’ Garcia-Rubio, cit. supra note 192, at 457, has similarly argued that the corpus of customary international law remains applicable to the relations governed by the WTO covered agreements to the extent that those agreements do not expressly provide otherwise, but regardless of the lack of an authorization or renvoi for so doing.’ Contra: Marceau, supra note 21, at 764. A more nuanced view has been expressed by Pauwelyn, supra note 266, at 1027: ‘this power for Panels to make prior findings of violation under non-WTO rules should not be easily accepted and may depend on the circumstances of each case. At that juncture, the dividing line between, on the one hand, substantive jurisdiction to decide on certain claims of violation (WTO claims only) and, on the other hand, the applicable law to decide on the validity of those claims (potentially all international law), becomes rather blurred. If the required finding of violation or compliance with obligations under non-WTO rules is both legally and factually straightforward, a Panel may decide to move forward. Especially if no compulsory dispute settlement mechanism exists under the other treaty, a Panel may be more inclined to decide the issue itself.’ It may be noted that if the WTO adjudicating bodies had interpreted the relevant provisions of the DSU in the way in which the ICJ has interpreted compromissory clauses (which circumscribe jurisdiction to disputes
concerning the interpretation or the application of the treaty to which they are party), no major jurisdictional cause célèbre would have arisen within the WTO. Cf. ICAO Council, supra note 187, at para. 32. On this point, see E. Cannizzaro and B. I. Bonafé, ‘Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case’, 16 European Journal of International Law (2005) 481 at 488 (‘the [ICJ] has not considered the possibility of splitting the dispute into two parts, or of declining its jurisdiction. A contrary principle has been affirmed: disputes concerning the applicability of a treaty fall within the jurisdiction conferred on the [ICJ] by compromissory clauses contained therein.’) and 494 (‘the [ICJ] considered that its jurisdiction under a compromissory clause is not limited to an assessment of the facts in light of relevant treaty provisions, but also includes the taking into account of other international law rules which can interact with the treaty.’).


274. Cf., by analogy, R. Kolb, Théorie du ius cogens international. Essai de relecture du concept (2001) 209-248 (concerning the Statute of the ICJ). In any case, the possibility of extending such preclusion to voluntary ad hoc arbitration under Article 25 DSU appears doubtful. Article 25(1) DSU provides that ‘[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the resolution of certain disputes that concern legal issues that are clearly defined by both parties.’ Those issue may well include non-WTO ones.

275. In this regard, it may be interesting to note that the ‘four corners of GATT’ theorem was neither derived from some statutory limitation nor was a product of GATT panels’ judicial policy. It was simply a consequence of the way in which the disputing parties defined each panel’s jurisdictional mandate. See Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, Report of the Panel (adopted), GATT Doc. No. L/6268 - 35S/98 (20 November 1987), at paras. 1.3 and 5.3 (‘Canada referred in its submission to international agreements on fisheries and the Convention on the Law of the Sea. The Panel considered that its mandate was limited to the examination of Canada’s measures in the light of the relevant provisions of the [GATT].’). In the so-called Superfund case, the EC claimed that certain tax measures adopted by the United States were at variance with the polluter-pays principle. The panel replied as follows: ‘The mandate of the Panel is to examine the case before it “in the light of the relevant GATT provisions” [...]. The Panel therefore did not examine the consistency of the revenue provisions in the Superfund Act with the environmental objectives of that Act or with the Polluter-Pays Principle.’ (United States – Taxes on Petroleum and Certain Imported Substances, Report of the Panel (adopted), GATT Doc. No. L/6175 - 34S/136 (5 June 1987), at para. 5.2.6). See also US – Sugar from Nicaragua, supra note 237, at para. 4.1 (where the panel noted that the challenged measures ‘were but one aspect of a more general problem. The Panel, in accordance with its terms of reference [...], examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute.’); US - Nicaragua II, supra note 244, at 5.15 (‘While not refuting such argumentation [that the GATT should be interpreted within the context of international law], the Panel nevertheless considered it to be outside its mandate to take up these questions because the Panel’s task was to examine the case before it “in the light of the relevant GATT provisions”, although they might be inadequate for the purpose’).

276. Cf. ICJ, Corfu Channel (United Kingdom v. Albania), Judgment of 9 April 1949, ICJ Reports 4 at 35 (‘[...] to ensure respect of international law, of which it is an organ [...]’).
If adopted, this solution would require that an ‘adjustment’ be made to the recommendations and rulings that the DSB may issue. In cases where a Member seeks to justify its WTO-inconsistent conduct as an ICEV, the panels and the Appellate Body should presume that such measure is internationally lawful and consequently abstain from recommending to the DSB that the measure be withdrawn, unless the claim based on general international law appears to them purely instrumental and manifestly unfounded. In addition, the WTO Members may adopt an understanding to the effect that, in such cases, the DSB shall confine itself to recommending (in a hortatory sense) that the measure be withdrawn.
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