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The Law on State Responsibility and the World Trade Organization

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Abstract

This paper examines the role of general international law in the World Trade Organization (WTO) regime, using the rules on state responsibility as a case study. It identifies and discusses instances in WTO case law where such rules were applied directly or were taken into consideration in interpreting relevant WTO provisions. The analysis demonstrates that direct application of general international law for the determination of indispensable matters not regulated by the WTO Agreements is part of the inherent powers of WTO adjudicative bodies. Moreover, under Article 3(2) Dispute Settlement Understanding and Article 31(3)(c) Vienna Convention on the Law of Treaties, WTO adjudicative bodies have an obligation to take into account general international law in interpreting relevant WTO provisions. The paper delineates the methodology for assessing the interaction between general international law and WTO law and highlights the importance of adhering to this methodology to provide clarity and legal certainty regarding the scope and content of WTO obligations.

Keywords

applicable law – Articles on the Responsibility of States for Internationally Wrongful Acts – general international law – inherent powers – interpretation – state responsibility – systemic integration – World Trade Organization

1 Introduction

The Dispute Settlement System (DSS) of the World Trade Organisation (WTO) was one of the greatest achievements of the Uruguay Round negotiations,

which radically changed the landscape of international trade. The Dispute Settlement Understanding (DSU),¹ which forms part of the WTO Agreements,² sets out the rules and procedures that govern the settlement of disputes arising thereunder. States that accede to the WTO automatically consent to the DSU and the jurisdiction of the WTO adjudicative bodies in a compulsory manner, as the WTO Agreements constitute a 'single undertaking'.³ Further, under Article 23 DSU the jurisdiction of the WTO DSS over WTO disputes is exclusive: it is 'the only means available to WTO Members to obtain relief, and only the remedial actions envisaged in the WTO system can be used by WTO Members'.⁴

The WTO DSS was an important step in the process of progressive 'judicialisation' of the settlement of trade disputes.⁵ The system gradually evolved from a power-based, political organisation in the early General Agreement on Tariffs and Trade (GATT) 1947 years to a more rule-oriented regime.⁶ According to WTO statistics, since its establishment in 1995, 598 disputes have been brought to the WTO DSS and over 420 rulings have been issued, making it one of the most active and prolific international dispute settlement mechanisms in the world.⁷ A number of different States participate actively⁸ in WTO

- 1 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement (signed 15 April 1994, entered into force 1 January 1995) Annex 2, 1869 UNTS 401 (DSU).
- 2 The term 'WTO Agreements' is used to describe the 1995 Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154 (Marrakesh Agreement) and its Annexes.
- 3 WTO, *Brazil – Measures Affecting Desiccated Coconut (Brazil – Coconut)*, Report of the Appellate Body (21 February 1997) AB-1996-4, WT/DS22/AB/R, 12–13.
- 4 WTO, *United States – Certain Products from the European Communities*, Report of the Panel (7 July 2000) WT/DS165/R, para 6.23; WTO, *United States – Section 301–310 of the Trade Act of 1974*, Report of the Panel (22 December 1999) WT/DS152/R, para 7.43.
- 5 Arie Reich, 'From Diplomacy to Law: The Juridicization of International Trade Relations' (1996) 17 Northwest J Intl L & Bus 775; Peter-Tobias Stoll and others, *WTO: Institutions and Dispute Settlement* (Brill 2006) 448; Peter Van Den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (CUP 2017) 296.
- 6 John Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (CUP 2006) 146; Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harv Intl LJ 333, 333. Cf Joseph Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191 on the persistence of the GATT diplomatic ethos in the WTO.
- 7 Statistics available on the WTO website at <www.wto.org/english/tratop_e/dispu_e/dispu_stats_e.htm> accessed 14 October 2021. Numbers included above are as of 31 December 2020.
- 8 Some developing members are active users of the WTO DSS, eg, Argentina, Brazil, China, Chile, India, Indonesia, Mexico, and Thailand. However, there is no doubt that developing States, which constitute the majority of WTO membership, face considerable burdens in using the DSS. As for least-developed States, with the exception of Bangladesh who has acted as

dispute settlement proceedings and thus, contribute to the development of the relevant case law.⁹

It is, thus, hard to deny that the WTO DSS is an international adjudicative mechanism of historic achievement. In fact, considering the importance of trade in international relations, the very broad range of obligations that the WTO Agreements encompass, the large membership of the organisation¹⁰ and its compulsory character, it is not surprising that the WTO DSS has been described as one of the most (if not *the* most) important and powerful adjudicative systems in international law.¹¹

Nonetheless, despite the importance of the WTO DSS in international dispute settlement and the large body of case law produced in its context, there are still uncertainties regarding the limits of the subject-matter jurisdiction of WTO panels and the Appellate Body (AB)¹² and the law applicable to WTO disputes. Notwithstanding the extensive academic literature on this matter, the proper place of WTO law and WTO adjudication within the broader 'system' of public international law is still unsettled. The general scepticism in the early WTO years towards general international law and the radical – now largely discredited¹³ – view of the WTO Agreements as a so-called 'self-contained system',¹⁴ whose rules alone are sufficient to regulate any dispute arising thereunder, have seeped through the case law and led to an apparent reluctance of the WTO adjudicative bodies to take into consideration general

complainant in one WTO dispute, they have, as of today, only participated in WTO disputes as third parties.

- 9 Note, however, the criticism that African States 'continue to live at the margins of the system', Regis Yann Simo, 'The Law of International Responsibility: The Case of the WTO as a "Lex Specialis" or the Fallacy of a "Self-Contained" Regime' (2014) 22 Afr J Intl & Comp L 184, 204. The only African State that has participated in WTO disputes as a complainant is Tunisia (two complaints launched), whereas South Africa, Egypt and Morocco participated in five, four and three WTO disputes, respectively, as respondents. Other African States have only participated as third parties.
- 10 Currently 164 WTO members (including the EU) and 24 observer governments.
- 11 Jackson (n 6) 135.
- 12 Note that, since December 2019, the AB has not been able to hear further appeals because AB members whose terms had expired have not been replaced. For an overview of the problem, see Jean Galbraith, 'United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process' (2019) 113 AJIL 822. See relevant discussion in *infra* Section 5.
- 13 Van Den Bossche and Zdouc (n 5) at 66; Joanna Gomula, 'Responsibility and the World Trade Organisation' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 791.
- 14 See Pieter Jan Kuijper, 'The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?' (1994) 25 NYIL 227. See also relevant discussion in *infra* Section 2.2, text accompanying *infra* nn 80-84.

international law, either as potentially applicable to the WTO dispute at hand or as a means of interpreting the WTO Agreements.

This paper examines the role of the rules on state responsibility, as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),¹⁵ in the WTO regime. It aims to ascertain whether and how such rules become relevant in the context of a WTO dispute. Through an examination of WTO law and an in-depth analysis of the relevant WTO case law, it seeks to establish a methodology for taking into consideration rules of general international law, such as the rules on state responsibility, based on the customary rules of treaty interpretation and the principle of *lex specialis*.

This matter is of great significance in the context of WTO adjudication. The analysis in this paper demonstrates that WTO adjudicative bodies have only used general international law to a limited extent and on a limited number of key issues of state responsibility and the law of treaties such as legal interest, attribution of conduct to a member, the proportionality of retaliatory action and issues of non-retroactivity. However, the relevant case law reveals the important practical implications that the application or consideration of the rules of general international law can have in WTO adjudication on a number of issues that remain more than topical, such as the definition of a prohibited subsidy or the scope of safeguard measures. In certain disputes discussed in this paper, such as the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the relevance of general international law was central to the argumentation of the parties and prominent to the discussion of the WTO adjudicative bodies, as it was decisive for the determination of the scope of the WTO obligations in question.

Moreover, there are several more channels of interaction between general international law and WTO law that remain largely underexplored. In the realm of state responsibility, for example, the issue of defences is of key importance, and the potential residual applicability of the general rules on countermeasures, necessity or self-defence in WTO adjudication could pave the way for new lines of argumentation for WTO responding States. Trade restrictions, or the threat thereof, have always been ‘a core foreign policy tool’,¹⁶ used to enforce international rules, react to illegality, prevent conflict, respond to emerging or current crises or exert pressure towards a change in policy or activity. Today, a very large percentage of trade obligations are subsumed under

15 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (adopted by the UNGA 28 January 2002) A/RES/56/83 (ARSIWA).

16 David Cohen and Zachary Goldman, ‘Like It or Not, Unilateral Sanctions Are Here to Stay’ (2019) 113 AJIL Unbound 146, 147.

the umbrella of the WTO Agreements. Thus, the legality of such trade restrictive measures must be assessed, primarily, under WTO law. It is known that the general and security exceptions in the WTO Agreements (Articles XX-XXI GATT, XIV-XIV bis GATS and 73 TRIPS)¹⁷ allow certain trade restrictions that would otherwise be inconsistent with a State's WTO obligations. However, the scope of these clauses is limited and does not necessarily coincide with that of the defences under general international law. It is unclear whether any of these general defences may also be applied in the context of a WTO dispute to justify a WTO-inconsistent measure.¹⁸ Moreover, despite the evident similarities between defences under general international law and the WTO exception clauses, the WTO DSS has almost never made reference to general international law when interpreting the scope of the WTO provisions. This lack of engagement with general international law is especially evident in the recent case law regarding the scope of the GATT and TRIPS security exceptions.¹⁹ WTO panels were called to interpret almost from scratch, without the benefit of prior WTO jurisprudence on the matter, the relevant clauses, whose scope remained controversial for a very long time, and still, they steered clear of any reference to the defences under the law on state responsibility or, more generally, to Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT).²⁰

This paper aims to provide a framework for further analysis on the interrelationship between rules of general international law and the WTO Agreements, which should be conducted on a case-by-case basis.

Section 2 of this paper revisits the scope of the jurisdiction of the WTO adjudicative bodies and the law applicable to WTO disputes. It confirms that, although the specialised character and limited jurisdictional scope of the WTO

17 1995 General Agreement on Tariffs and Trade, Marrakesh Agreement Annex 1A, 1867 UNTS 187 (GATT); 1995 General Agreement on Trade in Services, Marrakesh Agreement Annex 1B, 1869 UNTS 183 (GATS); 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Annex 1C, 1869 UNTS 299 (TRIPS).

18 See eg 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy' (4 May 2018) para 11, where the EU itself admits that, although some of its trade restrictive measures can be justified on the basis of the WTO general and security exceptions, 'in some cases [they] could be incompatible with WTO rules'. Such incompatibility may still be justified on the basis of general international law if general defences are found to be applicable to WTO disputes.

19 WTO, *Russia – Measures Concerning Traffic in Transit (Russia – Transit)*, Report of the Panel (26 April 2019) WT/DS512/R; WTO, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (Saudi Arabia – IPR)*, Report of the Panel (16 June 2020) WT/DS567/R.

20 Vienna Convention on the Law of Treaties (done on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

DSS signifies that the law applicable to WTO disputes is principally the WTO Agreements, there is no explicit exclusion of all other rules or implicit disconnection from the framework of public international law. WTO adjudicative bodies, in the exercise of their inherent powers, can apply rules of 'general international law' and make relevant interim findings to the extent that these are necessary for the purposes of discharging their function under the DSU.

Section 3, through a survey of the relevant case law, confirms that 'general international law', and most importantly the law on state responsibility as enshrined in ARSIWA, is indeed directly applicable to WTO disputes to the extent that the WTO Agreements do not 'contract out' of its application through a *lex specialis*. It further demonstrates that, under Article 31(3)(c) VCLT, panels and the AB have an obligation to take into consideration the general international law on state responsibility in interpreting relevant WTO provisions.

Section 4 delineates the methodology for taking into consideration the general rules on state responsibility, based on the customary rules of treaty interpretation and the principle of *lex specialis*. The analysis contributes to the strand of academic literature which suggests that WTO adjudicative bodies should properly place the WTO Agreements within the general regulatory framework in which they were created, i.e. the wider corpus of public international law, and adopt a principled methodology that serves the security and predictability of the multilateral trading system.

2 Jurisdictional Limitations and the Law Applicable to WTO Disputes

2.1 *Introduction to the Scope of Jurisdiction of the WTO Adjudicative Bodies and the Law Applicable to WTO Disputes*

Under the DSU, all disputes brought before the WTO DSS must be based on claims arising out of the 'covered agreements'.²¹ The jurisdiction of a panel is established in each dispute by its terms of reference, which specify the legal basis of the complaint and define the precise claims at issue.²² The function of panels, is to 'make an objective assessment of the matter before [them],

21 Arts 6(2), 7, 11, 23 DSU. Art 1 DSU specifies that it 'shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to ... as the "covered agreements")'. The agreements in App 1 are the Marrakesh Agreement, the GATT, the GATS, the TRIPS, and the DSU itself, as well as any Plurilateral Trade Agreement if applicable.

22 *Brazil – Coconut* (n 3) 22.

including ... the applicability of and conformity with the relevant covered agreements, and ... assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'.²³ It thus becomes clear that WTO panels and the AB are not adjudicative bodies of general jurisdiction,²⁴ i.e. they cannot be asked to adjudicate on any claim under international law. Their jurisdiction extends only to findings of inconsistency with the WTO provisions cited by the parties in the terms of reference.²⁵

Nonetheless, it is less clear, once jurisdiction of a panel is properly established, what law it may apply to settle the dispute.²⁶ As the International Law Commission's (ILC) Study Group on Fragmentation points out

A limited jurisdiction does not ... imply a limitation of the scope of the law applicable in the interpretation and application of ... treaties.... While the [DSU] limits the jurisdiction [of the WTO adjudicative bodies] to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law.²⁷

Indeed, the DSU is silent on this matter. Although it is plainly clear that panels and the AB shall apply the provisions of the covered agreements,²⁸ it is not clear whether they should determine disputes solely on this basis. In fact, it is not uncommon in international law to have a court or tribunal vested with

²³ Art 11 DSU.

²⁴ Trachtman (n 6) 338; Gabrielle Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 *JWT* 87, 109; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *AJIL* 535, 553; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 8–9.

²⁵ Art 7 DSU and the panel's terms of reference embody the maxim of *non ultra petita*. Panels only have authority to adjudicate upon claims relating to the provisions cited by the parties. See Stoll and others (n 5) 355.

²⁶ Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *JWT* 499, 504.

²⁷ Report of the Study Group of the ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (finalised by Martti Koskenniemi 13 April 2006) A/CN.4/L.682 (ILC Fragmentation Report) para 45.

²⁸ Arts 3.4, 7, 11 DSU. See also Petros Mavroidis and David Palmeter, 'The WTO Legal System: Sources of Law' (1998) 92 *AJIL* 398, 398 explaining that the text of the covered agreements is the 'fundamental source of law in the WTO' and all legal analysis begins there but arguing that they are only the 'first of all' and do not exhaust the sources of relevant rules.

limited jurisdiction, whilst having no limits on the rules of international law that it may apply in settling disputes properly brought before it.²⁹

The only DSU provision that bears any resemblance to an applicable law clause is Article 7,³⁰ which stipulates the following:

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise ... To examine, in the light of the relevant provisions in (... the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB ...
2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

Some scholars, relying on the wording of Article 7 and the exclusive reference to the covered agreements throughout the DSU,³¹ argue that WTO adjudicative bodies may only apply directly WTO law.³² Nonetheless, Article 7 does not really provide any information on applicable law. It confirms the self-evident, i.e. that Panels shall examine the dispute in the light of the covered agreements and address the WTO provisions invoked by the parties; but it does not necessarily prevent them from also addressing rules from other sources in settling the dispute at hand.³³ Besides, a Panel may, in principle, be established with special terms of reference and thus be mandated to apply sources other than the covered agreements.³⁴ Similarly, an arbitrator under Article 25 DSU may

29 See eg arts 288(1) and 293(1) United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; arts 1120, 1116, 1117 and 1131(1) North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289; arts 14.D.3 and 14.D.9 Agreement Between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, revised 10 December 2019, entered into force 1 July 2020) (USMCA).

30 Mavroidis and Palmeter (n 28) 399.

31 With the exception of the reference in art 3.2 DSU to the 'customary rules of interpretation of public international law', discussed extensively in *infra* Section 2.1.

32 Trachtman (n 6) 342, 'with so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable'; see *contra* Mavroidis and Palmeter (n 28) 399, arguing that art 7 can be construed as encompassing all sources of international law.

33 Bartels (n 26) 505; Pauwelyn (n 24) 562.

34 Arts 7.1 and 7.3 DSU. Note, however, that other WTO Members retain the right to object to special terms of reference. The Panel itself can also object, in the exercise of its *compétence de la compétence* (see text accompanying *infra* nn 40-47). Cf Stoll and others (n 5) 356 where it is argued that 'recourse to sources of law other than the agreements covered is appropriate only in interpreting the covered agreements' and thus, extraneous rules cannot be part of the Panel's terms of reference.

also be mandated to apply legal rules other than the WTO Agreements as, under this provision, the parties 'shall agree on the procedures to be followed'.

However, it cannot be denied that the questions of jurisdiction and applicable law are inter-linked. A broad definition of the law applicable to WTO disputes might indeed 'evolve towards a general jurisdiction for the WTO dispute settlement system'.³⁵ Although it is entirely possible to empower an adjudicative body to apply any relevant rule of international law in settling a dispute before it, in the absence of such an explicit conferral of power, it is contested whether and to what extent the adjudicative body can assert such broader competence. This is because, in cases of treaty-based disputes brought before an adjudicative body on the basis of a compromissory clause,³⁶ as is the case in WTO disputes, the adjudicative body would necessarily exceed the limits of its subject-matter jurisdiction by making findings on the application of substantive rules that are external to the treaty to the conduct in question. In view of this, in the absence of a clear applicable law provision, there seems to be a presumption that the law to be applied stems primarily from the treaty under which the dispute has arisen.³⁷ Even if the same conduct is also regulated by other substantive rules of international law, the adjudicative body that asserts jurisdiction over the dispute on the basis of a specific instrument can, in principle, examine this conduct only against the treaty provisions properly invoked by the claimant. An adjudicative body can be bestowed with jurisdiction to deal only with certain aspects of a larger, more complex dispute that falls within the ambit of more than one sources of law. However, as the International Court of Justice (ICJ) has affirmed several times in its jurisprudence, to the extent that the act in question might constitute breach of certain obligations under the instrument at hand, the jurisdiction of said adjudicative body can be properly exercised.³⁸

35 Van Damme (n 24) 14.

36 In other words, a clause included in a treaty with a view to provide options for settlement of disputes arising thereunder. See similarly Matina Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to be "Used" in the ICJ and the PCIJ' (2014) 5(3) JIDS 560, 561.

37 *ibid* 567.

38 See most recently *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Judgment) (3 February 2021) para 56. Cf Enzo Cannizzaro and Beatrice Bonafé, 'Fragmenting International Law Through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case' (2005) 16(3) EJIL 481, 485 on the inappropriateness of 'separating the structural elements of a dispute according to the scope of the compromissory clause' as it is not always possible to look into a dispute in isolation from the rest of its normative environment and runs the risk of producing incoherent legal results. Note, however, examples from the jurisprudence of the ICJ presented in that paper, relate to

In view of the above, it seems that, in the absence of an explicit applicable law clause in the WTO Agreements, the WTO adjudicative bodies are prevented from applying directly substantive rules external to the covered Agreements as this would necessitate the making of findings that exceed their subject-matter jurisdiction. As the AB pronounced in *Mexico – Soft Drinks*, ‘WTO panels and the Appellate Body [cannot] become adjudicators of non-WTO disputes’ as this is not their function as intended by the DSU.³⁹ In other words, the jurisdictional constraints of the WTO adjudicative bodies result in a presumption that the law applicable to WTO disputes is primarily the WTO Agreements, as they are prevented from addressing claims that do not arise thereunder.

Nonetheless, it is important to note that WTO adjudicative bodies, as any other adjudicative body,⁴⁰ enjoy certain inherent jurisdictional powers that derive directly from their nature as judicial bodies,⁴¹ regardless of the specialised character of their subject matter jurisdiction. Although WTO panels and the AB are often referred to as ‘quasi-judicial’ bodies, this ‘quasi-judicial’ character of the system is ‘more form than substance’.⁴² They fulfil all criteria for their characterisation as international adjudicative bodies.⁴³ Firstly, they have, *de facto*, the power to issue legally binding decisions. Their reports, although they are technically recommendations aiming to ‘assist the DSB in discharging its responsibilities’, can only be rejected in the DSB by consensus.⁴⁴ Thus, their adoption is semi-automatic. Secondly, their constituent instrument, i.e. the WTO Agreements, more generally, and the DSU, more specifically, is governed by international law. Thirdly, they principally apply international law, i.e. the WTO Agreements, to resolve disputes brought before them. And lastly,

the applicability of rules of ‘general international law’ to treaty-based disputes, a point that is further explored in *infra* Section 2.2.

39 WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, Report of the Appellate Body (6 March 2006) AB-2005-10, WT/DS308/AB/R, paras 78, 56.

40 As explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) No IT-94-1-AR72, para 18: ‘incidental or inherent jurisdiction ... is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals ...’.

41 Pauwelyn (n 24) 555.

42 Valerie Hughes, ‘Settlement of Disputes: The Institutional Dimension’ in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 278.

43 See Chiara Giorgetti, ‘Introduction’ in Chiara Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Brill 2012) 1–3; Cesare Romano and others, ‘Mapping International Adjudicative Bodies, the Issues, and Players’ in Cesare Romano and others (ed), *The Oxford Handbook of International Adjudication* (OUP 2014) 5–8.

44 Arts 11, 16.4, 17.14 DSU.

they comprise individuals who sit in their own personal capacity and not as government representatives.⁴⁵ In view of their nature as adjudicative bodies, as the AB itself has recognised, they have ‘a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated’ in the covered agreements.⁴⁶ Such inherent powers include, first and foremost, the right to determine whether they have jurisdiction in a given case (known as *compétence de la compétence*).⁴⁷ But, they further extend to all findings that are necessary in order ‘to ensure that the exercise of [their] jurisdiction over the merits, if and when established, shall not be frustrated’ and ‘to provide for the orderly settlement of all matters in dispute.’⁴⁸ Thus, an adjudicative body can always make certain interim findings on matters that are indispensable for the purposes of ruling on the main claims in dispute.

Applying this in the context of WTO adjudication suggests that, in the exercise of their inherent powers, WTO adjudicative bodies are entitled to apply certain rules of international law other than the covered agreements, and to make relevant findings, which are not *per se* findings on the claims of alleged inconsistency with the WTO provisions cited by the parties but are indispensable for the purposes of addressing such claims. The following Sections discuss which other rules of international law, in addition to the WTO Agreements, may be applied in this context.

2.2 *General International Law and the WTO Dispute Settlement System*

The previous Section demonstrated that, although the WTO Agreements have no applicable law clause that explicitly mandates the WTO adjudicative bodies to apply exclusively the WTO Agreements, due to the limited subject-matter jurisdiction of WTO adjudicative bodies there is a presumption that WTO disputes must be settled primarily on the basis of WTO law. Nonetheless, it was further demonstrated that, despite the specialised and limited character of their subject-matter jurisdiction, WTO adjudicative bodies, like any other adjudicative body, have the inherent power to make interim findings on

45 Art 8.9 DSU.

46 WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body (16 January 1998) AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, para 152, note 138.

47 The AB has confirmed that it is entitled to consider the issue of its own jurisdiction on its own initiative, eg WTO, *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body (28 August 2000) AB-2000-5, AB-2000-6, WT/DS136/AB/R, para 54, note 30; *Mexico – Soft Drinks* (n 39) para 45, note 90.

48 *Nuclear Tests Case (Australia v France)* (Jurisdiction and Admissibility, Judgment) [1974] ICJ Rep 253, 259, para 23.

certain issues that are not explicitly regulated in the WTO Agreements, to the extent that they are necessary for the purposes of ruling on a dispute properly brought before them under the DSU, i.e. a dispute over an alleged inconsistency with certain provisions of the WTO Agreements. Thus, there is *some* room for the application of non-WTO law in the context of WTO disputes. This Section aims to discern which non-WTO rules can fit in this room.

The only express reference to non-WTO law in the covered agreements is found in Article 3.2 DSU, which states that

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it 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 ...⁴⁹

This provision, like Article 7 DSU, is not an applicable law clause. It rather describes the role and purpose of the dispute settlement system within the WTO organisational structure and provides guidance as to how dispute settlement bodies should go about fulfilling this role. In this context, the provision instructs dispute settlement bodies to interpret the WTO Agreements in accordance with ‘customary rules of interpretation of public international law’, that is, primarily, the rules codified in Articles 31 and 32 VCLT.⁵⁰ Thus, this is a provision about interpretation, but it also specifies the rules that must be applied by WTO adjudicative bodies in this particular context.

A narrow, literal interpretation of Article 3.2 DSU suggests that only the customary rules on treaty interpretation can be applied in the context of a WTO dispute, to the exclusion of all other non-WTO rules of international law. Indeed, the DSU in all other provisions, such as Article 7 discussed above, refers exclusively to the covered agreements. Article 3.2 DSU itself highlights that ‘[r]ecommendations and rulings of the DSB cannot add to or diminish

⁴⁹ Art 3.2 DSU.

⁵⁰ The AB recognised the customary character of art 31 VCLT and, thus, its relevance under art 3.2 DSU already in WTO, *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (19 April 1996) 16–17 and WTO case law consistently reaffirms this ever since. For the customary character of art 32 VCLT and the application of the rules in arts 31–32 VCLT in a holistic fashion, see WTO, *US – Carbon Steel*, Report of the Appellate Body (28 November 2002) AB-2002-4, WT/DS213/AB/R, WT/DS213/AB/R/Corr.1, paras 61–62; WTO, *US – Continued Zeroing*, Report of the Appellate Body (4 February 2009) AB-2008-11, WT/DS350/AB/R, para 268.

the rights and obligations provided in the covered agreements', an instruction repeated in Article 19.2 DSU.⁵¹ It could be argued that by applying extraneous rules the WTO adjudicative bodies would add further obligations to WTO members than those envisaged in the covered agreements. Thus, the context of Article 3.2 DSU could indeed support such a narrow interpretation. Some DSU negotiators also assert that this solitary reference to non-WTO law in the DSU manifests their intention to introduce into the WTO system, only this specific set of customary rules, i.e. the rules on treaty interpretation.⁵²

Nonetheless, this is not a convincing interpretation of the DSU. As Pauwelyn suggests,⁵³ even if many negotiators, often economists and trade diplomats,⁵⁴ did not think of public international law when drafting the WTO Agreements, this is not a good enough reason to consider an international treaty as detached from its natural normative environment, i.e. the framework of international law. Rather, this explains why the WTO Agreements do not deal more explicitly with the relationship between WTO rules and other rules of international law.⁵⁵ The Panel in *Korea – Government Procurement*, addressing the arguments in favour of a restrictive reading of Article 3.2 DSU, observed that they

can see no basis ... for an a contrario implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.⁵⁶

51 Arts 3.2 and 19.2 DSU.

52 Isabelle Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in Isabelle Van Damme and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 316.

53 Pauwelyn (n 24) 538.

54 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 30, 343.

55 Pauwelyn (n 24) 538. See also Kuijper (n 14) 228 where he argues that 'it cannot be denied that the deviations from rules and principles of general international law in the GATT sometimes raise the suspicion that they are a consequence of ignorance of the general rules of international law, rather than of a well-considered refinement or adaptation that is beneficial to the special branch of law'.

56 WTO, *Korea – Measures Affecting Government Procurement* (*Korea – Government Procurement*), Report of the Panel (19 June 2000) WT/DS163/R, para 7.96, note 753. The panel report was not appealed.

Indeed, as suggested by its context, the express reference in Article 3.2 DSU to the customary rules on treaty interpretation was included *ex abundante cautela*⁵⁷ to ensure that WTO adjudicative bodies always use the same set of rules to interpret ('clarify') the WTO Agreements. Article 3.2 reiterates the need for a principled interpretation under the holistic test of Articles 31 and 32 VCLT, which honours the common intentions of the parties, provides legal certainty ('security and predictability') and does not 'add to or diminish the rights and obligations provided in the covered agreements'.⁵⁸ In other words, it is a word of caution against 'judicial activism'.⁵⁹ It does not purport to define the law applicable to WTO disputes.

But even if we conclude that indeed, Article 3.2 does not imply an exclusion of other rules of public international law through its exclusive reference to the customary rules of interpretation and that therefore, other extraneous rules may also be applied in the context of WTO disputes, the question remains: which other rules? The Panel in *Korea – Government Procurement* proclaimed that there is room for the application of customary international law to the extent that the WTO Agreements do not 'contract out' of its application.⁶⁰ The Panel expressed the view that 'to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, ... the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.'⁶¹ This is reminiscent of the general 'presumption against normative conflict' in international law.⁶² Indeed, in international law the absence of explicit derogation must be regarded as a continuation or implicit acceptance of existing customary rules.⁶³ As the arbitral tribunal explained in *Georges Pinson*: '*Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente.*'⁶⁴

57 Pauwelyn (n 24) 54.

58 See WTO, *Chile – Taxes on Alcoholic Beverages*, Report of the Appellate Body (13 December 1999) AB-1999-6, WT/DS87/AB/R, WT/DS110/AB/R, para 79, where the AB stated that it is hard to envisage 'circumstances in which the panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements'.

59 Van Den Bossche and Zdouc (n 5) 190.

60 *Korea – Government Procurement* (n 56) para 7.96.

61 *ibid.*

62 ILC Fragmentation Report (n 27) paras 37–38.

63 Pauwelyn (n 24) 541 and citations therein.

64 *Georges Pinson (France/United Mexican States)*, Award (13 April 1928) 5 UNRIAA 329, 422. Translates as follows: 'Every international convention must be deemed tacitly to refer to

However, this presumption does not imply that all customary rules are directly applicable in the context of a WTO dispute, simply because the WTO Agreements do not explicitly derogate from them. Rather, it suggests that adjudicative bodies should interpret the text of a treaty in a manner harmonious with other relevant international obligations of the parties, to the extent possible. As the ICJ stipulated in *Right of Passage*: 'It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.'⁶⁵ Article 31(3)(c) VCLT reflects precisely this principle, also known as the principle of systemic integration,⁶⁶ which is considered as one of the most important tools for addressing the phenomenon of fragmentation in international law.⁶⁷ It allows the judge to bridge the gap between a certain legal rule and the system, i.e. the normative environment, in which it was created.⁶⁸ Admittedly, the line between directly applying a rule and taking it into consideration under Article 31(3)(c) VCLT in interpreting the text of an applicable treaty is often blurred.⁶⁹ However, it is important to distinguish between interpretation and application in this context. The use of Article 31(3)(c) VCLT requires the existence of a textual foothold for the consideration of a rule external to the treaty at hand, whereas a rule directly applicable to the dispute could be applied even in the absence of any relevant treaty provision. There are inherent limitations to the process of interpretation, which can only be employed in the context of clarifying the meaning of a specific treaty term.⁷⁰

In view of the above, this paper argues that, whereas the pool of rules under customary international law relevant to the interpretation of the WTO Agreements may be larger, only the rules of 'general international law',

the common international law for all the questions which it does not itself resolve in express terms and in a different way'.

65 *Case Concerning the Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections, Judgment) [1957] ICJ Rep 125, 142.

66 See Campbell MacLahlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) ICLQ 279.

67 ILC Fragmentation Report (n 27) paras 410–80.

68 Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 6.

69 See for example the double reference to the *Georges Pinson* quote above in ILC Fragmentation Report (n 27) paras 179, 414, both in the context of discussing the application of general international law to 'self-contained (special) regimes' and in the context of discussing art 31(3)(c) VCLT.

70 Anastasios Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31, 51.

including, most prominently, the law of treaties and the law on state responsibility, are directly applicable, in their own name, to WTO disputes. The term 'general international law' is used here in a dual sense: it denotes rules that are general both in terms of their scope *ratione personae*, i.e. they are binding on and, in principle, applicable to all States,⁷¹ and their scope *ratione materiae*, i.e. they apply to the whole field of the international obligations of States regardless of their content and their source.⁷² These rules have no 'autonomous substantive content':⁷³ they are the 'toolbox' for the creation, operation, interplay, and enforcement of other rules of international law.⁷⁴ In other words, rules of general international law have a 'parasitical character': they only assist in the process of applying other rules of a substantive character, which set out the rights and obligations of States under international law. For example, the law of treaties assists in assessing the existence, validity and continuous operation, as well as in interpreting the content, of other international rules. Similarly, the law on state responsibility assists in assessing whether other substantive rules have been breached, what are the consequences of such breach and how the ensuing responsibility is implemented. The application of these rules happens 'in the subordinate levels of legal argument'⁷⁵ for the purpose of reaching a final verdict on the application and implementation of the substantive rules under consideration. It is precisely for this reason that the limited jurisdictional scope of an adjudicative body does not prevent it from addressing

71 Bin Cheng, 'Some Remarks on the Constituent Element(s) of General (or So-called Customary) International Law' in Anthony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Brill 1998) 379–80; Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 993, 1010 f. See also ILC, 'Draft Articles on the Law of Treaties, with Commentaries' (1966) II YBILC 187, 246, para 5.

72 See eg Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) II(2) YBILC 31 (ARSIWA Commentary) general commentary, para 5. See also James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 879.

73 Andrew Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 Mich J Intl L 561, 577.

74 Pauwelyn (n 24) 536. See also Papadaki (n 36) 580, characterising such rules as 'Meta-Norms'. Similarly Lorand Bartels, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?' in Tomer Brode and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 119 establishes a distinction between 'principal and incidental norms' and refers to the 'meta-normative function' of the latter.

75 Bartels (n 26) 511.

such rules and making relevant interim findings: these findings cannot be considered as independent verdicts as they are dependent upon the adjudicative body's analysis on the rules brought before it by the parties for an overall finding of breach. The final ruling will be one that addresses the main claim brought by the parties in accordance with applicable jurisdictional rules. As Judge Higgins explained in her separate opinion in the *Oil Platforms*, by reference to the Court's prior judgment in the *Arrest Warrant* case, the *non ultra petita* rule 'does not operate to preclude the Court from dealing with certain other matters "in the reasoning of its Judgment, should it deem this necessary or desirable"'.⁷⁶

This 'parasitical character' is what differentiates general international law from other substantive obligations of States under customary international law, such as obligations relating the protection of human rights. Such rules have an autonomous substantive legal content and their direct application necessarily implies that the adjudicative body in question, in our case a WTO panel or the AB, would be called to determine whether the content of this rule has been breached. This is not within the subject matter jurisdiction of the WTO adjudicative bodies. However, substantive obligations of WTO States under international law, such as in the field of human rights, can still be taken into consideration in interpreting relevant provisions of the WTO Agreements and can inform their scope and content under Article 31(3)(c) VCLT.

The case of *Bosnian Genocide* before the ICJ provides a good example of this operation of the rules of general international law in the context of treaty-based disputes. The ICJ acknowledged that its jurisdiction was founded in that case on Article IX of the Genocide Convention and that the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the said Convention,⁷⁷ much like in the case of WTO disputes. However, it stipulated that the determination of a breach and its legal consequences requires recourse 'to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts'.⁷⁸ Similarly, the WTO adjudicative bodies, as further demonstrated below through an overview of relevant case law, may also apply rules of general

76 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment, Separate Opinion of Judge Higgins) [2003] ICJ Rep 161, para 14, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 19, para 43.

77 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Bosnian Genocide)* (Merits, Judgment) [2007] ICJ Rep 43, 105, para 149.

78 *ibid.*

international law and make relevant findings, in the exercise of their inherent powers, to the extent that it is necessary to properly exercise their function and to the extent that such rules are not displaced by the text of the WTO Agreements.

WTO law is a special treaty regime because it indicates itself the consequences of its breach and the means by which the ensuing responsibility is implemented.⁷⁹ In other words, it includes not only primary obligations but also secondary rules on state responsibility, which constitute *lex specialis* to the relevant rules of general international law.⁸⁰ Due to this special characteristic, WTO law was characterised in its early years as a 'self-contained regime', a term that implied a disconnection from the rest of public international law. However, this approach to the WTO regime and the relevant debates have now largely subsided.⁸¹ The prevailing view is that the WTO constitutes a specialised sub-system of public international law,⁸² which includes a number of 'treaty-based derogations' from the rules of general international law.⁸³ It simply displaces some rules on state responsibility through the establishment of special rules that regulate the same subject matter for the purposes of the WTO Agreements. The determination of such 'derogation' or displacement is an interpretative exercise which should be done by reference to each rule separately.

In sum, the analysis in this Section suggests that rules of 'general international law' are applicable by default to WTO disputes, subject only to the application of the *lex specialis* principle in the process of interpreting the WTO Agreements. The case law of the WTO adjudicative bodies, analysed in the following Section, provides further evidence in support of this direct, albeit residual, applicability of the rules of general international law on state responsibility to WTO disputes.

79 Willem Riphagen, 'Second Report on State Responsibility' (1981) II(1) YBILC 79, paras 58–59.

80 For example art 23 DSU provides the obligation to have recourse to the WTO DSS to seek the redress of a violation; art 19 DSU provides that the appropriate form of reparation is to bring the measure into conformity with the WTO Agreements; art 22 DSU provides a special mechanism of compensation and suspension of concessions as temporary measures available in cases of non-compliance with DSB rulings within a reasonable time.

81 Gomula (n 13) 791.

82 Marceau (n 24) 87. See also Pauwelyn (n 24) 538, characterising WTO law as 'just' a branch of international law much like environmental or human rights law.

83 Special Rapporteur Gaetano Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) II(1) YBILC 2, para 111, by reference to the comments of Rapporteur Riphagen in draft art 2 of Part II in his sixth report (1985) II(1) YBILC 5.

3 General International Law on State Responsibility in WTO Case Law

This Section provides an overview of WTO reports that engage with the rules on state responsibility under general international law and demonstrates when and how WTO adjudicative bodies resort to these rules.

This paper identifies at least 23 WTO reports which make explicit reference to the rules of general international law on state responsibility, as codified in the ARSIWA. References to the ARSIWA were used in this research as a methodological shortcut to facilitate the identification of instances where the rules of general international law on state responsibility were taken into consideration by panels and the AB. Thus, the list of relevant reports in this Section is meant to be illustrative and not exhaustive.

WTO reports referring to the ARSIWA vary considerably as to the extent of the reference, the level of sophistication of the analysis and the conclusions reached on the relevance or applicability of general international law to WTO disputes. They can, nonetheless, be broadly classified into two groups. The first group comprise reports that directly apply a rule of general international law as codified in ARSIWA in order to rule on a subject matter that is *not* regulated by the WTO Agreements. The second group comprise reports that take the ARSIWA into consideration in interpreting the provisions of the WTO Agreements.

3.1 *Direct Application of the Rules on State Responsibility Under General International Law*

With respect to the first group, there are at least 6 instances where WTO Panels had direct recourse to rules of general international law. These instances are in the context of discussing issues of legal interest and attribution.

The first instance was in the case of *EC – Bananas*. The Panel acknowledged that a WTO member's 'potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement' suffice to establish a right to initiate dispute settlement proceedings.⁸⁴ Accordingly, it found that the United States had indeed a legal interest in that case, despite the fact that the US banana production and exports were minimal and has therefore suffered no nullification or impairment of WTO benefits in respect of trade in bananas. The Panel's conclusion

84 WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas)*, Report of the Panel (22 May 1997) WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM, WT/DS27/R/HND, para 7.50.

echoes the general international law rules on legal interest and the right to invoke international responsibility.⁸⁵ In support of this finding the Panel referred in a footnote to Draft Article 40, which later developed into Articles 42 and 48 ARSIWA.⁸⁶

Similarly, the Panel in *Turkey – Textile* applied directly the rules of general international law on attribution of conduct in cases of joint organs.⁸⁷ Turkey argued that the challenged quantitative restrictions on imports resulted from the implementation of its duly notified customs union with the European Communities (EC). As a result, it cannot be held individually liable for the restrictions; it is rather the Turkey-EC customs union, as a separate legal entity, that implemented the measures. The Panel noted that even if the customs union had a legal personality distinct from that of its constituent countries, ‘in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the union.’⁸⁸ In support of this statement the Panel referred to the ILC commentary to Draft Article 27 (now Article 16 ARSIWA), which stipulates that ‘[a]ccording to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is.’⁸⁹

In *Korea – Government Procurement*, the Panel rejected Korea’s arguments that the Ministry of Commerce, which was tasked with answering questions during the negotiations for its accession to the GPA,⁹⁰ should not be charged with knowledge about actions taken by the Ministry of Transportation. The Panel stipulated that the answers were on behalf of the whole of the Korean government and that such conclusion is ‘supported by the long established international law principles of State responsibility’ by which ‘the actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law.’⁹¹ On this

85 Petros Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’ (2000) 11 EJIL 763, 777.

86 *EC – Bananas* (n 84) note 361.

87 See ARSIWA Commentary (n 72) commentary to ch IV, pt I, para 2; *ibid* commentary to art 47, para 2.

88 WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textile)*, Report of the Panel (31 May 1999) WT/DS34/R, para 9.42.

89 *ibid* para 9.43, note 276.

90 Agreement on Government Procurement (signed 15 April 1994, entered into force 7 January 1996) 1915 UNTS 103.

91 *Korea – Government Procurement* (n 56) para 6.5. A similar wording was adopted, many years later, by the Panel in WTO, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, Report of the Panel (6 December 2017)

point the Panel cited Draft Articles 5 and 6 (now Article 4 ARSIWA).⁹² Similarly, in *Australia – Salmon*, the Panel found that the Tasmanian ban on imports of salmonids is ‘a measure for which Australia, under both general international law and relevant WTO provisions, is responsible.’⁹³ On a footnote to this finding the Panel referred to Draft Article 6 (now Article 4).

A few years later, and after the final adoption of the ARSIWA, the Panel in *US – Gambling* explicitly recognised the customary character of Article 4 ARSIWA,⁹⁴ which was applied to prove the attributability of the actions of the United States International Trade Commission (USITC), an agency of the US federal government, to the State. The Panel, by reference to Article 4 ARSIWA and its commentary,⁹⁵ found that official pronouncements by the USITC in an area where it has delegated powers are to be attributed to the United States, and, thus, its documents can legitimately be considered as probative of the US interpretation of its GATS Schedule, which was under dispute in that case.⁹⁶ An explicit recognition of the customary character of Article 4 ARSIWA is also found in *Thailand – Cigarettes*, where the Panel reaffirmed the principle that WTO members are responsible for the actions of their government officials.⁹⁷

In the instances above, the panels resort to well-established rules of general international law in order to rule on issues of international responsibility that are not directly regulated by the WTO Agreements. The panels’ findings support the direct applicability of rules of general international law to WTO disputes to the extent that they are not displaced by relevant WTO provisions, and clearly situate WTO law under the umbrella of general public international law.

WT/DS491/R, para 7.179, note 334, where it stipulated that ‘it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law’, citing arts 4 and 7 ARSIWA in its footnote with further references to the ILC commentary.

92 *Korea – Government Procurement* (n 56) note 683.

93 WTO, *Australia – Measures Affecting Importation of Salmon (Australia – Salmon)*, Report of the Panel (18 February 2000) recourse to art 21.5 of the DSU by Canada, WT/DS18/RW, para 7.12 and note 146.

94 WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, Report of the Panel (10 November 2004) WT/DS285/R, para 6.128.

95 *ibid* and citations therein.

96 *ibid* para 6.130.

97 WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand – Cigarettes)*, Report of the Panel (12 November 2018) recourse to art 21.5 of the DSU by the Philippines, WT/DS371/RW, para 7.636. See also further reference to art 4 in para 7.771, note 1654 and the reference in *ibid* para 7120, note 533.

3.2 *Taking into Consideration the General International Law on State Responsibility Through Interpretation*

With respect to the second group of reports, there are several instances where general international law, as codified in the ARSIWA, was taken into consideration by panels or the AB in interpreting the WTO provisions. These reports vary significantly as to the methodology followed and the extent of the discussion on general international law.

Most of the reports take into consideration the general rules on attribution of conduct in interpreting more specific WTO provisions, which explicitly or implicitly regulate this matter. The first of such reports was in the case of *Canada – Dairy*. The Panel discussed whether the Canadian provincial marketing boards were ‘agencies’ of the Canadian government for the purposes of Article 9.1(a) Agriculture Agreement.⁹⁸ It found that the boards ‘act under the explicit authority delegated to them by either the federal or a provincial government’ and can thus be presumed to be an ‘agency’ of such governments. In support of this finding the Panel referred in its footnote to Draft Article 7.2 (now Article 5 ARSIWA), which ‘might be considered as reflecting customary international law’.⁹⁹ The reference was rather vague and did not specify whether the rule was taken into account as ‘relevant rule of international law applicable between the parties’ in the sense of Article 31(3)(c) VCLT. Still, it seems that the panel interpreted the term ‘governments or their agencies’ in Article 9.1(a) Agriculture Agreement in light of the test under general international law, now codified in Article 5 ARSIWA.

In *US – DRAMS*, the AB referred more elaborately to the ARSIWA in the context of interpreting Article 1.1 SCM.¹⁰⁰ Article 1.1 defines a subsidy as a ‘financial contribution by a government or any public body’, including cases where ‘a government ... entrusts or directs a private body to carry out ... functions ... which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.’ The AB acknowledged that the terms ‘entrusts’ and ‘directs’ in this context ‘identify the instances where seemingly private conduct may be attributable to a government’ and confirmed that, for this purpose, there must be a demonstrable

98 Agreement on Agriculture (entered into force 1 January 1995) 1867 UNTS 410 (Agriculture Agreement).

99 WTO, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Panel (17 May 1999) WT/DS103/R, WT/DS113/R, note 427.

100 Agreement on Subsidies and Countervailing Measures (entered into force 1 January 1995) 1869 UNTS 14 (SCM).

link between the government and the conduct of the private body.¹⁰¹ On this point it referred on a footnote to the commentary to Article 8 ARSIWA.¹⁰² It then proceeded to interpret the terms ‘entrusts’ and ‘directs’ and concluded that ‘entrustment’ occurs where a government gives responsibility to a private body, and ‘direction’ refers to situations where the government exercises its authority over a private body.¹⁰³ The determination of entrustment or direction, according to the AB, will hinge on the particular facts of the case.¹⁰⁴ On this point, in a footnote, the AB referred once more to the commentary to Article 8 ARSIWA which ‘similarly states’ that the appreciation of whether a certain conduct is carried out under the control of a State should be done on a case-by-case.¹⁰⁵ The legal basis for these references is once more unclear but the AB findings suggest that Article 1.1(a)(1)(iv) SCM mirrors the attribution test under general international law as enshrined in Article 8 ARSIWA. It thus seems to take into consideration general international law in interpreting the specific attribution rule in Article 1.1 SCM.

In *US – Anti-Dumping-China*,¹⁰⁶ the Panel was called again to interpret Article 1.1 SCM. The Panel report included an extensive discussion on the relevance of the ARSIWA to WTO disputes and sparked disagreement with the AB, which later reversed the Panel’s findings on this matter. This time the contention concerned the term ‘any public body’ in Article 1.1(a)1 SCM. The Panel interpreted the provision based on the VCLT, reaffirming that under Article 31 the interpretative process is a holistic one which begins with the specific terms of the treaty.¹⁰⁷ Having examined the ordinary meaning and context of the term and the object and purpose of the SCM, the Panel concluded that for the purposes of the SCM the term ‘any public body’ extends to all entities controlled by governments, and is not limited to government agencies and other entities vested with and exercising governmental authority as argued by China.¹⁰⁸

The Panel then proceeded to examine other arguments raised by China based on ‘other international instruments that it consider[ed] relevant

101 WTO, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (US – DRAMS)*, Report of the Appellate Body (27 June 2005) AB-2005-4, WT/DS296/AB/R, paras 108, 112.

102 *ibid* note 179.

103 *ibid* para 116.

104 *ibid*.

105 *US – DRAMS* (n 101) para 188.

106 WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping-China)*, Report of the Panel (22 October 2010) WT/DS379/R, paras 8.53 ff.

107 *ibid* para 8.56 and citations therein.

108 *ibid* paras 8.73, 8.79 and citations therein.

context', to see 'whether any of these other instruments would *override* [its] analysis and conclusions based on the text of the SCM itself'.¹⁰⁹ The first of such instruments relied on by China was the ARSIWA, which China considered as 'codifying customary international law with respect to certain principles of state responsibility' and thus 'relevant rules of international law applicable in the relations between the parties' in the sense of Article 31(3)(c) VCLT.¹¹⁰ According to China, the panel 'must as a matter of law interpret the SCM provisions at issue in conformity with language and concepts in certain provisions of the Draft Articles'.¹¹¹ China argued in its oral and written submissions that the customary character of these principles has been repeatedly recognised by panels and the AB and that the term 'public body' must be interpreted in a manner analogous to Article 5 ARSIWA.¹¹²

The panel opined that the ARSIWA do not constitute 'relevant rules of international law' under Article 31(3)(c) VCLT and are thus irrelevant to the issue at hand.¹¹³ Firstly, the panel found that

China significantly overstates the status that has been accorded to [ARSIWA] where they have been referred to by panels and the Appellate Body. Indeed, in not a single instance of such citations identified by China has a panel or the Appellate Body identified the Draft Articles as 'relevant rules of international law applicable in the relations between the parties' in the sense of Article 31(3)(c), such that they should be 'taken into account together with the context' when interpreting the treaty. Rather, in our view, the various citations to [ARSIWA] have been as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements.¹¹⁴

The Panel then discussed certain reports cited by China. It referred to the *US – DRAMS*, which was 'at the heart of China's arguments', stipulating that despite the references to ARSIWA in the footnotes, the AB said 'nothing whatsoever about the status of the Draft Articles vis-à-vis the WTO Agreement'.¹¹⁵

¹⁰⁹ *ibid* para 8.84 (emphasis added).

¹¹⁰ *ibid* paras 8.85–8.87.

¹¹¹ *ibid* para 8.87 (emphasis in the original – the Panel underlined the term 'must' used in China's submissions).

¹¹² *ibid*.

¹¹³ *ibid* paras 8.85–8.91.

¹¹⁴ *ibid* para 8.87.

¹¹⁵ *ibid* para 8.88.

Indeed, as demonstrated above, this is a fair statement with respect to the AB's non-committal language. The Panel noted further that, in fact, panels and the AB have made it explicit in certain cases that the ARSIWA are not binding.¹¹⁶ Surprisingly, the Panel on this point refers to *US – Gambling* and *US – Line Pipe*, which are two of the scarce examples in WTO case law where the customary character of the rules reflected in the Articles under discussion is explicitly recognised.¹¹⁷

Secondly, the Panel opined that the provisions of ARSIWA are not 'relevant' to the interpretation of the term in question because Article 1.1 SCM is 'at heart ... an attribution rule' and as such, constitutes *lex specialis* with respect to the 'the content or implementation of the international responsibility of a State' for the purposes of the SCM and supersedes the relevant provisions in ARSIWA, in accordance with Article 55 ARSIWA.¹¹⁸

The AB a few months later re-examined the Panel's findings. It disagreed with both the interpretation of the term 'any public body' in Article 1.1 SCM and the findings regarding the role of the ARSIWA in WTO disputes. It noted that the ARSIWA are not a treaty but 'insofar as they reflect customary international law or general principles of law [they] are applicable in the relations between the parties.'¹¹⁹ It then confirmed that Article 5 ARSIWA concerns the same subject matter as Article 1.1 SCM and is thus 'relevant' in the sense of Article 31(3)(c) VCLT.¹²⁰ It disagreed directly with the Panel and clarified that Article 31(3)(c) VCLT is one of several means to ascertain the common intention of the parties and is not meant to 'override' results reached based on other elements of this interpretative exercise.¹²¹ It further disagreed with the Panel's finding that WTO adjudicative bodies have used the ARSIWA as 'conceptual guidance'. According to the AB, past case law suggests that the rules codified in the ARSIWA are indeed used in the sense of Article 31(3)(c) VCLT either 'as containing similar provisions to those in certain areas of the WTO Agreement ... [or] by way of contrast with the provisions of the WTO Agreement'.¹²² It seems that the AB treats the, rather vague, references to

116 *US – Gambling* (n 94) para 6.128; WTO, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US – Line Pipe)*, Report of the Appellate Body (15 February 2002) AB-2001-9, WT/DS202/AB/R, para 259.

117 *ibid.* In both cases the panel and AB stipulated that the provisions of the ARSIWA are 'not binding as such' but reflect principles of customary international law.

118 *US – Anti-Dumping-China* (n 106) para 8.90.

119 WTO, *US – Anti-Dumping-China*, Report of the Appellate Body (11 March 2011) AB-2010-3, WT/DS379/AB/R, para 308 and citations therein.

120 *ibid.*

121 *ibid.* para 312.

122 *ibid.* para 313.

ARSIWA examined above as instances of Article 31(3)(c) VCLT interpretation of the WTO Agreements.

The AB also addressed the Panel's finding that Articles 4, 5 and 8 ARSIWA are, in any event, superseded by Article 1.1 SCM pursuant to Article 55 ARSIWA and the *lex specialis* principle. The AB clarified that the Panel misconceived the operation of Article 55 ARSIWA. In the case at hand there was no doubt that the applicable provision was Article 1.1 SCM.¹²³ The question was not whether the rule codified in ARSIWA should be applied instead of the SCM. It was, rather, whether 'when interpreting the terms of Article 1.1(a) (1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements.'¹²⁴ According to the AB, Article 55 'does not speak to the issue of how the latter should be done.'¹²⁵ The AB did not address further the specific arguments of China and the United States on whether there is an 'actual inconsistency' between the rules of attribution under the ARSIWA and those in the SCM, which would activate the *lex specialis* principle and displace the rule under general international law.¹²⁶ Its analysis, however, implied that there is no such inconsistency because it proceeded to examine Article 1.1 SCM in view of Article 5 ARSIWA. It concluded that the test under Article 5 ARSIWA yields the same results as its own interpretation based on the ordinary meaning, context and object and purpose of the SCM. In view of this, the AB noted that 'it is not necessary ... to resolve definitively the question of to what extent Article 5 [ARSIWA] reflects customary international law'.¹²⁷ The analysis in *US – Anti-Dumping-China* and the debate outlined above provides a good example of how a dispute can turn on the relevance of general international law to the interpretation of a WTO provision, as taking relevant rules of general international law into consideration may yield a very different interpretative result.

Most recently, in *Saudi Arabia – IPR*, the Panel made explicit reference to Articles 4, 8 and 11 ARSIWA. The Panel assessed whether the challenged actions were 'measures taken by [a WTO] Member' under Article 3.3 DSU. It stipulated that in this assessment it 'is guided by [certain] legal considerations' and, in this context, it discussed the rules of attribution codified in the ARSIWA.¹²⁸ It confirmed that 'the responsibility of Members under interna-

123 *ibid* para 316.

124 *ibid*.

125 *ibid*.

126 *ibid* para 315.

127 *ibid* para 311.

128 WTO, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (Saudi Arabia – IPR)*, Report of the Panel (16 June 2020) WT/DS567/R, paras 7.48, 7.50–7.51.

tional law applies irrespective of the branch of government at the origin of the action', that acts or omissions of a private party may be attributed to a Member 'insofar as they reflect decisions that are not independent of one or more measures taken by a government' and that even unofficial, non-government acts (in that case certain tweets that promoted public screenings of pirated broadcast) may be attributable to the State to the extent that the State acknowledges and adopts them as its own.¹²⁹

There are several more instances where the general rules on attribution of conduct, especially the rule enshrined in Article 4 ARSIWA, have been taken into consideration in interpreting the WTO Agreements.¹³⁰ Most of the times, the Panels or AB cite the ARSIWA in the footnotes of their reports. These references are rather vague and do not specify the legal basis upon which the ARSIWA are taken into consideration. Nonetheless, they imply that the rules of general international law support the interpretative conclusions of the panel or the AB. In other words, they confirm the relevance of the general international law on state responsibility in the interpretation of the WTO Agreements. However, it should also be noted that the relevant footnotes often explain that the ARSIWA were invoked by one of the parties to the dispute in their submissions, implying that this is why they are addressed in the report.¹³¹

129 *ibid* paras 7.50–7.51, 7.161.

130 WTO, *European Communities – Selected Customs Matters (EC – Selected Customs)*, Report of the Panel (16 June 2006) WT/DS315/R, paras 4.706–4.708, 7.552, note 932, supporting the finding that the authorities in the member States act as organs of the EC when they review and correct administrative action taken pursuant to EC customs law; WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Panel (12 June 2007) WT/DS332/R, para 7.305, note 1480, supporting the finding that Brazilian domestic court rulings did not exonerate Brazil from its obligation to comply with the requirements of art XX GATT; WTO *United States – Measures Relating to Zeroing and Sunset Reviews (US – Zeroing-Japan)*, Report of the Appellate Body (18 August 2009) recourse to art 21.5 of the DSU by Japan, WT/DS322/AB/RW, para 183, note 466, supporting the finding that '[i]rrespective of whether an act is defined as "ministerial" or otherwise ... and irrespective of any discretion that the authority issuing such instructions or taking such action may have, the United States ... is responsible ... in accordance with the covered agreements and international law'; WTO, *United States – Certain Country of Origin Labelling (COOL) Requirements*, Report of the Panel (18 November 2011) WT/DS384/R, WT/DS386/R, para 7.16, note 41, supporting the finding that acts or omissions of State organs, including those of the executive branch are attributable to the State. See also WTO, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, Report of the Panel (19 December 2012) WT/DS412/R, WT/DS426/R, note 37, where the Panel stipulated that '[i]t is not disputed that, under public international law, Canada is responsible for the actions of the Government of the Province of Ontario', a reference to the rule codified in art 4 ARSIWA.

131 *ibid*. *EC – Selected Customs* (n 130), reference to the submissions of the EC; *US – Zeroing-Japan* (n 130), reference to the submissions of Japan; *US – COOL* (n 130), reference

This perhaps indicates a reluctance of WTO adjudicative bodies to engage with general international law *proprio motu*.

There are also a number of cases that make reference to Articles 49 to 53 ARSIWA, on countermeasures and their requirements. In *US – Cotton Yarn*, the AB referred to the ‘general international law on state responsibility’, and more specifically to Article 51 ARSIWA and the requirement of proportionality, to further support its conclusions regarding attribution of serious damage to individual members under Article 6.4 ATC¹³² for the purposes of imposing a safeguard restraint.¹³³ The AB found that, by analogy to the law on countermeasures, ‘the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member.’¹³⁴ It further added that, if ‘a WTO Member would be subject to a disproportionate and, hence, “punitive” attribution of serious damage not wholly caused by its exports’ it would be an ‘exorbitant derogation from the principle of proportionality’, which ‘could be justified only if the drafters of the ATC had expressly provided for it, which is not the case.’¹³⁵ The AB here implicitly recognises the customary character of the rule enshrined in Article 51 ARSIWA which was found to be relevant in the interpretation of the WTO provision in question. The reference further supports the presumption against conflict in international law, as it suggests that WTO provisions should be interpreted in harmony with applicable rules of general international law, save only in cases of *express* derogation in the WTO Agreements.¹³⁶ A few months later, the AB in *US – Line Pipe* referred again to Article 51 ARSIWA, expressly recognising its customary character.¹³⁷ The reference was made in the context of interpreting Article 5.1 of the Safeguards Agreement¹³⁸ to support the conclusion that

to the EU third-party oral statement. Similarly, WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (EC – Aircraft)*, Report of the Appellate Body (18 May 2011) AB-2010-1, WT/DS316/AB/R, para 485, where the brief reference to art 14 ARSIWA was prompted by the EU submissions regarding the temporal scope of art 5 SCM (n 100).

132 Agreement on Textiles and Clothing (entered into force 1 January 1995) 1868 UNTS 14 (ATC).

133 WTO, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Cotton Yarn)*, Report of the Appellate Body (8 October 2001) AB-2001-3, WT/DS192/AB/R, para 120.

134 *ibid* para 119.

135 *ibid* para 120.

136 See text accompanying *supra* nn 60-64.

137 *US – Line Pipe* (n 116) para 259.

138 Agreement on Safeguards (entered into force 1 January 1995) 1869 UNTS 154.

safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports.¹³⁹

Similarly, the arbitrators in *US – FSC* and *US – Upland Cotton* interpreted the term ‘countermeasure’ in Articles 4 and 7 SCM in view of Article 49 ARSIWA. According to their analysis, the term ‘as understood in public international law, may usefully inform our understanding of the same term as used in the SCM Agreement’.¹⁴⁰ The arbitrators agreed that the nature of countermeasures is the same under both general international law and the SCM: they are temporary measures that would otherwise be contrary to a State’s international obligations (the WTO Agreements in the case at hand), which an injured State may take in response to breaches of obligations under international law (the SCM in this case).¹⁴¹ Both reports refer to the application of the *lex specialis* principle in this respect. Indeed, ‘the term “countermeasures” has a specific meaning in the SCM Agreement as regards their nature and application’.¹⁴² ARSIWA ‘by their own terms ... do not purport to prevail over any specific provision relating to the areas it covers that would be contained in specific legal instruments’ but can still ‘inform [the Panel’s] understanding of the same term as used in the SCM’.¹⁴³ Accordingly, the arbitrators took into consideration Articles 49 and 51 ARSIWA in interpreting the SCM. It should be noted, however, that none of the decisions refers to the provisions in question as customary international law. In *US – FSC*, the arbitrators explained in a footnote that ‘the ILC’s work is based on relevant State practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law under Article 38 of the Statute of the International Court of Justice’.¹⁴⁴ Notwithstanding the legal error of equating the ‘subsidiary means for the determination of rules of law’ with the rest of the sources listed in Article 38 ICJ Statute,¹⁴⁵ the note further shows the reluctance of the

139 *US – Line Pipe* (n 116) para 260.

140 WTO, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, Decision by the Arbitrator (31 August 2009) recourse to arbitration by the United States under art 22.6 of the DSU and arts 4.11 and 7.10 of the SCM Agreement, WT/DS267/ARB/1, WT/DS267/ARB/2, para 4.31.

141 WTO, *United States – Tax Treatment for ‘Foreign Sales Corporations’ (US – FSC)*, Decision by the Arbitrator (30 August 2002) recourse to arbitration by the United States under art 22.6 of the DSU and art 4.11 of the SCM Agreement, WT/DS108/ARB, para 5.60; *US – Upland Cotton* (n 140) paras 4.30–4.32.

142 *US – FSC* (n 141) para 5.58.

143 *US – Upland Cotton* (n 140) para 4.31, note 69.

144 *US – FSC* (n 141) note 68.

145 Statute of the International Court of Justice (signed 26 June 1945) 1 UNTS XVI (ICJ Statute).

arbitrators to characterise the norms codified in ARSIWA as rules of customary international law. Seven years later in *US – Upland Cotton*, the arbitrators adopted clearer language in their use of the ARSIWA as a means of interpreting the SCM, but still fell short of explicitly recognising the customary character of the provisions in questions.

Last, but not least, in *Mexico – Soft Drinks*, the panel and AB, in addressing Mexico's arguments, discussed Article 49 ARSIWA and its relationship with the general exceptions in Article XX GATT. This was the first and only time that a WTO dispute settlement body has dealt with the interaction of the defences codified in Part I, Chapter V ARSIWA with the WTO Agreements, and more specifically with the potential relevance of the customary rules on countermeasures to WTO disputes. Mexico argued that Article XX(d) GATT which reads '... nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures: ... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ...'; incorporates the defence of countermeasures under general international law. According to Mexico, the term 'laws and regulations' includes international obligations of WTO members and thus, Article XX(d) can be invoked to justify measures designed 'to secure compliance' with such obligations, in that case the US obligations under NAFTA.

The Panel and AB held that Article XX(d) refers to 'enforcement action within a particular domestic legal system, and [does] not extend to international action of the type taken by Mexico'.¹⁴⁶ Interpreting the provision in its context and in accordance with the ordinary meaning of the terms, they found that the term 'laws and regulations' 'refer[s] to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of another WTO Member'.¹⁴⁷ Thus, they found that Article XX(d) does not encompass action taken as a countermeasure in response to an internationally wrongful act. As Mexico's arguments did not relate to other subparagraphs of Article XX, the panel and AB did not elaborate further on the potential relationship between countermeasures and the rest of the provision.

However, two further arguments were raised in the *Mexico – Soft Drinks* reports which suggest, more generally, that the defence of countermeasures under the general law on state responsibility cannot be invoked in the context of a WTO dispute.

146 WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel (7 October 2005) para 8.194; WTO, *Mexico – Soft Drinks* (n 39) para 75.

147 *ibid* para 75.

Firstly, the AB stressed that, if the term 'laws and regulations' included international obligations then it would also include obligations under the WTO Agreements.¹⁴⁸ Accordingly, Article XX(d) could also be used to justify measures taken in response to a member's breach of WTO obligations. This would be contrary to Articles 22 and 23 DSU which provide for the obligation to have recourse to the DSU instead of taking unilateral action in order to seek redress for any alleged WTO breach and for the possibility of WTO-mandated suspension of concessions in cases of non-compliance with a DSB ruling within reasonable time.¹⁴⁹

Secondly, the Panel and AB rejected the applicability of countermeasures from the viewpoint of jurisdiction. They pointed out that in order to examine whether a measure is justified as a countermeasure, panels and the AB would have to determine whether the non-WTO obligation in question (in that case, obligations under NAFTA) has been violated.¹⁵⁰ 'WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes', which, according to the AB, is not their function as intended by the DSU.¹⁵¹ The AB recited to this end Article 3(2) DSU according to which the WTO DSS 'serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*'.¹⁵² Accordingly, it cannot 'be used to determine rights and obligations outside the covered agreements'.¹⁵³ Thus, it seems that in the only case where the issue has arisen, the AB held that responding States cannot rely on the defence of countermeasures under general international law in a WTO dispute due to jurisdictional limitations of the WTO adjudicative bodies.¹⁵⁴

The case of *Mexico – Soft Drinks* shows the potential relevance of the law on state responsibility in the interpretation of the WTO general and security exceptions and raises the interesting issue of the potential applicability of the defences under the law on state responsibility, which has not been discussed extensively in the context of the WTO. The following Section discusses the *Mexico – Soft Drinks* findings further, in view of the rest of the case law

148 *ibid* para 77.

149 *ibid*.

150 *ibid* para 78.

151 *ibid* para 78, 56.

152 *ibid* para 56, note 173 (emphasis in original).

153 *ibid* para 56.

154 Note that the same approach was adopted by arbitral tribunals constituted under NAFTA in *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No ARB/(AF)/04/5, Award (21 November 2007) para 128; *Corn Products International, Inc v Mexico*, ICSID Case No ARB/(AF)/04/1, Decision on Responsibility (15 January 2008) para 180.

discussed above and the proposed methodology for approaching the relationship between general international law and the WTO Agreements. It identifies some flaws in the line of reasoning in *Mexico – Soft Drinks*, which suggest that the final conclusion on the availability of the defence of countermeasures in WTO disputes may be very different. This would have significant practical implications with respect to the defences available to a WTO responding State.

4 A Methodology for the Use of General International Law on State Responsibility in WTO Proceedings

The analysis above offers some useful insights into the relevance of the general international law on state responsibility to WTO law and WTO disputes, as well as the application of the rules of interpretation codified in Articles 31 and 32 VCLT and the *lex specialis* principle.

In the examples of *EC – Bananas*, *Turkey – Textile*, *Korea – Government Procurement*, *Australia – Salmon*, *US – Gambling* and *Thailand – Cigarettes*, we see the direct application of general international law as codified in ARSIWA. The panels and AB in these cases had recourse to general international law in order to rule on specific legal issues which are not explicitly regulated by the WTO Agreements. As stipulated in *Korea – Government Procurement*, there is no reason to assume that the WTO Agreements intend to deviate from general international law on state responsibility to the extent that no specific provision pointing to opposite direction is included in their text. Whenever a subject matter is not regulated in the WTO Agreements, but a ruling is indispensable to discharge their function, panels and the AB may revert to general international law on state responsibility to decide on the matter before them. Such indispensable matters in the cases above were those concerning the legal interest of the complainant and the attributability of actions to a member State. The panels and AB would not be able to proceed with deciding the case without first resolving these issues as part of their reasoning.

In a similar fashion, there are several instances where the WTO panels and AB applied rules on the law of treaties¹⁵⁵ and rules on international dispute

¹⁵⁵ See eg *Korea – Government Procurement* (n 56) paras 7.123–7.126 on error in treaty formation; *Brazil – Coconut* (n 3) 15; WTO, *EC – Bananas*, Report of the Appellate Body (9 September 1997) AB-1997-3, WT/DS27/AB/R, paras 235–37; WTO, *Canada – Term of Patent Protection*, Report of the Appellate Body (12 October 2000) AB-2000-7, WT/DS170/AB/R, paras 71–74 on issues of non-retroactivity.

settlement such as on the treatment of municipal law,¹⁵⁶ the burden of proof,¹⁵⁷ issues of due process¹⁵⁸ and judicial economy.¹⁵⁹ We have also seen the application of general principles of international law such as good faith and *abus de droit*,¹⁶⁰ *estoppel* and acquiescence.¹⁶¹ In these instances, such external rules are used by the WTO adjudicative bodies as gap-fillers,¹⁶² implicitly recognising their 'pervasive' nature,¹⁶³ i.e. their general applicability in international law. They suggest that WTO adjudicative bodies, like any other adjudicative body,¹⁶⁴ have the power to resort to such general rules to decide on matters before them that are indispensable in order to discharge their judicial function and exercise their jurisdiction over the merits of the case, when such matters are not regulated by the legal text that constitutes the basis of their jurisdiction. As Trachtman explains, 'no institution is an island: each exists in a

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- 156 WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body (16 January 1998) AB-1997-5, WT/DS50/AB/R, para 65.
- 157 WTO, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the Appellate Body (25 April 1997) AB-1997-1, WT/DS33/AB/R, 14.
- 158 WTO, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Report of the Appellate Body, (23 September 2002) AB-2002-2, WT/DS207/AB/R, para 144.
- 159 WTO, *Australia – Salmon*, Report of the Appellate Body (6 November 1998) AB-1998-5, WT/DS18/AB/R, para 223.
- 160 WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, Report of the Appellate Body (12 October 1998) AB-1998-4, WT/DS58/AB/R, para 158; WTO, *US – FSC*, Report of the Appellate Body (24 February 2000) AB-1999-9, WT/DS108/AB/R, para 166; WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (17 December 2007) AB-2007-4, WT/DS332/AB/R, para 224.
- 161 WTO, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, Report of the Panel (24 October 2000) WT/DS156/R, para 8.24; WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel (18 September 2000) WT/DS135/R, para 8.60.
- 162 Trachtman (n 6) 341; Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2004) 53 ICLQ 861, 874; Gourgourinis (n 70) 52. Note here the presumption (or what Weil characterises the 'allergy of international tribunals') against *non liquet* which arguably prohibits international courts from declaring that a *lacuna* exists, see Hersch Lauterpacht, 'Some Observations on the Prohibition of "Non Liqueet" and the Completeness of the Law' (1958) reproduced in Hersch Lauterpacht (ed), *Hersch Lauterpacht, International Law Collected Papers*, vol 2 (CUP 1975) 221–22; Prosper Weil, 'The Court Cannot Conclude Definitively ... Non Liqueet Revisited' (1998) 36 Colum J Transnatl L 109. Cf Vaughan Lowe, 'The Limits of the Law' (2016) 379 *Collected Courses Hague Academy* 21, arguing that international law 'does not and cannot provide a complete regime'.
- 163 *US – FSC* (n 160) para 166.
- 164 See supra Section 2.1, text accompanying supra nn 41-48 on the inherent powers of the WTO adjudicative bodies.

broader institutional setting. This setting penetrates the institutions at various points, to complete contracts and to supply broader institutional rules where appropriate.¹⁶⁵ In international law, the rules of general international law provide such 'institutional setting' and 'complete' its sub-systems,¹⁶⁶ such as the WTO regime, providing cohesion and assisting in the creation of a 'consistent and comprehensive body' of international law.¹⁶⁷

As discussed in Section 2.1 of this paper, an adjudicative body 'is fully empowered to make whatever findings may be necessary' in order 'to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated' and 'to provide for the orderly settlement of all matters in dispute'.¹⁶⁸ Accordingly, the competence of an adjudicative body to examine indispensable incidental issues of state responsibility is part of its inherent powers deriving from its 'mere existence ... as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded'.¹⁶⁹ It has been established that WTO adjudicative bodies indeed enjoy such inherent powers in the exercise of their functions.¹⁷⁰ The function of panels, according to the DSU, is to

make an objective assessment of the matter before [them], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB [Dispute Settlement Body] in making the recommendations or in giving the rulings provided for in the covered agreements.¹⁷¹

Findings that are indispensable to establish a State's international responsibility are certainly within the mandate of the panel to make an objective assessment and to assist the DSB in making recommendations. Such interim findings form an integral part of the reasoning of the Panel or the AB in the course of deciding the matter properly brought before them. As such, they are within the *petita* in the case at hand.

165 Trachtman (n 6) 346 where he examines the WTO dispute settlement system from the 'incomplete contracts' perspective.

166 Van Damme (n 52) 313, recognising that 'the WTO covered agreements are incomplete, and sometimes applying other international law becomes necessary'.

167 On this 'search for coherence', see Lowe (n 162) 30.

168 *Nuclear Tests Case* (n 48) 253, 259, para 23.

169 *ibid.*

170 See *supra* Section 2.1, nn 40-47 and accompanying text.

171 Art 11 DSU.

Nonetheless, in cases where there is indeed a provision in the WTO Agreements regulating the subject matter at hand, as explained by the AB in *US – Anti-Dumping-China*, there is no doubt that the applicable rule is the one enshrined therein. As confirmed in Article 55 ARSIWA, the rule agreed upon by the parties takes precedence over the general rules on state responsibility. Nonetheless, Article 31(3)(c) VCLT requires the consideration of general international law in clarifying the content of such WTO provisions. And it is quite often that such clarification is necessary because ‘many provisions of the covered agreements are a masterpiece of “constructive ambiguity”’.¹⁷² As pronounced by the AB in its very first report, and reaffirmed several times since, Article 3.2 DSU directs the panels and AB to apply, in seeking to clarify the provisions of the WTO Agreements, the ‘customary rules of interpretation of public international law’, and that direction ‘reflects a measure of recognition that [the WTO Agreements are] not to be read in clinical isolation from public international law’.¹⁷³ In other words, the AB acknowledged that the WTO is not a ‘hermetically closed regime impermeable to other rules of international law’¹⁷⁴ but was rather created within, and under the influence of, the wider corpus of public international law. It is in this vein that the WTO adjudicative bodies have, in the cases examined above, taken into consideration the relevant rules of general international law on state responsibility in interpreting the WTO provisions.

As the AB confirmed in *US – Anti-Dumping-China*, even when panels or the AB have used vague language in their use of the ARSIWA, in essence the legal basis for their consideration was Article 31(3)(c) VCLT. The apparent reluctance of WTO adjudicative bodies to use clear language and specify the legal basis for taking into consideration general international law can be attributed to two factors. First, the general scepticism in the early WTO years towards general international law and the arguments regarding the so-called ‘self-contained’ nature of the regime have seeped through the case law. The panels and AB seem to avoid as much as possible references to general international law, perhaps to avoid criticism due to the lack of clarity on the proper role of general international law within the WTO regime. Moreover, WTO panellists and AB members are not required to have expertise in public international law,¹⁷⁵ which may also justify their disinclination to proceed to an in-depth

172 Van Den Bossche and Zdouc (n 5) 190.

173 *US – Gasoline* (n 50) 17.

174 Marceau (n 24) 95.

175 Arts 8(4) and 17(3) DSU. WTO panellists need not even be lawyers and very often they are not. However, a panel composed of three non-lawyers is very rare. See Ruth MacKenzie and others, *Manual on International Courts and Tribunals* (OUP 2010) 78,

analysis of issues of general international law. Second, the panels and AB are, understandably, reluctant to make findings on the status of certain international law norms. The clear use of Article 31(3)(c) VCLT for the purposes of interpretation would necessitate proof that the norm under consideration is a rule 'applicable', i.e. binding, 'between the parties', which according to WTO case law, means between *all* parties to the WTO Agreements.¹⁷⁶ In the case of ARSIWA, this would mean that the panel or AB would have to first establish the customary character of the rule under consideration, which is indeed a daunting task.¹⁷⁷ It is evident from the reports above, that panels and the AB,

fn 30; Hughes (n 42) 277; Ernst-Ulrich Petersmann, 'From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System' (1998) 1 JIEL 175, 193; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 EJIL 753, 766. Of course, not all panel and AB members lack expertise in public international law. In fact, several renowned public international lawyers have served in these positions.

176 Expressly in WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel (29 September 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R, para 7.68. Note, however, the more ambiguous findings in *EC – Aircraft* (n 131) para 845 and *US – Anti-Dumping–China* (n 119) para 308 as well as instances of use of various international treaties in the context of determining a term's ordinary meaning, eg, *US – Shrimp* (n 160) para 130–31 and *US – FSC* (n 160) recourse to art 21.5 of the DSU by the European Communities, WT/DS108/AB/RW, paras 141–45. The approach of the Panel in *EC – Biotech*, which has not yet been reversed or discredited in WTO practice, has been subject to criticism, see eg ILC Fragmentation Report (n 27) para 471.

177 Cf the practice of the ICJ, which often asserts the existence (or non-existence) of customary international law without offering detailed analysis on its constituent elements under art 38(1)(b) ICJ Statute (n 145), see eg *Corfu Channel (United Kingdom v Albania)* (Merits, Judgment) [1949] ICJ Rep 4, 28; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Jurisdiction and Admissibility, Judgment) [2002] ICJ Rep 3, 20–21, 24, paras 51, 58; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits, Judgment) [2005] ICJ Reports 168, para 162. Very often, the ICJ refers to the work of the ILC as a 'shortcut' in establishing the customary nature of rules, see eg *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 40, para 51; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections, Judgment) [2007] ICJ Rep 582, 599, para 39; *Bosnian Genocide* (Merits) (26 February 2007) 202, 208, paras 385, 401; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, 194, para 140. On this lack of methodology in identifying custom see Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 434; Rudolf Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011).

with very few exceptions, avoid pronouncing on the customary character of the ARSIWA.

Despite the paucity of relevant jurisprudence and the lack of clear methodology in existing reports, the WTO adjudicative bodies are clearly instructed under Article 3.2 DSU to use the ‘customary rules of interpretation of public international law’ in interpreting the WTO Agreements. Article 31 VCLT, consistently recognised as reflective of customary international law,¹⁷⁸ establishes an obligation to take into consideration relevant rules of international law applicable between the parties, amongst the rest of the interpretative means enshrined therein. The Panel in *US – Anti-Dumping-China* underlined in a critical fashion the term ‘must’ used by China to suggest the existence of precisely such obligation. But the language of Article 31 VCLT leaves no doubt: ‘there shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties.’¹⁷⁹ This is not to say that the WTO provisions must always be interpreted ‘in conformity with’ or ‘in a manner analogous to’ general international law.¹⁸⁰ Article 31(3)(c) VCLT simply establishes that, where there are relevant rules of general international law, they shall at least be taken into account by the panels and AB in interpreting relevant WTO provisions.

But Article 31(3)(c) VCLT is only one of several means for the interpretation of a term in the WTO Agreements. In accordance with Article 55 ARSIWA, if the rule under general international law points to a different direction than the interpretative conclusions reached through the rest of the means codified in Articles 31 and 32 VCLT, then the specific arrangement reflected in the WTO provisions will take precedence. Whenever and to the extent that there is a ‘genuine conflict’ between the rule under general international law and the WTO rule, the *lex specialis* prevails.¹⁸¹ But the identification of such conflict is

178 The AB recognised this already in Appellate Body Report, *US – Gasoline* (n 50) 16–17 and WTO case law consistently reaffirms this ever since. Its customary character has also been consistently reaffirmed by other international courts and tribunals. See eg the first instance of recognition by the ICJ in *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53, 69, para 48.

179 Art 31(3)(c) VCLT (emphasis added).

180 See China’s arguments in *US – Anti-Dumping-China* (n 106) para 8.87 and cf *US – Anti-Dumping-China* (n 119) para 313 and text accompanying supra n 121.

181 The ILC defines conflict as a situation where two rules or principles suggest different ways of dealing with a problem. A ‘genuine conflict’ is a situation where ‘the law itself (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it’. In other words, a situation where ‘harmonious interpretation’ turns out to be impossible. See ILC Fragmentation Report (n 27) paras 25, 48, 88.

an interpretative exercise which still requires examination of the relevant general rule. Besides, it is entirely possible that the *lex specialis* does not displace the entirety of the general rule. It is again a matter of interpretation to discern whether the WTO Agreements intend to deviate from all aspects of the relevant general rule on state responsibility.

The case of *Mexico – Soft Drinks* provides a good case study on how the methodology above could be applied in practice and demonstrates the importance of its practical implications.

The reports in *Mexico – Soft Drinks* argue that Articles 22 and 23 DSU preclude the application of countermeasures to WTO disputes. According to the reports, if we were to accept that countermeasures responding to a prior internationally wrongful act can justify breaches of WTO law, this would also allow States to respond to breaches of the WTO Agreements themselves by suspending WTO obligations without recourse to the WTO DSS.¹⁸² However, this line of reasoning is flawed.

First, it is possible that the *lex specialis*, in our case Articles 22 and 23 DSU, excludes the application of some countermeasures under general international law but not others. In this case, the only conclusion to be reached through interpretation of the DSU is that the *lex specialis* excludes unilateral countermeasures as far as breaches of the WTO Agreements themselves are concerned. The WTO Agreements specify themselves the consequences of a breach of obligations enshrined thereunder and provide the means to induce compliance with WTO obligations through the WTO DSS. However, this does not effectively respond to Mexico's argument in *Mexico – Soft Drinks*. Articles 22 and 23 DSU provide no guidance on whether WTO obligations may be affected by countermeasures taken in response to breaches of obligations which are not within the WTO Agreements. In other words, whether the defence of countermeasures under general international law can justify a breach of WTO obligations.¹⁸³ There is no explicit provision in the WTO Agreements, whether in the DSU or elsewhere, relating to countermeasures in response to a breach of non-WTO obligations.

The findings and methodology outlined above suggest that in the absence of an explicit derogation in the WTO Agreements, general international law applies by default. Thus, there is no reason to assume *a priori* that the defence

182 See analysis in text accompanying supra nn 147–48.

183 See Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 BYIL 264, 270 on the dual role of countermeasures as a 'sword' (invocation of responsibility for breaches of the WTO regime) and as a 'shield' (defence against a claim of breach). In the case of the WTO it seems that countermeasures as a sword are precluded but it remains unclear whether they can still be invoked as a shield.

of countermeasures is not applicable to WTO disputes. Based on the reasoning elaborated in Section 2.2, the silence of the WTO Agreements must be interpreted as implicit acceptance of the relevant rules. Nonetheless, one would have to examine further how the *lex specialis* principle applies in this case, not only in relation to Article XX(d) GATT, which was discussed in *Mexico – Soft Drinks*, but also in relation to Article XXI GATT on Security Exceptions, especially read in conjunction with Article XX GATT. It could be argued, for example, that countermeasures taken in response to violations of international law that raise security concerns fall within the ambit of Article XXI GATT, and the relevant standard enshrined therein should be applied to the exclusion of the customary requirements of lawful countermeasures. However, countermeasures in response to violations that do not reasonably relate to the security interests of the imposing States, such as countermeasures in response to human rights violations or third-party countermeasures, do not seem to be regulated by the WTO security exception provisions.

As for the jurisdictional question, following the reasoning developed above with respect to rules of general international law and interim findings that have no independent legal force, it could be argued that WTO panels and the AB would not become ‘adjudicators of non-WTO disputes’ if they only determine the existence of the prior internationally wrongful act to the extent required to rule on the applicability of the defence of countermeasures. Defences under general international law have no ‘autonomous legal content’.¹⁸⁴ A rule and its exception constitute a logical and legal bundle.¹⁸⁵ The power of an adjudicative body to examine a defence along with all issues indispensable in this context follows from the principle that ‘jurisdiction to determine a breach implies jurisdiction to award compensation’,¹⁸⁶ or more generally to rule on the international responsibility of the respondent for breach of its international obligations. The legal effects of such interim findings would be limited ‘to the four corners of the covered agreements’ since the WTO DSS would not be able to accompany its findings with appropriate remedies.¹⁸⁷ The rulings form an integral part of the reasoning of the WTO adjudicative body in the course of deciding the WTO matter properly brought before it.

184 See supra n 72 and accompanying text.

185 See similarly Cannizzaro and Bonafé (n 38) 490–91 in relation to the jurisprudence of the ICJ.

186 James Crawford, *State Responsibility – The General Part* (CUP 2013) 599.

187 Anastasios Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps Between the WTO and Other Regimes* (Routledge 2015) 209.

A further question in this context is whether and to what extent the law on countermeasures may inform the interpretation of the WTO exception clauses under Article 31(3)(c) VCLT. GATT negotiating history suggests that the drafters envisaged the use of the security exceptions to justify unilateral trade sanctions.¹⁸⁸ The practice so far also suggests that the security exceptions are invoked to justify trade restrictions adopted in the context of broader disputes, as a response to alleged prior conduct of the targeted State. Saudi Arabia, for example, has itself characterised, in its public statements and submissions before other international fora, the very same measures challenged by Qatar in *Saudi Arabia – IPR* as ‘lawful countermeasures’ in response to Qatar’s alleged prior internationally wrongful acts.¹⁸⁹ Thus, there is a clear connection between the general defence of countermeasures and the WTO security exceptions. Nonetheless, the panels have so far ignored this connection and have not discussed the relationship between the two defences.

The WTO general and security exceptions also have evident similarities in terms of scope of application with the defence of necessity under general international law, as codified in article 25 ARSIWA. Both defences are invoked when there is an ‘irreconcilable conflict’ between certain State interests and a State’s international obligations and reflect the agreement of States that international obligations can be set aside for the protection of such interests under specific conditions. The interests recognised under the WTO exception provisions and those that fall within the scope of the customary necessity defence are to a certain degree coextensive. For example, the general necessity defence may be used to justify measures adopted for the purposes of environmental protection or the conservation of exhaustible natural resources,¹⁹⁰ objectives that also fall within the scope of the WTO general exceptions. Moreover, the notion of ‘essential interests’ is a common element between the WTO security exceptions and the customary rule of necessity. The term ‘emergency’ in Article XXI(b)(iii) GATT, in its ordinary meaning as confirmed by the Panel

188 Michael Hahn, ‘Vital Interests and the Law of GATT: Analysis of GATT’s Security Exception’ (1991) 12 Mich J Intl L 558, 567–69.

189 See eg submissions of Saudi Arabia in *Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v Qatar)* (Judgment) (2020) <www.icj-cij.org/en/case/174/judgments> and *Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)* (Judgment) (2020) para 24 <www.icj-cij.org/en/case/173/judgments> both accessed 14 October 2021.

190 *Gabčíkovo-Nagymaros* (n 177) para 53; *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, para 20.

in *Russia – Transit*,¹⁹¹ is also reminiscent of the grave and imminent peril test in the defence of necessity under general international law. Further textual similarities are also indications of the link between the two defences. For example, in the ‘public order’ exception of Article XIV(a) GATS¹⁹² the drafters added a footnote stipulating that the exception ‘may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society’.¹⁹³ The language of this footnote is again strongly reminiscent of the general necessity defence and shows the influence that general international law had in the drafting of the WTO Agreements.

Overall, there is an overlap in terms of subject matter between the general necessity defence and the WTO exception clauses, which suggests, at the very least, that the general necessity defence is a ‘relevant rule of international law applicable between the parties’ that shall be taken into consideration for the interpretation of the WTO exceptions under Article 31(3)(c) VCLT. Nonetheless, the WTO DSS has never engaged in an interpretation of these provisions in light of the necessity defence. It seems that the WTO treats, *sub silentio*, the WTO exception clauses as a strong form of *lex specialis* to necessity under general international law, without ever investigating further their interrelationship.

The relevance of the defences under general international law to the interpretation of the WTO Agreements and their potential residual applicability is a good example of the practical implications of the matter discussed in this paper, as it could provide additional legal defences to WTO responding States or may inform the scope and extent of the existing defences under the WTO exception clauses. Adhering to the methodology above could yield interesting interpretative results in this sensitive area of WTO law.

5 Concluding Remarks

This paper demonstrates that despite the specialised character and limited jurisdictional scope of the WTO dispute settlement system, general international law is applicable by default to WTO disputes, subject to the application of the *lex specialis* principle. Specifically, with respect to the law on state

191 See *Russia – Transit* (n 19) para 7.72, defining emergency as ‘situation, especially of danger or conflict, that arises unexpectedly and requires urgent action’, and a ‘pressing need ... a condition or danger or disaster throughout a region’.

192 Note that this objective appears explicitly only in art XIV GATS. This is one of the few textual differences between the GATT and GATS exceptions.

193 Art XIV(a) GATS fn 5.

responsibility, WTO panels have often applied such rules directly in the absence of a provision in the WTO Agreements regulating the same subject matter. Application of such rules in the cases analysed above was necessary in order to decide on matters that were indispensable for the exercise of their function under the DSU, such as the attributability of the actions in question to the responding state or the existence of a legal interest for the initiation of dispute settlement proceedings. The paper argues that WTO panels and the AB can examine rules of general international law in this context and make relevant findings on the basis of their inherent powers as international adjudicative bodies. Thus, it is proven, in the first place, that general international law on state responsibility is not displaced altogether from WTO disputes and applies to the extent that the WTO Agreements do not 'contract out' of its application. This approach can have significant implications in a number of issues. This paper discussed a bit more extensively, by way of example, the implications of applying this methodology in assessing the availability of the defences under the law on state responsibility to responding states in WTO disputes.

Moreover, the case law confirms that WTO adjudicative bodies have taken into consideration the rules on state responsibility – as codified in ARSIWA – in interpreting the terms of the WTO Agreements, as relevant rules of international law applicable between the parties under Article 31(3)(c) VCLT. The analysis confirms that there are several intersections between the law on state responsibility and WTO law and that general international law can shed light to the scope and meaning of WTO provisions whenever they regulate the same subject-matter. The paper provided an overview of WTO reports that take the ARSIWA into consideration to clarify, for example, which financial contributions fall within the scope of Article 1 SCM, which subsidies are subject to reduction commitments under Article 9 Agriculture Agreement, the scope of permissible countermeasures and safeguard measures under the SCM and the ATC, other issues of attribution in the context of the WTO Agreements, et al.

Still, the relevant practice is relatively scarce. The limited use, so far, of general international law in the analysis of WTO adjudicative bodies suggests, perhaps, a reluctance to engage in substantial discussions on the relationship between the provisions of WTO law and the general law on state responsibility. Moreover, the analysis suggests that, even when panels or the AB do have recourse to the rules of general international law, either as directly applicable to WTO disputes or as a means of interpreting the WTO Agreements, they do not specify the legal basis for such discussion or clarify how general international law becomes relevant to the dispute at hand. The analysis further suggests that WTO adjudicative bodies rarely engage in any such discussion

proprio motu and that they mostly do so whenever there are relevant references in the parties' submissions introducing the general law on state responsibility into their analysis.

Nonetheless, despite the methodological ambiguity observed in the case law, WTO adjudicative bodies are, undoubtedly, directly mandated under Article 3(2) DSU to 'clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law'. The customary rule of interpretation enshrined in Article 31(3)(c) VCLT has a mandatory character and instructs the interpreter of a treaty to take into account other relevant applicable rules of international law, i.e. to take into account the "systemic" environment of the treaty.¹⁹⁴ As the ILC Study Group on Fragmentation explained '[a]ll treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law.'¹⁹⁵ This is the rationale behind Article 31(3)(c) VCLT. In view of this, panels and the AB must take into account the general international law on state responsibility in interpreting the WTO Agreements. They must determine, through interpretation, whether the WTO provisions constitute *lex specialis* to general international law, and if so, to what extent the *lex generalis* is pertinent to their interpretation. When no provision on the subject matter at hand exists in the WTO Agreements, recourse to general international law as directly applicable is warranted.

In sum, it becomes apparent that there is no legal reason to consider the general international law on state responsibility as *a priori* non-applicable to WTO disputes and that WTO adjudicative bodies are directly instructed under the DSU to take such law into consideration, among other means, in clarifying the content of the WTO Agreements. The methodological obscurity of WTO panels and the AB, despite the evident interconnections between general international law and the WTO Agreements, is not legally justified or practically desirable. It perpetuates a lack of clarity and legal certainty regarding the role of general international law in WTO disputes and can potentially undermine the security and predictability of the system, with the protection of which they have been entrusted.

It is hard to ascribe specific motivation to WTO panels for their methodological choices or to interpret their lack of engagement with international law as a clear avoidance technique. There may be a number of reasons behind

194 ILC Fragmentation Report (n 27) para 179.

195 *ibid* para 414.

their lack of engagement, ranging from ignorance to a ‘political motivation’ to interpret WTO provisions in a certain restrictive or expansive manner. However, the paralysis of the WTO AB brings to the forefront the issue of methodological clarity. The WTO AB was seen as an agent of stability facilitating the development of a consistent line of jurisprudence.¹⁹⁶ But, as Thomas Graham, the last American member of the AB, put it in his farewell speech in December 2020, ‘[t]he Appellate Body, as we have known it, is gone and is not returning’.¹⁹⁷ In *US – Stainless Steel-Mexico*, the AB has stated that ‘[e]nsuring “security and predictability” in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.’¹⁹⁸ As Andersen explains ‘[this] argument is a cornerstone of a constitutional society based on rule of law and its implied principle of legal certainty’.¹⁹⁹ Methodological ambiguity is a serious obstacle in this respect as it is hard to transpose the legal reasoning of one panel report into another if the method followed in the initial report is obscure or vague. It also entails the danger that general international law is used in an ‘incorrect’ or ‘sloppy’ manner with a view to legitimise a specific reading of the WTO Agreements. The AB, being a standing review mechanism, was in a position to facilitate the consistent application of specific standards in WTO case law and its absence may be felt in a number of areas of WTO law. Regardless of which of the proposed scenarios for this post-AB era of WTO adjudication will eventually be adopted,²⁰⁰ methodological coherence and intelligibility will be more important than ever, as it can increase the legitimacy of panel reports and boost respect and trust to the WTO adjudicative process.

196 Although the AB hears appeals in divisions of three, under its Working Procedures, divisions have the obligation to exchange views with other AB members before finalising their report. This arrangement ensures consistency and coherence in decision making. See MacKenzie and others (n 175) 80.

197 WTO, ‘Farewell Speech of Appellate Body Member Thomas Graham’ (5 March 2020) <www.wto.org/english/tratop_e/dispu_e/farwellspechtgaham_e.htm> accessed 14 October 2021.

198 WTO, *US – Stainless Steel-Mexico*, Report of the Appellate Body (30 April 2008) AB-2008-1, WT/DS344/AB/R para 160.

199 Henrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18 JIEL 383, 388.

200 For an overview of the options see Joost Pauwelyn, ‘Scenarios for WTO Dispute Settlement Post 2019: What to Expect?’ (2019) 22 JIEL 297; Geraldo Vidigal, ‘Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis’ (2019) 20 JWIT 862; Andrea Hamann, ‘Living Without the WTO Appellate Body – Procedural Developments in International Trade Dispute Settlement’ (2021) 20 LPICT 166.

Moreover, there are several more channels of interaction between general international law and WTO law that remain underexplored and may have significant influence on the interpretation of the WTO Agreements and the development of WTO adjudication. The present paper aimed to act as a framework for reference in exploring further, on a case-by-case basis, the interaction of general international law with the WTO Agreements. Although clarity and predictability in terms of methodology are in themselves important objectives and shedding light to the ways in which general international law can be used in WTO dispute settlement contributes significantly to this objective, the relevance of general international law to the interpretation of several WTO clauses and its potential residual applicability to WTO disputes can have important practical implications to the WTO regime and needs to be further investigated in a disciplined and coherent manner.

Biographical Note

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