

# Normative Heterogeneity and International Responsibility: Another View on the World Trade Organization and its System of Countermeasures

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## Table of Contents

A.	Introduction: A Possible Connection between the Law of International Responsibility and the WTO Law.....	645
B.	The WTO Law in the International Law Atmosphere .....	646
C.	Horizontal and Vertical Relationships between WTO Law and International Law .....	648
I.	WTO Law as a Self-Contained Regime? .....	648
II.	Horizontality: <i>Jus Cogens</i> and International Public Order.....	652
III.	Verticality: Interactions Recognized by WTO/DSB .....	656
1.	International Environmental Law and the Precautionary Principle.....	656
2.	Non-Retroactivity Principle.....	659
3.	Proportionality Principle .....	660
IV.	Human Rights and the Kimberley Process .....	661

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D.	The Doctrine of “Direct Effect” and the Law of International Responsibility.....	663
I.	The “Direct Effect” Doctrine.....	663
II.	The World Bank Inspection Panel: A Necessary Instance of Institutional Control?.....	665
E.	International Responsibility and the WTO System of Countermeasures .....	667
I.	The WTO/DSB Recommendations and their Binding Force .....	667
II.	Countermeasures in General International Law .....	668
III.	Countermeasures in the WTO .....	671
F.	Final Considerations .....	673

## Abstract

As legal subjects, international organizations are seen as apt for both active and passive participation in the international judicial area and, in this regard, are regulated according to a specific responsibility regime, as established by the United Nations International Law Commission, in its latest reports on this matter. The challenge here lies on testing this regime as to its applicability in relation to the World Trade Organization, in view of the fact that this organization's conduct may potentially produce internationally illicit acts. After asserting the WTO's juridical nature, normative parameters to which the entity is submitted are established in the general international law based on the acknowledgement of its horizontal and vertical relations with the so-called WTO Law. From this point onwards, it is possible to assert that international illicitness in the World Trade Organization's practice becomes legally verifiable through an institutional performance capacity analysis of its organs and agents, with special focus on its countermeasures system.

### A. Introduction: A Possible Connection between the Law of International Responsibility and the WTO Law

“Between Scylla and Charybdis” is a good metaphor for demonstrating the researcher's position, when he/she analyses juridical gray borders located between two relatively complex fields. In this sense, traditional and compartmentalized lawyer's views over some kind of scientific objects should not show the myriad of possibilities, which international economic law and international law are capable of producing together in their contact zones. In this way, the specific mixture of the World Trade Organization and the regime of responsibility of international organizations can cause exciting surprises.

Before the research, some questions are raised, such as: 1) Could the WTO Law be qualified as a self-contained regime, isolated from the public international law (PIL)? 2) If not, which kind of principles or/and norms from PIL are able to “invade” the WTO sphere? 3) Could it be possible talk about hierarchy in that normative relationship? 4) Does the WTO's institutional activity pursuit direct effects over individual rights and affect the responsibility of the International Organization itself? 5) Are the countermeasures an example of potential international illicit acts, which attract the shared responsibility of the WTO and the executing Member?

In sum, the follow considerations intent to show the high potential of that problems to produce new academic investigations over the contemporary international scenario, focused on the international law field.

## B. The WTO Law in the International Law Atmosphere

Some international economic law theories give the impression that WTO law is a hermetically closed legal system with no normative relationship with any other field of international law. Nevertheless, the very recognition of the personality and legal capacity of the World Trade Organization requires a larger normative environment in which its legal faculties may be legitimately exercised.

One inescapable line of questioning raised by Hermann Mosler<sup>1</sup> resides in defining whether the internal legal framework of international organizations is part of international law or if it constitutes separate legislation similar to the legislation of States under a dualistic view. If one considers that international organizations are part of the International Community, the latter option would in theory be the correct one.

Nevertheless, it is necessary to take into account the fact that the internal legal framework of international organizations is linked to a constitutive treaty which is, in turn, immediately connected to general international law. A consequence of this assumption is the necessary alignment of the methods for interpretation and application of internal law in these organizations with the principles and rules of international law.

It is for no other reason that international organizations are presented not only as communities integrated through an internal legal framework, but also as entities operating within the legal space of the International Community under the aegis of general international law.<sup>2</sup>

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) states in Article 3.2:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Member recognize that it serves to preserve the rights and obligations of Member under the covered agreements, and to clarify the existing provisions of those agreements in accordance with

<sup>1</sup> H. Mosler, *The International Society as a Legal Community* (1980), 203.

<sup>2</sup> A. P. Sereni, *Le Organizzazioni Internazionali* (1959), 45.

customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.”

The reference to “customary rules of interpretation” encompasses the entire range of principles and norms of interpretation of public international law, some of which are included in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969).<sup>3</sup>

Although the Vienna Convention on the Law of Treaties was not ratified by all members of the WTO, in its provisions it summarizes customary international law on the subject.<sup>4</sup>

In this sense, we must quote the contents of the aforementioned rules of interpretation:

“Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

<sup>3</sup> P. Stoll, ‘Article 3 DSU’, in R. Wolfrum *et al.* (eds), *Max Planck Commentaries on World Trade Law: WTO – Institutions and Dispute Settlement* (2006), 288.

<sup>4</sup> R. L. Silva, *Direito Internacional Público*, 2nd ed. (2002), 95.

- b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - c. any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. leaves the meaning ambiguous or obscure; or
- b. leads to a result which is manifestly absurd or unreasonable.”

Based on the referenced ruling assumptions, it is feasible to assert that the WTO Agreement must not be viewed in a clinically isolated fashion in its relationship to public international law, as admitted by the WTO Appellate Body in its report on the *US – Gasoline* case.<sup>5</sup>

### C. Horizontal and Vertical Relationships between WTO Law and International Law

#### I. WTO Law as a Self-Contained Regime?

Unfortunately, the rules and procedures governing the settlement of disputes in the WTO, unlike other international legal systems, fail to define clearly the extent to which international law can or must be applied in conjunction with the framework of rules of the institution.<sup>6</sup>

<sup>5</sup> United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996.

<sup>6</sup> G. Jaenicke, ‘The Dispute Settlement System of the World Trade Organization: Jurisdiction and Applicable Law’, in J. A. Frowein *et al.* (eds), *Verhandeln für den Frieden: Negotiating for Peace: Liber amicorum Tono Eitel* (2003), 364.

The fact that what is referred to as WTO Law does not represent a complete legal response to the multi-dimensionality of disputes presented within international trade originates from the heteronymous nature of the legal system under analysis.<sup>7</sup>

It is therefore necessary to consider the assumption that the legal framework of the WTO does not appear to be strictly self-sufficient or self-contained,<sup>8</sup> with its interpretation and application occurring in conjunction with other norms of public international law.

The historical foundation of the self-contained regime concept is based on the *specialia generalibus derogant* principle originated in Roman Law, which establishes that the existence of a rule of a particular nature renders the legal incidence of the initially applicable general rule redundant.<sup>9</sup>

This notwithstanding, the English expression originated from international judicial language used in the ruling on the *S.S. Wimbledon* case by the Permanent Court of International Justice,<sup>10</sup> when the Treaty of Versailles concerning legal regime of the Kiel Canal were classified as self-contained, keeping those provisions from being supplemented or interpreted on the basis of the norms pertaining to other navigable bodies of water in Germany.

The issue was again considered under the auspices of the International Court of Justice in its ruling in the *United States Diplomatic and Consular Staff in Teheran* case.<sup>11</sup>

When analyzing the allegation of the occurrence of actions by members of the U.S. diplomatic and consular staff that characterized undue interference in internal Iranian affairs and thereby presenting the incident in the embassy as a legally acceptable act of retaliation, the Court considered the norms of diplomatic law as a self-contained regime. If on the one hand it imposes obligations on the receiving State with respect to facilitation,

<sup>7</sup> J. P. Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard International Law Journal* (1999) 2, 333, 338.

<sup>8</sup> D. Palmetier & P. C. Mavroidis, 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 3, 398, 413.

<sup>9</sup> P. Dupuy, 'L'Unité de l'Ordre Juridique International: Cours General de Droit International Public', in *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (2003), 428.

<sup>10</sup> *S. S. Wimbledon Case (United Kingdom, France, Italy and Japan v. Germany)*, PCIJ Series A, No. 1 (1923), 23, 24.

<sup>11</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 40, para. 86.

prerogatives and immunities for members of the diplomatic mission, on the other hand diplomatic law provides the legal remedies to be adopted in the case of abuse of these rights.

In this sense, the mechanism for notification of *persona non grata*, or unacceptable person, when referring to an undesirable member of a foreign delegation, finds normative provision in the Vienna Convention on Consular Relations (1963) and represents a proportional response to the actions referred by the Iranian defense.

Inspired by the aforementioned precedent, the *Rapporteur* on the topic of the international responsibility of States to the International Law Commission of the United Nations (ILC), Willem Riphagen,<sup>12</sup> concluded in his third report that recognition of self-sufficient legal regimes would in itself introduce the necessary notion of separate subsystems of norms within the body of international law. Moreover, in response to the primary norms generating obligations for both parties, there would then be secondary norms within an individual subsystem to deal with responsibility law within the same legal category.

As an example, a treaty could create a specific subsystem within international law, with its secondary norms implicitly or explicitly linked to the established primary norms. Faults occasionally uncovered in a specific subsystem would be resolved by accessing the internal prescriptions of another subsystem based on the criterion of normative subsidiarity.

In a renowned article on the subject, Bruno Simma wrote that even though the Court's precedent in the *U. S. Diplomatic and Consular Staff in Teheran* case based its decision on the recognition of diplomatic law as a legal system of special nature, there is no question that serious violations of diplomatic rights may generate the justified application of countermeasures in the guise of the suspension of general obligations in other fields of international relations, even supported by customary international law.<sup>13</sup>

The idea of a normative subsystem with a fulcrum on the doctrinal position of Simma abandons its essential base as a restrictive distinction. In this sense, the unsustainable aspect of the idea of isolation of WTO Law transmutes the concept of a self-sufficient regime, admitting its permeation through a plurality of norms applying both in the vertical plane (e.g.

<sup>12</sup> W. Riphagen, 'Third Report of the Special Rapporteur on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)', in *Yearbook of the International Law Commission*, Vol. II (1982), 22.

<sup>13</sup> B. Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985), 111, 120.

international environmental law), and on the plane of normative horizontality (e.g. *jus cogens*).

At this point, it is necessary to partially disagree with the position put forward by Mitsuo Matsushita *et al.*<sup>14</sup> in the sense that the legal regime of the WTO is a hybrid system since its laws originated from the texts of the Agreements while its interpretative elements are found in the decisions of the dispute settlement system.

In actual fact, the hybrid nature of WTO Law comes not only from exogenous influences within the field of interpretation of its positive provisions, but also from its horizontal and vertical relationships with other normative systems within the larger field of international law.

In its consultative statement in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice issued the following declaration: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”<sup>15</sup>.

During its 1957 session in Amsterdam, the *Institut de Droit International* (IDI) adopted a specific resolution on the acceptable remedies against decisions issued by international bodies and organizations, at same time it named several normative sources from which the legal links and those of obligation required for these institutions may arise.

On this matter, the resolution being commented established that:

“The Institute of International Law,

Considering that every international organ and every international organization has the duty to respect the law and to ensure that the law be respected by its agents and officials; that the same duty is incumbent on States as members of such organs or organizations,

[...]

II.

Is of the opinion that judicial control of the decisions of international organs must have as its object the assurance of respect for rules of law which are binding on the organ or organization under consideration, notably:

<sup>14</sup> M. Matsushita *et al.*, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 24.

<sup>15</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, 89-90, para. 37.

- a) general international law;
- b) the constitutional provisions applicable to that organ or organization and those which regulate the functioning of the international organ;
- c) the rules established by that organ or organization whether they concern the States members, the agents and officials of the organ or organization, or private persons to the extent that their rights and interests are involved;
- d) the provisions of applicable treaties;
- e) any provision of internal law applicable to the juridical relations of that organ or organization.”<sup>16</sup>

In line with the position of the *Institut*, the test for the legality of acts by international organizations relates to exogenous elements pertaining to general international law and applicable treaties and to endogenous ones, that is, the normative paradigms generated by the institution, centered in its constitutive act and its internal legal framework.

In the opinion of *Rapporteur* Wilhelm Wengler, the reference to “general international law” in the aforementioned item “a” encompasses customary international law as well as general legal principles, especially those extracted from the practice in the matter of jurisdiction remedies.<sup>17</sup>

## II. Horizontality: *Jus Cogens* and International Public Order

As previously explained, it is possible to affirm that legislation applicable to international organizations encompasses both their internal legal framework and general international law.

Taking into account that the application of international customs and general legal principles is not necessarily subordinated to an express acceptance on the part of the subjects of international law, the degree of pro-activeness present in the establishment of the internal normative framework, through the participation of the members, is not evidenced in the hypothesis of the submission of such institutions to customary international law and, by extension, to *jus cogens*.<sup>18</sup>

<sup>16</sup> Institut de Droit International, *Annuaire de l'Institut de Droit International: Session d'Amsterdam*, Vol. 47, T. II (1957), 488, 489.

<sup>17</sup> *Id.*, 297.

<sup>18</sup> E. David, ‘Le Droit International applicable aux Organisations Internationales’, in M. Dony (ed.), *Mélanges en Hommage à Michel Waelbroeck*, Vol. I (1999), 15, 22.

From a substantive viewpoint, decisions, recommendations and authorizations adopted within the World Trade Organization will result in consequences of an illicit nature if, for example, they either directly or indirectly violate *erga omnes* obligations derived from cogent norms.

In the field of general international law, there are norms in which the imperative contents aim at protecting the common interests of the International Community, for that reason they are rated as *jus cogens*.<sup>19</sup> By virtue of this differentiated nature, these norms generate obligations of an *erga omnes* character, i.e. applicable without distinction. In this sense, it is possible to regard *jus cogens* norms as the truly substantive conditions for the legal validity of acts undertaken in the field of institutional activity of all the subjects in international law, a group in which international organizations are included.<sup>20</sup>

Despite representing a wide range of normative prescriptions and given the eminently evolving nature of the international legal system,<sup>21</sup> among all the imperative norms of a cogent nature recognized by the International Court of Justice, it is important to mention prohibition of aggression<sup>22</sup> and genocide,<sup>23</sup> the right to self-determination,<sup>24</sup> basic human rights and the repression of slavery and racial discrimination.<sup>25</sup>

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) expressly recognized the existence of mutual obligations of participant States to concretely avoid committing this type of act, but its dispositions in fact endorsed provisions originated by the *jus cogens* norms.

As an example, the mere signing of a trade agreement to enable the transfer of military technology for the purpose of perpetrating genocide clearly violates *erga omnes* obligations included in the norms under

<sup>19</sup> M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 47, 73.

<sup>20</sup> E. P. Nicoloudis, *La Nullité de Jus Cogens et le Développement Contemporain du Droit International Public* (1974), 26, 132, 134.

<sup>21</sup> M. Virally, *El Devenir del Derecho Internacional: Ensayos Escritos al Correr de los Años* (1998), 175.

<sup>22</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 100-101, paras 190, 191.

<sup>23</sup> *Case Concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, 595, 616, para. 31.

<sup>24</sup> *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 102, para. 29.

<sup>25</sup> *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment [Second Phase], ICJ Reports 1970, 3, 32, para. 34.

discussion. It must be noted that this is not just a hypothetical scenario, if one considers that the Rwanda genocide in 1994 was made possible by a previous massive importation of machetes.<sup>26</sup>

It is enlightening to examine the various resolutions adopted by the United Nations in the 1970s and 1980s on the subject of the South African *Apartheid* theme,<sup>27</sup> whereby a series of embargoes was the object of binding recommendations to all members of the International Community, making evident the *erga omnes* nature of these restrictive diplomatic and commercial actions.<sup>28</sup>

Nevertheless, as James Crawford<sup>29</sup> pointed out, not all obligations applicable to the International Community necessarily have their origins in such peremptory norms, as exemplified in some rights and obligations of a consuetudinary character included in the United Nations Convention on the Law of the Sea, which have an essentially interstate nature (e.g. the obligation to fly the flag of the country of registry and the subjection of ships without registry to general jurisdiction).

A concept that deserves particular mention is one put forward by Günther Jaenicke,<sup>30</sup> which relates to an international public order of which the principles and norms would not be confined within the strict limits of the *jus cogens* normative category.

In spite of the supremacy of its fundamentals against the dogma of traditional international law (based essentially on the reference to verifiable rights and obligations between two or more States), since it encompasses links of obligation within the International Community as a whole, international public order recognizes the existence of obligations derived not only from the *jus cogens* norms, but also from other matters of common interest.

In the trial of the *Soering v. The United Kingdom* case argued in the European Court of Human Rights in 1989, Judge De Meyer recorded in his concurrent opinion that the conduct of extraditing a person over whom there

<sup>26</sup> S. H. Cleveland, 'Human Rights Sanctions and International Trade: a Theory of Compatibility', 5 *Journal of International Economic Law* (2002) 1, 133, 155.

<sup>27</sup> See SC Res. 418, 4 November 1977, and SC Res. 569, 26 July 1985.

<sup>28</sup> A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 2nd ed. (2002), 556.

<sup>29</sup> J. Crawford, *International Law as an Open System: Selected Essays* (2002), 351.

<sup>30</sup> G. Jaenicke, 'International Public Order', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II (1995), 1348, 1351.

is a risk of imposition of the death penalty by the requesting State results in a serious violation of European Public Order.<sup>31</sup>

In a more recent ruling in the case of *Loizidou v. Turkey*, the same Court found the expropriation by Turkey of real estate owned by ethnic Cypriot Greek citizens to constitute an express violation of public order considering that its implementation was based on criteria of clear racial discrimination.<sup>32</sup>

The legal contents of the international public order may be classified into the following normative requirements:<sup>33</sup>

- a) principles and norms relating to the formation and modification of international law (e.g. the law of treaties, the law of responsibility, creation and changes in customary international law);
- b) principles and norms relating to the organizational structure of the International Community (e.g. the coexistence of the independent sovereignty of States, territorial integrity, self-determination, equality between States, spheres and limits of state jurisdiction, constitution of international organizations and their relationships with members and non-members);
- c) principles and norms of substantive law that serve the essential rights of the International Community and their respective protection, for which evidence of consensus may be extracted from international conventions, the United Nations Charter and from other organizations, as well as resolutions defined in international conferences.

Therefore, the area encompassed by peremptory international norms lies within the domain of international public order.<sup>34</sup>

Although the logic of the legal thesis proposed by Günter Jaenicke is extremely convincing, it should be emphasized that this is not an undisputed position in international doctrine and judicial decisions, both of which remain firmly tied to the *jus cogens* concept framework of an international normative structure of a hierarchical nature, in some instances refuting it completely on strictly voluntaristic arguments.

<sup>31</sup> *Soering v. The United Kingdom*, ECHR (1989) Series A, No. 161.

<sup>32</sup> *Loizidou v. Turkey*, ECHR (1998) Series A, No. 310.

<sup>33</sup> Jaenicke, *supra* note 30, 1350.

<sup>34</sup> A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 29.

The evidenced existence of structural norms in international law, that are more extensive than the *jus cogens* limits, demonstrates the validity of the Jaenicke's scheme focused on the international public order.

### III. Verticality: Interactions Recognized by WTO/DSB

Without intending to exhaust the subject, it is important to list the hypotheses in which normative assumptions external to WTO Law are incorporated in the decisions of the DSB, irrespective of the hierarchy concept of the norms. Unlike the horizontal relationships discussed above, in this topic we deal with verticality.

In the same line of Joost Pauwelyn's lesson,<sup>35</sup> general principles of law have an important role for international organizations, especially for those with compulsory dispute settlement like the WTO, as a converging factor between the law of the international organization and the public international law's *corpus iuris*. Otherwise, general principles of law can be a fundamental tool for the judicial function within the institution to construe the law of the organization according to the contemporary problems.

In this sense, the analysis of the precautionary, non-retroactivity and proportionality principles applicable to the WTO Law demonstrate useful examples for the interaction between precepts of same normative hierarchy.

#### 1. International Environmental Law and the Precautionary Principle

General international law is not the only source of nourishment for the normative order of the World Trade Organization. The decisions from the system for the settlement of disputes are well-disposed to recognize interests of environmental protection as justification for commercial restrictions related to production methods (particularly on the basis of Article XX, item g, of the 1947 GATT)<sup>36</sup>, provided that the State invoking the restrictions has

<sup>35</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), 130.

<sup>36</sup> Art. XX General Agreement on Tariffs and Trade (General Exceptions): "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

sought adequate solutions for the issue beforehand and in a non-discriminatory way.<sup>37</sup>

Before the WTO-era, two GATT 1947 panels (*Tuna-Dolphin* cases) have analyzed the efficacy of multilateral environmental agreements (MEAs) in trade dispute matters. With an incipient perception, the *Tuna II* panel stated that MEAs were not relevant as a primary means of interpretation of the General Agreement,<sup>38</sup> in accordance with the Article 31.3(a) of the Vienna Convention,<sup>39</sup> despite the inevitable conclusion that multilateral treaties are the best positive evidence of an international consensus.

Otherwise, analyzing the argument that the yellowfin tuna capture process has been caused dangerous consequences for dolphin's population, the United States prohibition to import tuna was considered incompatible with the rules of GATT,<sup>40</sup> especially with the "necessary" test of Article XX(b).<sup>41</sup>

Inspired by the *Tuna-Dolphin* cases, in the adjudicating process related to *US – Shrimp* case, the DSU has faced a very similar problematic involving the shrimps' fishing process and its dangerous implication for sea turtles. In that case, a systematic interpretation method was adopted by the Appellate Body to specify the concept of "exhaustible natural resources" (Article XX.g), especially based on the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity and the "Agenda 21" adopted by the United Nations Conference on Environment and Development.<sup>42</sup>

On other hand, when unilateral measures respond to political convenience associated to domestic issues and not to objective reasons, they

[...] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

<sup>37</sup> M. Herdegen, *Völkerrecht*, 6th ed. (2007), 352.

<sup>38</sup> J. Cameron & K. R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', 50 *International and Comparative Law Quarterly* (2001) 2, 248, 264, 265.

<sup>39</sup> Art. 31 Vienna Convention on the Law of Treaties (General Rule of Interpretation): "[...] 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

<sup>40</sup> Matsushita *et al.*, *supra* note 14, 795.

<sup>41</sup> Art. XX General Agreement on Tariffs and Trade (General Exceptions): "[...] (b) necessary to protect human, animal or plant life or health".

<sup>42</sup> Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, 48, 50.

could result clearly in discriminatory acts which are incompatible with the fundamental principles of international trading system.<sup>43</sup> Side by side with the multilateral agreements of environmental protection, there are principles of law recognized by the International Community which can contribute against the discriminatory phenomena.

A good example of the WTO interactions with other environmental law sources is the precautionary principle, according to McIntyre and Mosedale,<sup>44</sup> as a general principle of international environmental law, which aims to minimize, and, if possible, eliminate, unnecessary human interference with a legitimate environmental interest, in order to avoid the occurrence of inadvertent environmental harm.

The status of the precautionary principle within international law, as highlighted by the WTO Appellate Body in the report on the *EC – Hormones* case, remains the object of fierce debate in both academic and legal spheres. Nevertheless, the controversy does not have to be settled in order to define precaution in the sense of a principle belonging to international environmental law or as a general principle of international law derived by a customary origin. Essentially, one must consider the aspects resulting from the precautionary principle and the Agreement on the Application of Sanitary and Phytosanitary Measures included in Attachment 1A of the WTO Agreement.<sup>45</sup>

Relating to the risk evaluation and connected with the precautionary principle, in *EC – Asbestos* case,<sup>46</sup> the Appellate Body supported the panel's conclusion for rejecting the argument, and focused on the viability of controlled use of asbestos, considering that the European Communities has demonstrated that there was no "reasonably available alternative" to the prohibition applicable by France against asbestos and products containing asbestos fibers, for the protection of human life or health.

<sup>43</sup> F. O. Vicuña, 'Trade and Environment: New Issues under International Law', in V. Götz *et al.* (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (1998), 708.

<sup>44</sup> O. McIntyre & T. Mosedale, 'The Precautionary Principle as a Norm of Customary International Law', 9 *Journal of Environmental Law* (1997) 2, 221, 240.

<sup>45</sup> Report of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R, 16 January 1998, 50 [EC – Hormones].

<sup>46</sup> Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, 63.

## 2. Non-Retroactivity Principle

Within the vertical normative plan, another exogenous provision referred to in the WTO case-law itself focuses on the general principle of the non-retroactivity of treaties as expressed in Article 28 of the Vienna Convention,<sup>47</sup> which states that a treaty shall not be applied to facts preceding its juridical validity, unless the intent of the parties is different, as agreed in the *Brazil – Coconut* case.<sup>48</sup>

In the *EC – Bananas III*,<sup>49</sup> the Appellate Body has agreed with the Panel's statement that the European Communities practice were *de facto* discriminatory and did continue to exist after the entry into force of the GATS ("continuing measures"). Inspired by the Article 28 of the Vienna Convention, the analyzed period of time did not include events before the GATS legal appearance, according to a harmonic interpretation of the non-retroactivity principle.

In the same way, in *Canada – Patent Term* report was registered that a new treaty (*TRIPS Agreement*) applies to existing rights, even when those rights result from acts which occurred before the treaty entered into force. According to the Article 28 of the Vienna Convention, in absence of contrary intention, treaty obligations do apply to any fact or situation which has not ceased to exist – that is, to any situation that arose in the past, but continues to exist under the new treaty.<sup>50</sup>

With regard to the remedies recommended by the DSU, in the large majority of cases,<sup>51</sup> arbitrators have authorized the applicability of exclusive prospective countermeasures, that is, stating that the obligation to

<sup>47</sup> Art. 28 Vienna Convention on the Law of Treaties (Non-Retroactivity of Treaties): "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

<sup>48</sup> Report of the Appellate Body, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 21 February 1997, 16.

<sup>49</sup> Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, 99, 100 [EC – Bananas III].

<sup>50</sup> Report of the Appellate Body, *Canada – Term of Patent Protection*, WT/DS170/AB/R, 18 September 2000, 21.

<sup>51</sup> For example: EC – Hormones, *supra* note 45; EC – Bananas III, *supra* note 49; Arbitration Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/ARB, 28 August 2000 [Brazil – Aircraft].

compensate becomes applicable after the expiration of the reasonable period of time.<sup>52</sup>

On the other hand, there were five cases in GATT-era<sup>53</sup> and only one WTO report panel (*Australia – Automotive Leather II*) that stated that the institutional normative structure had no specific norms against retroactive measures.<sup>54</sup> This isolated position intensifies the juridical perspective in support of the non-retroactivity principle before the WTO system.

### 3. Proportionality Principle

Within the general principles of public international law applicable to the comprehension of the WTO legal structure, its rights and obligations, the proportionality principle is detached with regard to the rules of international responsibility and their relationship with the countermeasures' juridical control.<sup>55</sup>

Explicitly based on the Draft Articles of the International Law Commission on State Responsibility, the Arbitrators in the case *Brazil – Aircraft (DSU, Art. 22.6)* rescued the definition of countermeasures from the state practice, international judicial decisions and doctrinal writings, as sources of international law, and used this concept to conclude that “a countermeasure is ‘appropriate’ *inter alia* if it effectively induces compliance”<sup>56</sup>.

When referring to the principle of proportionality of countermeasures, there was a clear case-law understanding recorded in the *US – Cotton Yarn* in the sense of its full applicability to WTO Law, taking into account that it is absurd to sanction the violation of an obligation by means of proportionally applied countermeasures while, in the absence of this violation, the Member State is subjected to non-proportional or punitive retaliation.<sup>57</sup>

Another very interesting question is focused on the *erga omnes* character of some WTO obligations. According to the *US – FSC*

<sup>52</sup> Matsushita *et al.*, *supra* note 14, 185.

<sup>53</sup> *Id.*

<sup>54</sup> Report of the Panel, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW, 21 January 2000, 15.

<sup>55</sup> M. E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (2006), 315.

<sup>56</sup> *Brazil – Aircraft*, *supra* note 51, 14, 15.

<sup>57</sup> Report of the Appellate Body, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001, 37, 38.

*Arbitration*, there was considered that the obligation concerning prohibited subsidies “is an obligation owed in its entirety to each and every Member. It cannot be considered to be ‘allocatable’ across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every Member, which is manifestly inconsistent with an *erga omnes per se* obligation”<sup>58</sup>.

In this sense, the proportionality principle cannot apply as between the countermeasures and the effects of the violation upon the complainant,<sup>59</sup> because it would not be possible precise the specific and individualized violation’s result.

Finally, as the Appellate Body stated in the *US – Line Pipe*,<sup>60</sup> the proportionality test in the countermeasures’ qualification and quantification derived from a recognized “principle of customary international law”, which is full applicable to WTO law system.

#### IV. Human Rights and the Kimberley Process

Several treaties forbid arbitrary discrimination, torture, slavery and child exploitation among other prohibitions. Far from these norms being of a strictly conventional nature, current development of the subject through the pioneering action of the regional protection systems has shown that human rights, under several hypotheses, reveal aspects that are typical of customary international law.<sup>61</sup>

One particular episode demonstrates the interaction between WTO Law and the human rights theme quite clearly: the adoption by the WTO General Council of the Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds.<sup>62</sup>

<sup>58</sup> Arbitration Report, *US – Tax Treatment for ‘Foreign Sales Corporations’*, WT/DS108/ARB, 30 August 2006, 21.

<sup>59</sup> T. Gazzini, ‘The Legal Nature of WTO Obligations and the Consequences of their Violation’, 17 *European Journal of International Law* (2006) 4, 723, 740.

<sup>60</sup> Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, 82.

<sup>61</sup> F. Francioni, ‘Environment, Human Rights and the Limits of Free Trade’, in F. Francioni (ed.), *Environment, Human Rights and International Trade* (2001), 6.

<sup>62</sup> Decision of the General Council, *Waiver Concerning Kimberley Process Certification Scheme*, WT/L/518, 27 May 2003.

First, it should be clarified that the WTO, in an act of exemption, allows a Member to forfeit the obligations arising from the WTO Agreements in the face of exceptionally justified circumstances.<sup>63</sup>

The factual foundation of the waiver under analysis refers to the occurrence of serious violations of humanitarian law as a result of armed conflict in several States in the African continent – notably in Angola, Sierra Leone and Liberia – , the financing of which could be directly traced to the illegal diamond trade. One should also add to this the massive proliferation of weapons among the war-faring groups as a result of this illicit trade.

The legal basis for the aforementioned waiver decree within the WTO concentrates on the legitimate institution of the Kimberley Process by means of a specific treaty concluded with the incentive of the UN General Assembly<sup>64</sup> and Security Council<sup>65</sup>. Through this international agreement, a series of legal requirements for certification were put in place aimed at removing diamonds from circulation that were in any way connected with the armed conflict.

In synthesis, from the implementation of the Kimberley Process, trade among Member States must be restricted only to diamonds bearing international certification, with complete prohibition of the diamond trade between Participants and Non-Participants in the Process.<sup>66</sup>

It is immediately evident that the Kimberley Certification Scheme contradicts one of the basic icons of international economic law, i.e. the most favored nation treatment.

As expressed in Article I of the GATT 1947, the rule on the treatment of a most favored nation establishes that:

“Article I: General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and

<sup>63</sup> K. N. Schefer, ‘Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process’, in T. Cottier *et al.* (eds), *Human Rights and International Trade* (2005), 440, 441.

<sup>64</sup> GA Res. 55/56, 29 January 2001.

<sup>65</sup> SC Res. 1459, 28 January 2003.

<sup>66</sup> J. Pauwelyn, ‘WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for ‘Conflict Diamonds’ ’, 24 *Michigan Journal of International Law* (2003) 4, 1177, 1179.

charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

However, we once again need to consider the WTO legal system from the viewpoint of its intrinsic heterogeneity, apparent by its rich permeability to the principles of international humanitarian law and international human rights law in its normative composition.

The considerations shown here do much more than merely report on the state of art included in WTO Law in connection with other aspects of public international law.

The very juridical and interpretative integration of the WTO Agreements with elements exogenous to them reveals the emergence of an *ethos* specific to its normative system,<sup>67</sup> directed towards placing the agreed-upon rights and obligations within the larger context of international law without the confinement of a legal framework isolated from the other legal factors governing the International Community.

## D. The Doctrine of “Direct Effect” and the Law of International Responsibility

### I. The “Direct Effect” Doctrine

Despite the fact that, historically, international organizations deal primarily with issues of an interstate nature, individuals and corporations are progressively being affected, albeit incidentally, by their operations due to the vast array of legal relationships established by these institutions in the globalized environment.<sup>68</sup>

<sup>67</sup> M. Koskenniemi, Report of the Special Rapporteur on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, International Law Commission, Report presented during the 58th session of the ILC, UN Doc A/CN.4/L.682, 13 April 2006, 90.

<sup>68</sup> M. H. Arsanjani, ‘Claims against International Organizations: Quis Custodiet Ipsos Custodes’, 7 *Yale Journal of World Public Order* (1982) 2, 131, 136.

With the intention of supporting the legal feasibility of the immediate efficacy of acts by international organizations within the internal sphere in States, some authors defend the so-called “direct effect doctrine“, which can only be understood from an essentially one-tier viewpoint. In general terms, the basis of this doctrine shows itself to be, in theory, applicable to cases where there is an intrinsic conflict between internal and international norms, when a private entity might object to a provision of internal law by going to the relevant adjudicative instance based on the obligation of the State linked to the prevailing provision in international law.<sup>69</sup>

Armin von Bogdandy defends a position in complete opposition to the doctrine under analysis, by affirming that the instances where decisions by international organs have a direct effect are indeed very rare. The most important exception<sup>70</sup> relates to Article 68.2 of the American Convention on Human Rights (1969), which admits the possibility of direct execution of a condemnatory decision issued by the Inter-American Court of Human Rights, in the same way applicable to internal decisions issued against the State.<sup>71</sup>

We do not deny the assumption that the original purpose of WTO Law was not to generate individual rights, which does not necessarily mean that no act perpetrated by the International Organization embodies in itself the potential to violate first tier individual rights.

Consequently, nothing prevents individual rights from being directly linked to the actions of an international organization, as in the case of international financing operations promoted by regional development banks through contracts signed with their member States, or their nationals in social and economic development projects.<sup>72</sup>

The international practice described below is a good illustration of this issue.

<sup>69</sup> T. Cottier, *The Challenge of WTO Law: Collected Essays* (2007), 311.

<sup>70</sup> Setting aside the jurisdiction of the European Court of Justice to determine the direct effect of Community Law within the legal framework of its Members.

<sup>71</sup> A. von Bogdandy, ‘Legal Effects of World Trade Organization Decision within European Union Law: a Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288(2) EC’, 39 *Journal of World Trade* (2005) 1, 45, 59.

<sup>72</sup> Arsanjani, *supra* note 68, 138.

## II. The World Bank Inspection Panel: A Necessary Instance of Institutional Control?

In 1993, a decision by the World Bank Board of Executive Directors created the Inspection Panel under the title of an institutional organ. Its primary purpose is to address the interests of people who may have been affected by projects developed by the Organization, as well as assuring that it supports its policies and standardized operating procedures through the planning, preparation and implementation phases of its projects.<sup>73</sup>

The Inspection Panel operates as a review administrative instance, with no participation in the legal proceedings, preparing recommendations to the World Bank President and its Executive Directors.<sup>74</sup> As an organ reporting to the Administrative Council, the Panel is composed of three members and enjoys full independence in fulfilling its function since its members are not subjected to the organic hierarchy of the Institution.<sup>75</sup>

The idea embodied in the Inspection Panel initiative is focused on promoting a contact point between individuals and social groups with the decision-making instances of the Organization, an initiative that is in line with amplifying access to the international decision-making process.

A fitting example was the action of the Panel in the Urban Transport Project in Mumbai, India, financed by the World Bank. Several complaints lodged by members of the community that had to be re-located because of the Project. The basis for the complaints was the fact that the place chosen for resettlement is near a public garbage dump, resulting in a high level of pollution in the area where the displaced individuals would permanently live.

On the basis of an investigative report issued by the Panel, the International Organization interrupted the transfer of financial resources to the Project until the local government corrected a series of faults and met

<sup>73</sup> Accountability at the World Bank: The Inspection Panel 10 Years on (2003) available at [http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8\\_07.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf) (last visited 29 August 2011), 3.

<sup>74</sup> E. Nurmukhametova, 'Problems in Connection with the Efficiency of the World Bank Inspection Panel', 10 *Max Planck Yearbook of United Nations Law* (2006), 397, 398.

<sup>75</sup> L. B. de Chazournes, 'Le Panel d'Inspection de la Banque Mondiale: à Propos de la Complexification de l'Espace Public International', 105 *Revue Générale de Droit International Public* (2001), 146, 149.

the minimum requirements for the relocation established by the Financing Institution.<sup>76</sup>

There are authors such as Ibrahim Shihata,<sup>77</sup> who believe that no legal obligations are applicable to the World Bank to guarantee that projects financed with resources from the International Institution meet the desired practical results and cause no harm to the people affected by the Project. Nevertheless, this opinion is high controversial in the actual stage of the international law.

Although implementation of such projects is the responsibility of the State that benefits from the financing, the essential participation of the World Bank is evident not only during the preparatory phase and before construction, but also during and in parallel with its execution, given its undeniable technical and financial assistance.

Therefore, once the Institution is aware of legal-international violations resulting from its projects, as in the case of forced resettlements, affronts to human rights or serious environmental damage, the obligation to stop financial and technical assistance by the International Organization is directly linked to the cessation of the offending conduct perpetrated by the State that executes the project.

The dispositions of Article 13 of the Draft Articles on Responsibility of International Organizations, adopted by ILC, deal with this question:

“Article 13: Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that organization.”<sup>78</sup>

<sup>76</sup> World Bank, *Annual Report of the Inspection Panel: July 1<sup>st</sup>, 2005, to June 30<sup>th</sup>, 2006* (2006), 51, 57.

<sup>77</sup> I. F. I. Shihata, *The World Bank Inspection Panel: in Practice*, 2nd ed. (2000), 241.

<sup>78</sup> Responsibility of International Organizations: Provisory Titles and Text of the Draft Articles adopted on the 61st session, Official Records of the UN General Assembly, UN Doc A/64/10, 84 (2009) [Provisory Titles and Text of the Draft Articles adopted on the 61st session].

From the reasoning above it is clear that the problems raised by the “direct effect doctrine” do not in any way invalidate the full applicability of the principles and norms concerning the public international law.

In conclusion, private and individual rights can be directly affected by international organizations’ activity, and for that reason their institutional acts are able to be qualified as internationally illicit under the normative regime of international responsibility.

In the case of the WTO the issue acquires an interesting dimension with respect to the peculiarities of its system of countermeasures, as explained below.

## E. International Responsibility and the WTO System of Countermeasures

### I. The WTO/DSB Recommendations and their Binding Force

Both the WTO Law and the recommendations of the Dispute Settlement Body must be considered as precepts that impose binding legal obligations on their addressees,<sup>79</sup> since it is not difficult to extract a clear normative option favoring the existence of a “compliance duty” inherent to the recommendations issued by the DSB from the Understanding on Rules and Procedures Governing the Settlement of Disputes.<sup>80</sup>

Although there are contrary opinions based on the assumption that the norms produced within the WTO are simply non-binding from an legal point of view,<sup>81</sup> one must bear in mind that immediate obedience to these legal prescriptions is fundamental to assure the effective settlement of disputes, generating global benefits for all members of the Organization.

This is determined by Article 21.1 of the DSU: “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members”.

<sup>79</sup> J. Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach’, 94 *American Journal of International Law* (2000) 2, 335, 341.

<sup>80</sup> J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000), 167.

<sup>81</sup> J. H. Bello, ‘The WTO Dispute Settlement Understanding: Less is More’, 90 *American Journal of International Law* (1996) 3, 416.

In the WTO Agreement itself there is clear reference with respect to the obligatory nature of its prescriptions, as recorded in its Article II.2: “The agreements and associated legal instruments included in Annexes 1, 2 and 3 (...) are integral parts of this Agreement, binding on all Members”.

When approved by the DSB, the report from the Special Group or the Appellate Body generates international responsibility on the part of the WTO member when it recognizes its obligation to revoke or modify the action being questioned in such a way as to avoid continuity of the conflict with the multilateral norms of trade.<sup>82</sup>

If the member receiving a decision issued by the DSB does not implement it of its own initiative, it must initially offer compensatory measures to the complainant, aiming at re-establishing legality to the commercial flow between the litigating parties. If on the other hand the parties fail to reach a compensatory agreement, the plaintiff can implement retaliatory countermeasures by suspending commercial benefits offered to the defendant by virtue of the WTO Agreements.<sup>83</sup>

When the time comes for concrete action on the recommendations of the DSB, or more specifically, at the moment of imposing countermeasures authorized by it, there may be repercussions that infringe the international legal system as a whole, generating the incidence of the responsibility principle.

## II. Countermeasures in General International Law

As a general rule, international organizations are formed essentially to adopt decisions in the area of their institutional competence and, secondarily, to assure effective implementation of their decisions. Based on this assumption, it is reasonable to conclude that in the majority of cases these decisions can be classified as acts of a unilateral nature, i.e. issued by a globally considered individual subject, even if these acts derive from internally collegiate manifestations.<sup>84</sup>

Nevertheless, some actions by international organizations are composed externally from a larger span of wills, as in the case of countermeasures within the WTO, which will be analyzed further below.

<sup>82</sup> W. Barral, ‘Solução de Controvérsias na OMC’, in A. D. de Klor *et al.* (eds), *Solução de Controvérsias: OMC, União Européia e Mercosul* (2004), 42.

<sup>83</sup> M. S. A. Braz, *Retaliação na OMC* (2006), 20.

<sup>84</sup> M. Virally, ‘Unilateral Acts of International Organizations’, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), 241.

In the realm of international law, countermeasures are a typical element in a decentralized system through which a harmed State can seek to redress its rights, alongside the restoration of the primary legal relationship with the State responsible for the internationally illicit act.<sup>85</sup>

According to international practice, countermeasures are understood as being the reactions of a State to a behavior by another State that is considered harmful to its interests. In this fashion, the purpose of such reactions is to restore the state prior to the violation while simultaneously restoring the legal balance that was destabilized by the illicit action.<sup>86</sup>

When ruling on the case concerning the *Gabcikovo-Nagymaros Project*, the International Court of Justice accepted that countermeasures may justify a behavior that under different circumstances would be illicit, but required that their adoption would only be in response to a previous illicit act committed by another State, for which reason they should be directed only towards the offending State, always provided that certain specific conditions are met.<sup>87</sup>

Among the legal conditions to be observed for a legitimate decision to implement countermeasures by States, the International Law Commission listed the following essential characteristics:<sup>88</sup>

- they must aim at inducing the offending State to comply with the specific international obligation that was breached;
- they must as far as possible be reversible;
- they must be commensurate with the injury suffered;
- they must be preceded by a call on the responsible State to comply with its obligation; and
- they must be accompanied by an official note to the offending State specifying the countermeasures to be adopted and an offer to negotiate with that State.

In accordance with the ILC, some obligations may not be impaired by the adoption of countermeasures, among which the protection of human

<sup>85</sup> State Responsibility: Titles and Text of the Draft Articles adopted on the 53th session, Official Records of the UN General Assembly, UN Doc A/56/10 (2001), 128.

<sup>86</sup> M. Virally, 'Panorama du Droit International Contemporain: Cours General de Droit International Public', in *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (1985), 217, 218.

<sup>87</sup> *Case Concerning Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 55-56, paras 83, 84.

<sup>88</sup> International Law Commission, *supra* note 85, 129, 135.

rights and obligations of a humanitarian character merit particular emphasis, in addition to other obligations under peremptory norms of general international law. It is opportune to note that threats or the use of force is strictly prohibited in the ambit of countermeasures.<sup>89</sup>

Another restriction inherent to countermeasures resides in their subjective thrust, as they must be directed against the State which has effectively committed the concrete wrongful act, and may not affect the rights or legal interests of third parties uninvolved in the dispute.<sup>90</sup> Even if unintentional, the violation of the legal sphere of third parties by countermeasures will characterize an internationally illicit act in relation to which the affected third party may also retaliate.

The need for the international legal system to set reasonable qualitative and quantitative standards to guard against the empirical possibility of overreaction on the part of the injured State, in complete dissonance with the nature and intensity of the illicit conduct that is being retaliated, results from the application of the principle of proportionality.<sup>91</sup>

One of the more interesting criticisms to the institution of countermeasures as established by the International Law Commission points to the priority assigned to its unilateral adoption and conditions, as opposed to the compulsory mechanisms for the resolution of controversies in international relations,<sup>92</sup> to the extent that authoritative command relates more closely to a fragmented international society based on juxtaposition rather than the contemporary idea of an International Community of increasingly institutionalized character.

The central problem with the unilateral nature of countermeasures relates therefore to deliberative judgment on their adoption, since it is the same State adopting them that defines when, how, why and to what extent the reaction will be applied concretely, characterizing in some ways an instance of *self-judging*,<sup>93</sup> especially in view of the lack of obligation to submit to previous judgmental proceedings in the area of general international law.

<sup>89</sup> J. Crawford & S. Olleson, 'The Nature and Forms of International Responsibility', in M. D. Evans (ed.), *International Law* (2003), 464.

<sup>90</sup> A. Cassese, *International Law*, 2nd ed. (2005), 305.

<sup>91</sup> E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *European Journal of International Law* (2001) 5, 889, 890.

<sup>92</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997), 272.

<sup>93</sup> M. E. O'Connell, 'Controlling Countermeasures', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 50.

Despite the defense of Arangio-Ruiz,<sup>94</sup> the thesis stating that countermeasures could only be adopted after the procedures for the resolution of international controversies had been exhausted and if implemented under effective subsequent control was rejected by the International Law Commission in its Draft Articles on Responsibility of States.

Nevertheless, the general regime of countermeasures may be adapted to other individual legal systems, in relation to which specific norms are feasible as in the case of the reGENCY of the subject within the World Trade Organization.

### III. Countermeasures in the WTO

Countermeasures within the World Trade Organization assume that a formal request has been made by the Applicant, which is then approved by the Dispute Settlement Body under the terms put forward in the final part of Article 22.2 of the DSU: “any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements”.

One must therefore conclude that the concrete implementation of trade retaliations must incorporate the dual conjugation of both wills: 1) that of the Applicant State; and 2) that of the Organization that approves them.

Since concurrence of wills between the international organization and the State is essential in order to perfect countermeasures within the WTO, it is appropriate to classify them as international legal acts of a complex character, unlike simple legal acts that originate in a single organ of the entity or composite legal acts issued by a plurality of organs in the same institution.<sup>95</sup>

It is precisely from this articulated conjunction of wills that it is feasible to put together a notion of co-authorship when any infringement of a legal obligation is committed, in which case the WTO and the Applicant Member will be classified as concurrent.<sup>96</sup>

<sup>94</sup> G. Arangio-Ruiz, ‘Counter-Measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: a Crucial Issue before the ILC’, 5 *European Journal of International Law* (1994) 1, 20.

<sup>95</sup> Sereni, *supra* note 2, 227.

<sup>96</sup> P. Klein, *La Responsabilité des Organisations Internationales: dans les Ordres Juridiques Internes et en Droit des Gens* (1998), 467-468.

In the majority view of specialized doctrine, members of an international organization are not responsible for the illicit acts of the entity simply by being members.<sup>97</sup> Nevertheless, if there is a concurrence of the wills of two or more legal subjects to commit a specific illicit international act, the responsibility link may extend to all involved.

According to the ILC, the organization may compromise its international responsibility if it authorizes a Member State to commit an illicit international act, or if it recommends such a practice.

In such cases there is no space for the incidence of responsibility of a secondary or subsidiary nature through which it would only be possible to involve the co-responsible after exhausting the complaint against the principal subject,<sup>98</sup> since in the case of countermeasures produced within the WTO, the intervention of the organization is evident in the authorization, implementation and closure phases of the retaliatory measure.

If such considerations were insufficient, one must add that the Dispute Settlement Body has the specific role of monitoring the countermeasures to which the Applicant Member is entitled, to assure that they are restricted to the boundaries previously approved by the International Organization.

Article 22.8 of the DSU states that:

“In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.”

In this sense, an omission on the part of the World Trade Organization regarding its legal duty of prevention may subsequently characterize

<sup>97</sup> R. Wilde, ‘Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake’, 12 *ILSA Journal of International & Comparative Law* (2006) 2, 395, 401.

<sup>98</sup> M. Hirsch, ‘The Responsibility of the Members of International Organizations: Analysis of Alternative Regimes’, 6 *Griffin’s View on International and Comparative Law* (2005) 2, 8, 16.

international responsibility,<sup>99</sup> particularly if the practice of the countermeasures implemented tends to extrapolate its legal competence.

The conduct that generates the responsibility for internationally illicit acts may result either from an action or from an omission attributable to an international organization<sup>100</sup> and, in this aspect, there are no differentiated constituent elements in the violation of the so-called “obligations of conduct” and the “obligations of result”, it being clear that in both cases omission by the international organization will be evaluated under the principle of effectiveness.

Moreover, let it not be said that the delegation of powers by the international organization to third parties is sufficient to exclude the responsibility of the delegating entity, as may be understood in the case of countermeasures authorized by the WTO to an executing Member, taking into account that such a responsibility may not be the object of a transfer, especially when the power originating from the delegation remains under the title and control of the same institution.<sup>101</sup>

In conclusion of this topic, it is important to highlight the institutional statement made by the World Trade Organization in a recent response to questions submitted by the International Law Commission on the subject of countermeasures: “Even when allowed under a particular treaty, countermeasures may breach other international obligations, thus potentially generating liabilities for the organization having authorized such countermeasures and the States having implemented them”<sup>102</sup>.

## F. Final Considerations

Whether in relation to the interpretative method or in the interaction of WTO Law with other normative assumptions originated in international law, it would appear impossible to deal with the legal framework in the Organization based on a strict concept of a self-contained regime.

<sup>99</sup> Responsibility of International Organizations: Provisory Titles and Text of the Draft Articles adopted on the 57th session, Official Records of the UN General Assembly, UN Doc A/60/10, 90 (2005).

<sup>100</sup> Provisory Titles and Text of the Draft Articles adopted on the 61st session, *supra* note 78, 20.

<sup>101</sup> K. Wellens, ‘Accountability of International Organizations: Some Salient Features’, *97 American Society of International Law* (2003) 2-5, 241, 243.

<sup>102</sup> Responsibility of International Organizations: Comments and Observations received from International Organizations during the 60th session, Official Records of the UN General Assembly, UN Doc A/CN.4/593, 2007, 12.

On the horizontal plane, the recognition of the existence of an international public order, even if composed minimally of norms with a *jus cogens* content, leads to the conclusion that external *erga omnes* obligations, which prevail hierarchically over WTO Law, condition the acts of the Institution.

Furthermore, it is the World Trade Organization itself that accepts the legal validity of other norms of international law irrespective of normative hierarchy, as illustrated by examples in cases on the principles of precaution, non-retroactivity, proportionality, human rights and rights of humanitarian nature.

Despite not offering unrestricted support to the so-called “direct effect doctrine” of acts of international organizations in the face of the internal legal order of their respective Members, we still fail to see sufficient constraints to inhibit the activity of these institutions in directly impacting the legal sphere of States, corporations or individuals, as indicated in the analysis on the actions of the World Bank and its Inspection Panel.

Finally, the present investigation considered that violations of obligations within the scope of the application of countermeasures – these having been authorized and monitored by the Dispute Settlement Body of the WTO – may generate international responsibility shared between the Organization and the Member executing the retaliatory action, taking into account the eminently complex nature of the international act in question.