THESIS SUBMISSION FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
TO THE UNIVERSITY OF OXFORD

GENERAL DEFENCES IN INTERNATIONAL ADJUDICATION

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WADHAM COLLEGE

TRINITY TERM 2023

ACKNOWLEDGEMENTS

I would like to thank, first and foremost, my supervisors, Professor Catherine Redgwell and Dr. Miles Jackson, for their support throughout my studies at Oxford. I couldn't ask for better guides in this incredible learning journey, from my MJur to the conclusion of my DPhil thesis.

I would like to thank Dr. Anastasios Gourgourinis and Professor Maria Gavouneli for being my mentors in my early years in law school, for giving me the opportunity to develop my skills and chase my passion for international law, and for their guidance and encouragement throughout the years. I would also like to thank Professor Antonios Tzanakopoulos for his support and for inspiring me to aim higher.

Many thanks to Professor Dapo Akande, Professor Dan Sarooshi, and Professor Martins Paparinskis for their comments and feedback during my MPhil viva and confirmation of status interview.

I would like to thank Professor Petros Mavroidis for his comments on earlier drafts of this thesis and for his support during my academic visit at Columbia Law School. I am immensely grateful for the opportunity to study in New York and observe his classes. I am also grateful to Mr. Thomas Ramopoulos, my supervisor during my traineeship at the European Commission, and to all my colleagues at the External Relations team of the Legal Service. The time that I spent working with this team was invaluable and shaped my understanding of the law and the arguments made in this thesis.

A big thank you to my friend Irini, my constant companion throughout my Oxford journey. I was very lucky to have her by my side, doing some serious growing-up together in the past 7 years, which simply wouldn't have been the same without her.

I would also like to thank the Oxford PIL group. Our Wednesday seminars, our discussion groups, our chats, and our library sessions have been instrumental in the writing of this thesis. I was incredibly lucky to be part of such a fantastic community and to have made some great friends along the way.

The past few years would have been much poorer if it wasn't for my dear friends Jess, Liyang, Sam, and Shazeaa. When I attended my first peer support training session in 2017, I couldn't even imagine that I would find the most supportive and loving group of friends that anyone can hope for. I am very grateful for your friendship and for your immense moral contribution to the completion of this thesis.

I would like to thank the Greek (and honorary-Greek) library (et al.) squad, Nikiforos, Akis, Konstantinos, Daniel, Matteo, Antonis, Andreas, Cal, and Vassilis. From the miserable days and nights at Bod Law, St Cross, or St Anne's (listed in order of increasing misery), to the Greek music and food soirées and the pub garden beers, they made my life in Oxford so much brighter.

Special thanks to my friends Katerina and Maria for being there for me 24/7. They are my personal support hotline, and I couldn't ask for better friends by my side.

A special shout-out to my friend Aspa, to the MACers (post-grad edition) Argyris, Dimitris, and Kostis, to our friends Eleana and Vassilis for being the best lockdown neighbours and cheese-platter sharers, to our Groningen support group Stratis and Tania, to my friends Anna and Johannes, Ilektra and Marios, Eleni and Loukas, Efthymis, Martha, Danai, John, Eleni, and Ermis. The DPhil is a very long journey and lots of life happens in the meantime. Their contributions along this journey were immeasurable. I am very grateful for their friendship.

A shout-out to my NYC squad, Sofia, Drago, Matteo, Jannik, Lorena, Gulu, Pier, Sam, David, Anais, Anne-Sophie, Elena, and Stefano, to the Columbia Visiting Scholars group, and to the amazing women of the International Feminists group. I had an incredible year of personal growth (and lots of fun) which wouldn't have been the same without these wonderful humans.

A very special thank you to my students and colleagues at Sheffield as they have shaped my ideas and given me inspiration and support for the last push of thesis-writing in the past year.

Above all, I would like to express my immense gratitude to my partner, Sotiris, to my parents, Vassilis and Vicky, to my siblings, George and Marina, to my uncle, Dimitris, and to the rest of my beautiful family. I wouldn't have made it without their unwavering love and support. I am a very lucky human**.**

ABSTRACT

This thesis tests the presumption of general applicability of the defences enshrined in Part I, Chapter V of the Articles on the Responsibility of States for Internationally Wrongful Acts in international adjudicative proceedings. These defences are considered 'general', both in terms of their personal scope (applicable to all States) and in terms of subject matter (in principle applicable with respect to all State obligations). The thesis identifies and assesses three factors, which can potentially exclude the applicability of general defences in international adjudication: firstly, applicable law limitations; secondly, the interpretation of the treaty that forms the basis of the claim and the application of the *lex specialis* principle; and thirdly, jurisdictional constraints of the adjudicative body in question. It examines these factors by reference to the case law of three international adjudicative bodies or systems: the International Court of Justice, the WTO dispute settlement system and investor-State arbitration. The analysis confirms that there is indeed a presumption of applicability of general defences to all international adjudicative proceedings relating to State obligations, regardless of jurisdictional constraints or applicable law limitations. This presumption, however, is rebuttable. Certain treaties reveal, through interpretation, the parties' intention to exclude the possibility of reliance on all or some general defences for breaches of obligations enshrined thereunder. Such intention is often expressed in the form of exception clauses. The thesis examines the interaction of such clauses with general defences and suggests a methodology for assessing to what extent general defences are residually available to the Respondent, and whether and how they inform the interpretation of treaty exceptions. Lastly, the thesis demonstrates that international adjudicative bodies have the power to make incidental findings in the context of applicable defences, even if such matters would be outside the scope of their jurisdiction if they were presented before them as independent claims.

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Short name	**Citation**	**Index**
GATT 1947, WTO AGREEMENTS, AND RELATED LEGAL INSTRUMENTS		
Agriculture Agreement	Agreement on Agriculture (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 410	130
ARO	Agreement on Rules of Origin (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 397	164
ATC	Agreement on Textiles and Clothing (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 14	133, 201
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Annex 2 (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401	*passim*
GATS	General Agreement on Trade in Services, Marrakesh Agreement Annex 1B (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183	*passim*
GATT	General Agreement on Tariffs and Trade, Marrakesh Agreement Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187	*passim*
GPA	Agreement on Government Procurement (adopted 15 April 1994, entered into force 1 January 1996) 1915 UNTS 103	128
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154	111, 143
SCM	Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14	130-134, 139, 147
TBT	Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120	164
TFA	Protocol amending the Marrakesh Agreement establishing the World Trade Organization (Agreement on Trade Facilitation) (adopted 27 November 2014, entered into force 22 February 2017) UN Registration number 31874	141
TRIMS	Agreement on Trade-Related Investment Measures, Marrakesh Agreement Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186	141
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Annex 1C	112, 141, 143, 162,

	(adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299	164, 165, 169, 182
Safeguards Agreement	Agreement on Safeguards (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 154	134
BILATERAL AND MULTILATERAL TREATIES WITH INVESTMENT PROTECTION CLAUSES		
Argentina—Chile BIT	Tratado entre la Republica Argentina y la Republica de Chile sobre promocion y Proteccion reciproca de inversions (adopted 2 August 1991, entered into force 1 January 1995) terminated 1 May 2019 and replaced by Argentina–Chile FTA	251, 252
Argentina—France BIT	Acuerdo entre el Gobierno de la Republica Argentina y el Gobierno de la Republica Francesa para la promocion y la proteccion reciproca de las inversions (adopted 3 July 1991, entered into force 3 March 1993)	240, 251, 252, 301
Argentina—Italy BIT	Acuerdo entre la Republica Argentina y la Republica Italiana sobre promocion y proteccion de las inversions (adopted 22 May 1990, entered into force 14 October 1993)	251, 252, 301
Argentina—Spain BIT	Acuerdo para la promocion y la proteccion reciproca de las inversions entre el Reino de España y la Republica Argentina (adopted 3 October 1991, entered into force 28 September 1992)	251, 252
Argentina—UK BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments (adopted 11 December 1990, entered into force 19 February 1993)	251, 252, 301
Argentina—US BIT	Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investments (adopted 14 November 1991, entered into force 20 October 1994)	*passim*
Armenia—Italy BIT	Agreement between the Government of the Italian Republic and the Government of the Republic of Armenia for the promotion and protection of investments (adopted 23 July 1998, entered into force 13 January 2003) expired 13 January 2018	306
Australia—Chile FTA	Free Trade Agreement between Chile and Australia (adopted 30 July 2008, entered into force 6 March 2009)	335, 336
Austria—Libya BIT	Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the promotion and protection of investments (adopted 18 June 2002, entered into force 1 January 2004)	301
Azerbaijan—Italy BIT	Agreement between the Government of the Italian Republic and the Government of the Republic of Azerbaijan for the promotion and protection of	306

	investments (adopted 25 September 1997, entered into force 4 February 2000) expired 4 February 2015	
Bangladesh—Italy BIT	Agreement between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the promotion and protection of investments (adopted 20 March 1990, entered into force 20 September 1994)	306
Canada Model BIT	Canadian Government, '2004 Model Agreement for the Promotion and Protection of Investments' (2004)	240, 246, 321, 335
Canada Model FIPA	2021 Canada Model Foreign Investment Promotion and Protection Agreement (FIPA)	299
Canada—Chile FTA	Free Trade Agreement between Canada and the Republic of Chile (adopted 5 December 1996, entered into force 5 July 1997)	335
Canada—Colombia FTA	Free Trade Agreement between Canada and Colombia (adopted 21 November 2008, entered into force 15 August 2011)	337
Canada—Panama FTA	Free Trade Agreement between Canada and Panama (adopted 14 May 2010, entered into force 1 April 2013)	337
Canada—Peru BIT	Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (adopted 14 November 2006, entered into force 20 June 2007)	335, 337
Canada—Peru FTA	Free Trade Agreement between Canada and Peru (adopted 29 May 2008, entered into force 1 August 2009)	335
Central America—Mexico FTA	Tratado de Libre Comercio entre los Estados Unidos Mexicanos, y las Repúblicas de Costa Rica, El Salvador, Guatemala, Honduras y Nicaragua (adopted 22 November 2011, entered into force 1 July 2013)	335, 336
Chile—Japan FTA	Agreement between Chile and Japan for a Strategic Economic Partnership (adopted 27 March 2007, entered into force 3 September 2007)	335
Chile—US FTA	Free Trade Agreement Between the Government of Chile and the Government of the United States of America (adopted 6 June 2003, entered into force 1 January 2004)	335, 336
China—Netherlands BIT	Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands (adopted 26 November 2011, entered into force 1 August 2004)	301
Colombia—Peru BIT	Agreement between the Government of the Republic of Peru and the Government of the Republic of Colombia on the Promotion and Reciprocal Protection of Investments (adopted 11 December 2007, entered into force 30 December 2010)	337

Cyprus—Libya BIT	Agreement on the promotion and the reciprocal protection of investments between the Government of the Republic of Cyprus and the Great Socialist People's Libyan Arab Jamahiriya (adopted 30 June 2004, entered into force 12 February 2005)	301
Czech Republic—Yemen BIT	Agreement between the Czech Republic and the Republic of Yemen for the promotion and reciprocal protection of investments (adopted 20 March 2008, entered into force 2 July 2009)	305
Denmark—Laos BIT	Agreement between the Government of the Kingdom of Denmark and the Government of the Lao People's Democratic Republic concerning the promotion and reciprocal protection of investments (adopted 9 September 1998, entered into force 9 May 1999)	305
ECT	Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100	246, 296, 298, 305, 306, 321
Egypt—Germany BIT	Agreement between the Arab Republic of Egypt and the Federal Republic of Germany concerning the encouragement and reciprocal protection of investments (adopted 16 June 2005, entered into force 22 November 2009)	301
Egypt—US BIT	Treaty between the United States of America and the Arab Republic of Egypt concerning the reciprocal encouragement and protection of investments (adopted 11 March 1986, entered into force 27 June 1992)	301
Germany—Zimbabwe BIT	Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the encouragement and reciprocal protection of investments (adopted 29 September 1995, entered into force 14 April 2000)	301
India Model BIT	Indian Government, 'Model Text for the Indian Bilateral Investment Treaty' (2016)	240
Italy—Morocco BIT	Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la République Italienne relatif à la promotion et la protection réciproques des investissements (adopted 18 July 1990, entered into force 7 April 2000)	240
Italy—Syria BIT	Agreement between the Government of the Italian Republic and the Government of the Syrian Arab republic on the promotion and protection of investments (adopted 13 November 2002, entered into force 13 November 2003) expired 13 November 2018	306
Italy—Yemen BIT	Agreement between the Government of the Republic of Italy and the Government of the Republic of Yemen on the promotion and protection of investments (adopted 25 November 2004, entered into force 3 May 2008)	306

Japan—Korea BIT	Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment (adopted 22 March 2002, entered into force 1 January 2003)	321
Libya—Turkey BIT	Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the reciprocal promotion and protection of investments (adopted 25 November 2009, entered into force 22 April 2011)	301
Morocco—US FTA	Free Trade Agreement between the Kingdom of Morocco and the United States of America (adopted 15 June 2004, entered into force 1 January 2006)	335, 336
NAFTA	North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289	*passim*
Netherlands—Zimbabwe BIT	Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands (adopted 11 December 1996, entered into force 1 May 1998)	301
New Zealand—Singapore FTA	Agreement Between New Zealand and Singapore on a Closer Economic Partnership (adopted 14 November 2000, entered into force 1 January 2001)	321
Oman—US FTA	Free Trade Agreement between the United States and Oman (adopted 19 January 2006, entered into force 1 January 2009)	335, 336
Pakistan—Switzerland BIT	Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the promotion and reciprocal protection of investments (adopted 11 July 1995, entered into force 6 May 1996)	240
Panama—Taiwan FTA	Free Trade Agreement between Panama and Taiwan, Province of China (adopted 21 August 2003, entered into force 1 January 2004)	335
Panama—UK BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the promotion and protection of investments (adopted 17 October 1983, entered into force 7 November 1985)	305
Panama—US FTA	United States – Panama Trade Promotion Agreement (adopted 28 June 2007, entered into force 31 October 2012)	335, 336, 337
Philippines—Switzerland BIT	Agreement between the Republic of the Philippines and the Swiss Confederation on the promotion and reciprocal protection of investments (adopted 31 March 1997, entered into force 23 April 1999)	240
Russia—Ukraine BIT	Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on	291

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Rwanda—US BIT	Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment (adopted 19 February 2008, entered into force 1 January 2012)	335, 336
Singapore—US FTA	Free Trade Agreement between Singapore and the United States of America (adopted 6 May 2003, entered into force 1 January 2004)	335, 336
Sri Lanka—UK BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the promotion and protection of investments (adopted 13 February 1980, entered into force 18 December 1980)	303, 305
Switzerland—Zimbabwe BIT	Agreement between the Swiss Confederation and the Republic of Zimbabwe on the promotion and reciprocal protection of investments	305
UK Model BIT	Model Text 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [...] for the Promotion and Protection of Investments' (2008)	305
Uruguay—US BIT	Treaty between the United States of America and the Oriental Republic of Uruguay concerning the encouragement and reciprocal protection of investment (adopted 04 November 2005, entered into force 31 October 2006)	335, 336
US Model BIT	'2012 U.S. Model Bilateral Investment Treaty' (2012)	305, 335, 336
US—Zaire (DRC) BIT	Treaty between the United States of America and the Republic of Zaire (Democratic Republic of the Congo) concerning the reciprocal encouragement and protection of investment (adopted 3 August 1984, entered into force 28 July 1989)	305
USMCA	Agreement between the United States of America, the United Mexican States, and Canada (adopted 10 December 2019, entered into force 1 July 2020)	116
OTHER TREATIES AND INTERNATIONAL INSTRUMENTS		
1957 European Convention	European Convention for the Peaceful Settlement of Disputes (adopted 29 April 1957, entered into force 30 April 1958) 329 UNTS 243	25, 99
AB-Working Procedures	WTO Working Procedures for Appellate Review, WT/AB/WP/6 (as amended 16 August 2010)	144

CERD	International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195	28
Chicago Convention	Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295	40, 91-93
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221	199
FCN	Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (United States of America-Nicaragua) (adopted 21 January 1956, entered into force 24 May 1958) 367 UNTS 3	*passim*
GCAP-I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3	187, 305
GCAP-II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609	305
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277	33-34, 99, 103
Hague Regulations	Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277	306
IASTA	International Air Services Transit Agreement (adopted 7 December 1944, entered into force 30 January 1945) 84 UNTS 389	40, 91, 93
ICC Rules	International Chamber of Commerce (ICC) Arbitration Rules (latest rules entered into force 1 January 2021)	249
ICC Statute	Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3	97
ICSFT	International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197	28
ICJ Rules	International Court of Justice Rules of the Court (adopted 14 April 1978, entered into force 1 July 1978, with amendments)	25, 98, 99, 334

ICJ Statute	Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI	*passim*
ICSID	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159	*passim*
ICSID Arbitration Rules	International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (entered into force 1 July 2022)	337, 338
JCPOA	Joint Comprehensive Plan of Action between the E3/EU+3 (China, France, Germany, the Russian Federation, the United Kingdom, and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy) and the Islamic Republic of Iran (adopted 18 October 2015)	58-59
NAT	North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243	188
NPT	Treaty on the Non-Proliferation of nuclear weapons (adopted 1 July 1969, entered into force 5 March 1970) 729 UNTS 161	58, 59
Optional Protocol to VCCR	Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 487	38
Optional Protocol to VCDR	Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 241	38
Pact of Bogotá	American Treaty on Pacific Settlement (adopted 30 April 1948, entered into force 6 May 1949) 30 UNTS 55	25
SCC	Arbitration Rules of the Stockholm Chamber of Commerce (SCC) Arbitration Institute (latest rules entered into force 1 January 2023)	249
Treaty of Amity	Treaty of Amity Economic Relations and Consular Rights between the United States and Iran (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93	*passim*
UN Charter	Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI	20, 43, 71, 86, 188, 293, 295, 364
UNCITRAL	United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (effective since 15 August 2010, with amendments)	245, 249, 337, 338

UNCLOS	United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3	6, 30, 31, 104, 116
VCCR	Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261	34, 35, 38, 45, 46, 48-53, 212
VCDR	Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95	34, 38, 45, 46, 48-53, 212
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331	*passim*
DOMESTIC LEGISLATION		
US Executive Order 13846	US, Executive Order 13846 'Reimposing certain sanctions with Respect to Iran' (7 August 2018)	59
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I. INTRODUCTION

A. SETTING THE SCENE

This thesis explores the subject of State defences in international adjudicative proceedings. It seeks to provide clarity on the range of legal arguments that States as Respondents can put forward to defeat on the merits a claim that they bear responsibility under international law.

The thesis started from an intellectual curiosity regarding the legality of unilateral[1] economic sanctions.[2] Economic sanctions or the threat thereof, have always been a core foreign policy tool,[3] used to enforce international rules, react to illegality, prevent conflict, respond to crises, or exert pressure towards a change in policy or activity. Their long history demonstrates that they are indeed one of the most powerful weapons in the arsenal of States to effect political change. However, they are also susceptible to abuse, straddling the fine line between legal means of economic pressure and illegal measures in breach of State obligations under international law.

Despite the important place that economic sanctions occupy within the system of international law as a means to invoke and implement State responsibility, this fine line

[1] Sanctions adopted by States without the involvement of the UN Security Council, either individually or jointly with other States.

[2] Although not a term of art, sanctions can be broadly defined as restrictive measures of commercial or financial character, aiming to harm the economic interests of another State or key persons, with a view to achieve specific foreign policy objectives, see Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 850. Note, however, objections to the use of the term 'sanctions' to characterise unilateral restrictions and the proposal to reserve its use solely for measures imposed by a competent international organ (i.e., the UNSC) in Sicilianos, 'Sanctions Institutionnelles et Contre-Mesures : Tendances Recentes' in Picchio Forlati and Sicilianos (eds), *Les sanctions économiques en droit international* (Brill 2004) 4–5.

[3] Cohen and Goldman, 'Like It or Not, Unilateral Sanctions Are Here to Stay' (2019) 113 AJIL Unbound 146, 147.

is not clearly defined, especially with respect to sanctions that target the economy of foreign States, such as embargoes, barriers on imports and exports, and restrictions in monetary transactions.[4] Some economic restrictions may constitute acts of retorsion: they are unfriendly but lawful measures in areas of economic activities on which the imposing State has not assumed any international obligation and is thus free to adopt them at its own discretion.[5] However, economic restrictions are often inconsistent, at least *prima facie*, with States international obligations under international economic law instruments. In such cases, their imposition must be justified on the basis of an applicable defence, otherwise it will result in international responsibility.[6] Under the law on State responsibility, unilateral sanctions consisting in the non-performance of international obligations, could be justified under the defences codified in Part I, Chapter V ARSIWA, known as 'circumstances precluding wrongfulness'. Amongst them, the most pertinent are the defences of self-defence, necessity, and countermeasures, depending on the specific circumstances under which States impose the sanctions.[7] However, it is unclear whether these defences are available to States in the context of all international disputes. At the same time, specific treaty provisions in bilateral or multilateral economic cooperation treaties, such as Articles XX and XXI GATT, may also be used to justify economic sanctions that are *prima facie* incompatible with the substantive provisions of

[4] See also the traditional definition of economic sanctions as 'the deliberate withdrawal, or threat of withdrawal, of customary trade or financial relations [i.e.] the levels of trade and financial activity that would probably have occurred in the absence of sanctions' Hufbauer, Schott, Elliott, and Oegg 'Economic Sanctions Reconsidered' (3rd edn, Peterson Institute for International Economics, 2009).

[5] Alland, 'The Definition of Countermeasures' in Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 1131; Crawford, *State Responsibility - The General Part* (CUP 2013) 675. Note that States have no obligation to continue economic relations under general international law in the absence of treaty commitments or other specific obligations, *Nicaragua(Merits)* [276].

[6] Tzanakopoulos, 'We Who Are Not as Others: Sanctions and (Global) Security Governance' in Geiß and Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP 2021) 779.

[7] Arts. 21, 22, 25 and 49-54 ARSIWA.

the same treaty. Yet, the relationship between such provisions and the defences under the law on State responsibility remains unclear.

This uncertainty in the field of economic sanctions is not an isolated issue in international law. More broadly, the extent of the right of States to deviate from their international obligations in pursuit of public policy objectives or in response to exceptional circumstances has always been a key issue. States are confronted with various challenges of immense magnitude and intricacy. Adjusting to the realities of climate change, conserving exhaustible natural resources, addressing the complexities of both international and non-international armed conflicts, advancing diverse developmental goals, safeguarding fundamental human rights and freedoms, ensuring financial stability, upholding the international rule of law, and responding to international health crises are only some of the many objectives that States strive to achieve today. The pursuit of these objectives can create tensions with their international obligations across a range of domains, and particularly in the realm of economic relations.

Recent events provide ample illustration of this tension, in the context of economic sanctions and beyond. The 2014 and 2022 Russian invasions in Ukraine led to the adoption of several commercial and financial restrictions, not only by the two warring States against each other, but also by third States. At least some of these sanctions, including limitations on imports and exports from and to Russia, restrictions on financial transactions, asset freezes and others, seem, at first sight, incompatible with States' commitments under international economic law instruments. The armed conflict has generated several claims by investors against both Russia and Ukraine under applicable investment protection instruments, demanding compensation for losses suffered as a

result of hostilities or restrictions imposed in the broader context of the dispute.[8] Trade restrictions imposed by Russia have also been challenged before the WTO dispute settlement system, which in 2014 was for the first time called to determine the extent to which security concerns can justify deviations from the obligations of States under the WTO Agreements.[9] The United States is also facing multiple challenges of the various economic restrictions it has imposed on Iran as a response to alleged breaches of its obligations in the fields of nuclear disarmament and international terrorism.[10] In parallel, the global COVID-19 pandemic caused a significant shock to the international commercial system. States adopted various measures in response to the public health crisis, including export and import controls, subsidies, and suspension of economic operations. These measures had a severe impact on trade and investment and infringed, at least *prima facie*, relevant State obligations in these areas. Global and national financial crises have also sparked several legal battles, especially in the field of international investment protection. The saga of investment disputes against Argentina, challenging a range of measures introduced in response to its 2001-2003 economic, social, and political crisis is a characteristic example of the tensions that arise in this context.[11] Several disputes before the WTO, such as those relating to the renewable energy sector[12] or sustainable fishing practices,[13] also highlight some of the main areas

[8] E.g., *Belbek*; *DTEK*; *Everest*; *Lugzor*; *Naftogaz*; *Oschadbank*; *Ostchem; PrivatBank*; *Stabil*; *Ukrenergo; Ukrnafta*. See analysis in (n 1051-1053).

[9] See *Russia-Transit(PR)* and relevant analysis in Ch III(C)(2).

[10] See *Alleged Violations* and *Iranian Assets* and relevant analysis in Ch II(C)(2).

[11] See analysis of relevant case law in Ch IV(C)(1). See, similarly, the saga of no less than 50 arbitral proceedings against Spain for changing its feed-in-tariffs scheme in the renewable energy sector in view of financial difficulties, e.g., *Masdar*; *Antin*; *SolEs.*

[12] E.g., *Canada-Renewable*; *India-Solar; US-Renewable(India).*

[13] E.g., *US-Shrimp*; *US-Tuna II(Mexico).*

of tension between international economic law instruments and the goals of sustainable development, environmental protection, and energy security.

These examples serve to highlight the importance of investigating and clarifying the scope of States' right to adopt such restrictive economic measures despite being *prima facie* inconsistent with their international obligations. At the same time, they indicate that States are increasingly called to defend such measures in the context of adjudicative proceedings before international courts and tribunals. It is thus vital to explore the defences that Responding States can rely on in this context and can thus be used as part of a successful litigation strategy.

B. A NOTE ON TERMINOLOGY: 'GENERAL INTERNATIONAL LAW' AND 'GENERAL DEFENCES'

This thesis focuses on the availability of general defences in international adjudication. From the outset, a brief note on terminology is warranted.

In criminal law theory, the term 'offence' is used to describe a breach of the rule, a presumptive wrong that the legal system seeks to prevent by means of sanction.[14] Conversely, a 'defence' is an argument on the defendant's side presenting defeating circumstances which negate either legal wrongfulness or culpability and is distinct from, and additional to, a mere denial of the offence.[15] In a broad analogy, we may say that the

[14] Westen, 'Offences and Defences Again' (2008) 28 OJLS 563, 565.

[15] Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 77,141; Duarte d'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (OUP 2015) 32,219. *Cf* the broader use of the term to describe 'any set of identifiable conditions or circumstances which may prevent a conviction for an offense' in Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 ColumLRev 199, 203. A mere denial of the offence in this context would consist of a negation that the act or omission in question took place and would require a factual inquiry.

international law equivalent of 'offence' is an action or omission attributable to a State, which constitutes a breach of an international obligation of that State, i.e., an internationally wrongful act.[16] Accordingly, the term breach is used throughout the thesis to describe conduct inconsistent with a State's international obligations. Conversely, the term defence is used to describe arguments put forward by a Respondent to defeat on the merits a claim that it bears responsibility for an internationally wrongful act,[17] conceding that such act was indeed committed. Thus, the term defence as used in this thesis is agnostic regarding proposed distinctions amongst defences, such as justifications and excuses, or primary and secondary rules,[18] which are addressed in the substantive parts of this thesis where appropriate.

The thesis focuses on possible State defences[19] and specifically, on a particular sub-set of such defences: those under 'general international law' or, 'general defences'.

The term 'general international law' is often used in international legal scholarship and case law[20] as a term of art. It also features in provisions of international legal instruments without further clarification or definition.[21] Nonetheless, it becomes

[16] Art.2, ARSIWA.

[17] Similarly, Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) 85 BYIL 90, 91, n1.

[18] See proposed distinctions amongst defences in Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 405, 406–407.

[19] Thus, it does not elaborate on their availability to other subjects of international law, such as international organisations, or individuals in international criminal law proceedings.

[20] *Nicaragua(Objections)* [73]; *Tehran Hostages* [90]; *Armed Actions* [35]; *ELSI* [111]; *Wall* [150]; *Armed Activities* [259]; *Genocide-Bosnia* [149]; *Pulp Mills* [205].

[21] E.g., Art.53 VCLT; §8 UNCLOS Preamble.

readily apparent that the use of the term is characterised by a degree of imprecision[22] and there is no uniform understanding on its content, scope, and function.[23] Cheng defines general international law as 'the body of legal principles, rules and procedures binding on and, in principle, applicable to all the subjects of the international legal system, the legal effects of which are *erga omnes*',[24] as opposed to treaty norms, which are only binding *inter partes*.[25] Based on this definition, it seems that general international law comprises international custom[26] and general principles of law,[27] both of which have binding force *erga omnes*,[28] whilst 'principles of international law proper and…analogies from domestic laws, especially principles of the legal process' may also fall within its scope.[29]

Although a precise definition of general international law falls outside the purview of this thesis, the analysis focuses on a *sub-group* of rules of general international law, which seem to be general not only in terms of their scope of application

[22] Wood, 'The International Tribunal for the Law of the Sea and General International Law' (2007) 22 IJMCL 351, 354.

[23] Fragmentation Report p.254.

[24] Cheng, 'Some Remarks on the Constituent Element(s) of General (or So-Called Customary) International Law' in Anghie and Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer 1998) 379.

[25] Note that *erga omnes* in this context refers to the scope of addressees and not *jus standi*, see Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 993, 1011.

[26] Perhaps we should even say 'general custom' (e.g., Fragmentation Report [194]) as opposed to 'particular custom', whether regional, local, or other, which applies only among a limited number of States, see Conclusion 16, ILC Draft Conclusions on Custom.

[27] Arts.38(1)(b-c) ICJ Statute.

[28] Cheng (n 24) 381; Gourgourinis, 'General/Particular' (n 25) 1010–1011.

[29] Fragmentation Report p.254.

ratione personae (binding force *erga omnes*)[30] but *also* in terms of their scope of application *ratione materiae*. These rules of general international law proper have no autonomous substantive content[31]: they are the toolbox for the creation, operation, interplay, and enforcement of other rules of international law.[32] Put differently, these rules have a parasitical character: they only assist in the process of applying *other* rules of a substantive nature, which set out the rights and obligations of States under international law. Their application happens in the subordinate levels of legal argument[33] for the purpose of reaching a final verdict on the application and implementation of the substantive rules under consideration. This differentiates them from other rules of customary character that may form part of general international law in the broader sense described above, such as substantive customary rules on human rights, humanitarian law, or the law of the sea.

The law on State responsibility, as enshrined by the ILC in ARSIWA, is a prime example of rules that form part of general international law proper. Although the customary character of all normative propositions contained in ARSIWA is not uncontested,[34] international practice seems to suggest that their undeniable weight and

[30] At least as far as States are concerned, which are the focus of this thesis, see (n 19).

[31] Mitchell and Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 MJIL 561, 577.

[32] Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL 535, 536. See also Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to Be "Used" in the ICJ and the PCIJ' (2014) 5 JIDS 1, 21, 26, characterising such rules as 'Meta-Norms' or 'Constructive-Norms'. Similarly, Bartels, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It?' in Broude and Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 119 suggests a distinction between 'principal and incidental norms' and refers to the 'meta-normative function' of the latter.

[33] Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 JWT 499, 511.

[34] Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857, 873.

authority[35] creates a presumption of binding character.[36] This thesis operates on the basis of this presumption, i.e, that the rules enshrined in ARSIWA are indeed applicable to all States (generality *ratione personae*). Moreover, as the ILC stipulated, these rules apply, in principle, to the whole field of the international obligations of States regardless of their content and their source[37] (generality *ratione materiae*). The rules on State responsibility have been described as 'secondary', a term that alludes directly to this parasitical character elaborated above. In accordance with this normative distinction, which is the central organising idea of the ARSIWA,[38] primary rules are those 'which in one sector of inter-State relations or another, impose particular obligations on States', whilst secondary rules are those 'concerned with determining the consequences of failure to fulfil obligations established by the primary rules'.[39] Indeed, the rules on State responsibility are not assessed independently: they assist in determining whether other substantive rules have been breached, what are the consequences of such breach, and how the ensuing responsibility is implemented. Thus, they form part and parcel of the application of the primary rules applicable in each individual case.

This thesis uses the term 'general international law' in a limited, narrow sense, to describe this sub-group of parasitical rules, as described above. Through an in-depth examination of relevant international case law, this thesis demonstrates that the rules of

[35] Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 618. *Cf* Caron (n 34).

[36] Or, 'présomption de positivité' in Pellet, 'L'adaptation Du Droit International Aux Besoins Changeants de La Société Internationale' (2007) 329 RdC 9, 40.

[37] ARSIWA, general commentary [5]; Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 879.

[38] Crawford, *The International Law Commission's Articles on State Responsibility* (CUP 2002) 15.

[39] Ago, 'Second Report' p.179.

general international law proper, including the rules on State responsibility, enjoy a special place in international adjudication: they can be examined and applied regardless of applicable law or jurisdictional limitations, unless their applicability is clearly excluded by the special rule(s) applicable to the dispute under consideration.

As for the term 'general defences', this refers to State defences that form part of this sub-group of rules of general international law proper and are thus applicable, in principle, in all international disputes involving State obligations. Such general defences can be found in possible general principles of international law such as estoppel,[40] acquiescence,[41] abuse of rights or process,[42] clean hands,[43] or the exception of non-performance (*exceptio non adimpleti contractus*).[44] They may also be found, with respect to treaty-based claims, in the general law of treaties, such as the rules regarding treaty termination and suspension as a response to material breach, supervening impossibility of performance, or fundamental change of circumstances.[45] Although the arguments in this thesis may be used by analogy in assessing the availability of these defences in the context of international adjudicative proceedings, the analysis focuses on the defences under the law on State responsibility codified in Part I, Chapter V, ARSIWA, known as 'circumstances precluding wrongfulness'. The inclusion of these defences within the ARSIWA was considered part of the ILC's 'permanent contribution to general

[40] *Obligation to Negotiate* [153].

[41] *Malaysia/Singapore* [121].

[42] *Criminal Proceedings* [146-152].

[43] *Jadhav* [61]; *Iranian Assets(Merits)* [81].

[44] *Interim Accord* [114].

[45] Arts.60-62 VCLT.

international law'.[46] As such, they are considered general, both in terms of their personal scope and in terms of subject-matter. The case law examined in this thesis further attests to the customary character and general applicability of these defences.

C. OVERVIEW OF RESEARCH QUESTION AND THESIS STRUCTURE

This thesis tests the hypothesis that the general defences under the law on State responsibility are indeed *general* and thus, applicable, in principle, in all international disputes relating to State obligations. The thesis identifies and assesses three factors, which can potentially exclude the applicability of general defences in international adjudication: firstly, limitations to the law that the adjudicative body may apply to settle the dispute; secondly, the interpretation of the treaty that forms the basis of the claim and the application of the *lex specialis* principle; and thirdly, jurisdictional constraints of the adjudicative body in question. It examines these factors by reference to three international adjudicative bodies or systems: the International Court of Justice (ICJ), the World Trade Organisation (WTO) Dispute Settlement System (DSS), and the international system of Investor-State Dispute Settlement (ISDS).

Regarding the first factor, certain restrictions may exist to the law that an adjudicative body can apply in determining a matter before it. Such restrictions are outlined in its founding instrument and rules of procedure, or the instrument that constitutes the basis of its jurisdiction in any given case. For example, a treaty may explicitly mandate an adjudicative body to interpret and apply the provisions of that treaty to settle any dispute arising thereunder. The thesis explores whether the law on State responsibility is within the law that an adjudicative body may apply in any given

[46] ILC, 'Record of 2587th Meeting' [46].

case, even in the absence of explicit reference to general international law in the relevant instruments. The findings on this factor in the substantive chapters of this thesis substantiate the hypothesis outlined in the previous section, i.e., that there is a presumption of applicability of general international law in all international disputes relating to State obligations and that such presumption extends to general defences.

Regarding the second factor, in cases of treaty-based claims, the treaty in question may, explicitly or implicitly, indicate the exclusion of general defences. This is either because the treaty in its entirety reveals, through interpretation, the parties' intention to exclude the application of general defences for breaches of obligations enshrined therein; or because certain provisions within the treaty constitute *lex specialis* to the general defences. According to the *lex specialis derogat legi generali* principle, 'a matter governed by a specific provision, dealing with it as such, is…taken out of the scope of a general provision dealing with the category of subject to which that matter belongs, and which therefore might otherwise govern it as part of that category.'[47] Treaty provisions often establish special rules that are aimed at contracting out of or adjusting relevant norms under customary international law.[48] In the context of State responsibility, the *lex specialis* principle is enshrined in Art.55 ARSIWA, which recognises that general international law does not apply where and to the extent that the same subject-matter is governed by special rules reflecting the common intentions of the States concerned.

In view of the above, the first challenge is to identify that there is indeed a relationship of *lex specialis/lex generalis* between a general defence and a treaty rule and

[47] Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 203, 236.

[48] See e.g., *Nicaragua(Merits)* [274].

that application of the principle is warranted. The application of *lex specialis* naturally requires the juxtaposition of two norms, as a norm can only be qualified as more special by reference to another norm that meets a certain degree of sameness.[49] The second challenge is to determine the normative consequences of the operation of the *lex specialis* principle and the role of the *lex generalis* in the dispute under consideration.

Treaty rules regulating the same subject-matter as general defences take, in most cases, the form of an exception clause. The term 'exception' is used in international legal discourse to refer to various legal provisions that provide special legal treatment to certain situations otherwise governed by a general rule.[50] This thesis uses as case studies the exceptions discussed in the relevant case law of the adjudicative bodies under consideration. The ICJ discussed in *Nicaragua*, *Oil Platforms*, *Alleged Violations*, and *Iranian Assets* the function and scope of Art.XX Treaty of Amity and Art.XXI FCN. The WTO DSS is often faced with the question of the applicability of Arts.XX-XXI GATT and similar clauses in other WTO Agreements. Lastly, in ISDS, the applicability of Art.XI US-Argentina BIT and its relationship with the general defence of necessity has been the subject of several proceedings and the relevant awards and decision are always the point of reference for the academic literature on this subject.

The term 'exception clause' is used in this thesis to describe treaty provisions with structural features similar to these clauses. Despite their important textual variations, Art.XX Treaty of Amity, Art.XXI FCN, Arts.XX-XXI GATT and Art.XI US-

[49] Fragmentation Report [21-26]; Art.55 ARSIWA, commentary [4]; Gourgourinis, 'Lex Specialis in WTO and Investment Protection Law' (2010) 53 GYIL 579, 610.

[50] Viñuales, 'Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law' in Bartels and Paddeu (eds), *Exceptions in International Law* (OUP 2020) 66.

Argentina BIT share the same anatomy. First, they stipulate that 'the treaty shall not preclude the application of' or that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement of', certain measures. This opening phrase follows the typical 'non-precluded measures' formula,[51] which implies that although the measures in question relate to State obligations under the treaty and would normally be inconsistent with relevant substantive provisions, the State is granted flexibility to adopt them under the circumstances envisaged in the exception clause. What follows this opening formulation is a list of permissible objectives to which the adoption of the measures in question must relate. How close this relationship between the measures and the listed objectives must be depends on the wording of each provision and each sub-paragraph. The most common formulation requires that the measures are 'necessary for' the fulfilment of one of the relevant objectives. The required nexus in other cases is that the measure is 'essential' for, 'related' to or 'directed' at the fulfilment of the relevant objectives. The listed objectives relate to important areas of public policy such as human, animal, or plant life and health, exhaustible natural resources, and public morals, or to security considerations, the protection of public order, the maintenance of international peace and security, and the safeguarding of core State functions in exceptional circumstances such as armed conflicts, civil unrest, and other emergencies. Lastly, the provisions define the 'breadth' of their application, i.e., they stipulate whether they exempt the State from all or some of the treaty's substantive provisions. The thesis discusses to what extent such provisions displace the general defences and whether the requirements of general defences can assist in their interpretation.

[51] On the prevalence of this formula, especially in international economic law instruments, see Burke-White and von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 VaJIntlL 307, 318.

The application of the *lex specialis* principle is a question of treaty interpretation, which is always conducted on a case-by-case basis. In view of the specificities of each treaty, it is not possible to offer generally applicable conclusions on the relationship of general defences with each separate treaty-specific arrangement. To better discuss the modalities of the application of the principle and critically evaluate the methodology followed by the adjudicative bodies in relevant case law, the thesis uses as examples for the purposes of juxtaposition three general defences: self-defence, countermeasures, and necessity.[52] These were selected as the most appropriate in this context since, in the factual circumstances under which most of the disputes discussed in this thesis arose, States would, in the absence of relevant treaty provisions, be able to invoke one of these defences under general international law. This suggests at least a partial overlap that would warrant the application of the *lex specialis* principle. Moreover, as mentioned in the first section of this introduction, these three general defences are the most pertinent in the context of economic sanctions, whose legality assessment lies in the background of this thesis. The analysis in the following chapters suggests that exception clauses often regulate the same subject-matter as and constitute *lex specialis* to these general defences. Specifically with respect to necessity and self-defence, the thesis argues that exception clauses displace their applicability in the context of disputes arising under the provisions of the relevant treaty. Nonetheless, their customary requirements remain pertinent to the interpretation of the scope and content of exception clauses. As for countermeasures, the thesis argues that, although certain countermeasures may be justifiable under the terms of applicable exception clauses, the defence often remains residually applicable to treaty-based disputes.

[52] Arts.21, 22, 25 ARSIWA.

Lastly, regarding the third factor, i.e., potential jurisdictional constraints, limitations to the subject-matter and personal jurisdiction of an adjudicative body may also affect the availability of a defence to the Respondent. The examination of a countermeasure or an act in self-defence may require the prior determination of rights and obligations of the States parties to the dispute that fall outside the subject-matter jurisdiction of the adjudicative body as established in that case. They may even fall outside its competence more broadly, i.e., the 'class of cases' or else, 'the general field' in which the adjudicative body 'exercises and is entitled to exercise its functions'.[53] For example, for a WTO Panel to examine the defence of countermeasures, it would have to decide first whether the Complainant has committed a prior internationally wrongful act to which the Respondent responded with a countermeasure, i.e., a trade restrictive measure otherwise inconsistent with the WTO Agreements. This prior act may be a breach of an obligation outside the WTO Agreements –for instance, an obligation relating to human rights– and thus, seemingly outside the jurisdictional limits of the WTO Panel. This thesis examines the limits of the subject-matter jurisdiction of international adjudicative bodies in the context of applicable defences. It further examines whether limitations in their personal jurisdiction may constitute an obstacle to the invocation of a defence. In ISDS, the author of the prior internationally wrongful act to which the Respondent (host-State) reacted with a countermeasure, would not be the Claimant (investor) but rather, its home-State, which is normally absent from relevant proceedings. The analysis in this thesis demonstrates that the limited jurisdictional scope *ratione materiae* of an adjudicative body, does not preclude it from examining an applicable defence in its entirety. It further demonstrates that the mixed character of ISDS

[53] Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals' (1952) 29 BYIL 1, 40–42.

and the absence of the home-State from the proceedings do not constitute an obstacle to the applicability of a general defence.

The thesis examines these issues through an in-depth analysis of the case law of the ICJ, the WTO and investment arbitral tribunals in three substantive chapters. The first substantive chapter (II) examines the practice of the ICJ, a permanent international court, which can, in principle, rule on any inter-State dispute under international law. The ICJ hears inter-State disputes that are submitted before it on the basis of several different legal instruments, including a variety of treaties relating to different subject-matters. The second substantive chapter (III) focuses on the case law of the WTO adjudicative bodies. The WTO includes an inter-State dispute settlement system which, unlike the ICJ, is of specialised character and entrusted with the interpretation and application of a specific set of treaties, i.e., the WTO Agreements. The WTO DSS comprises both *ad hoc* panels established for the purposes of each dispute,[54] and a standing body of appellate jurisdiction.[55] The third substantive chapter (IV), discusses the practice of investor-State arbitral tribunals. ISDS, unlike the ICJ and the WTO, is a mixed system of international adjudication, which involves the direct participation of private persons (investors). Investment tribunals, like the WTO bodies, have a specialised field of competence, but unlike the WTO, their jurisdiction is based on diverse legal instruments, including a large number of substantially different bilateral and multilateral investment treaties. In view of the different characteristics of each of these adjudicative bodies or systems, the case law discussed in this thesis is sufficiently representative to

[54] The WTO adjudicative bodies on first instance, see Arts.6-8 DSU.

[55] At least in principle, under Art.17 DSU, despite the current deadlock in the appointment of Appellate Body members.

draw general conclusions on the availability of general defences in international adjudication.

The terms 'international adjudication' and 'international adjudicative body' are used in this thesis to describe bodies and procedures with a public international law origin, whose constituent instrument is governed by international law; have the power to issue decisions that are legally binding between the parties; decide cases before them on the basis of law and specifically, international law; and comprise individuals who serve independently in their own professional capacity and do not represent any State.[56] The analysis and arguments are limited to international disputes relating to State obligations and thus, to defences that may be invoked in adjudicative proceedings where States act as responding parties.[57] Moreover, the thesis deals solely with the *availability* of the relevant defences, i.e., on whether the Respondent can indeed invoke them in the context of adjudicative proceeding, and does not elaborate on possible remedies available in case that a defence is successfully invoked, including issues of compensation. This matter is only addressed incidentally to the extent that it may affect a determination on the availability of certain general defences.

Note that, all information included in this thesis is as of March 2023.

[56] Giorgetti, 'Introduction' in Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Brill 2012) 1–3; Romano, Alter, and Shany, 'Mapping International Adjudicative Bodies, the Issues, and Players' in Romano, Alter, and Shany (eds), *The Oxford handbook of international adjudication* (OUP 2014) 5–8.

[57] Note, however, that the thesis does not discuss the availability of general defences in disputes regarding human rights obligations. International human rights instruments often include derogation clauses which follow a different formula from the exception clauses discussed in this thesis. Moreover, in view of the motivation behind the thesis and the subject-matter of the limited international case law on the interaction of treaty clauses with general defences, the thesis focuses primarily on disputes based on international economic law instruments.

II. THE INTERNATIONAL COURT OF JUSTICE: AN INTER-STATE ADJUDICATIVE MECHANISM WITH GENERAL COMPETENCE

A. INTRODUCTION

This is the first of the three substantive chapters of this thesis, which focuses on the case law of the ICJ. The ICJ is an inter-State international adjudicative body which has, in principle, general competence to deal with any international dispute relating to State obligations, even in areas of international law covered by the specialised competence of other international courts and tribunals. Often referred to as the World Court, [58] the ICJ was established by the UN Charter as the 'principal judicial organ of the United Nations' and UN members become *ipso facto* parties to its Statute. [59] As the only judicial institution with general competence and universal reach, it enjoys exceptional authority and holds a unique position within the system of international law.[60] As such, its findings often form 'the backbone of the primary reference materials on international law to validate an argument'.[61] Thus, the analysis in this chapter sets the foundations upon which the following two chapters, dealing with specialised international adjudicative bodies, build on.

Despite its prominent position and its general competence, the ICJ does not possess compulsory and automatic jurisdiction over all legal disputes.[62] As discussed in

[58] Koroma, 'The Application of International Law by the International Court of Justice' (2011) 4 Collected Courses, Xiamen Academy 22.

[59] Arts.92-93 UN Charter; Art.1 ICJ Statute.

[60] Koroma (n 58) 22; Pellet and Müller, 'Article 38' in Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 949.

[61] Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 5.

[62] Pellet and Müller (n 60) 949. See overview of drafting process and relevant debates in Dubisson, *La Cour Internationale de Justice* (Pichon et Durand-Auzias 1964) 13; Marston, 'The London Committee and

more detail in Section B, the jurisdiction of the ICJ depends on the consent of the States parties to the dispute in question.[63] Thus, it is subject to important jurisdictional constraints. The law applicable to each dispute submitted before the ICJ may also vary depending on the provisions of the instrument that forms the basis of its jurisdiction. Accordingly, it is unclear whether a Respondent can invoke general defences in any dispute before the ICJ without distinction as to the jurisdictional basis upon which the Court is seized of the matter or the source of the obligations that form the basis of the Applicant's claims. General defences may not be explicitly within the law that the Court is mandated to apply in settling the dispute under consideration. Moreover, in some cases of treaty-based disputes, the provisions of the treaty in question may reveal the parties' intention to exclude general defences. Lastly, the application of some general defences may require the prior determination of issues that are not within the subject-matter jurisdiction of the ICJ as established in the relevant dispute. These three factors, as discussed in Chapter I, may result in the non-availability of general defences in the context of certain ICJ disputes.

This chapter discusses these factors in turn, putting particular emphasis on the jurisprudence of the Court itself. Nonetheless, it must be noted that case law on the matter of general defences *per se* is relatively scarce. In only a handful of cases has the ICJ examined the availability of general defences, their interplay with exception clauses, and

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the Statute of the International Court of Justice' in Lowe and Fitzmaurice (eds), *Fifty Year of the International Court of Justice: Essays in honour of Sir Robert Jennings* (CUP 1996); Tomuschat, 'Article 36' in Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 719; Kolb, *The International Court of Justice* (Hart 2013) 51; Rosenne, *Rosenne's Law and Practice of the International Court, 1920-2015* (Malcolm Shaw ed, 5th edn, Brill 2016) 43.

[63] Art.36 ICJ Statute reflects in its entirety the principle of consent, see Xue, 'Jurisdiction of the International Court of Justice' (2017) 10 Collected Courses, Xiamen Academy 55.

the power of adjudicative bodies to examine incidental issues arising in this context.

The following analysis is divided into four substantive sections. Section B discusses the bases upon which ICJ jurisdiction may be established and the ensuing jurisdictional limitations. It further discusses the law applicable to ICJ disputes and explores the interplay between subject-matter jurisdiction and applicable law. Through an overview of relevant case law, it argues that general international law, as defined in the introduction, is always within the law that the Court can apply, even in treaty-based disputes submitted before it based on a limited compromissory clause. The analysis demonstrates that this includes general defences under the law on State responsibility, which are presumed to apply to all international disputes regarding State obligations, subject to the application of the *lex specialis* principle.

Section C explores the interaction of general defences with treaty provisions. Firstly, it discusses the landmark case of *Tehran Hostages* and the finding of the Court that diplomatic law constitutes a self-contained regime that excludes the possibility of invoking external defences for breaches of obligations enshrined therein. It analyses the judgment and demonstrates that the non-availability of general defences for breaches of diplomatic law results from an interpretation of the relevant treaties, which reveal the parties' intention to establish the inviolability of diplomatic rights. Secondly, Section C examines the interaction of exception clauses with general defences. It takes the judgments in *Nicaragua*, *Oil Platforms*, *Alleged Violations*, and *Iranian Assets* as a starting point and considers the modalities of the application of the *lex specialis* principle and the interpretation of treaty provisions under Art.31(3)(c) VCLT. The analysis demonstrates that exception clauses are often *lex specialis* to the general defences of necessity and self-defence, but the customary requirements of the latter remain relevant

to the interpretation of the former. As for countermeasures, Section C argues that exception clauses do not exclude the residual applicability of countermeasures as the two defences do not regulate the same subject-matter.

Lastly, Section D discusses whether the Court has the power to rule on indispensable incidental issues arising in the context of applicable defences. It argues that, as confirmed in *ICAO-2020*, the subject-matter jurisdiction of an adjudicative body entails the power to make incidental findings, i.e., findings in the course of its reasoning, in the context of applicable defences, even if such findings would be outside its jurisdictional boundaries if presented before it as independent claims.

B. JURISDICTIONAL LIMITATIONS AND THE LAW APPLICABLE TO ICJ DISPUTES

This section discusses first the bases on which ICJ jurisdiction may be founded and the resulting jurisdictional limitations, as well as the interplay between jurisdiction and the law applicable to ICJ disputes (1). It then elaborates on whether jurisdictional and applicable law limitations affect the Court's power to examine and apply rules of general international law, including the law on State responsibility (2). Lastly, it discusses whether the presumption of applicability of general international law extends to general defences by reference to relevant case law (3).

1. ICJ jurisdiction and applicable law

The ICJ is an international court endowed with very broad competence. For scholars that support the distinction between jurisdiction and competence,[64] the term competence

[64] Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part Nine' (1998) 69 BYIL 1, 4.

describes the outer limits of an adjudicative body's powers,[65] i.e. the general field or class of cases that is entitled to hear.[66] By contrast, jurisdiction refers to the power to decide the particular, individual case before it with final and binding force.[67] This power has four principal dimensions: *ratione personae* (personal jurisdiction), *ratione materiae* (subject-matter jurisdiction), *ratione temporis* (temporal jurisdiction), and *ratione loci* (spatial or territorial jurisdiction).[68] In terms of competence, the ICJ can deal with all inter-State disputes under international law: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation.[69]

Nonetheless, in terms of jurisdiction, the ICJ is subject to important limitations. Participation in the ICJ Statute 'simply opens the door for a State to sue or be sued before the Court, but it does not allow the State to go through that door.'[70] The Court's jurisdiction is circumscribed by the principle of consent.[71] Per Art.38 of its Statute, its function is 'to decide…such disputes as are submitted to it'. Under Art.36 ICJ Statute, cases may be submitted to it in one of the following forms. Firstly, parties may refer to

[65] Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1973) 136 RdC 331, 351.

[66] Fitzmaurice (n 53) 40–42. Also known as 'foundational jurisdiction' or outer limits/jurisdictional boundaries, Shany, 'Jurisdiction and Admissibility' in Romano, Alter, and Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 782; Broches (n 65) 351.

[67] Xue (n 63) 32.

[68] Shany (n 66) 781.

[69] Art.36(2) ICJ Statute.

[70] Murphy, 'The International Court of Justice' in Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Brill 2012) 15.

[71] Tomuschat (n 62) 728.

the Court any case under international law through mutual agreement.[72] Secondly, certain treaties, whether bilateral or multilateral, include compromissory clauses,[73] which authorise the parties to submit future disputes arising thereunder to the ICJ.[74] Moreover, States may conclude general dispute settlement treaties that provide for submission of future disputes *inter se* to the ICJ.[75] Thirdly, under the optional clause of Art.36(2) ICJ Statute, States may submit to the UN a declaration recognising as compulsory the jurisdiction of the Court over all or certain legal disputes, on a reciprocal basis.[76]

The instruments that form the basis of the Court's jurisdiction also delineate the parameters of such jurisdiction. The Court has the power to pronounce only on matters that fall within the scope of these instruments and are raised in the parties' submissions –known as the principle of *non ultra petita*.[77] Disputes based on special agreements rarely entail preliminary objections to the Court's jurisdiction.[78] However, in cases of unilateral submission of a dispute based on a compromissory clause or optional clause declarations, the Court is faced with the important interpretative task to determine whether the dispute

[72] Thirlway, 'Compromis', *MPEPIL* (2006); Tomuschat (n 62) 743. See also Art.38(5) ICJ Rules on *forum prorogatum*.

[73] Broadly defined as a 'clause included in a treaty with a view to provide options of settlement of a dispute arising out of that treaty', see Papadaki (n 32) 2.

[74] Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice' (1987) 81 AJIL 855.

[75] E.g., Pact of Bogotá; 1957 European Convention.

[76] Gross, 'Compulsory Jurisdiction under the Optional Clause: History and Practice' in Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational 1987). Initiation of proceedings on this basis requires both mutuality *ratione personae* and reciprocity *ratione materiae*, Thirlway, 'Reciprocity in the Jurisdiction of the International Court' (1984) 15 NYIL 97, 98.

[77] Overview of the principle in Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part Ten' (2000) 70 BYIL 1, 21; Kolb, 'General Principles of Procedural Law' in Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (3rd edn, OUP 2019) 893–903.

[78] Save for objections as to whether an agreement exists, e.g., *Qatar/Bahrain* [19-30]; *Aegean Sea* [97-99].

falls within the scope *ratione materiae* of the relevant instruments.[79]

In practice, only a very small number of international disputes can be submitted to the Court by the disputing States. Optional clause declarations usually include several reservations significantly reducing their scope.[80] Special agreements are usually concluded only in the context of specific territorial disputes.[81] Dispute settlement treaties providing for recourse to the ICJ are also very rare and concluded on a regional level.[82] In view of this, States often attempt to squeeze disputes into the scope of tight compromissory clauses as it is their only option to bring the matter before the Court.[83] Statistically, compromissory clauses are the most utilised means for submitting a dispute to the ICJ with over half of contentious cases initiated on that basis.[84]

In treaty-based disputes, the Court is empowered to rule only on aspects that indeed fall within the scope of the treaty. Compromissory clauses usually authorise parties to submit to the Court disputes relating to/arising from the 'interpretation and/or application' of the treaty in which they appear.[85] In this context the Court's interpretative

[79] Tomuschat (n 62) 753.

[80] See list of current optional clause declarations at <https://www.icj-cij.org/declarations>. Art.36(3) ICJ Statute recognises the right of States to make reservations, confirmed in case law, e.g., *Nicaragua(Objections)* [59]; *Fisheries-Spain-Canada* [44].

[81] Out of 19 disputes based on special agreements only 2 disputes did not concern rights over territory (*Asylum* and *Gabčíkovo-Nagymaros*). See list of disputes per jurisdictional basis in ICJ Yearbook 2019-2020.

[82] See examples in (n 75).

[83] See Greenwood's analogy between compromissory clauses and Cinderella's glass slipper, as quoted in Papadaki (n 32) 1–2, n 1.

[84] 84 out of 151 contentious cases rely exclusively or partially on a compromissory clause, see ICJ Yearbook 2019-2020, p.75.

[85] This reference seems to be the common denominator of compromissory clauses, see Charney (n 74) 856; Papadaki (n 32) 10.

task becomes crucial, as it needs to determine whether and to what extent the claims before it are within the purview of the compromissory clause. It must identify the subject-matter of the dispute and determine whether it relates to the 'interpretation or application' of the treaty.

The Court has been faced several times with preliminary objections on this matter. Respondents often claim that the dispute's true subject-matter falls outside the parameters of the treaty and hence, outside the Court's subject-matter jurisdiction.[86] The Court, responding to such arguments, has confirmed that it shall itself determine, on an objective basis, the subject-matter of a dispute of which it is seised.[87] In this context, it must take into account the parties' submissions and give particular attention to the Applicant's formulation of the dispute.[88] Although it has the power (and duty) 'to isolate the real issue in the case and to identify the object of the claim',[89] it is not permitted to modify the object of the Applicant's submissions.[90] Nor is it permitted to infer the subject-matter from the political context of the dispute, disregarding the Applicant's precise claim.[91] As explained in *Tehran Hostages*:

> [L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute…Yet never has the view been put forward…that because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the

[86] E.g., *Alleged Violations* [40]; *ICAO-2020* [24,43].

[87] *Alleged Violations* [52-53] and references therein; *ICSFT/CERD* [24].

[88] ibid.

[89] *Nuclear Tests* [29].

[90] *Alleged Violations* [59].

[91] ibid.

parties the legal questions at issue.[92]

In short, 'to the extent that the measures [in question] might constitute breaches of certain obligations under the [Treaty in question], those measures relate to the interpretation or application of that Treaty'[93] and thus, the Court can properly exercise its jurisdiction based on the compromissory clause. Indeed, 'certain acts may fall within the ambit of more than one instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument'.[94] Similarly, disputes may arise in a complicated political context raising several legal and political questions.[95] The Court need only examine, in the first place, if the very subject-matter of the Applicant's claims is unrelated to the treaty in question.[96] Then, it must walk a thin line and ensure that in examining the relevant claims it does not go beyond the boundaries of the parties' consent. This invariably results in the fragmentation of international disputes, with the Court pronouncing only on one –often peripheral– aspect of a more intricate, and often impactful, international dispute. To name but a few examples, in *CERD* the Court acknowledged that, whilst there may have been a dispute regarding 'ethnic cleansing' under CERD, the primary dispute between Georgia and Russia was about the status of Abkhazia and South Ossetia and Russia's use of force, over which it had no jurisdiction.[97] Similarly, in *ICSFT/CERD* the Court examined whether a dispute between Russia and Ukraine existed under the provisions of ICSFT and CERD, whilst

[92] *Tehran Hostages* [37].

[93] *Alleged Violations* [56].

[94] ibid; similarly, *CERD-Georgia* [32].

[95] see similar findings in *South China* [152]; *Enrica Lexie* [231-245].

[96] *Alleged Violations* [59].

[97] *CERD-Georgia* [38,63-64,93].

acknowledging that it cannot make any pronouncements on Russia's alleged aggression and occupation of Ukrainian territory or the status of Crimea, which were admittedly at the heart of the dispute.[98]

In view of the above, the issue of general defences and the Court's jurisdiction to examine and apply them becomes particularly relevant. Especially in the context of self-defence and countermeasures, as discussed further in Section D, the parties have an opportunity to introduce before the Court, arguments regarding the legality of acts that would not fall within the scope of the Court's subject-matter jurisdiction if submitted before it as independent claims.

As to the law applicable to ICJ disputes, according to Art.38 ICJ Statute, the Court shall, in principle, decide 'in accordance with international law' and, in exceptional cases, *ex aequo et bono*. As to what the term 'international law' entails, Art.38(1) further includes 4 subparagraphs, instructing the Court to apply international conventions, international custom, and general principles of law, and to use judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This list is evidently broad: since the Court is competent to decide on any matter under international law, it is also competent to apply all rules of international law in making such decisions. For this reason, scholars often use Art.38 ICJ Statute as an authoritative statement of the sources of international law more generally.[99]

[98] *ICSFT/CERD* [28-32].

[99] Mendelson, 'The International Court of Justice and the Sources of International Law' in Lowe and Fitzmaurice (eds), *Fifty years of the International Court of Justice* (CUP 1996) 88; Pellet and Müller (n 60) 846–847.

However, the list in Art.38 is misleading in two ways. Firstly, it is not exhaustive,[100] as international obligations may also be reflected in other formal sources, such as unilateral acts of States[101] and acts of international organisations.[102] Secondly, and most importantly, the Court is not always empowered to apply *all* rules of international law that are relevant to the acts under consideration. Like the Court's scope of jurisdiction, applicable law is also circumscribed by the principle of consent. Art.38 does not preclude the parties from agreeing on a smaller pool of norms to be applied in a given case.[103] Thus, the law applicable in each ICJ dispute depends on the instrument forming the basis of the Court's jurisdiction.

This question presents more challenges in treaty-based disputes, where there are three possible scenarios. First, the treaty may include an applicable law clause empowering the Court to apply not only the provisions of the treaty in question but also 'other rules of international law'.[104] Second, in theory, the treaty may include an applicable law clause that specifically instructs the Court to apply exclusively a specific set of rules. For example, it may specify that the only law applicable to disputes arising thereunder is the treaty itself. Or, third, as is most often the case, the treaty may not include an applicable law clause at all. It may include only a 'typical' compromissory clause, authorising the parties to submit to the Court disputes relating to/arising from the 'interpretation and/or application' of the treaty in question,[105] without further information

[100] Pellet and Müller (n 60) 846.

[101] *Nuclear Tests* [43-46]; Principle 1, ILC Principles on Unilateral Declarations.

[102] *Certain Expenses* p.163; *Wall* [26]; *Kosovo* [117].

[103] Papadaki (n 32) 7.

[104] E.g., Art.293(1) UNCLOS.

[105] See (n 85).

as to the law that the Court shall apply in this context.

The interplay between jurisdiction and applicable law inevitably results in certain limitations to the Court's power to apply all relevant rules of international law applicable between the parties in all cases of treaty-based disputes. There seems to be a 'symmetry' between the Court's scope of jurisdiction and the law that it may apply.[106] Under a compromissory clause, the Court only has jurisdiction to make findings with respect to claims arising under the relevant treaty. If the Court was to make findings in relation to the application of substantive rules that are external to the treaty to the conduct in question it would necessarily exceed the limits of its subject-matter jurisdiction. Thus, even when the treaty includes a generous applicable law clause that empowers the Court to apply not only the treaty itself but also 'other rules of international law', the extent to which the Court can indeed have recourse to external substantive rules would be very limited.[107] It follows that the interplay between jurisdiction and applicable law dictates that the law to be applied in treaty-based disputes stems primarily from the treaty under which the dispute has arisen.[108] Although, as discussed above, it is not uncommon for a State act to fall within the regulatory scope of more than one substantive rule of international law, when the Court's jurisdiction is established on the basis of a compromissory clause, the scope of the dispute is narrowed down to specific claims arising out of the treaty in question. Accordingly, the conduct that is challenged by the

[106] Cannizzaro and Bonafé, 'Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case' (2005) 16 EJIL 481, 484.

[107] For example, the Court could apply external rules without exceeding its jurisdiction if the treaty under consideration includes itself a *renvoi* to 'other rules of international law' in its substantive provisions. An example is UNCLOS, which includes direct references to 'other [or pertinent] rules of international law' in several provisions, see, e.g., Arts.2(3), 19(1), 58(2-3), 87(1) UNCLOS.

[108] See, similarly, Papadaki (n 32) 8 and references therein.

Applicant is assessed only against the relevant treaty provisions properly invoked in the application.

In view of these limitations, the question that arises is whether general defences are always within the law that the Court may apply and thus, are always available, at least in principle, to the Respondent in the context of an ICJ dispute. As demonstrated above, this question is particularly pertinent to treaty-based disputes when the Court is seized of the matter based on a compromissory clause. But similar questions can also arise in the context of a restrictive special agreement.[109] The following section discusses whether the power of the Court to examine and apply the law on State responsibility, including general defences, is affected by the jurisdictional and applicable law limitations above.

2. General international law on State responsibility as applicable by default to ICJ disputes

The introductory chapter elaborated on the notion of general international law proper, comprising those parasitical norms that may be applied in the context of all international disputes.[110] This sub-section further demonstrates that, indeed, applicable law limitations and the compartmentalisation of disputes resulting from limited compromissory clauses, cannot sever the links between the treaty in question and general international law.[111] ICJ case law confirms that the law on State responsibility is always applicable to international

[109] However special agreements usually empower the Court to discern and apply all relevant rules under Art.38 ICJ Statute, e.g., Art.III Agreement in *Kasikili/Sedudu*; Art.5 Agreement in *Malaysia/Singapore*; Art.4 Agreement in *Indonesia/Malaysia*.

[110] See analysis in (n 20-33).

[111] Papadaki (n 32) 10.

disputes, unless the instrument under consideration reveals through interpretation the parties' intention to establish a special arrangement.

The most prominent confirmation of this presumption of applicability of the law on State responsibility was in *Genocide-Bosnia*. The Court's jurisdiction was based on Art.IX Genocide Convention, empowering parties to submit to the Court disputes 'relating to the interpretation, application or fulfilment' of said Convention.[112] Accordingly, claims arising out of obligations outside the Convention, such as those protecting human rights or 'essential humanitarian values', could not be entertained, even if they are of a *jus cogens* and *erga omnes* character.[113] Nonetheless, the Court stipulated that it does not follow from these jurisdictional limitations that 'the Convention stands alone'.[114] It explained that:

> In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.[115]

The Court suggests that application of certain rules external to the treaty is functionally necessary to perform its task and thus, it falls within its subject-matter jurisdiction under the treaty. Adhering to this reasoning, the Court examined and applied the general rules on attribution of conduct as a precondition to 'ascertain whether the international

[112] *Genocide-Bosnia* [149].

[113] *Genocide-Bosnia* [147].

[114] ibid.

[115] ibid.

responsibility of the Respondent c[ould] have been incurred'.[116] Having found that the Respondent had indeed failed to comply with obligations under the Genocide Convention, the Court turned to the question of reparation, where it applied once more the general law on State responsibility to determine appropriate remedies.[117]

The Court followed a similar approach in *Genocide–Croatia*, which was based on the same compromissory clause. Quoting the passage above, it reaffirmed that the general law on State responsibility applied since 'the Convention itself does not specify the circumstances that give rise to the responsibility of a State'.[118] It further affirmed that disagreements on the 'application…of a rule on some aspect of State responsibility…in connection with [the] allegations [in question]' still fall squarely within the category of 'disputes…relating to the interpretation, application or fulfilment of the [Genocide Convention]' and thus within the Court's subject-matter jurisdiction.[119]

Other judgments further confirm this understanding of the Court's jurisdictional boundaries. Indicatively, in *Tehran Hostages*, where the Court's jurisdiction was based on the VCDR, the VCCR, and the Treaty of Amity, the Court applied the general rules on attribution to determine whether 'the acts in question may be regarded as imputable to the Iranian State'[120] and subsequently confirmed that Iran's responsibility entails an

[116] *Genocide-Bosnia* [379], applying the rules in Arts.4, 8, 16 ARSIWA.

[117] *Genocide-Bosnia* [460], applying the rules in Arts.31, 36 ARSIWA.

[118] *Genocide-Croatia* [115].

[119] ibid.

[120] *Tehran Hostages* [56ff]. Although the Court did not explicitly refer to general international law, it becomes evident from the judgment that its conclusions are based on principles of general international law. The Court's findings on attribution reflect the test later set out in Art.11 ARSIWA.

obligation to make reparation for the injury thereby caused.[121] In *LaGrand* and *Avena*, where the Court's jurisdiction was based on the VCCR, the Court examined what constitutes 'reparation in an adequate form' and whether assurances of non-repetition can be demanded from the Respondent.[122]

These cases demonstrate that matters pertaining to the law on State responsibility form part of the Court's mandate to interpret and apply the treaties in question. This is because the determination of such matters is indispensable for the Court to discharge its function under its Statute and the applicable compromissory clause. For example, attribution of conduct is one of the two elements of an internationally wrongful act under general international law.[123] As stipulated in *Genocide-Bosnia*, 'the fundamental principle governing the law of international responsibility…[is] that a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.[124] Thus, it would not be possible for the Court to rule on the case without determining first whether the conduct was attributable to the Respondent. Similarly, as proclaimed in *Chorzów*, '[it] is a principle of international law that the breach of an engagement involve[s] an obligation to make reparation in an adequate form.'[125] Accordingly, 'reparation…is an indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations…are…differences relating to its application.'[126] Thus,

[121] *Tehran Hostages* [90].

[122] *LaGrand* [48,121-125]; *Avena* [119-121]

[123] Art.2 ARSIWA.

[124] *Genocide-Bosnia* [406].

[125] *Chorzów* p.21. See subsequent confirmation of the principle in *Nicaragua(Merits)* [283]; *LaGrand* [48].

[126] *Chorzów* p.21.

the Court's power to rule on a particular dispute entails, in principle, the power to indicate appropriate remedies in accordance with the rules of general international law. To the extent that the treaty under consideration does not provide any special rules dealing with such indispensable matters of State responsibility, the Court must have recourse to general international law to rule on the case as a matter of functional necessity.

The Court's power to rule on incidental issues of State responsibility in deciding the claims before it, is inherent: it is a necessary component of the judicial function and does not need to be expressly provided for in its constitutive instrument or the instrument that forms the basis of its jurisdiction.[127] Every international adjudicative body enjoys such inherent jurisdictional 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.'[128] Such inherent powers include, first and foremost, the right to determine whether it has jurisdiction in a given case (*Kompetenz-Kompetenz*).[129] But, they are not limited to that. As explained in *Nuclear Tests*, the Court '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'.[130] Accordingly, the Court's jurisdiction to determine issues of State responsibility forms part of its inherent powers since deciding the merits of a case and determining whether the Respondent bears responsibility, as well as the content of such responsibility, are 'so

[127] *Tadić* [18]; Amerasinghe, *Jurisdiction of Specific International Tribunals* (Brill 2009) 19.

[128] *Nuclear Tests* [23].

[129] Art.36(6) ICJ Statute; Kolb (n 62) 601.

[130] *Nuclear Tests* [23].

closely linked that competence to deal with the former necessarily includes the competence to deal with the latter, because they both concern settlement of the dispute'.[131]

It short, exclusive reference in a jurisdictional clause to the legal rules enunciated in a specific treaty does not exclude the applicability to the dispute of the rules of general international law on State responsibility.[132] To the extent that the instrument that forms the basis of the Court's jurisdiction does not reveal, through interpretation, an intention to deviate from general international law –a matter discussed in Section C– general international law on State responsibility is presumed to apply to all international disputes, even if no explicit reference to such rules is made in the instrument under consideration. Similarly, findings relating to matters of international responsibility are within the Court's subject-matter jurisdiction, even when it is limited to issues arising out of the instrument at hand.

3. *Prima facie* applicability of general defences to treaty-based disputes

The sub-section above demonstrated that a limited jurisdictional clause does not deprive the Court of the authority to determine indispensable incidental issues of State responsibility that are functionally necessary for a finding on whether the Respondent bears international responsibility. This sub-section further argues that the presumption of applicability of the law on State responsibility to all international disputes, including treaty-based disputes, extends to general defences.

[131] Amerasinghe (n 127) 166.

[132] Tomuschat (n 62) 754.

Although findings on this direct applicability of general defences are scarce, the ICJ seems to readily examine the potential applicability of general defences in treaty-based disputes when relevant arguments are raised by the Respondent, without expressing any hesitation regarding applicable law or jurisdictional limitations.

Tehran Hostages provides an example of this 'casual' approach of the Court to this matter. In *Tehran Hostages*, the US instituted proceedings against Iran with respect to the seizure of the US Embassy in Tehran and the holding as hostages of US diplomatic and consular staff and US nationals by Iranian militants in November 1979. The application referred primarily to breaches of the VCDR, the VCCR and the Treaty of Amity. The Court's jurisdiction was founded on the compromissory clauses of these treaties,[133] which conferred upon it compulsory jurisdiction to hear cases arising out of/as to their 'interpretation or application'.[134] Thus, the Court's jurisdictional boundaries were delimited by these instruments. Moreover, these treaties include no further provisions on applicable law.

Iran filed no pleadings and was not represented at the hearings, but made its position known to the Court, in two letters.[135] According to Iran, the hostages crisis was but a 'marginal and secondary aspect of an overall problem', involving several US activities which were 'contrary to and in conflict with all international and humanitarian norms'.[136] Such acts were described as involving, '*inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless

[133] *Tehran Hostages* [49, 54, 55].

[134] Art.1, Optional Protocols to VCDR and VCCR; Art.XXI(2), Treaty of Amity.

[135] *Tehran Hostages* [10, 33-38, 82].

[136] ibid.

exploitation of [the] country, and numerous crimes perpetrated against the Iranian people…'.[137] Iran did not explicate the legal significance of these claims or specify the legal basis on which they were to be considered by the Court. Nevertheless, the Court noted that it could not 'overlook the fact that on the Iranian side, in often imprecise terms, the idea ha[d] been put forward that the conduct of the Iranian Government…might be justified by the existence of special circumstances'.[138]

Accordingly, the Court considered whether Iran's claims 'could be regarded as constituting a justification of Iran's conduct and thus a defence to the US claims'.[139] The Court did not explicitly provide a legal characterisation for the Iranian defence. However, there is no indication in the judgment that the defence was examined in light of any treaty provision.[140] Given the clear resemblance of the Iranian claims to the general defence of countermeasures, it seems that the Court examined these claims under general international law,[141] without expressing any reservations regarding its *prima facie* applicability to the treaty-based dispute in question. Nonetheless, general defences were ultimately found to be unavailable in this case, based on the interpretation of the treaties under consideration.[142]

Another example of this casual approach is *Interim Accord*. North Macedonia[143]

[137] ibid.

[138] *Tehran Hostages* [80].

[139] *Tehran Hostages* [83].

[140] Art.XX Treaty of Amity was not examined by the Court in this case.

[141] The ILC in Art.50 ARSIWA, commentary [15] also refers to the Iranian defence as 'countermeasures', as have earlier the Special Rapporteurs, e.g., Arangio-Ruiz, 'Third Report' [26]. See similarly, Cannizzaro and Bonafé (n 106) 492.

[142] See analysis in Ch II(C)(1).

[143] Known as former Yugoslav Republic of Macedonia (FYROM) at the time of the dispute.

challenged Greece's decision to block the process of its accession to NATO, contrary to the latter's obligations under the countries' bilateral Interim Accord. The case was submitted to the Court based on Art.21 of the Accord, which provided, in commonly employed language, that differences concerning the 'interpretation or implementation of this…Accord may be submitted…to the [ICJ]'. Greece invoked, among others, the defence of countermeasures to rebut the claims of North Macedonia. The Court examined –and rejected– the defence without raising any concerns regarding its applicability in this treaty-based dispute.[144]

The Court's approach in these instances sits comfortably with its findings with respect to defences stemming from the law of treaties, which are also general in character, as far as treaty-based disputes are concerned. In *ICAO-1972*, India refused to allow overflights of Pakistani aircraft over its territory contrary to the Chicago Convention and IASTA. It claimed that its obligations towards Pakistan were suspended on account of Pakistan's involvement in the hijacking of an Indian aircraft. The case was referred to the International Civil Aviation Organisation (ICAO) Council, but India contended that the Council had no jurisdiction because the suspension of overflights was not undertaken on the basis of the aforementioned treaties but rather on the basis of general international law, i.e., the law of treaties regarding suspension and termination.[145] Accordingly, India contended that the Council, whose jurisdiction extended only to matters arising under the treaties, had no power to hear the case.[146] The matter of the Council's jurisdiction was referred to the ICJ.

[144] *Interim Accord* [114-164].

[145] *ICAO-1972* [29, 31].

[146] *ICAO-1972* [31].

The ICJ, noting that the matter 'involves a point of principle of great general importance for the jurisdictional aspects of this –or of any– case',[147] confirmed that the ICAO Council had jurisdiction to determine the validity of India's contention, i.e., to examine and apply the relevant rules of general international law, regardless of jurisdictional constraints.[148] The Court observed that India's arguments are 'essentially in the nature of replies to the charge that India is in breach of the Treaties: the Treaties were at the material times suspended or not operative, or replaced —hence they cannot have been infringed.'[149] Thus, its findings are especially relevant to the present inquiry as they confirm the applicability by default of general international law in international adjudication and further demonstrate the importance of this approach in the context of defences. As observed in *ICAO-1972*, upholding India's objection regarding the Council's jurisdiction to rule on the validity of defences under general international law would be 'tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses…'.[150] This issue re-emerged in *ICAO-2020*, this time with respect to countermeasures under the law on State responsibility. The Court, following the same reasoning as in its 1972 judgment, reaffirmed that the invocation of a defence under general international law cannot remove a dispute from an adjudicative body's scope of jurisdiction, and made further findings with respect to the power of an adjudicative body to make incidental findings in this context, a matter discussed in Section D.

[147] ibid.

[148] *ICAO-1972* [31-32].

[149] ibid.

[150] ibid.

Lastly, we cannot overlook the findings in *Nicaragua* and *Oil Platforms*, where, as discussed more extensively in Section C, the Court examined the interaction of exception clauses with self-defence. In both cases, self-defence was examined with respect to treaty-based claims only in the context of interpreting the relevant treaty exceptions. Especially in *Oil Platforms*, where the Court's jurisdiction was circumscribed by the compromissory clause of the Treaty of Amity, the Court emphasised that self-defence was only pertinent to the dispute through the lens of Art.XXI of that treaty and not as a self-standing defence.[151] The Court's findings, which put emphasis on the relevance of general defences only in the context of interpreting the relevant treaty provisions, can be seen as implicitly assuming that general defences are otherwise inapplicable to treaty-based disputes.[152] However, this does not necessarily follow from the analysis of the Court. As discussed in the following section, the Court's approach in both cases was in line with the *lex specialis* principle, which dictates that priority must always be given to the text of the treaty under consideration. The judgments do not discuss whether the Court would have been able to directly apply the defence of self-defence under general international law to the treaty-based claims in question in the absence of an exception clause, or in a hypothetical case where the exception clause did not regulate measures taken in response to an armed attack. However, the US arguments in *Oil Platforms* and its reference to Art.21 ARSIWA support the claim that, absent the *lex specialis*, self-defence would have been applicable as the *lex generalis*.[153] The commentary to Art.21 ARSIWA also stipulates that '[s]elf-defence may justify non-

[151] *Oil Platforms(Merits)* [38].

[152] Cannizzaro and Bonafé (n 106) 483.

[153] Paddeu (n 17) 126.

performance of certain obligations other than [Art.2(4) UN Charter], provided that such non-performance is related to the breach of that provision'.[154] In other words, self-defence permits the adoption of necessary and proportionate non-forcible measures that may otherwise be in breach of an international obligation as a response to an armed attack.[155] This defence is also available for *prima facie* breaches of treaty-based obligations such as the ones discussed in *Nicaragua* and *Oil Platforms*.

To conclude, it emerges from the analysis in this section that general defences apply, in principle, to all international disputes. The Court, in the exercise of its inherent powers, can have recourse to general international law to the extent that it is necessary to discharge its function under its Statute and the applicable jurisdictional provisions. Thus, a Respondent is, in principle, able to invoke general defences regardless of applicable law and jurisdictional limitations.

C. GENERAL DEFENCES AND TREATY REGIMES: THE LEX SPECIALIS PRINCIPLE AND THE ROLE OF TREATY INTERPRETATION

Section B demonstrated that there is no *a priori* exclusion of the applicability of general defences in an international dispute relating to State obligations, even when it is submitted before the Court based on a limited compromissory clause[156] and the legal instruments under consideration do not explicitly mandate the Court to apply general international law. Nonetheless, this presumption of applicability is subject to the parties' contractual freedom. States are free to deviate from the general rules on State

[154] Art.21 ARSIWA, commentary [2].

[155] See evidence in support of this claim in Buchan, 'Non-Forcible Measures and the Law of Self-Defence' (2023) 72 ICLQ 1.

[156] Or, similarly, a limited *compromis*.

responsibility and establish different standards that govern the same subject-matter. Art.55 ARSIWA confirms this understanding of general international law as 'residual': 'where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law' such special rules take priority and displace the relevant *lex generalis*.[157]

However, as the ILC Study Group on Fragmentation has noted, although 'the special [rule] steps in to become applicable instead of the general…[s]uch replacement remains…always only partial. The more general rule remains in the background providing interpretative direction to the special one.'[158] It is thus essential to determine in each case not only to what extent the special rule was intended to displace the general one, but also to what extent the latter informs the interpretation of the former.

The ICJ has seldom made explicit pronouncements on the interaction of general defences with treaty provisions. Nonetheless, the analysis, methodology and findings of the Court in the few cases where this issue was discussed provide the basis to investigate the availability of general defences in treaty-based disputes and the modalities of the application of the *lex specialis* principle. This section discusses firstly the interaction of general defences with so-called 'self-contained regimes' (1). Secondly, it discusses the interaction of exception clauses with the general defences of self-defence, necessity, and countermeasures (2).

[157] Art.55 ARSIWA and commentary [2].

[158] Fragmentation Report [102]; see also analysis in (n 47-48).

1. General defences and self-contained regimes: the *Tehran Hostages* judgment

The notion of 'self-contained regimes' in relation to the applicability of the law on State responsibility to certain treaty-based fields of international law was famously introduced in *Tehran Hostages*. An analysis of the Court's findings can assist in our understanding of what the term 'self-contained regime' entails and of the methodology for assessing the relationship between general defences and treaty provisions.

In *Tehran Hostages* most of the discussion was focused on breaches of the VCDR and the VCCR. It is in the context of these two instruments that the term 'self-contained regime' was introduced. As explained above, Iran's arguments were treated by the Court as referring to the general international law on countermeasures.[159] Iran in its letters to the Court implied that the alleged US espionage and interference to its internal affairs through its Embassy and diplomatic personnel constituted internationally wrongful acts in response to which it was entitled to suspend its own obligations under diplomatic law.

The Court first confirmed that Iran's conduct was indeed in breach of the VCDR and the VCCR and then moved on to examine whether it could nonetheless be justified on the basis of the claims raised in its letters.[160] In this context, it found that Iran's actions were not justified 'because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.[161] The means that the Court refers to in this part of the judgment are primarily those enshrined in Arts.9 VCDR and 23 VCCR, namely that '[t]he receiving State may

[159] See analysis in (n 140-141).

[160] *Tehran Hostages* [80].

[161] *Tehran Hostages* [83].

at any time and without having to explain its decision, notify the sending State that…any member of the diplomatic staff of the mission is persona non grata'.[162] The Court also pointed out that receiving States have the power to break off diplomatic relations with a sending State and call for the closure of a diplomatic mission.[163] Having said that, the Court asserted that:

> The rules of diplomatic law…constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious….[164]

The Court observed, as it was indeed evident, that Iran did not 'employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it…complained', i.e., espionage and interference in the host-State's internal affairs by diplomatic personnel, and concluded that no circumstances existed that could justify its conduct.[165] Thus, the analysis and structure of the judgment suggest that the characterisation of diplomatic law as a self-contained regime was the key element supporting the Court's finding on the non-availability of general defences –*in casu*, countermeasures.

This finding has rightly been criticised for its imprecision.[166] This was the first

[162] Art.9, VCDR; Art.23, VCCR. For the means of sanction available to receiving States under diplomatic law see Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth 1966) Chapter 5.

[163] *Tehran Hostages* [85].

[164] *Tehran Hostages* [86].

[165] *Tehran Hostages* [87, 89].

[166] Arangio-Ruiz, 'Fourth Report' [86] and citations therein.

time that the Court used the term 'self-contained regime' in the context of State responsibility. It remains unclear from the judgment what this characterisation entails. Further, it is not evident how it relates to the final finding on the non-availability of general defences for breaches of diplomatic law. Thus, the Court's finding, in its context, warrants some further analysis to fully understand its meaning and practical significance.

The term 'self-contained' was first used by the PCIJ in *Wimbledon*. The question before the Court was whether the provisions of the Treaty of Versailles relating to German waterways applied also, by analogy, to the Kiel Canal. That Treaty included a special section for the Kiel Canal, which established rules substantially different to those relating to other watercourses.[167] Accordingly, the Court concluded that '[t]he provisions relating to the Kiel Canal in the Treaty of Versailles are…self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways…they would lose their "raison d'être".'[168]

The PCIJ in this passage reaffirms, on the one hand, the principle of effective interpretation,[169] which suggests that the Court may not read treaty provisions in a manner that leads them to redundancy or inefficiency[170] and, on the other hand, the *lex specialis* principle. The interpretation of the special provisions on the Kiel Canal reveals the parties' intention to exclude other rules that may ordinarily apply in similar situations. Thus, they should not be altered or disregarded, whether by direct application of the

[167] *Wimbledon* [31].

[168] *Wimbledon* [24].

[169] *Corfu Channel(Merits)* p.24; *Navigational Rights* [52]; *CERD-Georgia* [133-134]; Arts.27-8 ILC Articles on the Law of Treaties, commentary [6]; for an overview of the principle see also Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 168–169.

[170] Arts.27-28 ILC Articles on the Law of Treaties, commentary [6]; *US-Gasoline(ABR)* p.23.

general rules, which are displaced by virtue of the *lex specialis* principle, or by other means of interpretation, which should be applied in a manner that gives full effect to the parties' intention.

In *Tehran Hostages*, the ICJ used the same notion of self-containment but this time it did not refer to a specific set of provisions but rather to a 'regime' in its entirety. Further, it seems that it used the term in a different sense than its predecessor.[171] First and foremost, the Court emphasised repeatedly that diplomatic law provides the means to 'counter' or 'remedy for' any abuse of rights and privileges or to 'sanction for illicit activities' by diplomatic and consular staff.[172] Such abuse would be contrary to their duty to respect the laws and regulations of the host-State and to not interfere in its internal affairs under Arts.41 VCDR and 55 VCCR.[173] The VCDR and VCCR already provide instructions on how to react in case of breach of their own provisions. The Court's *dictum*, read in its context, suggests that this is the core element of a self-contained regime: it indicates itself the consequences of its breach and the means through which the ensuing responsibility is implemented.[174] In the same vein, Simma, provides the following definition:

> The concept of a 'self-contained regime' should…be reserved to designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules. A 'self-contained regime' would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the

[171] Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 EJIL 483, 492.

[172] *Tehran Hostages* [83-86].

[173] *Tehran Hostages* [84].

[174] Similarly, Riphagen, 'Second Report' (1981) II(1) YbILC 79 [58-59].

disposal of an injured party.[175]

Emphasis is put on the legal consequences of wrongful acts, which in the case of self-contained regimes are specified within the text of the treaties that form such regime. The provisions describing the consequences of the breach of the treaty or the means to implement the responsibility arising from such breach are *lex specialis* to the rules codified in Parts II and III ARSIWA and, especially, the rules on countermeasures.[176]

Following this reasoning, it may be observed, firstly, that diplomatic law is not really an example *par excellence* of such a self-contained regime: it does not preclude, for example, the taking of countermeasures in areas other than diplomatic law itself for breaches of diplomatic law by the host-State.[177] A State is not precluded under the VCDR and the VCCR from suspending, for example, trade benefits under a bilateral agreement as a means of reacting to a breach of diplomatic law. There are, thus, means of implementing international responsibility for breaches of diplomatic law that are not described in the text of the relevant treaties. But proving or disproving the existence of self-contained regimes in international law and their theoretical feasibility is beyond the scope of this thesis.[178]

What is most important for the present inquiry is a second observation emerging

[175] Simma, 'Self-Contained Regimes' (1985) 16 NYIL 111, 117. Similarly Simma and Pulkowski (n 171) 484.

[176] Note the dual role of countermeasures with respect to primary obligations as evidenced in their double appearance in Arts.22 and 49-54 ARSIWA: precluding the wrongfulness of a breach ('shield') or inducing compliance following a breach ('sword'). See Part I, Chapter V ARSIWA, commentary [2]; Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 BYIL 264, 270.

[177] Simma (n 175) 120; Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4 EJIL 341, 352.

[178] See on this matter Fragmentation Report [123-190]; Crawford, 'Retrospect' (n 37) 879ff; Simma (n 175); Simma and Pulkowski (n 171); Lindroos and Mehling, 'Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO' (2005) 16 EJIL 857.

from the analysis above, which is that the characterisation of diplomatic law as a self-contained regime, at least in the sense used by the ICJ, does not necessarily and automatically signify that the applicability of general defences to disputes arising thereunder is precluded. The VCDR and VCCR indicate that in cases of breach of diplomatic law by diplomatic and consular staff, the host-State may only respond with specific sanctions provided by diplomatic law itself. In other words, 'the right to counter certain violations of international diplomatic law by way of reprisal…is subject to certain limitations *ratione personae/materiae*, and…this bitter pill is sweetened to a certain degree by the availability of certain other special remedies.'[179] However, this conclusion only affects countermeasures in the field of diplomatic rights and privileges, which are adopted as a means of implementing responsibility for illegal acts by diplomatic staff.[180] It does not explain, for example, why diplomatic rights cannot be the object of countermeasures taken in response to breaches of international law other than diplomatic law committed by the sending State and not in response to illegal acts of the diplomats themselves. Nor does it explain why diplomatic rights cannot be affected by measures adopted in cases of necessity or force majeure. It is rather the *inviolability* of such rights which dictates that these defences are precluded in the context of diplomatic law. This inviolability is discerned through interpretation.

There are traces of such an interpretative approach in *Tehran Hostages*. After the finding that diplomatic law constitutes a self-contained regime, the Court raises additional points substantiating the inviolability of diplomatic rights. These points, even if the Court does not explicitly characterise them as such, are in fact interpretative

[179] Simma (n 175) 121.

[180] Riphagen, 'Fourth Report' [97, 116]; Arangio-Ruiz, 'Third Report' [26] and 'Fourth Report' [84-88].

material: the Court points to several VCDR and VCCR provisions which, read together, suggest the inviolability of diplomatic rights; it refers to the object and purpose of the treaties in question; and it has recourse to the treaties' preparatory work.[181] Taking all these into consideration, the Court ultimately concludes that diplomatic rights are inviolable and cannot be side-stepped by the invocation of general defences. Thus, the Court's analysis provides, implicitly, a holistic interpretation of the rules of the diplomatic regime in accordance with the customary rules of interpretation enshrined in Arts.31-32 VCLT.[182]

More specifically, the Court refers to Art.9 VCDR which provides the host-State with broad margin of appreciation in declaring a member of diplomatic staff *persona non grata*. It is an unlimited remedy which does not even require providing any reasons for taking this action.[183] That being so, Art.9 can be the response (defence) available in a broad range of circumstances, including those that could give rise to the general defences of necessity and countermeasures. It may be used to respond to illegalities by diplomatic staff or to breaches of other international obligations by the sending State. In fact, in *Tehran Hostages*, Iran's claims referred, among others, to alleged US breaches of international law, such as the principle of non-intervention through the admission of the Shah to the US, which did not necessarily imply involvement of diplomatic staff in

[181] *Tehran Hostages* [86].

[182] The customary character of these rules was consistently reaffirmed in later ICJ jurisprudence, see e.g., *Arbitral Award* [48]; *Indonesia/Malaysia* [37]; *Indian Ocean* [63].

[183] Barker, 'In Praise of a Self-Contained Regime: Why the Vienna Convention on Diplomatic Relations Remains Important Today' in Behrens (ed), *Diplomatic Law in a New Millennium* (OUP 2017) 27.

Tehran.[184] Similarly, the 'radical remedy', as the Court characterised it,[185] of breaking off diplomatic relations with a sending State and calling for the closure of a diplomatic mission, is always available to sovereign States as a response to any wrongdoing. Thus, the Court is making in the subsequent parts of the judgment a more general case for the inviolability of diplomatic rights.[186] In so doing, it puts great emphasis on the 'fundamental character' of diplomatic law, stipulating that 'the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of [that] long-established régime, to the evolution of which the traditions of Islam made a substantial contribution.'[187] It thus points to the object and purpose of the treaties under consideration and the reasoning and history behind their conclusion. It looks into the very *raison d'etre* of the rules on diplomatic relations,[188] in a manner reminiscent of *Wimbledon*.[189]

Moreover, it becomes evident that the VCDR and VCCR cover in principle the full spectrum of general defences through special provisions. As explained by the Court,[190] Arts.44 and 45 VCDR provide that, even in case of armed conflict or breach of diplomatic relations, the receiving State must grant facilities to enable persons enjoying privileges and immunities to leave at the earliest possible moment and must respect and

[184] Röling, 'Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran' (1980) 11 NYIL 125, 146. Note, however, that Iran also argued that members of the diplomatic mission in Tehran facilitated such interference and that the Embassy in Tehran was a 'lair of espionage and plotting', see *Tehran Hostages* [26, 71, 82-85].

[185] *Tehran Hostages* [85].

[186] Without however doing this explicitly. See Röling (n 184) 147.

[187] *Tehran Hostages* [86, 91]. See also *Tehran Hostages-Provisional Measures* [38].

[188] Arangio-Ruiz 'Fourth Report' [86].

[189] See analysis in (n 167-170).

[190] *Tehran Hostages* [86].

protect diplomatic premises.[191] Art.22 VCDR further establishes the inviolability of diplomatic premises. It is accepted that even in cases of *force majeure* or distress the host-State cannot intervene without consent of the head of the mission.[192] In fact, the introduction of relevant exceptions in the treaty text had been proposed during the negotiations for the conclusion of the treaties but was rejected by the majority of participants.[193] Thus, in the case of diplomatic law, we can discern the intention of States to exclude totally any interference with diplomatic rights, save through the limited means provided under diplomatic law itself. It follows that the aforementioned provisions constitute *lex specialis* to the general defences, which are thus displaced in the context of relevant disputes. In this sense, diplomatic law looks more self-contained after all, albeit in the sense of the term as used in *Wimbledon*.[194]

The Court's findings in *Tehran Hostages* were central in the ILC discussions on countermeasures and feature in the reports of the ARSIWA Special Rapporteurs.[195] The inviolability of diplomatic rights and its potential legal basis were still contested, which further attests to the ambiguity and imprecision of the Court's judgment. Nevertheless,

[191] Similarly in Arts.26 and 27, VCCR. Of course, as pointed out in *Tehran Hostages* [86], the principle of inviolability of diplomatic persons and premises ' [n]aturally does not mean…that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime'. Similarly, draft VCDR, commentary p.97 points out that the principle of personal inviolability 'does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.' Thus, there are some limited exceptions to the rule of inviolability, which are primarily related to the domestic criminal law of the host-State.

[192] Roucounas, *Public International Law* (Nomiki Vivliothiki, 2011) 386 (in Greek); Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) 118-119. Note, however, some objections discussed in Jackson, 'Inviolability and the Protest at the Bahraini Embassy' (*EJIL:Talk!*, 9 August 2019).

[193] Denza (n 192) 118–119.

[194] See analysis in (n 167-170).

[195] See (n 180).

the non-availability of countermeasures affecting diplomatic law was in the end included in Art.50(2)(b) ARSIWA. The commentary to Art.50 refers directly to the *Tehran Hostages* judgment but suggests that the rule is justified 'on functional grounds', rather than the analytical reasons outlined above.[196] The term 'self-contained regime' appears only in the commentary to Art.55 ARSIWA as a 'strong form of *lex specialis*'.[197]

In conclusion, the term self-contained regime that has been discussed extensively in the academic literature is not particularly informative or helpful in understanding whether general defences are available to a Respondent in an international dispute. In all cases, the Court should proceed to an interpretation of the treaty in question, using the customary rules of treaty interpretation reflected in the VCLT, with a view to discerning whether the parties intended to exclude the availability of (all or some) general defences for breaches of obligations enshrined thereunder. This matter is discussed further in the context of the GATT/WTO framework, which has also been characterised, especially in its early years, as a self-contained regime whose provisions displace the general law on State responsibility.[198] It is also discussed in the context of investment arbitration, where, again, arguments have been made suggesting that general defences are implicitly excluded by the object and purpose of investment protection treaties.[199]

2. General defences and treaty-specific defences: the interplay of exception clauses with general international law

[196] Art.50 ARSIWA, commentary [15].

[197] Art.55 ARSIWA, commentary [5]. See also Crawford, 'Retrospect' (n 37) 880: 'A genuinely self-contained regime would be a special lex specialis, a lex specialis to the nth degree.'

[198] See analysis in (n 418-419).

[199] See analysis in (n 898-911).

Tehran Hostages demonstrates that a treaty in its entirety may reveal the parties' intention to establish rights and obligations that cannot be deviated from on the basis of general defences. In other cases, the treaty under consideration may include exception clauses which overlap in terms of subject-matter with general defences. This overlap raises two questions: first, whether it is still possible for the Respondent to invoke general defences to justify *prima facie* breaches of the treaty on top of these exceptions; and second, whether general defences and their customary requirements are pertinent to the interpretation of the relevant clauses.

The analysis in this sub-section uses as a point of departure the Court's judgments in *Nicaragua*, *Oil Platforms*, *Alleged Violations*, and *Iranian Assets*. In these treaty-based disputes, the Court had the opportunity to examine the nature and scope of exception clauses and, in the first two, it also discussed the interaction of such clauses with self-defence under general international law.

These cases involved claims under two bilateral treaties: the FCN and the Treaty of Amity. Both treaties include identical exception clauses which read as follows:

> 1. The present Treaty shall not preclude the application of measures:
> (a) regulating the importation or exportation of gold or silver;
> (b) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;
> (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and
> (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[200]

It is under the terms of these clauses that the US, the Respondent in these cases, attempted

[200] Art.XX Treaty of Amity; Art.XXI FCN.

to justify the actions challenged by the Applicants. A brief overview of the pertinent factual background of these disputes is warranted at this point to provide context for the analysis.

In *Nicaragua*, Nicaragua instituted proceedings against the US in respect of the latter's responsibility for directly and indirectly carrying out military and paramilitary actions, and for imposing certain measures of an economic nature, including a total trade embargo, against Nicaragua.[201] The Court in its judgment on jurisdiction found that it had jurisdiction to entertain Nicaragua's claims under customary international law based on the parties' optional clause declarations,[202] as well as claims under the FCN based on the compromissory clause under Art.XXIV FCN. The primary response of the US to Nicaragua's claims was the assertion that it was acting pursuant to its right of collective self-defence in response to the alleged aggression of Nicaragua against El Salvador, Honduras, and Costa Rica.[203] With regard to its support for the contras, the US claimed that this was in response to Nicaragua's similar conduct in assisting armed opposition in El Salvador. This defence was also formulated by the US along the lines of self-defence, but the Court, having found that the conduct falls outside the scope of self-defence, further examined whether the pleaded circumstances may qualify as countermeasures in response to an intervention.[204] The Court examined these defences with respect to Nicaragua's claims under customary international law relating to the prohibition of the use of force and the principle of non-intervention. The examination of general defences

[201] *Nicaragua-Application* p.16.

[202] But not claims under applicable multilateral treaties due to the US 'Vandenberg' reservation, *Nicaragua(Objections)* [67-76]; *Nicaragua(Merits)* [42-56].

[203] *Nicaragua(Merits)* [266].

[204] *Nicaragua(Merits)* [248].

in this context does not present any challenges: general defences are available in response to claims of breach of customary international law, to the extent that the content of the customary rule itself does not exclude the possibility of invoking defences. Moreover, the Court, whose jurisdiction over issues of customary international law was seized under the parties' optional clause declarations undoubtedly had the power to examine the applicability of general defences in this context. What is more interesting, and is further discussed below, is whether general defences were also available to justify the alleged breaches of the FCN and how they interacted with the exception clause in Art.XXI FCN.

In *Oil Platforms*, the case was initiated by Iran with respect to an attack on, and destruction of, three Iranian offshore oil production complexes by warships of the US Navy in 1987-1988. Proceedings were based on the compromissory clause under Art.XXI(2) Treaty of Amity. Iran contended that the US actions were in breach of the treaty, most importantly Art.X(1) on freedom of commerce and navigation. The US submitted a counter-claim concerning Iran's alleged actions in the Gulf during the Iran-Iraq war which, among others, involved mining and other attacks on US-flagged or US-owned vessels.[205] The counter-claim, which was admitted by the Court and formed part of the proceedings, was also based on Art.X Treaty of Amity.[206] It becomes swiftly evident that this was 'a dispute which originated in the use of force but was brought to the Court as a violation of treaty-guaranteed freedom of commerce.'[207] The US, responding to Iran's claims, contended that its actions were measures necessary to protect its essential security interests under Art.XX Treaty of Amity. Accordingly, one of the

[205] *Oil Platforms-Counter-claim* [4].

[206] *Oil Platforms-Counter-claim* [46].

[207] *Oil Platforms-Kooijmans* [4].

most important tasks of the Court in this case was to interpret this exception clause.

The scope and nature of the same exception clause emerged again in the more recent cases of *Alleged Violations* and *Iranian Assets*. Iran challenged restrictive measures of an economic nature imposed against it by the US, based again on the Treaty of Amity. The two disputes were the last ones submitted to the ICJ under the provisions of that treaty. In view of the Court's decision to order provisional measures in the context of *Alleged Violations*, the Trump administration announced in 2018 its decision to terminate the almost 70-year-old agreement.

To briefly outline the background of these disputes, starting in 2006, economic sanctions were imposed on Iran as a response to the proliferation risks presented by the Iranian nuclear programme and its failure to comply with obligations under the NPT.[208] In 2015, several States, including the US, negotiated and concluded with Iran the JCPOA, a joint plan/agreement aiming to ensure that the latter's nuclear programme is used exclusively for peaceful purposes. The plan envisaged the lifting of all sanctions relating to Iran's nuclear programme,[209] and all participating States, including the US, complied with this agreement upon adoption. In May 2018, the Trump administration announced the end of the US participation in the JCPOA and directed the reimposition of economic sanctions against Iran. These sanctions included restrictions in financial transactions, trade in metals, the importation of Iranian-origin carpets and foodstuffs, the export of commercial passenger aircraft and related parts, trade in petroleum products, transfer of goods or technologies 'likely to be used to commit human rights abuses and censorship'

[208] See S/RES/1737 (2006) and subsequent UNSC resolutions.

[209] JCPOA [18-33].

and others.[210] The US asserted that it was in its national interest to reimpose such sanctions because Iran was allegedly involved in military activities in Syria, Iraq, Yemen, Lebanon and Gaza, had declared its intention to deny the International Atomic Energy Agency access to military sites contrary to the NPT and the JCPOA, and had twice violated the JCPOA's heavy-water stockpile limits.[211] It is the reimposition of these sanctions that Iran challenged in *Alleged Violations*.

Further to sanctions relating to Iran's nuclear activities, the US has also imposed restrictions on Iran by designating it in 1984 as a 'State sponsor of terrorism'.[212] This designation, maintained ever since, entails the removal of Iran's immunity from suit before US courts in certain types of cases and allows for assets that have been blocked by the US to be subject to execution for the satisfaction of related judgments.[213] In *Iranian Assets*, Iran asserted that these measures 'have had a serious adverse impact on the ability of Iran and of certain Iranian companies to exercise their rights to control and enjoy their property' contrary to the Treaty of Amity.[214]

The analysis below takes as a starting point the Court's findings in these cases and investigates the relationship between exception clauses and general defences in accordance with Arts.31-32 VCLT and the *lex specialis* principle. It discusses two key issues that arise from these judgments. The first issue is the nature and function of exception clauses and whether they are sufficiently similar to general defences for the

[210] US Executive Order 13846.

[211] US Presidential Memorandum (8 May 2018).

[212] *Iranian Assets* [21].

[213] *Iranian Assets* [21-27].

[214] *Iranian Assets-Application* [1].

lex specialis principle to apply (a). The second issue is whether and to what extent general defences inform the interpretation of exception clauses and whether there is any room for their residual application to disputes arising under the same treaty (b).

a. The analytic character of exception clauses and the applicability of the lex specialis principle

The juxtaposition of two norms and the application of the *lex specialis* principle necessitates a certain degree of 'sameness' of the norms under comparison.[215] This sameness is primarily assessed by reference to their subject-matter: both rules should be able to be invoked in regard to the matter under discussion.[216] For the application of the *lex specialis* principle as a conflict-resolution tool, the two rules must also 'point to different directions', i.e., the State in question must be unable to follow both rules at the same time (a 'genuine conflict' of norms).[217]

In this context, it has been argued in the academic literature that there is an alleged difference in the 'analytic character' or 'normative function'[218] of exception clauses, on the one hand and general defences, on the other. As a result, their relationship cannot be characterised as one of *lex specialis*/*lex generalis*, as they do not meet the requisite sameness threshold.

Arguments in favour of this approach are not entirely uniform. According to some

[215] See analysis in (n 49).

[216] Fragmentation Report [23-24].

[217] ibid.

[218] Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 ICLQ 557, 558; Gourgourinis, 'Lex Specialis' (n 49) 613.

scholars, exception clauses operate as 'carve-outs', 'exclusions', 'scope limitations', or 'permissions', rather than defences. Under this approach, the invocation of an exception clause by the Respondent can be examined either as a preliminary objection to an adjudicative body's jurisdiction[219] or as a threshold/preliminary matter before examination of the substantive treaty obligations.[220] According to other scholars, exception clauses are 'primary rules' that go to the issue of wrongfulness, whilst general defences are 'secondary rules' that relate to State responsibility.[221] Thus, the two types of rules operate on different normative levels and are not mutually exclusive. These two approaches are often conflated with each other, especially in the context of investment arbitration, where this alleged difference in the nature and function of these two sets of rules has played a prominent role in case law, especially after the oft-discussed decision of the Annulment Committee in *CMS*.[222]

This thesis argues that exception clauses operate as defences on the merits of the dispute in a manner similar to the defences under the law on State responsibility. They are neither an objection to the Court's jurisdiction nor a preliminary/threshold matter relating to the applicability of a treaty's substantive obligations. The analysis below demonstrates that this view is supported by ICJ case law. As for the arguments relating to the distinction between primary and secondary rules, the thesis argues that even if we were to accept the relevance of this distinction in the context of defences, this would still

[219]Alschner and Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' in Sachs, Johnson, and Coleman (eds), *Yearbook of International Investment Law and Policy, 2018* (OUP 2020) 375–376.

[220] Henckels (n 218).

[221] Burke-White and von Staden (n 51) 321; Gourgourinis, 'Lex Specialis' (n 49) 613; Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016) 217; Titi, *The Right to Regulate in International Investment Law* (Hart 2014) 251.

[222] See Ch IV(C)(1)(b)(i).

not affect the applicability of the *lex specialis* principle in assessing the relationship between an exception clause and a general defence. This matter is discussed more extensively in Chapter IV, through a discussion of the relevant findings of arbitral tribunals, which have engaged with this issue in discussing the defences available to Argentina for measures adopted in response to its financial, political, and social crisis.[223]

ICJ case law relating to the function of exception clauses, confirms, first, that their invocation does not affect, in any way, its jurisdiction to hear the dispute. The Court has rejected the argument that exception clauses 'exclude…certain measures from the actual scope of the Treaty and, consequently…the jurisdiction of the Court to test the lawfulness of such measures'.[224] In this context, it has confirmed that the power to determine whether the measures at issue meet the requirements of the exception clause falls squarely within its mandate of interpreting or applying the treaty in question under the relevant compromissory clause.[225]

The Court has also rejected consistently arguments that attempt to classify such clauses as self-judging, i.e., subject only to the unilateral determination of the invoking State.[226] Thus, according to the Court, invocation of an exception clause does not constitute a jurisdictional objection. It is interesting to note that, in making this finding, the Court in *Nicaragua* also raised an argument *a contrario*, contrasting the wording of Art.XXI FCN with that of Art.XX GATT, which stipulates that the Agreement is not to be construed to prevent the parties from taking any action which they '*consider*

[223] See analysis in Ch IV(C)(1)(b)(i).

[224] *Oil Platforms(Objections)* [20].

[225] *Nicaragua(Merits)* [222].

[226] *Nicaragua(Merits)* [222]; *Oil Platforms(Objections)* [20]; *Iranian Assets(Objections)* [45].

necessary' for the protection of their essential security interests. The Court implied that the GATT/WTO adjudicative bodies, in view of the term 'consider' in the text of the exception clause, do not enjoy 'jurisdiction to determine whether measures taken by one of the Parties fall within such exception'.[227] This *a contrario* argument fuelled the academic debate on the scope of the GATT security exceptions and the possibility and extent of judicial review of measures adopted thereunder, a matter discussed further in Chapter III.[228]

The Court's case law confirms that invocation of an exception clause is not a threshold/preliminary issue either. Conscious of the Court's judgments on this matter in *Nicaragua* and *Oil Platforms*, the US, in the preliminary objections' stages of *Iranian Assets* and *Alleged Violations,* modified slightly the arguments regarding the function and use of the exception clause. In *Iranian Assets*, the US argued that 'the Court's jurisdiction is limited to deciding, as an initial matter, whether the exclusions [in Art.XX Treaty of Amity] apply to the challenged measure' and that such initial decision is exclusively preliminary.[229] In a similar fashion, in *Alleged Violations,* the US argued that security considerations are 'severable from the merits of Iran's claims' and that its measures fall so clearly within the ambit of Art.XX Treaty of Amity that the Court should, in the 'interests of fairness, procedural economy, and the sound administration of justice', dismiss the case at the stage of preliminary objections.[230] These arguments acknowledge that exception clauses do not exclude the Court's jurisdiction and rather

[227] *Nicaragua(Merits)* [222].

[228] See analysis in Ch III(D)(2).

[229] *Iranian Assets(Objections)* [40].

[230] *Alleged Violations* [98].

allude to the idea that they constitute 'carve-outs' which exclude certain measures from the treaty's scope. As such, their applicability must be determined as a threshold issue before the Court proceeds to the merits of the dispute. In other words, the Court's jurisdiction extends only to a preliminary, purely factual finding that the actions in question fall within the ambit of the 'carve-out'.

The Court in both cases reaffirmed that the potential applicability of an exception clause is examined on the merits.[231] It pointed out that, as evidenced by the parties' opposing arguments, the terms used in exception clauses, such as 'measures…relating to fissionable materials' or 'necessary to protect its essential security interests' require further interpretation to determine their meaning and implications.[232] They also require an assessment of the facts and legal arguments of the parties to determine the 'reasonableness and necessity of the measures' in question.[233] Such assessments 'can be conducted only at the stage of the examination of the merits'.[234]

Importantly, in all these cases, the Court explicitly characterised the exception clauses as provisions 'affording the Parties a possible defence on the merits to be used should the occasion arises'.[235] This wording –naturally– confirms that the Court is treating such clauses as defences rather than carve-outs.

The order of analysis of arguments suggested by the Court in *Nicaragua* further

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[231] *Iranian Assets(Objections)* [45-47]; *Iranian Assets(Merits)* [94]; *Alleged Violations* [113]. Similarly, *Oil Platforms(Objections)* [20].

[232] *Alleged Violations* [111-112].

[233] ibid.

[234] *Alleged Violations* [110-113].

[235] *Oil Platforms(Objections)* [20]; similarly, *Iranian Assets(Objections)* [45-47] and *Alleged Violations* [109]. See also *Nicaragua(Merits)* [282]: 'Art.XXI affords no defence for the United States.'

substantiates the understanding of exception clauses as defences on the merits. The Court stipulated that exception clauses, which provide 'a power for each of the parties to derogate from the other provisions of the Treaty' must be considered 'once it is apparent that certain forms of conduct…would otherwise be in conflict with the relevant provisions of the Treaty'.[236] Accordingly, the Court established, first, that the conduct was in breach of the Treaty's substantive provisions stipulating that its findings were 'subject to the question whether the exceptions…may be invoked to justify the acts complained of.'[237] This sequence of steps and the justificatory language used by the Court corroborate that exception clauses are seen as defences for otherwise wrongful acts.

In *Oil Platforms*, the Court's majority judgment reversed this order of analysis and examined first the applicability of the exception clause. This odd methodological choice, which was rather unfortunate and attracted acute criticism in separate opinions and the academic literature, is discussed further in Section D. At this point, it suffices to say that this reversal, justified by the Court on the basis of its 'freedom to select the ground upon which it will base its judgment'[238] did not imply a different understanding of the function of exception clauses. The Court had already stipulated in its judgment on jurisdiction that Art.XX Treaty of Amity constitutes a defence on the merits, following closely its previous findings in *Nicaragua*.[239] In the merits judgment, despite the reverse order of analysis, it still treats Art.XX as a potential 'justification' for acts that may

[236] *Nicaragua(Merits)* [225]. See also the finding in *Oil Platforms(Objections)* [20] that such clauses constitute 'a possible defence on the merits to be used should the occasion arise'.

[237] *Nicaragua(Merits)* [280].

[238] *Oil Platforms(Merits)* [37] and references therein.

[239] *Oil Platforms(Objections)* [20].

otherwise constitute breaches of the Treaty of Amity.[240] Moreover, the Court suggested that there were 'particular considerations' in that case militating in favour of examining the exception clause and the US arguments on self-defence before examination of the treaty's substantive provisions. These 'particular considerations', according to the Court, related to the fact that the 'original dispute' between the parties concerned the legality of the US actions under the international law on the use of force, rather than the treaty-guaranteed freedom of commerce and navigation.[241] This justification was not convincing as a matter of logic and was at odds with its findings in several other cases where it has consistently rejected arguments implying that the 'true subject-matter' of the dispute lies outside the scope of the treaty in question.[242] It emerges from an analysis of the judgment that the reversal of the order of analysis in *Oil Platforms* was motivated by political rather than legal considerations,[243] and that, in any event, it is not indicative of a different understanding of the nature and analytic character of exception clauses. It must also be noted that, despite the criticism of *Oil Platforms*, in the recent *Iranian Assets(Merits)* judgment, the Court reversed the order of analysis once again and addressed the US defences before establishing any *prima facie* breaches of the Treaty of Amity. The justification for this reversal was again the Court's 'freedom' to choose the order of analysis and the grounds for its judgment.[244] There is no clear reason why the Court decided to proceed in such order. In any event, it still characterises the US arguments as 'defences of the merits', consistently with its previous findings in *Iranian*

[240] *Oil Platforms(Merits)* [35, 78, 125].

[241] *Oil Platforms(Merits)* [37].

[242] See analysis in (n 86-97).

[243] See analysis in Ch II(D)(2).

[244] *Iranian Assets(Merits)* [74] citing *Oil Platforms*.

Assets(Objections).[245]

It follows from the above that there is no difference in the function and analytic character of exception clauses on one hand, and general defences on the other. Both general defences and exception clauses become pertinent as affirmative defences, invoked by the Respondent once *prima facie* breach of its obligations under international law is established. Thus, to the extent that the two defences regulate the same subject-matter, the requirement of sameness for the purposes of the *lex specialis* principle is fulfilled.

b. Interaction of exception clauses with general defences: Art.31(3)(c) VCLT and the lex specialis principle

Having established that the *lex specialis* principle can be properly applied in assessing the relationship between an exception clause and a general defence, we need to investigate *how* the principle is applied in this context and what results it yields with respect to the availability of general defences in treaty-based disputes. Moreover, to the extent that general defences 'touch on the same subject-matter' as the exception clauses, they also constitute 'relevant rules of international law applicable between the parties' under Art.31(3)(c) VCLT and shall thus be taken into consideration in their interpretation.[246] We need to explore further how and to what extent such interpretation is appropriate and what are its practical implications with respect to the substantive requirements for successful invocation of exception clauses.

[245] *Iranian Assets(Merits)* [75]; *Iranian Assets(Objections)* [45-47].

[246] Gardiner (n 169) 299; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009) 433.

The Court had the opportunity to discuss the substantive requirements of exception clauses in *Nicaragua*, *Oil Platforms*, and *Iranian Assets*. This sub-section takes these judgments as a starting point and critically evaluates the Court's approach based on the customary rules of treaty interpretation. For this purpose, as explained in the introduction to this thesis, it uses three general defences as case studies: self-defence (i), necessity (ii), and countermeasures (iii).

i. Exception clauses and self-defence

As discussed above, the main defence of the US in *Nicaragua* was that its actions were taken in the exercise of its right to collective self-defence under general international law.[247] Accordingly, with respect to Nicaragua's treaty-based claims under the FCN the Court had to determine the relationship between self-defence and Art.XXI FCN. In this context, it found that '[i]t [was] difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests' under Art.XXI FCN.[248] It based this interpretation, *inter alia*, on an excerpt from the proceedings of the US Senate Foreign Relations Committee which corroborated that this had been the intention of the parties.[249] Nonetheless, the Court confirmed that Art.XXI FCN has a wider scope than self-defence because 'the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past'.[250] Measures taken in self-defence certainly fall within the scope of the exception, as well as other measures short of self-defence. In view of

[247] See analysis in (n 201-204).

[248] *Nicaragua(Merits)* [224].

[249] ibid.

[250] ibid.

this, although the Court had already rejected the US arguments on collective self-defence, it proceeded to examine whether the US breaches of the FCN may have been justified under Art.XXI.[251] In this context, the Court discussed the test for successful invocation of the exception clause based on its proper text and made no further reference to self-defence under general international law. It found that neither the mining of Nicaraguan ports and direct attacks against ports and installation, nor the trade embargo were 'necessary' to protect US essential security interests within the meaning of the clause[252] and thus 'Art.XXI affords no defence' to the US in respect of breaches of the FCN.[253]

In *Oil Platforms*, the Court was similarly faced with the question of the relationship between the exception clause in the Treaty of Amity and self-defence under general international law. In this case, there was an additional challenge for the Court, as the US contended that its jurisdiction, which was based on the Treaty's compromissory clause, did not 'extend directly to the determination of the legality of any action of either Party under general international law', including the legality of the exercise of self-defence.[254] Moreover, according to the US, '[t]he scope of the exemption provided by Art.XX, paragraph 1(d) , [was] not limited to those actions that would also meet the standards for self-defence under customary international law and the United Nations Charter'.[255] Accordingly, as far as breaches of the Treaty of Amity were concerned, the US actions had to be tested solely against the criteria of the exception clause and there

[251] *Nicaragua(Merits)* [281-282].

[252] *Nicaragua(Merits)* [282].

[253] ibid.

[254] *Oil Platforms(Merits)* [39].

[255] ibid.

was no need for the Court to 'address the question of self-defence'.[256]

In view of this argument and conscious of its jurisdictional limitations, the Court embarked on its analysis by expressly stipulating that self-defence arguments would be examined 'to the extent that its jurisdiction under Art.XXI, paragraph 2, of the 1955 Treaty authorize[d].'[257] In the words of the Court, the main question to be answered was:

> whether the parties to the 1955 Treaty, when providing therein that it should 'not preclude the application of measures…necessary to protect [the] essential security interests' of either party, intended that such should be the effect of the Treaty even where those measures involved a use of armed force; and if so, whether they contemplated, or assumed, a limitation that such use would have to comply with the conditions laid down by international law.[258]

The Court, interpreting the relevant provision and following its findings in *Nicaragua*, reaffirmed that the parties intended for Art.XX Treaty of Amity to cover measures involving a use of armed force.[259] However, such armed force would be subject to the conditions laid down by international law, i.e., the conditions of self-defence.[260] This conclusion was reached through interpretation of the provision under Art.31 VCLT. The Court emphasised that Art.I Treaty of Amity declared that '[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran' and thus, it would be 'hardly consistent' with such provision to 'interpret Art.XX(1)(d), to the effect that the "measures" there contemplated could include even an unlawful use

[256] ibid.

[257] *Oil Platforms(Merits)* [38].

[258] *Oil Platforms(Merits)* [40].

[259] *Oil Platforms(Merits)* [40].

[260] ibid.

of force by one party against the other.'[261] It further suggested that the requirements of self-defence are pertinent to the interpretation of Art.XX as 'relevant rules of international law applicable between the parties' under Art.31(3)(c) VCLT.[262] It concluded that:

> The Court [could] not accept that Art.XX(1)(d)…was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Art.XXI(2).[263]

Under general international law, the exercise of the right to self-defence 'is subject to the State concerned having been the victim of an armed attack'.[264] Accordingly, having concluded that the requirements for the exercise of self-defence are incorporated into the treaty text through interpretation, the Court went on to determine whether Iran had launched an armed attack against the US.[265] It found that there was not sufficient

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[261] *Oil Platforms(Merits)* [41]. Note the finding in *Oil Platforms(Objections)* [31, 52] that Art.I was drafted 'in terms so general that by itself it is not capable of generating legal rights and obligations', but it is of such nature 'as to throw light on the interpretation of the other Treaty provisions' and 'thus not without legal significance for such an interpretation'. *Cf* criticism of this approach in Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 YaleJIntlL 291, 317.

[262] *Oil Platforms(Merits)* [41]. See *Oil Platforms(Merits)-Buergenthal* [22], criticizing the use of Art.31(3)(c) VCLT, which 'cannot have the effect of allowing the Court to take account…of those [rules] which the parties to the dispute have not submitted to the Court's jurisdiction…This is so whether or not they might be relevant in the abstract to the interpretation of a treaty with regard to which the Court has jurisdiction' [22].

[263] *Oil Platforms(Merits)* [41]. *Cf* Weil and Richemond-Barak, 'The Oil Platforms Case Before the International Court of Justice: A Non-Case of International Responsibility' in Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005) 338 suggesting that the Court misinterpreted or ignored the relevant US submissions.

[264] *Nicaragua(Merits)* [195]; Art.51, UN Charter.

[265] Note the effort of the Court to justify each step of its analysis showing the link with the issue under determination, *Oil Platforms(Merits)* [44, 45, 50, 57, 73]. Similarly, the Court expressly excludes certain questions from its analysis based on jurisdictional limitations, e.g., the extent to which Iran and Iraq complied with the international legal rules of maritime warfare, see [44].

evidence to support the claim that an armed attack had occurred, and on that basis it rejected the US defence.[266] We see that the Court in this context made incidental findings regarding the existence of an armed attack and thus implicitly determined the legality of the US use of force under general international law, a matter that was not within its jurisdiction under the Treaty of Amity.[267] This controversial approach to the limits of the Court's subject-matter jurisdiction is discussed in Section D.

It becomes evident from the analysis above that in the few cases where the opportunity was presented, the Court provided very little information or guidance on methodology. Moreover, the findings in *Nicaragua* and *Oil Platforms* are not entirely consistent. Although both judgments acknowledge that measures involving a use of armed force can be potentially justified under the relevant exception clauses and that measures taken in self-defence would certainly fall within the ambit of 'measures necessary to protect essential security interests', there is an important difference in the Court's reasoning in the two cases. In *Nicaragua* the Court rejected the US defence under the FCN exception clause on the basis that its actions did not meet the 'necessity' requirement enshrined therein. The Court had already found that armed actions of the US were in breach of the prohibition of the use of force under customary international law and did not meet the requirements of self-defence.[268] The fact that it still proceeded to discuss the potential applicability of the exception clause to the US actions without introducing any distinction between acts that involved a use of force (such as the direct attacks at Nicaraguan ports and oil installations) and acts that did not (such as the trade

[266] *Oil Platforms(Merits)* [45-72].

[267] *Oil Platforms(Objections)* [28-31].

[268] *Nicaragua(Merits)* [227, 238].

embargo) suggests that it did not interpret Art.XXI FCN as incorporating the requirements of self-defence under general international law even with respect to armed measures, as it did in *Oil Platforms*.

The approach of the Court in *Oil Platforms* was subject to much criticism.[269] The incorporation of the requirements of self-defence under general international law into the treaty text has been characterised as arbitrary and unsubstantiated, placing an unwarranted limitation on the parties' freedom of contract.[270] Berman suggested that the result of the Court's reasoning was 'to substitute for what the Parties had provided in their Treaty the rules of general international law that applied between them in any case'.[271] Similarly, Judge Higgins in her separate opinion commented that '[t]he Court ha[d]…not interpreted Art.XX, paragraph l(d), by reference to the rules on treaty interpretation. It ha[d] rather invoked the concept of treaty interpretation to displace the applicable law.'[272] This is perhaps pointing to the Court's methodology and the proper use of interpretative tools: although Art.31(3)(c) VCLT was invoked, the Court seems to have applied directly the law on the use of force rather than simply taking it into consideration in interpreting the exception clause.[273]

However, in terms of substance, the Court's approach in *Oil Platforms* was analytically correct. Art.31(3)(c) VCLT establishes an *obligation* to interpret treaties in

[269] e.g., Berman (n 261) 321; Green, 'The Oil Platforms Case: An Error in Judgment' (2004) 9 JC&SL 357, 358; Kammerhofer, 'Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case' (2004) 17 LJIL 695, 696; Weil and Richemond-Barak (n 263) 329.

[270] Berman (n 261) 319–320.

[271] Berman (n 261) 320.

[272] *Oil Platforms(Merits)-Higgins* [49].

[273] Papadaki (n 32) 16.

light of 'any relevant rules of international law applicable in the relations between the parties'. This becomes evident from the mandatory language used in the provision which stipulates that the interpreter 'shall' take into consideration such rules together with the context of a given provision.[274] Thus, Art.31(3)(c) VCLT 'must be applied where it has a role in any particular instance'.[275] Accordingly, the Court must always examine the interaction of general international law with relevant treaty provisions under interpretation, starting from a presumption that general international law remains applicable in the relations between the parties. As 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.'[276] It is generally accepted that treaty interpretation must embark on a 'presumption against normative conflict' and attempt to read treaty obligations in a manner harmonious with other applicable rules of international law.[277] Art.31(3)(c) VCLT reflects precisely this principle, also known as the principle of systemic integration,[278] which is considered as one of the most important tools for addressing the phenomenon of fragmentation in international law.[279] It allows the judge to bridge the gap between a certain legal rule and the system, i.e., the normative

[274] For the mandatory character of the term 'shall' in international treaty practice see, indicatively, *OSPAR* [129-130]; *Churchill* [162]. *Cf* the language of Art.32 VCLT which suggests in a non-dictatorial manner that recourse to supplementary means of interpretation 'may be had', see Gardiner (n 169) 347.

[275] Gardiner (n 169) 298.

[276] *Right of Passage* p.142.

[277] n 276-284.

[278] McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

[279] Fragmentation Report [410-480].

environment, in which it was created.[280] General international law, including the defences under the law on State responsibility, is always in the background providing interpretative direction regarding the scope of treaty provisions regulating the same subject-matter. If the parties intend to displace the standards of general international law and replace them by a different treaty-specific arrangement, such intention must be clear through interpretation of the relevant provisions.

The judgment in *ELSI* provides an example of this approach. The Chamber held that the customary rule of exhaustion of local remedies for the exercise of diplomatic protection[281] was applicable, despite the fact that the compromissory clause in question made no reference to such prerequisite for submission of a dispute to the Court.[282] It found that it was 'unable to accept that an important principle of customary international law should be held to have been *tacitly* dispensed with, in the absence of any words making clear an intention to do so'.[283] Nonetheless, the Court admitted that the parties could indeed deviate from the customary rule. As Berman points out '[a]s a matter of abstract logic, it is perfectly conceivable that a pair of Contracting States might wish to displace the general law in their mutual relations; very often that is the whole purpose of a bilateral treaty.'[284] Nonetheless, such intention cannot be presumed.

With respect to measures involving a use of armed force, as was the case in both *Oil Platforms* and –at least partly– in *Nicaragua* there is an additional reason militating

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

[281] Now codified in Art.44 ARSIWA, see commentary [3-4].

[282] *ELSI* [50].

[283] ibid.

[284] Berman (n 261) 319.

in favour of interpreting the term 'necessary' in light of the requirements of self-defence in the absence of explicit indication to the contrary. The nature of the prohibition of the use of force as *jus cogens*[285] suggests that no deviation from the customary requirements would be acceptable.[286] Even if the exception clause would only justify an armed measure as far as treaty breaches are concerned and would not affect the (il)legality of said measure under general international law, there is a strong presumption that States would not intend to allow for armed measures contrary to a *jus cogens* prohibition. This is arguably underlying the Court's interpretation of Art.XX in *Oil Platforms*,[287] together with its context and the object and purpose of the Treaty of Amity. In this vein, in *Nicaragua*, the Court erred in not pointing out that, as far as US measures involving a use of armed force were concerned, the exception clause could not afford a defence because the term 'necessary' in this context can only be understood as incorporating the requirements for the exercise of self-defence under general international law.

However, it does not necessarily follow from the above that the requirement of a prior armed attack under the law on self-defence is always read into the terms of an exception clause, especially if the wording of the clause is evidently less or more restrictive. As discussed in the following chapters, in the context of the WTO Agreements and ISDS, where measures regulated under the relevant treaties do not entail a use of force, the exception clauses are clearly meant to provide more flexibility to

[285] de Hoogh, 'Jus Cogens and the Use of Armed Force' in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015); Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations' (2014) 61 NILR 167. *Cf* Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 MichJIntlL 215.

[286] Arts.53 and 64 VCLT prescribe that a treaty norm in conflict with *jus cogens* is or becomes void. See also Fragmentation Report [64] on the limits of the application of *lex specialis*.

[287] *Oil Platforms(Merits)-Simma* [6, 9]; *Oil Platforms(Merits)-Rigaux* [19]. *Contra* Kammerhofer (n 269) 705; Berman (n 261) 320, n 23.

States. Even in the context of the FCN and the Treaty of Amity, as confirmed in *Nicaragua*, the term 'measures…necessary to protect its essential security interests' extends beyond the notion of armed attack and does not seem to limit States to actions taken in self-defence, as far as non-forcible measures are concerned. However, the customary principles of necessity and proportionality[288] which present both in the law on self-defence and in the general defence of necessity can always inform the interpretation of the term 'necessary' in exception clauses such as the ones in the FCN and the Treaty of Amity. This matter is discussed further below in the context of necessity.

ii. Exception clauses and necessity

Unlike investment tribunals, which, as discussed in Chapter IV, have often been faced with this question,[289] the ICJ has never discussed the interaction of necessity with exception clauses.[290] However, based on the analysis above we can draw some conclusions on the methodology to be followed in assessing the relationship between the two defences.

It was established earlier that the Court is in all cases required under Art.31(3)(c) VCLT to take into consideration relevant rules of general international law in interpreting treaty provisions and that there is a presumption against normative conflict.[291] Exception clauses and necessity regulate the same subject-matter, i.e., the right of States to deviate from their existing obligations to protect essential interests. Ago's report on State

[288] *Nicaragua(Merits)* [176]; *Nuclear Weapons* [41]; *Oil Platforms(Merits)* [76].

[289] IV(C)(1)(b).

[290] Although the US raised a relevant argument in *Oil Platforms(Merits)-Pleadings*, record CR 2003/12 [17.37ff] (Weil).

[291] n 276-284.

responsibility relating to necessity supports this understanding. The report refers to the existence of 'conventional provisions referring in one way or another to situations of necessity'. [292] According to Ago 'a convention, whether multilateral or bilateral, may expressly provide in one of its general clauses that the States in question are not bound to comply with such obligations when a special situation of "necessity" prevents them from doing so.'[293] The footnote of the report provides examples of such clauses, some of which, including Art.XX GATT, follow the 'non-precluded measures' formula of the exception clauses discussed in this thesis.[294] It is thus apparent that necessity is a relevant rule applicable between the parties that must be considered in interpretating exception clauses and that the interpretation of an exception clause must embark on the premise that necessity is reflected in the treaty provision.

However, Art.31(3)(c) VCLT is only one element of the customary rule of interpretation enshrined in Art.31 VCLT. According to the Court, all elements of Art.31 'are to be considered as a whole'.[295] Its application is a holistic exercise[296] that must take into consideration all available evidence and not be 'mechanically sub-divided into rigid components'.[297] Thus, with necessity in the background, the Court must strive to establish –by looking into the text, context, object and purpose, subsequent agreements and practice, and, perhaps, any available supplementary means– whether and to what extent the parties intended to deviate from the relevant customary requirements.

[292] Ago, 'Addendum to Eighth Report' [67].

[293] ibid.

[294] ibid, n 148.

[295] *Indian Ocean* [64].

[296] Merkouris (n 280) 268.

[297] *EC-Chicken(ABR)* [176]; *US-Continued-Zeroing(ABR)* [268].

Sometimes this interpretative exercise will lead to the conclusion that the exception clause has 'no other *raison d'être* and no other effect than to make explicit and…to protect against any possible challenge consequences identical with those which would follow from simply applying the principle of general international law'.[298] In other words, in some cases the exception clause incorporates all the requirements of necessity or provides a direct *renvoi* to general international law, so that the two rules become indistinguishable. In other cases, which is more common in practice, the interpretation of the clause in question suggests that:

> The parties…have wanted to prescribe less rigid conditions for the recognition of a situation of necessity as a ground for a State party to the convention not to comply with its obligations, or at least conditions other than those which must be fulfilled in order for there to be a 'state of necessity' as provided for in general international law. The parties may also have wanted to spell out the essential interests the 'necessary' safeguarding of which may be invoked to justify an exception to compliance with the obligations laid down by the convention…[299]

According to Ago, in such cases, 'the special rule will obviously prevail, and the existence of…necessity…will have to be appraised in accordance with the terms of that special rule'.[300] Exception clauses such as those in FCN and Treaty of Amity, are typical examples of the provisions to which Ago was referring to in this passage. The parties clearly intended to replace necessity with a different treaty-specific arrangement that regulates the same subject-matter in a different manner. For necessity, the State interest in question must be 'essential' but there is no list of specific interests for the protection of which the defence may be invoked. As the ILC commentary stipulates '[t]he extent to

[298] Ago (n 292) [67].

[299] ibid.

[300] ibid.

which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole'.[301] Conversely, exception clauses include an exhaustive list of interests for the protection of which States are allowed to take measures that are *prima facie* inconsistent with their treaty obligations. In this sense, these exceptions are narrower than necessity as they may only justify measures adopted on specific grounds, whereas necessity may be used for any interest 'essential' to the invoking State.

As for the test for successful invocation of these exception clauses, this also seems to be different, and at first sight, more lenient, than the test for necessity. Under the first 3 subparagraphs (a to c) of Arts.XXI(1) FCN and Art.XX(1) Treaty of Amity, a State must only show that the measure in question 'regulates' the importation or exportation of gold or silver, or the production of or traffic in arms and related materials; or that 'it relates' to fissionable materials. The precise scope of these exceptions is yet to be interpreted by the Court.[302] But certainly, in terms of the required nexus between the objective and the measure, the provision is more permissive than the customary requirement that the measure is 'the only way' for the State to safeguard the identified essential interest.[303] As for subparagraph (d), which has a broader regulatory scope extending to all measures 'necessary to protect essential security interests', the term 'necessary' seems to be *in lieu* of the 'only way' test under general international law. Moreover, none of the other requirements of necessity, i.e., the existence of a grave and

[301] Art.25 ARSIWA, commentary [15].

[302] The matter has arisen in *Alleged Violations* and *Iranian Assets* and was discussed briefly in the merits of the latter, but no information was offered on the nexus requirement, *Iranian Assets(Merits)* [102].

[303] Art.25(1)(a) ARSIWA.

imminent peril, that the measure does not seriously impair an essential interest of the States towards which the obligation exists and the non-contribution requirement, are explicitly mentioned, in one way or another, in these provisions.

Nonetheless, this does not mean that necessity and its customary requirements are irrelevant. On the contrary, they inform the interpretation of exception clauses.

The ICJ in the cases above did not refer to necessity in interpreting the exception clauses. The relevant findings can be summarised as follows. The Court found that it must assess 'whether the risk run by the [identified] "essential security interests" is reasonable'.[304] It must further assess whether 'the measures presented as being designed to protect these interests are not merely useful' or do not 'merely…tend to protect the…interests [at stake]' but are rather 'necessary' for that purpose.[305] This assessment, according to the Court, does not rely on the subjective judgment of the party; rather it must be assessed on the basis of available evidence.[306] In the context of assessing this evidence, the Court again evaluated the alleged 'threats' to the party's essential security interests and weighted them against the action taken to determine the measure's necessity.[307]

The Court has only applied these criteria with respect to the measures in *Nicaragua*. In this context, it stipulated that 'the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as "necessary" to

[304] *Nicaragua(Merits)* [224]. Similarly, *Alleged Violations* [112].

[305] *Nicaragua(Merits)* [224,282]; *Iranian Assets(Merits)* [106].

[306] *Nicaragua(Merits)* [282]; *Oil Platforms(Merits)* [43]; *Iranian Assets(Merits)* [106].

[307] *Nicaragua(Merits)* [282].

protect the essential security interests of the United States'.[308] The language in this finding implies that the US actions were considered as obviously disproportionate to the interest invoked. As to the trade embargo, the Court pointed out that the express justification of the US at the time of imposing the embargo was that 'the policies and actions of…Nicaragua constitute[d] an unusual and extraordinary threat to [its] national security and foreign policy'.[309] However, 'no evidence at all [was] available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985'.[310] Given that Nicaraguan policies 'had been consistent, and had been consistently criticized by the United States for at least four years previously', the Court was unable to find that the embargo was 'necessary' to protect US essential security interests.[311] This finding suggests that the measures in question must be 'necessary' *at the time* that they are taken.[312] But it can also be read to imply some good faith considerations relating to the invocation of necessity with respect to measures that were known to and tolerated by the Respondent for years.

The findings above, despite the lack of express engagement with general international law, allude to the requirements of necessity. First of all, the requirement of a 'risk' or 'threat' objectively established on the basis of evidence, which can be inferred by the term '*to protect*…essential security interests', is reminiscent of the requirement of a 'peril' under the customary law of necessity.[313] Although the Court has not explicitly

[308] ibid.

[309] ibid.

[310] ibid.

[311] ibid.

[312] *Nicaragua(Merits)* [281].

[313] Art.25(1)(a) ARSIWA and commentary [15]; *Gabčíkovo-Nagymaros* [54].

suggested that the peril in question must be 'grave and imminent', it requires that the risk is 'reasonable' enough to create 'necessity' for action. The findings also allude to the test of proportionality reflected in the customary requirement that the measure taken under necessity is 'the only way' to safeguard the interest, and does 'not seriously impair an essential interest of the State or States towards which the obligation exists…'.[314] In a different context, the Court has confirmed that the 'reasonableness' of a measure requires that 'its negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked'.[315] Moreover, good faith considerations are the foundation of the 'non-contribution' requirement under customary international law. There is nothing in the language of the exception clause suggesting that a State is precluded from invoking it if it has contributed to the situation in question. However, the term 'necessary' accommodates considerations of good faith. Evidence suggesting that the State is invoking an exception clause in a manifestly abusive manner can certainly be taken into consideration in assessing a measure's necessity under the circumstances. The interaction of the non-contribution requirement with exception clauses and the relevant necessity test is examined further in following chapters, especially in the context of ISDS, where the issue was extensively discussed in relevant case law.[316]

In sum, clearer engagement by the Court with the requirements of necessity in interpreting relevant exception clauses, in accordance with the compulsory mandate under Art.31(3)(c) VCLT, would provide clarity on the methodology to be followed in

[314] Art.25(1)(b) ARSIWA.

[315] *Navigational Rights* [87]; *Iranian Assets(Merits)* [149]. *Contra Iranian Assets(Merits)-Iwasawa* [26] arguing that the proportionality test is too stringent for security exceptions.

[316] See analysis in Ch III(E)(2)(c) and Ch IV(C)(1)(b)(ii).

ascertaining, on a case-by-case basis, the requirements for successful invocation of such clauses. It would also assist in the creation of a consistent line of relevant jurisprudence, which would boost legal certainty on the availability of defences. The existence of a threat, the requirement of proportionality and general principles of good faith are indeed implied in the language of such treaty provisions, and their examination by the Court can assist in drawing a line between measures that are genuinely necessary for the protection of essential interests and measures serving different objectives, presented in the guise of security concerns under the treaty exception. At the same time, relevant judgments will also assist in the crystallisation of the criteria for successful invocation of necessity under general international law, which remain to this day elusive.

iii. Exception clauses and countermeasures

Regarding the defence of countermeasures, the cases discussed above provide evidence that exception clauses, especially those allowing for measures 'necessary to protect [a State's] essential security interests', may be able to accommodate within their scope certain countermeasures. The US measures challenged in *Alleged Violations* and *Iranian Assets* were economic sanctions, imposed against Iran as a response to alleged prior breaches of the latter's international obligations. Under general international law, the US would have had to justify these measures based on the defence of countermeasures. Instead, in these treaty-based disputes, it invoked the exception clause of the Treaty of Amity. Indeed, to the extent that the prior internationally wrongful act in response to which a State imposes a countermeasure relates to one of the objectives enumerated in the exception clause, the State may be able to justify the countermeasure on that basis. Two questions arise in this context: firstly, whether and to what extent the customary requirements for the imposition of a lawful countermeasure are pertinent to the

interpretation of exception clauses; and secondly, whether the defence of countermeasures under general international law would still be available to the Respondent for measures that do not relate to the objectives enumerated in the relevant exception clause.

On the first question, the incorporation of the requirements for countermeasures into an exception clause such as Art.XX Treaty of Amity would result in a test that is evidently more stringent than what the text of the clause dictates. Taking as an example the US measures challenged in *Alleged Violations* and *Iranian Assets*, under general international law the US would have to prove, first and foremost, that Iran had indeed committed the internationally wrongful acts that the US alleges.[317] The express terms of Art.XX Treaty of Amity, which allows for measures 'necessary to protect…essential security interests', do not require such prior determination. As discussed in the previous sub-section, the wording suggests that action may be taken when there's a risk to the State's essential security interests that is 'reasonable', as established on the basis of evidence.[318] It does not require that an internationally wrongful act has been committed by the target State.

However, precisely because the requirements under such exception clauses are more permissive than countermeasures, emphasis must be put on delimiting their scope and defining the pool of measures that may be justified thereunder. Otherwise, there is a clear risk that States will try to fit anything under the sun within their scope. For example, in the case of the Treaty of Amity, the first three enumerated categories of permissible

[317] See analysis in (n 214).

[318] See analysis in (n 304-307).

measures under Art.XX establish a very low threshold for their successful invocation: a State simply needs to show that its measures regulate imports and exports of gold or silver; regulate the production of or traffic in arms and other materials related to military operations; or, relate to fissionable materials. As discussed above, the US invoked some of these subparagraphs to justify economic measures in response to alleged breaches of Iran's obligations relating to nuclear proliferation. However, even if such measures 'relate'[319] to fissionable materials or arms in a broad sense, they still cannot be properly classified under the relevant subparagraphs. Although the preamble of the Treaty of Amity emphasises in the first place 'the friendly relations' of the two States, it then makes specific reference to the goal of 'encouraging mutually beneficial trade and investments and closer economic intercourse' as well as 'regulating consular relations'.[320] As affirmed in *Oil Platforms*, it emerges from the Treaty that it did not intend to 'regulate peaceful and friendly relations between the two States in a general sense…[or] incorporat[e] into the Treaty all of the provisions of international law concerning such relations'.[321] This conclusion was further substantiated by drawing a distinction between the Treaty of Amity and other treaties of friendship/amity and cooperation, which include substantive provisions on consultation in case of armed conflict, a *renvoi* to the provisions of the UN Charter, or even clauses on military cooperation.[322] The Treaty of Amity regulates matters relating to commercial, financial and consular relations and only refers to peace and friendship as a necessary precondition for the development of such

[319] See also WTO case law on the term 'relating to' in (n 561-565).

[320] Preamble, Treaty of Amity.

[321] *Oil Platforms(Objections)* [28].

[322] ibid.

relations.[323] In *Nicaragua* the Court made a similar finding with respect to the FCN, stipulating that the treaty's 'object and purpose is the effective implementation of friendship in the *specific fields* provided for in the Treaty, not friendship in a vague general sense'.[324] In other words, the wording of Art.XX Treaty of Amity, read in its context and in light of the treaty's object and purpose, suggests that it intended to provide a wide margin of appreciation to States in regulating trade, investment or more generally economic activity relating to fissionable materials.[325] It did not intend to cover countermeasures in response to nuclear activities within the territory of the other State that are deemed incompatible with the latter's international obligations. This narrow understanding of the provision was confirmed in *Iranian Assets(Merits)*, where the Court found that only measures intended to regulate a Party's 'own production of or its own traffic in arms, or…the export of arms to the other party or the import of arms from the other party' and not 'measures…solely intended to have an indirect effect on the production of and the traffic in arms by the other party or on the territory of the other party' may fall within the scope of the exception.[326] The US arguments are illustrative of the risks entailed in a broad interpretation of exception clauses so as to accommodate a broad range of countermeasures.

The fourth subparagraph of Art.XX Treaty of Amity seems more appropriate in this instance as the US could more plausibly argue that Iran's nuclear activities constituted a threat to its essential security interests. As noted by Judge Sebutinde 'even

[323] *Oil Platforms(Objections)* [27-28]

[324] *Nicaragua(Merits)* [273] (emphasis added).

[325] See similar arguments in *Alleged Violations-Iran* [9.10-9.16].

[326] *Iranian Assets(Merits)* [102].

interpreted relatively narrowly, it is likely that…interests…relat[ing] to counterterrorism, prevention of arms trafficking and arms production, safely fall within the category of "essential security interests"'.[327] Still, the notion of essential security interests should not be stretched so much as to render the customary law on countermeasures obsolete. Security exceptions establish more lenient standards to provide sufficient space for States to safeguard 'essential interests' relating specifically to *security* –and not *any* interest that they deem essential– from reasonable threats objectively established. Economic sanctions such as the US measures in question, are imposed today in the context of various disputes that do not all relate to security concerns. For example, sanctions imposed in response to breaches of international human rights law, humanitarian law, environmental law or intellectual property and financial law, cannot reasonably be considered as measures taken to protect a State's essential security interests without overstretching the definition of 'security'. This is especially so if the State adopting the measure is not even in geographic proximity to the target State. In such cases the measures cannot fit within the scope of the exception clause. This narrow understanding was confirmed by the majority in *Iranian Assets*, where the Court explained that even if the US 'enjoys a certain margin of discretion', it emerged from the relevant domestic instruments that the reasons behind their enactment 'relate to the financial practices of Iranian banks, deficiencies in Iran's anti-money laundering régime and the ensuing risks for the international financial system' and there was 'no mention of security considerations'.[328]

[327] *Iranian Assets(Merits)-Sebutinde* [46].

[328] *Iranian Assets(Merits)* [108]. *Contra Iranian Assets(Merits)-Barkett* [17-21]; *Iranian Assets(Merits)-Sebutinde* [46].

However, the defence of countermeasures is residually applicable and available to the Respondent in such cases. In accordance with the analysis in previous sections, to the extent that the treaty does not suggest otherwise, general defences are not displaced. Economic agreements such as the Treaty of Amity or the FCN do not suggest the exclusion of countermeasures. Exception clauses may be able to cover some specific types of countermeasures when they relate to one of the enumerated interests, but they are not designed to regulate the subject-matter of countermeasures, i.e., the right of a State to take measures 'against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations'.[329] They are designed to regulate the right of States to take measures relating to, or necessary for the protection of the enumerated interests, which most of times relate to situations of emergency. Thus, measures adopted as countermeasures that do not relate to such enumerated interests, must be assessed based on general international law, which remains applicable to the dispute.

This residual applicability of countermeasures to treaty-based disputes raises a jurisdictional question, discussed further in the following section: whether the Court has subject-matter jurisdiction to determine that a prior internationally wrongful act has taken place, even if such act does not relate to the interpretation or application of the treaty that formed the basis of its jurisdiction in the case at hand.

D. INDISPENSABLE INCIDENTAL ISSUES IN THE CONTEXT OF APPLICABLE DEFENCES

The sections above established that general defences are applicable to all international disputes to the extent that they are not displaced by a *lex specialis*. It was further

[329] Art.49 ARSIWA.

established that the Court's power to examine and apply general defences is not affected by applicable law and jurisdictional limitations. The Court can always apply the law on State responsibility in the exercise of its inherent powers because such law is indispensable in discharging its function under its Statute and under the applicable jurisdictional clause.

However, in the context of countermeasures and self-defence there is an additional jurisdictional obstacle that puts under stress the conclusion on the availability of general defences in international adjudication. Self-defence requires the existence of a prior armed attack. Similarly, countermeasures are only available as a response to a prior internationally wrongful act. The prior determination of such issues, which is a necessary prerequisite for the application of said defences in the context of adjudicative proceedings, will very likely fall outside the subject-matter jurisdiction of the Court when established on a compromissory clause. The prior wrongful act or the prior armed attack will likely not fall within the ambit of disputes arising out of the 'interpretation or application' of the treaty in question. But similar issues may also arise in disputes submitted based on optional clause declarations: the declarations may include reservations that exclude from their scope certain subject-matters, and the prior acts in this context may relate to such matters. Similarly, a special agreement may not include issues relating to such prior acts.

In ICJ jurisprudence, this matter has famously arisen in *Oil Platforms*. The Court, as discussed above,[330] discussed whether the requirements of self-defence under general international law were met in order to rule on the applicability of the defence invoked by

[330] See analysis in (n 254-267).

the US. In this context, it made findings on the (non)existence of a prior armed attack by Iran against the US, despite its prior conclusion that issues relating to the legality of the armed actions of two States under general international law were beyond the scope of its jurisdiction under the Treaty of Amity.[331] It was, for this reason, severely criticised as 'overstepping' its jurisdictional boundaries as established by the relevant compromission clause. More recently, the issue was discussed in *ICAO-2020*. The ICJ found that the ICAO Council's jurisdiction entailed the power to rule on indispensable incidental matters in the context of countermeasures in order to discharge its dispute settlement functions under the Chicago Convention and IASTA.

The analysis in this section discusses, firstly, with the findings of the Court in *ICAO-2020*, which confirm the conclusions reached in previous rts regarding the presumption of applicability of general international law in international adjudication and the limits of the Court's subject-matter jurisdiction (1). Secondly, it examines the *Oil Platforms* judgment and demonstrates that the crux of the criticism to the Court's approach was not that its jurisdiction did not entail the power to rule on indispensable incidental matters in the context of an applicable defence, but rather that in that case such ruling was not really indispensable (2).

1. *ICAO-2020*: jurisdiction to make indispensable incidental findings in the context of applicable general defences

In *ICAO-2020*, the applicants (Saudi Arabia, Bahrain, United Arab Emirates and Egypt, also known as 'the Quartet') challenged the decision of the ICAO Council to uphold its jurisdiction over Qatar's claims relating to the Quartet's aviation restrictions against

[331] See (n 267).

Qatar-registered aircrafts. These restrictions formed part of a comprehensive set of measures adopted in 2017 by the four applicants in the context of their air, land and sea blockade imposed on Qatar. According to the Quartet, the embargo was imposed on Qatar for allegedly supporting and harbouring terrorist individuals and organisations and allowing them to use Qatar-based and Qatar-sponsored media platforms to spread their messages. The Quartet also accused Qatar of meddling in their internal affairs. The above actions, according to the Quartet, were in breach of the so-called Riyadh Agreements, a series of agreements concluded in 2013-2014 within the Gulf Cooperation Council aiming to ensure stability in the region and restore the already shaken relations amongst Council members. Qatar repeatedly denied these allegations and challenged several aspects of these measures before different judicial fora,[332] including the ICAO Council and the WTO.[333]

The Quartet argued that the 'ICAO Council lacked jurisdiction under the Chicago Convention since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law'.[334] The Council rejected this preliminary objection. The Respondents then instituted an appeal from the Council's decision on jurisdiction before the ICJ under Art.84 Chicago Convention.

The ICJ found that the ICAO Council did not err in dismissing the Quartet's

[332] *CERD-Qatar* before the ICJ; CERD inter-State communications by Qatar against Saudi Arabia and the United Arab Emirates; *PCA Arbitrations pursuant to Art.32 of the Constitution of the Universal Postal Unio;* ISDS in *beIN Corporation v Saudi Arabia*; *Qatar Pharma v Saudi Arabia*; *Qatar Airways v Bahrain*/*Egypt*/*Saudi Arabia*/*UAE.* Note, however, that the resolution of the political dispute led to discontinuation of these proceedings.

[333] See analysis of the WTO dispute in Ch III(C)(2)(b).

[334] *ICAO-2020* [24].

objection to its jurisdiction and rejected the Applicant's grounds of appeal. It firstly confirmed that '[t]he prospect that a Respondent would raise a defence based on countermeasures in a proceeding on the merits…does not, in and of itself, have any effect on…jurisdiction'.[335] This finding echoes its judgment in *ICAO-1972,* where the same conclusion was reached with respect to defences under the law of treaties.[336]

Secondly, and most importantly, the Court found that:

> [T]he integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the *exclusive* purpose of deciding a dispute which falls *within* its jurisdiction…Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of the Chicago Convention [or IASTA] solely in order to settle a disagreement relating to the interpretation or application of the Chicago Convention [or IASTA] would not render the application submitting that disagreement to it inadmissible.[337]

In other words, the ICJ confirmed that the ICAO Council could make incidental determinations on indispensable incidental matters in the context of countermeasures in order to discharge its function under the dispute settlement provisions of the Chicago Convention and IASTA. Although the judgment referred to the competence of the ICAO Council, a dispute settlement organ that is not a 'judicial institution in the proper sense of that term',[338] its findings *a fortiori* apply to international adjudicative bodies.[339]

The Court's findings in *ICAO-2020* are consistent with its prior jurisprudence

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[335] *ICAO-2020* [49].

[336] See analysis in (n 145-150).

[337] *ICAO-2020* [61] (emphasis added).

[338] *ICAO-2020* [60].

[339] *Cf ICAO-2020-Gevorgian* [7-10] arguing that the expansive understanding of the Council's competence, 'a body of a primarily technical and administrative nature' goes too far but seemed more receptive to the idea that the ICJ itself (a purely judicial body composed of independent judges) has such power.

regarding the role of the law on State responsibility in international adjudication, as discussed in Section B. The examination of applicable defences forms indispensable part of the Court's reasoning in deciding the claims properly brought before it in accordance with the respective jurisdictional clause.[340] The Court's power to examine a defence along with all issues indispensable to determine its applicability follows from the 'principle that jurisdiction to determine a breach implies jurisdiction to award compensation',[341] or more generally, to rule on the content of a State's international responsibility. The Court would not be able to determine whether the Respondent bears responsibility and the ensuing legal consequences without prior examination of applicable defences. Incidental findings in this context are made for the sole purpose of deciding whether the obligations under the treaty have been breached, and thus, they fall squarely within the power of the Court to rule on differences relating to the 'application' of the treaty in question.

Deciding on matters that are indispensable to reach a verdict on the claims before it is part of the Court's inherent powers. As discussed in Section B, the ICJ 'is fully empowered to make whatever findings may be necessary…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'.[342] It becomes readily apparent that the Court would not be able to rule on the Respondent's international responsibility or settle the dispute in question without examining, in their entirety, any applicable defences invoked. Any other course of action would, in one way or another,

[340] Pauwelyn and Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 42 CornellIntlLJ 101.

[341] Crawford, *State Responsibility* (n 5) 599.

[342] *Nuclear Tests* [23]; see analysis in (n 127-131).

hinder the Court from discharging its function under its Statute and the applicable jurisdictional clause. This is further corroborated when we examine any alternative courses of action for the Court. If a general defence was indeed residually applicable to a given dispute –following interpretation of the instrument in question in accordance with the methodology discussed in previous sections– but the Court had no jurisdiction to address the defence in its entirety this would have one of three outcomes.

A first option would be to deny the Respondent the possibility of invoking a defence which is otherwise available to it. This seems contrary to fundamental principles of justice and equality of the parties. A rule and its exception constitute a logical and legal bundle that should be applied together. It would be inequitable and nonsensical to find a State responsible for a wrongdoing without prior examination of applicable defences. Such approach would result in unfair judgments, which would fail to objectively settle the dispute at hand.

A second option for the Court would be to proceed to examine first the rest of the requirements of the general defence under general international law, putting a pin on the issue that seems to fall outside its scope of jurisdiction. In the case of countermeasures, it could examine the requirements of proportionality or the aim to induce compliance. If the evidence so suggests, the Court could reject the defence on this basis, thereby avoiding examination of the prior wrongful act. This approach was followed, for example, by a NAFTA Tribunal in a similar context.[343] Of course, apart from the artificiality of this approach, the obvious problem is that, if the measure at issue indeed meets the rest of the requirements of the general defence, then the Court would inevitably

[343] See analysis in (n 1210-1215).

stumble again upon the same problem. Thus, this solution could, at best, avoid the jurisdictional hurdle in a small number of cases. Moreover, it is arguably impossible to assess a measure's proportionality or aim, without first establishing the parameters of the situation to which it allegedly responds. It is thus doubtful that the relevant judgment would be legally sound.

Lastly, a third option for the Court would be to stay the proceedings until another competent adjudicative body rules on the prior internationally wrongful act or the prior armed attack. Based on judicial comity,[344] the Court could give priority to another court that has jurisdiction over this indispensable incidental matter and wait until proceedings before that court are concluded. It would then be able to take that court's decision into consideration as a fact, rather than making a finding on the matter on its own. However, this approach could easily lead to a stalemate –or a possible escalation of extra-judicial actions– if no other adjudicative body has jurisdiction over the case, which is more than likely. A reflection of this problem can be seen in the NAFTA US-Mexico sugar war cases. In one of the NAFTA Chapter Eleven arbitral proceedings, where the Tribunal was faced with this jurisdictional concern in the context of the defence of countermeasures,[345] the Respondent suggested that the Tribunal should stay the proceedings until a NAFTA Chapter Twenty Panel could decide on the relevant incidental issues.[346] The Tribunal was receptive to this idea[347] despite the fact that a stay in the proceedings would have inevitably led to a deadlock, as the appointment of

[344] Discretionary conduct based on courtesy, tradition, goodwill, or utility, Kämmerer, 'Comity' [2006] MPEPIL. See e.g., *MOX Plant* [28].

[345] See analysis in Ch IV(C)(3).

[346] *ADM* [112].

[347] *ADM* [131-133].

Panellists under Chapter Twenty was blocked by the Respondent and thus, there would never be a decision on the matter.[348] Moreover, this approach would lead to significant delays in resolving the dispute and time is often of the essence, especially if the dispute refers to an ongoing situation.

The Court could also have recourse to the relevant findings of a competent political organ, such as the UN Security Council, instead of providing itself a legal characterisation of the act that is allegedly wrongful. However, the extent to which the determinations of political organs, even the UN Security Council, are relevant to the Court's reasoning, whose function is to decide disputes 'in accordance with international law'[349] is, to say the least, contested.[350] It is also contested that the Court has the power to interpret political instruments and discern whether a determination on international responsibility was made and whether such determination was meant to be binding.[351]

Thus, it emerges that none of the options above allows the Court to properly fulfil its jurisdictional mandate. It is functionally necessary for the Court to make incidental determinations on all indispensable incidental matters arising in the context of an applicable defence in order to decide the claims before it and settle the dispute. Thus, the power to make such determinations is inherent to the international judicial function. As stipulated in *Continental Shelf*, '[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must…exercise that jurisdiction to its full extent.'[352]

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[348] See analysis in (n 1149).

[349] Art.38 ICJ Statute.

[350] See by analogy Art.15bis(9) ICC Statute.

[351] E.g., *East Timor* [31-33].

[352] *Continental Shelf* [19].

Lastly, it is important to note that the legal effects of such incidental findings are limited to the 'four corners' of the main claim under consideration, as the Court would not be able to accompany these findings with appropriate remedies.[353] This results from the jurisdictional constraints of the Court as established in each case and the principle of *non ultra petita*,[354] which dictate that the object of the dispute on which the judge can award executory rights is limited by the main claims presented by the Applicant and any counter-claims properly introduced to the proceedings.[355] Normally, an incidental finding in the context of an applicable defence will not appear in the judgment's *dispositif* but will rather form part of the *motifs*.[356] At the very best, the Court's finding on the prior internationally wrongful act could be considered as an affirmation of the Applicant's wrongdoing, and could operate as a reminder of its primary obligation at issue, as well as its secondary obligations to cease such act, if continuing, and make reparations for possible injury caused.[357] These obligations exist independently of any relevant pronouncement by a court or tribunal.[358]

This is the main difference between defences, and incidental findings made in their context, and findings on incidental claims or counter-claims. Under Art.80 ICJ Rules '[a] counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of

[353] Gourgourinis, *Equity and Equitable Principles in the World Trade Organization: Addressing Conflicts and Overlaps between the WTO and Other Regimes* (Routledge 2015) 209.

[354] See (n 77).

[355] Kolb (n 77) 895.

[356] *Cf* the analysis regarding the Court's methodology in *Oil Platforms* in (n 371-372).

[357] Arts.29-31 ARSIWA.

[358] See Art.31 ARSIWA, commentary [4].

the Court'.[359] Thus, for a counter-claim to be admitted it must independently fall within the Court's subject-matter jurisdiction. Indeed, there is a reasonable analogy to be drawn between the requirements on the admissibility of a counter-claim and an adjudicative body's jurisdiction to examine a defence, especially that of countermeasures. If there is indeed jurisdiction to examine any incidental issue that is indispensable for successful invocation of a defence, it may sometimes provide a back door for entertaining – indirectly– otherwise inadmissible counter-claims.[360] Given that countermeasures are a lawful reaction to a prior internationally wrongful act, a Respondent can claim that its action was in response to the wrongful act of the Applicant, regardless of whether the Court would be able to rule on that matter as an independent claim or counter-claim. However, the Respondent will not have in such cases an independent, enforceable verdict on the actions of the Applicant, as it would in the case of a counter-claim. The Court's finding of a prior breach in the context of countermeasures will only constitute part of the Court's reasoning in deciding the case brought by the Applicant.

As discussed in the next chapters, WTO bodies and investment tribunals adopted a different approach to indispensable incidental issues in the context of defences than that suggested by the ICJ in *ICAO-2020*. Their approach is reminiscent of the requirements for the admissibility of counter-claims, introducing a *Monetary-Gold*-like

[359] Art.80(1) ICJ Rules; Thirlway, 'Counterclaims Before the International Court of Justice: The Genocide Convention and Oil Platforms Decisions' (1999) 12 LJIL 197; Murphy, 'Counter-Claims Article 80 of the Rules' in Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (2nd edn, 2012). See similarly Art.46 ICSID.

[360] A reflection of this, in a slightly different context, can be seen in *Jurisdictional Immunities-Counter-claim* [3, 32] where the Court rejected Italy's counter-claim regarding Germany's obligation of reparation to Italian victims of war crimes and crimes against humanity due to lack of jurisdiction *ratione temporis* under Art.1 1957 European Convention. Then in *Jurisdictional Immunities* [50] Italy argued that failure to perform a duty of reparation constitutes an exception to a State's jurisdictional immunities and the Court implied that, if such exception existed, it would re-examine its jurisdiction to determine whether Germany had indeed violated its duty.

reasoning with regards to jurisdiction *ratione materiae*.[361] The following chapters unpack the reasoning of these adjudicative bodies and argue that the approach of the ICJ should be adopted in the context of all international adjudicative proceedings.

2. The *Oil Platforms* judgment: the question of indispensable incidental issues

As discussed above, the ICJ in *Oil Platforms* faced jurisdictional challenges in the context of an applicable defence. It found through interpretation that Art.XX Treaty of Amity incorporated the requirements of self-defence. In view of this interpretation, it proceeded to examine whether a prior armed attack has taken place as an indispensable part of its analysis on self-defence. The Court's decision to proceed to such examination, having already made clear in its 1996 judgment on preliminary objections that it had no jurisdiction to evaluate the lawfulness of the US armed actions as such,[362] was rather controversial and attracted severe criticism.[363] The decision was even controversial amongst the Court's own judges, which issued several separate and dissenting opinions discussing this matter. However, it is important to note that the judgment presented two further peculiarities, which are decisive for the purposes of assessing the appropriateness of the Court's approach.

Firstly, the Court examined the exception clause, infused with the general international law requirements of self-defence, *before* establishing a *prima facie* breach

[361] See pertinently Tzeng, 'Investments on Disputed Territory: Indispensable Parties and Indispensable Issues' (2017) 14 BrazilianJIL 121. On the principle of Monetary Gold see analysis below in (n 1232-1233).

[362] See *Oil Platforms(Objections)* [24-31] where the Court found that Art.I Treaty of Amity on 'firm and enduring peace and sincere friendship', 'is not [by itself] capable of generating legal rights and obligations' and thus cannot provide a basis for the Court's jurisdiction.

[363] E.g., Berman (n 261) 321; Green (n 269) 358; Kammerhofer (n 269) 696; Weil and Richemond-Barak (n 263) 329.

of the Treaty of Amity.[364] It thereby reversed the order of analysis of arguments that it has earlier suggested and followed in *Nicaragua*, according to which 'the possibility of invoking [the exception clause] must be considered once it is apparent that certain forms of conduct by the [Respondent] would otherwise be in conflict with the relevant provisions of the Treaty.'[365] It found that this was a matter of the discretion of the Court and the economy of the treaty in question.[366] However, it becomes evident from the rest of the judgment that the Court's analysis on the US defence was, overall, entirely unnecessary.[367] The findings on the US defence were, essentially, *obiter*, as no breach of the Treaty was later substantiated.[368] Had the Court followed its past practice regarding the order of analysis, which is consistent with its characterisation of the clause as a 'defence on the merits',[369] it would not have to deal with the US defence and, hence, with issues regarding the legality of the US armed actions, at all. Thus, the Court's analysis on the legality of the use of force by the US under general international law was unjustifiable, not because the Court should generally abstain from making such incidental findings but, rather, because in that case the incidental finding was not *indispensable* for the Court to decide on the Applicant's claim. In the words of Judge Kooijmans, the Court in 'an upsurge of misplaced activism'[370] decided to give prime place to issues that 'were

[364] Weil and Richemond-Barak (n 263) 335.

[365] *Nicaragua(Merits)* [225].

[366] *Oil Platforms* [36-37].

[367] Kammerhofer (n 269) 717; Taft, 'Self-Defense and the Oil Platforms Decision' (2004) 29 YaleJIntlL 295, 306.

[368] *Oil Platforms(Merits)* [125] *dispositif* 1.

[369] *Oil Platforms(Objections)* [20]; *Oil Platforms(Merits)* [33, 79].

[370] Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy' (2007) 56 ICLQ 741, 752.

not determinative or even relevant for the dismissal of the claim' by Iran.[371]

Secondly, the Court included its findings on the US defence in the judgment's *dispositif*. In fact, reversing again the order of findings, the Court found first that the actions of the US *cannot be justified* under Art.XX Treaty of Amity, as interpreted in light of general international law on the use of force, and second that those actions *do not* constitute a breach of the US obligations under Art.X Treaty of Amity and, hence, Iran's claim for reparation must be rejected. Essentially, what the Court says in the *dispositif* of this judgment is first that the US *has* violated the prohibition on the use of force, which was not within the Court's scope of jurisdiction, and second that the US *has not* violated the provisions on freedom of commerce, which was the actual claim in dispute. As Judge Higgins noted in her separate opinion, it is far from standard practice to accept or reject a claimed defence as an element in the *dispositif* and offer a proper conclusion on this basis rather than simply taking it into consideration as part of the reasoning on which the final conclusion is based.[372] This separate conclusion in the Court's majority judgment was criticised by several judges as being *ultra petita*.[373]

It follows that the *Oil Platforms* is, in reality, far from a characteristic example of 'simply' making incidental findings in the context of an applicable defence. Arguably, the real heart of the debate in *Oil Platforms* was the perceived role and mandate of the Court and the 'desirability' of making general findings (*obiter*).[374] Judge Higgins opined

[371] *Oil Platforms(Merits)-Kooijmans* [3].

[372] *Oil Platforms(Merits)-Higgins* [12]; *Oil Platforms(Merits)-Buergenthal* [4ff].

[373] *Oil Platforms(Merits)-Higgins* [14-15]; *Oil Platforms(Merits)-Buergenthal* [8].

[374] *Oil Platforms(Merits)-Higgins* [22-23]. See also Rishikoft, 'When Naked Came the Doctrine of "Self-Defense": What Is the Proper Role of the International Court of Justice in Use of Force Cases?' (2004) 29 YaleJIntlL 331, 340; Gordon, 'The Oil Platforms Opinion: An Elephant in the Eye of a Needle' (2009) 1 Amsterdam Law Forum 132, 140; Laursen, 'The Judgment by the International Court of Justice in the Oil

in her separate opinion that 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*"'.[375] It is latter that was in question in *Oil Platforms*. Indeed, the Separate Opinions of Judges Higgins, Parra-Aranguren, Kooijmans, Buergenthal and Owada expressed disapproval of the Court's approach to the US defence.[376] At the same time, Judges Al-Khasawneh, Elaraby, Simma and Rigaux suggested that the Court could and should have gone further still in taking the opportunity to pronounce on breaches of the prohibition on the use of force by making a clear and straightforward pronouncement on the legality of the US actions.[377] This shows a disagreement on the desirable approach to cases where important legal issues must remain only in the background of the Court's analysis because the dispute is submitted under a different legal basis, mostly due to jurisdictional constraints. The Court has been faced with such cases multiple times in the past, and still is in the present.[378] The most recent example was the application of Ukraine instituting proceedings and requesting provisional measures against Russia for its military operations in Ukrainian territory on the basis of the Genocide Convention.[379] Quite evidently, the 'real' issue in dispute in this case is Russia's acts of aggression rather than Ukraine's alleged acts of genocide.

Platforms Case' (2004) 73 NordicJIL 135, 146; Small, 'The Oil Platforms Case: Jurisdiction through the-Closed-Eye of the Needle' (2004) 3 LPICT 113, 124.

[375] *Oil Platforms(Merits)-Higgins* [14], citing *Arrest Warrant* [43] (emphasis added).

[376] *Oil Platforms(Merits)-Higgins* [53-54]; *Oil Platforms(Merits)-Parra-Aranguren* [14]; *Oil Platforms(Merits)-Kooijmans* [3]; *Oil Platforms(Merits)-Buergenthal* [3]; *Oil Platforms(Merits)-Owada* [33-36].

[377] *Oil Platforms(Merits)-Al-Khasawneh* [9-10]; *Oil Platforms(Merits)-Elaraby* [1.2, 3.3]; *Oil Platforms(Merits)-Simma* [5-8]; *Oil Platforms(Merits)-Rigaux* [33].

[378] See analysis in (n 97).

[379] see *Genocide Allegations*.

However, the extent to which it is desirable for the Court to make general findings in the context of such disputes is a matter separate from the Court's jurisdiction to examine *indispensable* legal issues in the context of an applicable defence. Had it been truly indispensable to examine the US defence in *Oil Platforms*, the Court's decision to examine the requirements of self-defence under general international law would have been less controversial. Similarly, the Court would have the power to make incidental findings on the legality of the Russian military operations if these were brought before it in the context of an applicable defence. However, it must also be noted that when a matter is incidental to the main claim of the Applicant rather than the defence of the Respondent, there are additional considerations, which may militate in favour of a different approach.[380] The latter escapes the scope of this thesis and the scope of the argument advanced in this section.

E. INTERIM CONCLUSIONS

From the case law of the ICJ, we may reach the following preliminary conclusions on the three factors potentially affecting the availability of general defences as identified in the introduction.

Firstly, the analysis above demonstrates that there is a presumption of applicability of general international law proper, including the law on State responsibility and general defences, to all international disputes relating to State obligations, even in the absence of explicit reference to such law in the instrument that forms the basis of the

[380] e.g., *Chagos-MPA* [219] where the Tribunal found that 'to read Art.298(1)(a)(i) UNCLOS as a warrant to assume jurisdiction over matters of land sovereignty on the pretext that the Convention makes use of the term "coastal State" would do violence to the intent of the drafters of the Convention to craft a balanced text and to respect the manifest sensitivity of States to the compulsory settlement of disputes relating to sovereign rights and maritime territory'. Similarly, *Black Sea* [195-196].

claim and the Court's jurisdiction. The most challenging cases are those submitted to the Court based on a compromissory clause. Such clauses usually vest the Court with jurisdiction over disputes arising out of the 'interpretation or application' of the treaty in question, but do not clarify what law the Court may apply in settling such disputes. However, the interplay between jurisdiction and applicable law suggests that there is a 'symmetry' between the limits of the Court's subject-matter jurisdiction and the substantive law that it may apply. Thus, the law applicable to treaty-based disputes stems primarily from the treaty in question. Even so, the analysis in this chapter demonstrates that a restrictive compromissory clause cannot, in and of itself, have the effect of precluding the applicability of general international law to disputes arising thereunder. The power of the Court to apply general international law is inherent as it forms indispensable part of its reasoning in settling the dispute in question and discharging its functions under its Statute and the applicable jurisdictional clause.

Nonetheless, this presumption of applicability is *rebuttable*. The parties are free to deviate from general international law, as long as such deviations do not conflict with *jus cogens*. These deviations should not be presumed but should rather be identified through interpretation of the instrument in question and through proper application of the *lex specialis* principle. This case-by-case interpretation must be principled and methodologically clear.

The customary rules on treaty interpretation provide guidance on the methodology to be followed by the Court in ascertaining the relationship between a treaty and its normative environment, including general defences. Under Art.31(3)(c) VCLT the Court has an obligation to at least take into consideration general defences in interpreting provisions of the treaty in question that relate to the same subject-matter, as

they are relevant rules of international law applicable between the parties. The Court must interpret the relevant provisions using all the elements of the interpretative rule codified in Art.31 VCLT (and to the extent necessary, Art.32 VCLT), with a view to discern whether and to what extent they are in genuine conflict with general defences and their customary requirements. To the extent that the general rule is not displaced by the treaty, it remains applicable. Accordingly, the interpretation of the instrument in question can lead to one of the following results: it may reveal an intention of the parties to exclude the application of all or certain general defences, as in the case of diplomatic law; it may show an intention to modify (restrict or broaden) the scope of such defences, as in the case of exception clauses like the ones in the FCN and Treaty of Amity; or it may show a clear intention to fully incorporate general defences and their customary requirements into the treaty text. In a nutshell, treaty interpretation may lead to the conclusion that all or some general defences are not available to the Respondent. But their applicability cannot be considered as excluded *a priori*.

As seen in *Tehran Hostages*, treaty provisions that constitute *lex specialis* to the general defences may vary significantly in terms of form and language. The treaty in its entirety must be interpreted with a view to discern the parties' intention on the matter of defences. Nevertheless, treaties often include exception clauses which regulate the same subject-matter as general defences, especially the defence of necessity. Exception clauses also perform the same normative function as general defences: they operate as affirmative defences on the merits of a dispute once a *prima facie* inconsistency with relevant substantive obligations has been established. Hence, the relationship between exception clauses and general defences can generally be characterised as one of *lex specialis/lex generalis*. As the *lex generalis*, general defences are always in the

background of treaty-specific arrangements and inform the interpretation of their scope and content.

This chapter argued that the defence of necessity is, most of the times, displaced by exception clauses such as the ones discussed in this thesis, which are meant as treaty-specific adaptations of necessity under general international law. Nonetheless, the customary requirements of necessity remain pertinent to the interpretation of the exceptions' substantive requirements. Similarly, exception clauses often subsume the defence of self-defence under general international law, since measures adopted in the exercise of a State's right to self-defence would usually fall within the regulatory scope of such exceptions. Still, the customary requirements of self-defence are pertinent to the interpretation of exception clauses, especially when they allow for the adoption of measures that involve a use of armed force. Lastly, with respect to countermeasures, the chapter argued that the defence is often residually applicable to treaty-based disputes. Some countermeasures which relate to one of the objectives enumerated in exception clauses, such as essential security interests, may be justified thereunder, following the relevant treaty test, which is usually more permissive than the test for countermeasures under general international law. Countermeasures taken in response to prior internationally wrongful acts that do not relate to the enumerated objectives must be justified on the basis of general international law, which remains residually applicable to the treaty-based dispute. This is because countermeasures under general international law are available as a means to induce compliance with a State's international obligations and not for the protection of specific State interests *per se*. As such, the rules on countermeasures do not regulate the same subject-matter as exception clauses and they are not displaced by the latter by virtue of the *lex specialis* principle.

Lastly, it emerges from this chapter that the invocation of general defences has no impact on the Court's jurisdiction. A Respondent cannot exclude a dispute from the Court's jurisdiction simply by asserting the applicability of a defence. Likewise, the limited subject-matter jurisdiction of the Court in a particular dispute cannot preclude it from examining an applicable defence in its entirety. The examination of applicable defences and their requirements is a prerequisite for the Court to determine whether the Respondent bears international responsibility and to specify the ensuing consequences. For these reasons, the Court's subject-matter jurisdiction always entails the power to examine all indispensable incidental issues arising in the context of an applicable defence. It can make incidental findings on the prior internationally wrongful act in the context of countermeasures, and, similarly, on the existence of a prior armed attack in the context of self-defence. This power follows from the principle that an adjudicative body is fully empowered to make all findings necessary to exercise its judicial function and to provide for the orderly settlement of the dispute before it. The case law examined above shows several reflections of this principle in the practice of the ICJ.

It is important to stress that findings made in this context are for the sole purpose of ruling on the main claims properly brought before the Court by the Applicant (or, similarly, on the counter-claims properly introduced to the proceedings by the Respondent) and thus, they fall squarely within the Court's mandate to 'apply' the treaty in question. They form part of the reasoning of the judgment and are confined to the four corners of the treaty and/or the claim in question. They are not independent verdicts in the operative provisions of the judgment and do not constitute an enforceable title, as opposed to rulings on counter-claims or incidental claims. Two important caveats are drawn in this context. Firstly, the arguments in this chapter extend only to indispensable

incidental issues in the context of a defence. They do not extend to incidental issues in the context of the Applicant's main claim. The latter is outside the scope of the present thesis. Moreover, it is argued that a distinction should be drawn between indispensable incidental issues in the context of defences and general findings or *obiter dicta* on the broader background of the dispute. Indeed, it is often tempting for the Court to 'pierce the veil' and 'go directly to the real heart of the dispute'.[381] The desirability of such general findings and the proper role of the Court in cases of international crises, such as the ongoing armed conflict between Russia and Ukraine, is a discussion separate from the Court's power to examine matters arising in the context of applicable defences that are truly indispensable to rule on the claims in question.

[381] *Oil Platforms(Merits)-Ranjeva* [3-4].

III. THE WTO DISPUTE SETTLEMENT SYSTEM: AN INTER-STATE ADJUDICATIVE MECHANISM WITH SPECIALISED COMPETENCE

A. INTRODUCTION

Chapter II examined the jurisprudence of the ICJ, an inter-State adjudicative body with competence to hear any inter-State dispute under international law, to the extent that consent of the parties' can be established in accordance with Art.36 of its Statute. ICJ case law suggests that general defences are in principle applicable to all international disputes concerning State obligations, including treaty-based disputes, subject only to the interpretation of the treaty in question and the application of the *lex specialis* principle, which may reveal the parties' intention to exclude or modify the scope of general defences. It further suggests that, in the absence of clear indication that the parties intended otherwise, the customary requirements for successful invocation of general defences are pertinent to the interpretation of relevant treaty clauses. Lastly, the ICJ endorses an expansive approach to the limits of the subject-matter jurisdiction of international adjudicative bodies: they have the power to make incidental findings on all indispensable issues arising in the context of applicable defences, even if such issues could not be presented before it as independent claims due to lack of jurisdiction.

This chapter examines the practice of the WTO DSS. Similar to the ICJ, the WTO DSS is an inter-State adjudicative mechanism. However, it differs from the ICJ in terms of jurisdictional field.[382] It is a specialised system with exclusive competence to hear

[382] See definition in (n 66).

trade disputes under the WTO Agreements.[383] The DSU sets out the rules and procedures on the settlement of disputes arising under the WTO 'covered agreements[384] and forms part of the so-called 'single undertaking'.[385] Thus, WTO member States automatically consent to the jurisdiction of the WTO DSS in a compulsory manner.

The creation of this dispute settlement mechanism was one of the greatest achievements of the Uruguay Round negotiations, which radically changed the landscape of international trade. It was an important step in the shift from the more power-based, political arrangements of the GATT 1947 –especially in its earlier years– to a more rule-oriented regime,[386] and in the process of the progressive 'judicialisation' of the settlement of trade disputes.[387] According to WTO statistics, since its establishment in 1995, 616 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.[388] It is, thus, hard to deny that it is an international adjudicative mechanism of historic achievement. In fact, considering the importance of trade in international relations, the very broad range of obligations under the WTO Agreements, the large

[383] The term 'WTO Agreements' is used to describe the agreements that resulted from the Uruguay Round of Multilateral Trade Negotiations (Marrakesh Agreement and Annexes).

[384] Art.1 DSU. The 'covered agreements' are the WTO Agreements listed in Appendix 1 DSU.

[385] *Brazil-Coconut(ABR)* pp.12-13.

[386] Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (CUP 2006) 146; Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 HarvIntlLJ 333, 333. *Cf* 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.

[387] Reich, 'From Diplomacy to Law: The Juridicization of International Trade Relations' (1996) 17 NorthwesternJIntlL&Bus 775; Stoll, Wolfrum, and Kaiser, *WTO: Institutions and Dispute Settlement* (Martinus Nijhoff 2006) 448; Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (4th edn, CUP 2017) 296.

[388] Statistics available at <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm> and <https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm>.

membership of the organisation,[389] 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.[390] Hence, it is essential to clarify the scope of States' right to deviate from their obligations under the WTO Agreements, as well as to ascertain, more generally, the role that the WTO can play in the broader system of international law.

Trade is one of the cornerstones of international relations. It is thus unsurprising that trade sanctions[391] have always held a significant position within a State's arsenal of foreign policy instruments. Yet, as elaborated in the introduction to this thesis,[392] there is a lack of clarity on the legal regime governing the legality of trade restrictive measures, the defences available to the imposing States, and the possibility and extent of their judicial review. Today, a large percentage of trade activities are conducted under the umbrella of the WTO. Thus, the legality of trade sanctions should be assessed, primarily, under WTO law. It is known that the 'general' and 'security' exceptions in the WTO Agreements (Arts.XX-XXI GATT, XIV-XIV*bis* GATS and 73 TRIPS) allow for certain trade restrictions that would otherwise be inconsistent with States' WTO obligations. However, the scope of these clauses is limited and does not necessarily coincide with that of general defences. It is unclear whether any of the general defences may *also* be invoked to justify *prima facie* WTO-inconsistent measures. We see, for example, that the EU, which has one of the most sophisticated sanctions regimes internationally, in its

[389] Currently 164 WTO members (EU included) and 25 observer governments.

[390] Jackson (n 386) 135.

[391] See definition in (n 2).

[392] See analysis in (n 2-7).

Sanctions Guidelines stipulates that:

> Restrictive measures should…respect the international obligations of the Union and its Member States, in particular the WTO Agreements. The…GATT and the…GATS apply when restrictive measures affect trade in goods or services with third countries. Art.XXI of GATT allows for [certain] import and export restrictions…Art.XIVbis of GATS provides for a similar exception. Measures restricting trade which do not fall under these categories have to meet the conditions laid down in Art.XX of GATT and Art.XIV of GATS, respectively, and, in some cases, could be incompatible with WTO rules.[393]

This statement illustrates both the limited scope of the WTO exceptions and the importance of assessing whether a *prima facie* incompatibility with WTO rules may still be justified under general international law.

Moreover, despite the evident similarities between general defences and the WTO exception clauses, the WTO DSS, as shown below, has almost never taken into consideration general international law when interpreting the scope of the latter. This apparent disinclination is especially striking in the case law regarding the scope of the security exceptions. The WTO security exceptions had for a long time escaped judicial scrutiny. Panels were in recent years called to interpret them almost from scratch, without the benefit of prior WTO jurisprudence on the matter, and still, they steered clear of any reference to general defences or, more generally, to Art.31(3)(c) VCLT.

The analysis in this chapter is divided in 3 substantive sections. Section B introduces the scope of jurisdiction of the WTO DSS and the law applicable to WTO disputes. It confirms that, although the specialised character and limited jurisdictional scope of the WTO DSS signifies that the law applicable to WTO disputes is principally

[393] EU Sanctions Guidelines [11].

the WTO Agreements, there is no explicit exclusion of *all* other rules or implicit disconnection from the framework of general international law. Through an overview of relevant case law, it further confirms that general international law, and most importantly, the law on State responsibility as enshrined in ARSIWA, is indeed applicable to WTO disputes to the extent that the WTO Agreements do not 'contract out' of its application through *lex specialis*. It further demonstrates that, under Art.31(3)(c) VCLT, WTO panels and the AB have an obligation to take into consideration general international law in interpreting relevant WTO provisions. Section C proceeds with an overview of the scope of application and substantive requirements of the WTO exception clauses through a survey of relevant case law. Lastly, Section D critically assesses the relationship of the WTO exception clauses with the general defences of self-defence, necessity, and countermeasures, in view of the customary rules of treaty interpretation and the *lex specialis* principle. It argues that the defences of necessity and self-defence are displaced by the WTO exception clauses. However, their requirements are still pertinent to the interpretation of the WTO general and security exceptions. With respect to countermeasures, it argues that the defence is residually applicable to WTO disputes, i.e., applicable to the extent that it is not displaced by the rules on WTO-mandated countermeasures and the WTO exception clauses. In view of this residual applicability, it further argues that WTO bodies have the inherent power to make incidental findings on whether a non-WTO obligation has been previously violated, in order to rule on the availability of the defence of countermeasures to the Respondent.

B. JURISDICTIONAL LIMITATIONS AND THE LAW APPLICABLE TO WTO DISPUTES

This section discusses first the limits of the subject-matter jurisdiction of the WTO adjudicative bodies and the law applicable to WTO disputes (1). It then examines the

applicability of rules of general international law through an overview of relevant WTO case law (2).

1. Jurisdiction of the WTO 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.[394] 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.[395] The panels' function is to 'make an objective assessment of the matter before [them], 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'.[396] It thus becomes clear that WTO panels and the AB are not adjudicative bodies of general competence:[397] 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.[398]

Nonetheless, it is less clear, once jurisdiction of a Panel is properly established, what law it may apply to settle the dispute.[399] As the ILC Study Group on Fragmentation

[394] Arts.1(1), 6(2), 7, 11, 23 DSU.

[395] *Brazil-Coconut(ABR)* p.22.

[396] Art.11 DSU.

[397] Trachtman (n 386) 338; Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 JWT 87, 109; Pauwelyn, 'How Far Can We Go' (n 32) 553; Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 8–9.

[398] Art.7 DSU and the Panel's terms of reference embody the maxim of *non ultra petita*, see n (77). Panels only have authority to adjudicate upon claims relating to the provisions cited by the parties, see Stoll, Wolfrum and Kaiser (n 387) 355.

[399] Bartels, 'Applicable Law' (n 33) 504.

pointed 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 bodies] to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law.[400]

Indeed, the DSU is silent on this matter. Although it is plainly clear that WTO bodies shall apply the provisions of the covered agreements,[401] it is not clear whether they should determine disputes solely on this basis. In fact, it is not uncommon in international law to have an adjudicative body vested with limited jurisdiction, whilst seemingly having no limits on the rules of international law that it may apply in settling disputes properly brought before it.[402]

The only DSU provision that bears any resemblance to an applicable law clause is Art.7,[403] 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 Art.7 and the exclusive reference to the covered

[400] Fragmentation Report [45].

[401] Arts.3.4, 7, 11 DSU; Palmeter and Mavroidis, '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.

[402] e.g., Art.288(1) and 293(1) UNCLOS; Arts.1120, 1116, 1117 and 1131(1) NAFTA; Art.14(D)(3) and 14(D)(9) USMCA.

[403] Palmeter and Mavroidis (n 401) 399.

agreements throughout the DSU, argue that WTO bodies may only apply WTO law.[404] Nonetheless, Art.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 prevent them from *also* addressing rules from other sources in settling the dispute at hand.[405] 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.[406] Similarly, an arbitrator under Art.25 DSU may 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, as discussed in Chapter II, it cannot be denied that the questions of jurisdiction and applicable law are inter-linked. In treaty-based disputes, as in the WTO, there seems to by a symmetry between the limits of an adjudicative body's subject-matter jurisdiction and the substantive law applicable to the dispute.[407] This is because, the adjudicative body would necessarily exceed the limits of its subject-matter jurisdiction by making findings in relation to the application of substantive rules that are external to the treaty to the conduct in question. A broad definition of the law applicable to WTO disputes 'might evolve towards a general jurisdiction for the WTO dispute settlement

[404] E.g., Trachtman (n 386) 342. *Cf* Palmeter and Mavroidis (n 401) 399 arguing that Art.7 can be construed as encompassing all sources of international law.

[405] Bartels, 'Applicable Law' (n 33) 505; Pauwelyn, 'How Far Can We Go' (n 32) 562.

[406] Arts.7.1, 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 based on its *Kompetenz-Kompetenz*, see analysis in (n 127-130). *Cf* Stoll, Wolfrum and Kaiser (n 387) 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.

[407] See analysis in (n 106-108).

system'[408] contrary to the DSU. As discussed in Chapter II, 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 Applicant.[409] 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 ICJ has reiterated several times, 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.[410]

Hence, the limited scope of the subject-matter jurisdiction of WTO adjudicative bodies entails a presumption that the law applicable to WTO disputes stems primarily from the WTO Agreements, as the application of external substantive rules would necessitate the making of findings that exceed the subject-matter jurisdiction of WTO bodies. As stipulated in *Mexico-Drinks(ABR)*, 'WTO Panels and the Appellate Body [cannot] become adjudicators of non-WTO disputes' as this is not their function as intended by the DSU.[411]

Nonetheless, WTO bodies enjoy certain inherent jurisdictional powers that derive directly from their nature as judicial bodies,[412] regardless of the specialised character of

[408] Van Damme (n 397) 14.

[409] See analysis in (n 87-98).

[410] See analysis in (n 92-95).

[411] *Mexico-Drinks(ABR)* [78,56].

[412] See analysis in (n 127-128); Pauwelyn, 'How Far Can We Go' (n 32) 555. Note that, although they are often characterised as 'quasi-judicial', WTO bodies are indeed international adjudicative bodies within the definition in (n 56). Although their reports do not constitute a decision *per se* and must be adopted by the Dispute Settlement Body (DSB), the DSB can only reject them by consensus (Arts.16.4, 17.14 DSU). Thus, their adoption is, in reality, semi-automatic and the 'quasi-judicial' character of the system is 'more

their subject-matter jurisdiction. 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.[413] Such inherent powers include, first and foremost, the right to determine whether they have jurisdiction in a given case.[414] But, as the ICJ explained by reference to its own inherent jurisdiction, the powers of an adjudicative body extend to all findings necessary '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'.[415] Thus, an adjudicative body can always make certain incidental 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 bodies can apply certain rules of international law other than the covered agreements, and can 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 sub-section discusses *which* other rules of international law may be applied in this context.

2. General international law and the WTO dispute settlement system

The previous sub-section demonstrated that, although the WTO Agreements have no

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form than substance', see Hughes, 'Settlement of Disputes: The Institutional Dimension' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 278.

[413] *EC-Hormones(ABR)* [152, n138].

[414] E.g., *US-1916(ABR)* [54, n30]; *Mexico-Drinks(ABR)* [45, n90].

[415] *Nuclear Tests* [23]; see analysis in (n 127-131).

applicable law clause explicitly mandating the WTO bodies to apply *exclusively* the WTO Agreements, due to their limited subject-matter jurisdiction, there is a presumption that they must settle WTO disputes primarily based on WTO law. Nonetheless, case law suggests that WTO bodies have the inherent power to make incidental findings on certain issues 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. 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 fit in this room and whether general defences are amongst them. It starts with an overview of the relationship of the WTO Agreements with general international law, setting the analytical framework for further discussion (a), and then examines the relevant case law of WTO bodies (b). Lastly, it offers conclusions on the role of general international law, including general defences, in WTO disputes (c).

a. Non-WTO law in WTO disputes: the analytical framework

The only express reference to non-WTO law in the covered agreements is Art.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…

This provision, like Art.7 DSU, is not an applicable law clause. It rather describes the function of dispute settlement within the WTO. In this context, it instructs WTO bodies to interpret the WTO Agreements in accordance with 'customary rules of interpretation

of public international law', that is, primarily, the rules codified in Arts.31-32 VCLT.[416] Thus, this is a provision about interpretation, but it also specifies the rules that must be applied by WTO bodies in this particular context.

A narrow, literal interpretation of Art.3.2 DSU suggests that only the customary principles of interpretation apply to WTO disputes, to the exclusion of other general international law. Indeed, the DSU in all other provisions refers exclusively to the 'covered agreements'. Art.3.2 DSU itself highlights that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements', an instruction repeated in Art.19.2 DSU. It could be argued that by applying extraneous rules, WTO bodies would add further obligations to WTO members under the covered agreements. Thus, the context of Art.3.2 DSU could support 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 exclusively this specific set of customary rules, i.e., the rules on treaty interpretation.[417] This assertion is consistent with the radical, and now largely discredited,[418] view of the WTO Agreements as a so-called 'self-contained system',[419] whose rules alone are sufficient to regulate any dispute arising thereunder.

Nonetheless, this is not a convincing interpretation of the DSU. Even if many

[416] The AB recognised the customary character of Art.31 VCLT and thus, its relevance under Art.3.2 DSU in *US-Gasoline(ABR),* 16-17. WTO case law consistently reaffirms this ever since. For the customary character of Art.32 VCLT and the application of Arts.31-32 VCLT in a holistic fashion see *US-Stainless Steel-Mexico(ABR)* [61-62]; *US-Continued-Zeroing(ABR)* [268].

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

[418] Bossche and Zdouc (n 387) 66.

[419] 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.

negotiators, often economists and trade diplomats,[420] 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 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.[421] *Korea-Procurement(PR)*, addressing the arguments in favour of a restrictive reading of Art.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.[422]

Indeed, as suggested by its context, the express reference in Art.3.2 DSU to the customary rules on treaty interpretation was included *ex abundante cautela*[423] to ensure that WTO bodies always use the same set of rules to interpret ('clarify') the WTO Agreements. Art.3.2 reiterates the need for a principled interpretation under the holistic test of Arts.31-32 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'.[424] Thus, it is a word of caution

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

[421] Pauwelyn, 'How Far Can We Go' (n 32) 538. See also Kuijper (n 419) 228. Kuijper argues that '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'.

[422] *Korea-Procurement(PR)* [7.96, n 753]. The Panel report was not appealed.

[423] Pauwelyn, 'How Far Can We Go' (n 32) 541.

[424] See *Chile-Alcohol(ABR)* [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

against judicial activism.[425] It does not aim to address the issue of applicable law.

But even if we conclude that Art.3.2 DSU does not imply an exclusion of other rules of public international law, the question remains: *which* other rules may be applied in the context of WTO disputes? *Korea-Procurement(PR)* 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.[426] 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.'[427] This approach is reminiscent of the general 'presumption against normative conflict' in international law.[428] Indeed, in international law, the absence of explicit derogation must be regarded as a continuation or implicit acceptance of existing customary rules.[429] As the 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.[430]

However, this presumption does not imply that *all* customary rules are directly applicable

correct interpretation and application of provisions of the covered agreements'.

[425] Bossche and Zdouc (n 387) 190.

[426] *Korea-Procurement(PR)* [7.96].

[427] ibid.

[428] See analysis in (n 276-284).

[429] In the WTO context see Pauwelyn, 'How Far Can We Go' (n 32) 541 and citations therein.

[430] *Georges Pinson* p.422. Translates as follows: 'Every international convention must be deemed tacitly to refer to the common international law for all the questions which it does not itself resolve in express terms and in a different way.'

in the context of a WTO dispute, simply because the WTO Agreements do not explicitly derogate from them. It, rather, 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. This principle of harmonious interpretation or systemic integration is reflected in Art.31(3)(c) VCLT.[431] Admittedly, the line between directly applying a rule and taking it into consideration under Art.31(3)(c) VCLT in interpreting the text of an applicable treaty is often blurred.[432] However, it is important to distinguish between interpretation and application in this context. The use of Art.31(3)(c) VCLT requires the existence of a textual foothold for the consideration of a rule external to the treaty, whereas a rule directly applicable to the dispute may 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.[433]

In view of the above, this section 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 proper,[434] including, most prominently, the law on State responsibility are directly applicable, in their own name, to WTO disputes. We have already seen the special place of these rules in international adjudication in Chapter II. Their application takes place as part of the adjudicative body's

[431] See analysis in (n 276-280).

[432] E.g., the double reference to *Georges Pinson* in Fragmentation Report [179, 414] both in the context of the application of general international law to 'self-contained (special) regimes' and in the context of Art.31(3)(c) VCLT.

[433] Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31, 51.

[434] See definition in (n 31-33).

chain of reasoning: they assist in reaching a final verdict on whether the substantive rules in question apply, whether they have been breached, and what are the consequences of such breach.[435] The limited jurisdiction of an adjudicative body does not prevent it from addressing such rules and making relevant incidental findings, as such findings do not constitute independent verdicts. The final ruling is always one that addresses the main claim(s) brought by the parties in accordance with applicable jurisdictional rules. In view of this, WTO bodies, as further demonstrated below, may have recourse to general international law in the exercise of their inherent powers, to the extent that it is necessary to properly exercise their function, and to the extent that they are not displaced by the text of the WTO Agreements.[436]

WTO law includes not only primary obligations but also secondary rules on State responsibility, which constitute *lex specialis* to the relevant rules of general international law.[437] It indicates itself the consequences of its breach and the means by which the ensuing responsibility is implemented.[438] Due to this special feature, 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.[439] Similar to

[435] See analysis in (n 31-33).

[436] Similarly, Mitchell and Heaton (n 31).

[437] E.g., 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 WTO law; Art.22 DSU provides a special mechanism of compensation and suspension of concessions as temporary measures in cases of non-compliance with DSB rulings within reasonable time.

[438] Riphagen, 'Second Report' [58-59].

[439] Gomula, 'Responsibility and the World Trade Organization' in Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 791.

diplomatic law, discussed in the previous chapter,[440] WTO law is not a self-contained regime proper. The prevailing view is that it constitutes a specialised sub-system of public international law,[441] which includes several 'treaty-based derogations' from the rules of general international law.[442] 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 of general international law separately.

In sum, the analysis in this sub-section suggests that general international law is applicable to WTO disputes, subject to the application of the *lex specialis* principle in the process of interpreting the WTO Agreements. The following sub-section provides an overview of relevant WTO case law, which provides further evidence in support of this direct, albeit residual, applicability of the rules of general international law on State responsibility to WTO disputes.

b. General international law on State responsibility in WTO case law

This sub-section provides an overview of WTO reports which engage with the rules on State responsibility under general international law and discusses when and how WTO bodies resort to these rules. It identifies WTO reports which make explicit reference to the rules of general international law on State responsibility, as reflected in ARSIWA.

[440] See analysis in Ch II(C)(1).

[441] Marceau (n 397) 87. See also Pauwelyn, 'How Far Can We Go' (n 32) 538 characterising WTO law as 'just' a branch of international law much like environmental or human rights law.

[442] Arangio-Ruiz, 'Fourth Report' [111] by reference to the commentary of draft Art.2 in Riphagen, 'Sixth Report' p.4-5.

References to the ARSIWA were used 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 WTO bodies. Thus, the list of relevant reports below 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 comprises reports that directly apply a rule of general international law as codified in ARSIWA to rule on a subject-matter that is *not* regulated by the WTO Agreements. The second group comprises reports that take the ARSIWA into consideration in interpreting WTO provisions.

Regarding the first group, there are several instances where panels had direct recourse to rules of general international law regarding legal interest and attribution. *EC-Bananas(PR)*, 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.[443] Accordingly, it found that the US had a legal interest in that case, although US banana production and exports were minimal. In support of this conclusion, which echoes the general international law rules on legal interest and the right to invoke international responsibility,[444] the Panel referred in a footnote to Draft Art.40 (now Arts.42 and 48

[443] *EC-Bananas(PR)* [7.50].

[444] Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 EJIL 763, 777.

ARSIWA).[445] *Turkey-Textile(PR)* directly applied the rules of general international law on attribution of conduct in cases of joint organs.[446] Turkey argued that it could not be held liable individually for the challenged import restrictions as they were implemented by the Turkey-EC customs union as a separate legal entity. The Panel, by reference to the ILC commentary to Draft Art.27 (now Art.16 ARSIWA), found 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'.[447] Similarly, *Korea-Procurement(PR)* found that statements of the Ministry of Commerce during the negotiations for Korea's accession to the GPA, were on behalf of the whole of the Korean government, in accordance with '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'.[448] The Panel referred on this point to Draft Arts.5-6 (now Art.4 ARSIWA).[449] Similarly, in *Australia-Salmon(PR),* 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' and cited Draft Art.6 (now Art.4).[450] A few years later, and after the final adoption of the ARSIWA, *US-*

[445] *EC-Bananas(PR)* [n 361].

[446] See Part I, Chapter IV ARSIWA, commentary [2]; Art.47 ARSIWA, commentary [2].

[447] *Turkey-Textile(PR)* [9.42-9.43, n276].

[448] *Korea-Procurement(PR)* [6.5]. Similar wording was adopted by the Panel, many years later, in *US-Paper(PR)* [7.179,n334], stipulating 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' and citing Arts.4 and 7 ARSIWA with further references to the ILC commentary.

[449] *Korea-Procurement(PR)* [n683].

[450] *Australia-Salmon(PR-21.5)* [7.12, n146].

Gambling(PR) explicitly recognised the customary character of Art.4 ARSIWA,[451] and applied it to prove that official pronouncements of the US International Trade Commission, an agency of the US federal government, in an area where it has delegated powers, are attributable to the US.[452] An explicit recognition of the customary character of Art.4 ARSIWA is also found in *Thailand-Cigarettes(PR)*, which reaffirmed the principle that WTO members are responsible for actions of their government officials.[453]

In the instances above, the Panels resort to well-established rules of general international law 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.

Regarding the second group of reports, there are various cases where general international law, as reflected in ARSIWA, was taken into consideration by WTO bodies in interpreting relevant WTO provisions.

Most reports refer to the general rules on attribution of conduct in interpreting more specific WTO provisions, which explicitly or implicitly regulate this matter. In *Canada-Dairy(PR)*, the Panel referred in a footnote to Draft Art.7.2 (now Art.5 ARSIWA) to support its finding that the Canadian provincial marketing boards were

[451] *US-Gambling(PR)* [6.128].

[452] *US-Gambling(PR)* [6.130].

[453] *Thailand-Cigarettes(PR-21.5)* [7.636]; further reference to Art.4 in [7.771, n1654] and *Thailand-Cigarettes(PR)* [7120, n533].

'agencies' of the Canadian government under Art.9.1(a) Agriculture Agreement.[454] Similarly, *US-DRAMS(ABR)* referred to Art.8 ARSIWA on attribution of private conduct to a government to support its interpretation of the terms 'entrusts' and 'directs' in Art.1.1(a)(1)(iv) SCM. [455] Most recently, *Saudi-IPR(PR)* made explicit reference to Arts.4, 8 and 11 ARSIWA in the context of assessing whether the challenged actions were 'measures *taken by* [a WTO] Member' under Art.3.3 DSU. The Panel confirmed that 'the responsibility of Members under international 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.[456] There are several more instances where the general rules on attribution of conduct, especially the rule enshrined in Art.4 ARSIWA, have been taken into consideration in interpreting the WTO Agreements.[457] Most of the times, WTO bodies cite the ARSIWA in the footnotes of their reports to support their findings and do

[454] *Canada-Dairy(PR)* [n427].

[455] *US-DRAMS(ABR)* [n179, n188].

[456] *Saudi-IPR(PR)* [7.48-7.51, 7.161].

[457] *EC-Customs(PR)* [4.706-4.708, 7.552, n932] supporting the finding that authorities of member States act as organs of the EC when they review and correct administrative action taken pursuant to EC customs law; *Brazil-Tyres(PR)* [7.305, n1480] supporting the finding that Brazilian domestic court rulings did not exonerate Brazil from its obligation to comply with the requirements of Art.XX GATT; *US-Zeroing-Japan(ABR-21.5)* [183, n466] 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"; *US-COOL(PR)* [7.16, n41] supporting the finding that acts or omissions of State organs, including the executive branch, are attributable to the State. See also *Canada-Renewable(PR)* [n 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', mirroring Art.4 ARSIWA.

not specify the legal basis upon they are taken into consideration. Nonetheless, they imply that relevant terms in the WTO Agreements are interpreted in light of ARSIWA. In other words, they confirm the relevance of the general international law on State responsibility to the interpretation of the WTO Agreements.

The most extensive discussion on the relevance of the rules of attribution reflected in ARSIWA to the interpretation of the WTO Agreements and on the methodology to be followed in the context of this exercise is found in *US-Anti-Dumping-China(ABR).* The AB examined and ultimately reversed the earlier findings of the Panel, which had categorically rejected China's argument that Art.5 ARSIWA is a 'relevant rule of international law' under Art.31(3)(c) VCLT and thus pertinent to the interpretation of the term 'any public body' in Art.1.1(a)1 SCM. The Panel had found, firstly, that citations to the ARSIWA in previous WTO reports did not indicate that these were taken into consideration under Art.31(3)(c) VCLT but were rather used as 'conceptual guidance…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'.[458] Secondly, it had opined that the provisions of ARSIWA are not 'relevant' to the interpretation of the term in question in Art.1.1 SCM because it 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 Art.55 ARSIWA.[459]

[458] *US-Anti-Dumping-China(PR)* [8.87] (emphasis added).

[459] *US-Anti-Dumping-China(PR)* [8.90].

The AB in *US-Anti-Dumping-China(ABR)* noted, firstly, 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.'[460] It then confirmed that the rules of attribution reflected in ARSIWA concern the same subject-matter as certain parts of Art.1.1 SCM and are thus 'relevant' in the sense of Art.31(3)(c) VCLT.[461] In response to the Panel's findings, it clarified that Art.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.[462] As to the Panel's finding that WTO bodies have used the ARSIWA as 'conceptual guidance', the AB disagreed and opined that past case law referred to the rules enshrined in ARSIWA in the sense of Art.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'.[463] Thus, it seems that the AB treats the, rather vague, references to ARSIWA in previous reports, such as the ones in *Canada-Dairy(PR)* and *US-DRAMS(ABR)* discussed above, as instances of Art.31(3)(c) VCLT interpretation of the WTO Agreements.

The AB also addressed the Panel's finding that the ARSIWA rules of attribution are, in any event, superseded by Art.1.1 SCM pursuant to Art.55 ARSIWA and the *lex specialis* principle. The AB clarified that the Panel misconceived the operation of Art.55 ARSIWA. In the case at hand there was no doubt that the applicable provision was

[460] *US-Anti-Dumping-China(ABR)* [308] and citations therein.

[461] ibid.

[462] *US-Anti-Dumping-China(ABR)* [312].

[463] *US-Anti-Dumping-China(ABR)* [313].

Art.1.1 SCM.[464] 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 Art.1.1(a)(1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements.'[465] According to the AB, Art.55 ARSIWA 'does not speak to the issue of how the latter should be done'.[466]

There are also several cases that refer to Arts.49-53 ARSIWA, on countermeasures and their requirements. *US-Yarn(ABR)* referred to Art.51 ARSIWA and the requirement of proportionality, to support its conclusions that, for the purposes of imposing a safeguard restraint under Art.6.4 ATC, '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'.[467] 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'.[468] The AB here not only uses Art.51 ARSIWA in interpreting the WTO provision in question but also reaffirms the general presumption against conflict in international law,[469] by suggesting that WTO provisions should be interpreted in harmony with applicable rules of general international law, save only in cases of express derogation. A few months later, *US-Pipe(ABR)* referred again to Art.51

[464] *US-Anti-Dumping-China(ABR)* [316].

[465] ibid.

[466] ibid.

[467] *US-Yarn(ABR)* [119-120].

[468] *US-Yarn(ABR)* [120].

[469] n 426-430.

ARSIWA, in the context of interpreting Art.5.1 of the Safeguards Agreement. Recognising expressly its customary character, it used this rule to support the conclusion that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports.[470]

Similarly, the arbitrators in *US-FSC(22.6)* and *US-Cotton(22.6)* interpreted the term 'countermeasure' in Arts.4 and 7 SCM in view of Arts.49 and 51 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.'[471] 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).[472] 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'.[473] 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'.[474]

c. Evaluation of the case law: the relevance of general international law to WTO

[470] *US-Pipe(ABR)* [259-260].

[471] *US-Cotton(22.6)* [4.31].

[472] *US-FSC(22.6)* [5.60]; *US-Cotton(22.6)* [4.30-4.32].

[473] *US-FSC(22.6)* [5.58].

[474] *US-Cotton(22.6)* [4.31, n 69].

disputes

The analysis of the relevant case law 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 customary rules of treaty interpretation and the *lex specialis* principle.

In the examples of *EC-Bananas*, *Turkey-Textile*, *Korea-Procurement*, *US-Paper*, *Australia-Salmon*, *US-Gambling* and *Thailand-Cigarettes*, we see the direct application of general international law as codified in ARSIWA. WTO bodies had recourse to general international law to rule on specific legal issues not explicitly regulated by the WTO Agreements. As stipulated in *Korea-Procurement*, there is no reason to assume that the WTO Agreements intend to deviate from the general 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, WTO bodies 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 Complainant's legal interest and the attribution of conduct to the Respondent. The WTO bodies would not be able to decide the case without first resolving these issues as part of their reasoning.

In a similar fashion, there are several instances where WTO bodies applied rules on the law of treaties[475] and rules on international dispute settlement, such as on the

[475] E.g., *Korea-Procurement(PR)* [7.123-7.126] on error in treaty formation; *Brazil-Coconut(ABR)* p.15, *EC- Bananas(ABR)* [235-237] and *Canada-Patent(ABR)* [71-74] on issues of non-retroactivity.

treatment of municipal law,[476] the burden of proof,[477] issues of due process[478] and judicial economy.[479] We have also seen the application of general principles of international law such as good faith and *abus de droit*,[480] *estoppel* and acquiescence.[481] In these instances, such external rules are used by WTO bodies as gap-fillers,[482] implicitly recognising their pervasive nature,[483] i.e., their general applicability in international law. They suggest that WTO bodies have the inherent power[484] to resort to such general rules to decide on matters before them that are indispensable to discharge their judicial function and exercise their jurisdiction over the case, when such matters are not regulated by the legal text establishing their jurisdiction.

When a WTO provision regulates the subject-matter at hand, as explained in *US-Anti-Dumping-China(ABR)*, there is no doubt that the applicable rule is the one enshrined therein. As confirmed in Art.55 ARSIWA, the rule agreed upon by the parties takes precedence over rules of general international law. Nonetheless, Art.31(3)(c) VCLT

[476] *India-Patents(ABR)* [65].

[477] *US-Wool(ABR)* p.14.

[478] *Chile-Price(ABR)* [144].

[479] *Australia-Salmon(ABR)* [223].

[480] *US-Shrimp(ABR)* [158]; *US-FSC(ABR)* [166]; *Brazil-Tyres(ABR)* [224].

[481] *Guatemala-Cement(PR)* [8.24]; *EC-Asbestos(PR)* [8.60].

[482] Trachtman (n 386) 341; Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2004) 53 ICLQ 861, 874; Gourgourinis, 'Interpretation/Application' (n 433) 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 Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' (1958) reproduced in Lauterpacht (ed), Hersch Lauterpacht, International Law Collected Papers, vol 2 (CUP 1975) 221–22; Weil, 'The Court Cannot Conclude Definitively...Non Liquet Revisited' (1998) 36 ColumJTransnatlL 109. *Cf* Lowe, 'The Limits of the Law' (2016) 379 RdC 21 arguing that international law 'does not and cannot provide a complete regime'.

[483] *US-FSC(ABR)* [166].

[484] n 412-415.

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"'.[485] As pronounced by the AB already in its very first report, Art.3.2 DSU directs WTO bodies 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'.[486] In other words, the AB acknowledged that the WTO is not a 'hermetically closed regime impermeable to other rules of international law',[487] but was rather created within, and under the influence of, the wider corpus of public international law. It is in this vein that WTO bodies have, in the cases above, taken into consideration the relevant rules of general international law on State responsibility in interpreting the WTO provisions.

As confirmed in *US-Anti-Dumping-China(ABR)*, even when WTO bodies have cited the rules reflected in the ARSIWA without offering a legal explanation for such reference, in essence, they were taking them into consideration in accordance with Art.31(3)(c) VCLT. The apparent reluctance of WTO bodies to use clear language and specify the legal basis for taking into consideration general international law can be attributed to three factors. First, the general scepticism in the early WTO years towards general international law and the arguments regarding the alleged self-contained nature of the regime have seeped through the case law. WTO bodies seem to avoid as much as

[485] Bossche and Zdouc (n 387) 190.

[486] *US-Gasoline(ABR)* p.17.

[487] Marceau (n 397) 95.

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, Panellists and AB members are not required to have expertise in public international law,[488] which may also justify their disinclination to proceed to an in-depth analysis of issues of general international law. Secondly, as far as the AB is concerned, it seems to follow a 'flexible jurisprudential style', adopting reasoning that often leaves certain key legal questions open to multiple interpretations.[489] This is arguably not the result of error or omission but rather a calculated choice 'specifically designed to maintain…flexibility and freedom to respond appropriately as the context changes'.[490] Thirdly, WTO bodies are, understandably, reluctant to make findings on the status of certain international legal norms. The clear use of Art.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.[491] In the case of ARSIWA, this would mean that WTO bodies would have to first establish the customary character of the rule under consideration, which is indeed a daunting task.[492] WTO bodies in the

[488] Arts.8(4), 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 MacKenzie and others, *Manual on International Courts and Tribunals* (2nd ed, OUP 2010) 78, n 30; Hughes (n 412) 277; Petersmann, 'From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System' (1998) 1 JIEL 175, 193; 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. Some renowned public international lawyers have served in these positions.

[489] Lang, 'The Judicial Sensibility of the WTO Appellate Body' (2016) 27 EJIL 1095, 1101–1102.

[490] Lang (n 489) 1101–1102.

[491] Expressly in *EC-Biotech(PR)* [7.68]. Note, however, the more ambiguous findings in *EC-Aircraft(ABR)* [845] and *US-Anti-Dumping-China(ABR)* [308] as well as instances of use of various international treaties in determining a term's ordinary meaning, e.g., *US-Shrimp(ABR)* [130-131] and *US-FSC(ABR-21.5)* [141-145]. *EC-Biotech*, which has not been reversed or discredited in WTO practice, has been subject to criticism, e.g., Fragmentation Report [471].

[492] *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, e.g.,

reports above generally avoided pronouncing on the customary character of the ARSIWA, with few exceptions. However, through this methodological ambiguity, they perpetuate a lack of clarity and legal certainty regarding the role of general international law in WTO disputes, which can potentially undermine the security and predictability of the system, with the protection of which they have been entrusted. This lack of clarity is especially evident in the case of defences, the consequences of which are demonstrated further in the following sections.

Despite the apparent disinclination to engage with issues of general international law and the lack of clear methodology when they do so, WTO bodies are clearly instructed under Art.3.2 DSU to use the 'customary rules of interpretation of public international law' in interpreting the WTO Agreements. Art.31 VCLT establishes an obligation[493] to take into consideration relevant rules of international law applicable between the parties, amongst the rest of the interpretative means enshrined therein. China in its submissions in *US-Anti-Dumping-China(PR)* argued that 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'.[494] The Panel underlined in a critical fashion the term 'must' used by China, to suggest the existence of precisely such obligation. But the language of Art.31 VCLT leaves no doubt: 'there *shall* be taken into

Corfu Channel(Merits) p.28; *Arrest Warrant* [51, 58]; *Armed Activities* [162]. Very often, the ICJ refers to the work of the ILC as a 'shortcut' in establishing the customary nature of rules, e.g., *Gabčíkovo-Nagymaros* [51]; *Diallo*(Objections) [39]; *Genocide-Bosnia* [385,401]; *Wall* [140]. On this lack of methodology in identifying custom see Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 434; Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' in Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011).

[493] See analysis in (n 274-275).

[494] *US-Anti-Dumping-China(PR)* [8.87] (emphasis in the original).

account, together with the context…any relevant rules of international law applicable in the relations between the parties.'[495] 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.[496] Art.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 WTO bodies in interpreting relevant WTO provisions.

But Art.31(3)(c) VCLT is only one of several means for the interpretation of a term in the WTO Agreements. In accordance with Art.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 Arts.31 (and Art.32 VCLT where necessary), then the specific arrangement reflected in WTO law 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.[497] But the identification of such conflict is an interpretative exercise which still requires examination of the relevant general rule.

Based on the conclusions above, it seems that, despite the apparent reluctance of the WTO bodies to refer to general defences, there is no legal reason to consider them as *a priori* non-applicable to WTO disputes. The evidence above suggests that the general international law on State responsibility remains residually applicable and informs the scope and content of WTO provisions. Thus, the general defences under the law on State

[495] Art.31(3)(c) VCLT (emphasis added).

[496] See China's arguments in *US-Anti-Dumping-China(PR)* [8.87]. *Cf US-Anti-Dumping-China(ABR)* [313] and (n 463).

[497] See analysis in (n 215-217).

responsibility may be applied and taken into consideration by WTO bodies in the same manner as the rest of the rules of general international law. The following sections examine the interplay between general defences and the WTO Agreements. Section C discusses the approach of the WTO bodies to the interpretation and application of the WTO general and security exceptions. Section D evaluates this approach and examines the relationship of these provisions with the general defences of self-defence, necessity, and countermeasures, in view of the customary rules on treaty interpretation and the methodology outlined above.

C. THE WTO EXCEPTION CLAUSES

The WTO Agreements include a number of exceptions.[498] This thesis focuses on WTO exception clauses of 'general character',[499] i.e., whose scope extends to all substantive obligations under the same WTO agreement.[500] These are the exceptions in Arts.XX GATT and XIV GATS ('general exceptions') and XXI GATT, XIV *bis* GATS and 73 TRIPS ('security exceptions').[501] The general and security exceptions in the GATT, GATS and TRIPS are largely identical with only few differences in their respective lists of objectives. This chapter uses Arts.XX and XXI GATT as examples for the purposes of the analysis.

[498] See definition in (n 50). Examples are Arts.XXIV GATT and V GATS on regional integration or Art.XIX GATT on economic emergency.

[499] Mavroidis, *The Regulation of International Trade: GATT* (MIT Press 2016) 413.

[500] *US-Gasoline(ABR)* p.24. Or even in other WTO agreements, e.g., Art.XX GATT also extends to TRIMS (Art.3 TRIMS), TFA (Art.24.7 TFA).

[501] For an overview of the WTO exceptions see Bossche and Zdouc (n 387) 543ff; Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 548ff,613ff; Ayres and Mitchell, 'General and Security Exceptions Under the GATT and the GATS' in Carr, Bhuiyan, and Alam (eds), *International Trade Law and WTO* (Federation Press 2012).

Art.XX GATT reads as follows:

> 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:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health; …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …
>
> (j) essential to the acquisition or distribution of products in general or local short supply …[502]

Art.XXI GATT – the security exceptions' clause – provides that:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Art.XX GATT has been examined several times by both the WTO DSS and its predecessor, the GATT 1947 panels. There are also a few reports regarding its GATS

[502] The article lists more policy objectives (a to j), here omitted due to space limitations.

equivalent, Art.XIV, which is interpreted in an analogous manner.[503] In contrast, until recently, Art.XXI GATT and its GATS and TRIPS equivalent had been explicitly invoked very few times.[504] The 2019 *Russia-Transit(PR)* was the first report dealing comprehensively with this matter, followed by a few more reports on this issue in the following years. This section provides an overview of the case law on the WTO general (1) and security exceptions (2) and outlines the criteria for their successful invocation as interpreted by the WTO bodies.

1. The WTO General Exceptions

The WTO general exceptions are characterised as 'limited and conditional exceptions from the substantive obligations contained in…other provisions' of the WTO Agreements.[505] According to the AB, their purpose is to 'enumerate the various categories of government acts, laws or regulations which WTO members may carry out or promulgate in pursuit of differing legitimate State policies or interests outside the realm of trade liberalisation.'[506] The WTO Agreements, as a whole 'reflect the balance struck by WTO Members between trade and non-trade-related concerns.'[507] The general exceptions demonstrate this balance *par excellence*: they provide 'proof of the agreed

[503] See the first case where Art.XIV GATS was discussed, *US-Gambling(PR)* [6.447-6.448] and *US-Gambling(ABR)* [291].

[504] Overview of relevant past practice in Akande and Williams, 'International Adjudication on National Security Issues: What Role for the WTO' (2002) 43 VaJIntlL 365, 373 ff; Schloemann and Ohlhoff, 'Constitutionalization and Dispute Settlement in the WTO: National Security As an Issue of Competence' (1999) 93 AJIL 424, 432; Whitt, 'The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua' (1987) 19 L&Pol in IntlBus 603, 617.

[505] E.g., *US-Section 337(1989)* [5.9]; *US-Shrimp(ABR)* [157].

[506] *US-Gasoline(ABR)* p.17. Similarly, *US-Shrimp(ABR)* [121].

[507] *China-Raw(ABR)* [306]. See also Preamble [1] Marrakesh Agreement; Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2008) 11 JIEL 43, 44.

hierarchy between trade commitments and (national) social preferences' and acknowledge that certain agreed objectives need not 'be set aside in the name of trade liberalization commitments'.[508] In disputes where the WTO general exceptions are invoked, the WTO bodies 'face the difficult task of weighing and balancing the policy objectives and public interests invoked by the responding Member against the interests of trade and economic development of the complaining Member.'[509]

WTO case law on general exceptions is generally consistent. This is partly explained by the identity of the agreements interpreted and applied in all disputes: there are no variations in the wording, context or object and purpose of text under consideration in each dispute. Moreover, the existence of the AB, a standing appellate mechanism –at least until its paralysis in December 2019– facilitated the development of a consistent line of jurisprudence. Although the AB hears appeals in divisions of three, divisions have the obligation to exchange views with other members before finalising their report.[510] This arrangement ensures consistency and coherence in decision making.[511] Moreover, despite the lack of a rule of precedent in the WTO, '[e]nsuring "security and predictability" in the dispute settlement system, as contemplated in Art.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.'[512] This argument 'is a cornerstone of a constitutional society based on rule of law and its implied principle of

[508] Mavroidis (n 499) 415.

[509] Diebold (n 507) 44.

[510] AB-Working Procedures [4(3)].

[511] Mavroidis (n 494) 415.

[512] *US-Stainless Steel-Mexico(ABR)* [160].

legal certainty'[513] and has been largely followed in WTO case law, especially in AB jurisprudence.

The following sub-sections outline the main findings of the WTO adjudicative bodies on the nature and function of the WTO general exceptions (a) and the substantive requirements for their successful invocation (b).

a. The function of the WTO general exceptions

The WTO DSS has maintained a consistent approach to the order of analysis of arguments in disputes where the WTO general exceptions are invoked. The examination of the exceptions is always a 'further and separate' legal test that follows once *prima facie* inconsistency with substantive WTO provisions is established.[514] This two-stage approach,[515] is followed even if it leads to a certain degree of duplication in the analysis, as WTO bodies are 'called upon to analyze a substantive obligation and an affirmative defence, and to apply both to that[same] measure'.[516] This sequence of steps serves the system's security and predictability and allows WTO bodies to clarify the content and regulatory scope of the WTO substantive provisions.[517] Moreover, this approach ensures that they do not engage in hypotheticals or *obiter dicta* as was the case in *Oil Platforms(Merits)* where this order of analysis was reversed and the examination of

[513] Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 JIEL 383, 388.

[514] Indicatively on this issue *US-Gasoline(ABR)* p.22; *US-Shrimp(ABR)* [121]; *US-Gambling(ABR)* [266]; *Thailand-Cigarettes(ABR)* [173].

[515] Similar to *Nicaragua(Merits)* [225].

[516] *Thailand-Cigarettes(ABR)* [173].

[517] Although some consider this duplication redundant, e.g., Henckels (n 218) 575.

defences turned out to be entirely redundant.[518] In the WTO, examination of general exceptions takes place only when necessary for the final determination of the dispute.

This order of analysis is consistent with the characterisation of the WTO general exceptions as 'defences'. WTO bodies consistently use this term to describe the nature of Art.XX GATT.[519] Their analysis on this matter can assist us in understanding the meaning of this characterisation and the function of exception clauses as compared to other treaty provisions of a different nature.

According to *US–Wool(ABR)*, Art.XX GATT is a 'limited exception from obligations under certain other provisions of the GATT 1994, not [a] positive rule establishing obligations in [itself]. [It is] in the nature of [an] affirmative defence.'[520] We see here the contrast between an 'exception' or 'affirmative defence' and a 'positive rule establishing an obligation'. The terms 'exception' and 'affirmative defence' are both used in WTO case law to describe Art.XX, often interchangeably. As confirmed in case law, the two concepts are not identical but 'an exception can often be invoked as an affirmative defence'.[521]

EC-Tariff(PR) drew the same distinction. It explained that 'it is a common understanding that "exception" is a relative concept, in relation to the main rules of treaties, that is, those positive rules that set out obligations'.[522] It further suggested that

[518] See analysis in (n 364-371).

[519] E.g., *Indonesia-Licensing(ABR)* [5.51]; *EC-Asbestos(PR)* [8.177-8.178]; *Argentina-Leather(PR)* [11.289]; *Mexico-Drinks(PR)* [8.166]; *US-Customs(PR)* [6.13]; *US-Shrimp(PR)* [7.30]; *Thailand-Cigarettes(ABR)* [173]. Similarly, for Art.XIV GATS see *US-Gambling(ABR)* [309].

[520] *US-Wool(ABR)* pp.15-16.

[521] *Dominican Republic-Cigarettes(PR)* [7.131]; similarly, *EC-Bananas(PR-21.5)* [5.275].

[522] *EC-Tariff(PR)* [7.32, 7.35].

there are 'effectively…two criteria for determining whether a rule constitutes an 'exception': first, it must not be a rule establishing legal obligations in itself; and second, it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations.'[523] The Panel further explained the function of exceptions by comparing them to other provisions in the WTO Agreements that perform a different function. For example, according to the Panel, Art.27 SCM, 'clearly excludes the application to developing countries of the prohibition on export subsidies' in Art.3.1(a) SCM.[524] On the contrary, an exception 'does not exclude the application of [the positive rule] but prevails over [it] to the extent of a conflict between the two provisions'.[525] The difference between the two types of provisions, the first being a 'carve-out' and the second an 'exception' or 'defence' lies primarily in the latter's limited and conditional character. The exception does not apply immediately and horizontally to all WTO members. It rather exempts members from complying with an obligation on a case-by-case basis, provided that their action meets the prescribed conditions[526] and for as long as they meet the conditions.[527] On the other hand, a carve-out excludes the application of the positive rule to the conduct in question.[528] There is no *prima facie* finding of inconsistency. The carve-out applies directly to all cases that fall within its scope and, as

[523] ibid.

[524] *EC-Tariff(PR)* [7.48]. Art.27 SCM provides that ' [t]he prohibition of paragraph 1(a) of Article 3 *shall not apply to*...(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement…' (emphasis added).

[525] *EC-Tariff(PR)* [7.49].

[526] Implicitly in *EC-Tariff(ABR)* [90].

[527] The temporary character of the exemption is often implicit in the substantive requirements of the exception clause, e.g., a measure no longer meets the requirements of necessity in Arts.XX(a),(b),(d),(i) once the circumstances invoked cease to exist.

[528] *EC-Tariff(PR)* [7.48-7.50]. See *Brazil-Aircraft(ABR)* [139-141]; *EC-Sardines(ABR)* [275]; *EC-Hormones(ABR)* [104].

a matter of order, its applicability needs to be examined first, before any further examination of the actions in question in light of substantive rules. The AB has also characterised certain carve-outs as 'autonomous rights'.[529] The key word here is the term 'autonomous'. It implies that the carve-out disengages completely the State from the treaty obligation and establishes a different rule that applies autonomously to such cases or simply suggests that the cases covered by the carve-out are not regulated *at all* under the treaty or provision(s) in question. In other words, the State is entitled to the non-application of the treaty or the specific treaty provision(s).[530] In this sense, the examination of the applicability of a carve-out by a Panel is a threshold issue: it does not affect its jurisdiction to hear the case, but it needs to be determined before it proceeds to examine the substantive provisions invoked by the Complainant.

WTO reports put emphasis primarily on the implications of this distinction for the burden of proof. The Complainant, to establish a *prima facie* case,[531] needs to prove that the Respondent has acted inconsistently with an *applicable* rule. In other words, it needs to show, in the first place, that the acts in question are within the scope of the rule invoked, which is circumscribed by the carve-out.[532] In the case of a defence, the burden of proving its applicability rests with the Respondent. The Respondent needs to prove that despite the *prima facie* inconsistency with a certain rule *applicable* to its conduct, another overriding rule is *also* applicable in the case at hand and takes precedence, thus

[529] *EC-Hormones(ABR)* [104, 172].

[530] *Brazil-Aircraft(ABR)* [139].

[531] According to the AB, a *prima facie* case is one which, 'in the absence of effective refutation by the defending party, requires a Panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.', *US-Wool(ABR)* p.14; *EC-Hormones(ABR)* [104].

[532] *EC-Tariff(ABR)* [88].

justifying the acts under consideration.

But the shift in the burden of proof is not the only implication of the distinction. The characterisation of a clause as an affirmative defence implies a degree of sameness with general defences: they perform the same function and may be invoked by a Respondent in the same fashion.[533] There is no difference in their nature or analytic character: they both become pertinent as affirmative defences once *prima facie* inconsistency with an international obligation is established.[534] This is legally significant for two reasons: first, when the exception clause regulates the same subject-matter as a general defence, the general defence is a 'relevant rule of international law' and must be taken into consideration in its interpretation; and second, to the extent that the two rules are in genuine conflict, the general defence is displaced by the exception clause (*lex specialis*).

b. Substantive requirements for successful invocation of the WTO general exceptions

Once there is a finding of *prima facie* inconsistency with a substantive obligation, WTO bodies proceed to the second stage of analysis, which is the examination of the affirmative defence. At this stage, they have established a 'two-tiered test'. As explained in *US-Gasoline(ABR)*:

> In order that the justifying protection of Art.XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) - listed under Art.XX; it must also satisfy the requirements imposed by the opening clauses of Art.XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [one of the

[533] See analysis in (n 49 and 215-222),

[534] *Contra*, Henckels (n 218). Henckels argues that WTO general and security exceptions are 'permissions that operate to limit the scope of the commands in the relevant agreements, rather as defences invoked to justify otherwise unlawful conduct.'

> subparagraphs of Art.XX]; second, further appraisal of the same measure under the introductory clauses of Art.XX.[535]

The function of the two-tiered test is to distinguish between legitimate regulatory choices and excuses for protectionism or discriminatory treatment. Whilst the measure's 'specific contents' are to be appraised under the subparagraphs of the provision, the *chapeau* is concerned with 'the manner in which that measure is applied'.[536] In other words, the subparagraphs set the specific conditions under which the right to adopt measures for non-trade reasons may be exercised and the *chapeau*, which constitutes an expression of the general principle of good faith,[537] establishes further criteria to prevent the abuse or misuse of such right.[538] According to the AB '[t]he standards established in the chapeau are…necessarily broad in scope and reach…When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies'.[539] This is also why the particular order of analysis of the two tiers 'reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Art.XX.'[540]

The first step of the two-tiered test, i.e., the provisional justification under one of

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[535] *US-Gasoline(ABR)* p.22.

[536] *US-Gasoline(ABR)* p.22. *contra*, Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 AJIL 95 criticising this division .

[537] *US-Shrimp(ABR)* [158].

[538] ibid; *US-Gasoline(ABR)* p.22 by reference to the drafting history of Art.XX. See, also, Bartels, 'Chapeau' (n 536) 102 where it is suggested that the abuse of rights doctrine permeates the entirety of the general exceptions' provision, not just the chapeau.

[539] *US-Shrimp(ABR)* [119-120].

[540] *US-Shrimp(ABR)* [119-120]. *Cf Indonesia-Licensing(ABR)* [5.100-5.101]: ' [d]epending on the particular circumstances…a Panel that deviates from the sequence of analysis under Art.XX might not necessarily…commit a reversible legal error… However, following the normal sequence of analysis…provides Panels with the necessary tools to assess the…chapeau.'

the subparagraphs, further requires *two* separate sub-steps. The first sub-step is 'an initial, threshold examination…to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection' of one of the exhaustively enumerated objectives.[541] The Respondent should present evidence that the measure at issue is 'designed' to serve the particular objective.[542] This does not necessarily require express reference to said objective in the relevant measure.[543] The examination of a measure's design includes its content, structure and expected operation[544] and is not 'a particularly demanding step' in the analysis of Art.XX.[545] The threshold is relatively low as the measure should be 'not incapable of' protecting/securing/contributing to the interest invoked.[546]

By contrast, the second sub-step 'entails a more in-depth, holistic analysis' of the relationship between the measure and the stated objective.[547] The Respondent must demonstrate a specific kind or degree of connection between the measure and the objective invoked.[548] This required nexus differs among the subparagraphs of Art.XX. The measure should be 'necessary' for the protection of the objectives in paragraphs (a), (b), (d) and (i); 'essential' to the objective in paragraph (j); 'relating to' the objectives in

[541] *Colombia-Textiles(ABR)* [5.68]. The exhaustive nature of the list was confirmed in *US-Gasoline(ABR)*, p.22.

[542] E.g., *US-Gasoline(PR)* [6.20]; *EC-Asbestos(PR)* [8.184-8.186]; *EC-Tariffs(PR)* [7.198-7.199]; *Colombia-Textiles(ABR)* [5.67].

[543] *Colombia-Textiles(ABR)* [5.69].

[544] ibid. See similarly, *Japan-Alcohol(ABR)* p.29, in the context of national treatment.

[545] *Colombia-Textiles(ABR)* [5.70].

[546] *Colombia-Textiles(ABR)* [5.68]; *Brazil-Taxation(PR)* [7.570]; *India-Solar(ABR)* [5.58].

[547] ibid.

[548] *US-Gasoline(ABR)* pp.17-18.

paragraphs (c), (e) and (g); imposed 'for the protection of' certain interests in paragraph (f) and 'in pursuance of' certain interests in paragraph (h). This asymmetry in the required nexus among different subparagraphs reveals a calculated choice of the drafters, as they expressly established different conditions depending on the objective that the State invokes to justify its measure.

The AB, interpreting the term 'necessary' in accordance with Art.31 VCLT, has explained that, in a continuum ranging from 'indispensable' to 'making a contribution to', a 'necessary' measure is 'located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to"'.[549] Measures that are 'indispensable or of absolute necessity or inevitable' certainly fulfil the necessity requirement, but other measures may also fall within its ambit[550] if their 'contribution to the achievement of the objective [is] material, not merely marginal or insignificant'.[551] According to the AB, there is no 'generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Art.XX'.[552] The greater the contribution, the more easily a measure might be considered as necessary.[553] Actual contribution is important in this assessment, but a Panel may also conclude that a measure is necessary on the basis of its aptness to produce material contribution, based on available evidence.[554] Besides, a measure's contribution to the

[549] *Korea-Beef(ABR)* [160-161].

[550] ibid.

[551] *Brazil-Tyres(ABR)* [210].

[552] *EC-Seal(ABR)* [5.213-5.214]; *Colombia-Textiles(ABR)* [5.72].

[553] *Korea-Beef(ABR)* [163]; *China-Publications(ABR)* [251].

[554] *Brazil-Tyres(ABR)* [151].

objective is only one of the components in the necessity calculus.[555] According to case law, the analysis involves 'a process of "weighing and balancing" a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure.'[556] In this context, WTO bodies also examine the availability of less trade-restrictive alternative measures to achieve the desired objective.[557] Such alternatives must be 'reasonably available' and not 'merely theoretical in nature', i.e., the Respondent must be actually capable of taking them, without imposing an undue burden, such as prohibitive costs or substantial technical difficulties.[558]

The term 'essential', in paragraph (j), defined according to a dictionary definition as 'absolutely indispensable or necessary' suggests that it 'is located at least as close to the 'indispensable' end of the continuum as the word 'necessary''.[559] On the other hand, the term 'relating to', in (c), (e) and (g) is 'more flexible textually than the "necessity" requirement'.[560] Although in *US-Gasoline* it was interpreted as requiring that the measure in question is 'primarily aimed at'[561] the stated objective, in later jurisprudence, it seems that the test to meet the requirement became –implicitly– a bit less strict. According to the AB, the means must be 'reasonably related' to the ends;[562] or, in other words, the

[555] ibid.

[556] *Colombia-Textiles(ABR)* [5.70] and citations therein.

[557] *China-Publications(ABR)* [239-242] and examples therein.

[558] *US-Gambling(ABR)* [308].

[559] *India-Solar(ABR)* [5.62].

[560] *Korea-Beef(ABR)* [104].

[561] *US-Gasoline(ABR)* p.16.

[562] *US-Shrimp(ABR)* [141].

relationship between ends and means must be 'substantial', [563] 'genuine'[564] or 'observably…close and real'.[565]

Lastly, it should be noted that WTO members have some latitude in selecting specific policy objectives –within the confines of Art.XX– and enjoy wide discretion with respect to the level at which they wish to pursue them.[566] States 'have the right to determine the level of protection that they consider appropriate [and] may set different levels of protection even when responding to similar interests'.[567] The State's desired level of protection is also taken into consideration by WTO bodies in assessing the measure's relationship with the stated objective and the existence of less trade-restrictive alternatives.[568]

WTO case law on Art.XX GATT is extensive. The brief analysis above illustrates that WTO jurisprudence on the substantive requirements for successful invocation of the general exceptions establishes particular requirements for the justification of trade-restrictive measures depending on the terms of each of the enumerated sub-paragraphs. WTO bodies have discussed the meaning and scope of each term in Art.XX GATT and have further laid down the criteria for assessing whether a specific measure falls within their scope. Overall, the test reflects 'the shared understanding of Members that

[563] *US-Gasoline(ABR)* p.19.

[564] *Brazil-Tyres(ABR)* [210].

[565] *US-Shrimp(ABR)* [141].

[566] Mavroidis (n 499) 423 suggesting that panels and the AB do not question the reasoning for invoking an objective but simply verify that the conditions for invoking it are met. In other words, 'means are justifiable, not ends'.

[567] *EC-Seal(ABR)* [5.200]. Similarly, *EC-Asbestos(ABR)* [168].

[568] *US-Gambling(ABR)* [308-311]; *China-Publications(ABR)* [243-245]; *Colombia-Textiles(ABR)* [5.74]; *Brazil-Tyres(ABR)* [170]. See McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2008) 12 JIEL 153, 157.

substantive obligations should not be deviated from lightly'[569] and aims to discern whether the measure at hand is a proportionate means adopted in good faith to achieve the stated objective. Nonetheless, as argued in the next section, specific parts of the test can be further refined by taking into consideration the customary requirements for the invocation of defences under the general international law on State responsibility.

The next sub-section examines the interpretation of the WTO security exceptions and demonstrates that panels have so far established more lenient requirements for their successful invocation as compared to the general exceptions and are thus more susceptible to abuse.

2. The WTO security exceptions

The WTO security exceptions serve a function similar to the general exceptions in that they allow members to justify trade-restrictive measures on non-trade grounds.[570] They also have significant *prima facie* similarities in terms of anatomy not only with the WTO general exceptions but also with Art.XXI 1956 FCN, Art.XX 1955 Treaty of Amity and the IIA exception clauses, discussed in Chapters II and IV. However, there are two significant textual differences. The WTO security exceptions do not provide for the adoption of measures 'necessary' for the protection of essential security interests, but rather for measures that a contracting party '*considers* necessary' for such purpose.[571] Moreover, they do not include a *chapeau* similar to Art.XX GATT which explicitly

[569] *US-Gambling(ABR)* [308].

[570] Ayres and Mitchell (n 501).

[571] Art.XXI(b) GATT.

incorporates good faith considerations into the treaty text.[572] These two drafting peculiarities have, for a long time, sparked controversy regarding the scope of these exceptions.

The drafters of the GATT evidently recognised the need to allow deviations from trade obligations for security reasons. The security exceptions represent 'an indispensable escape mechanism or safety valve',[573] the adoption of which reassured GATT parties that they retain control over issues intimately connected to the protection of their sovereignty. However, given the selected wording, it was unclear under which prerequisites they intended for such mechanism to apply and to what extent it is subject to third-party scrutiny. As seen so far from State practice, the exception is mostly invoked to justify unilateral trade restrictions, imposed in the context of broader disputes, often of a –*prima facie*– non-economic nature. GATT negotiating history also suggests that security exceptions were considered as 'an overriding authorisation for sanctions'.[574] But, in the absence of strict criteria for the imposition of such sanctions, the invocation of security exceptions may well serve disguised economic purposes inconsistent with the WTO Agreements, or provide a back door for WTO-sanctioned retaliation measures. Ensuring the right of States to take measures necessary for the protection of their essential security interests whilst minimising the possibility of abuse of the WTO system under the guise of security is fundamental. It is equally fundamental to clarify whether and to what extent WTO bodies have the authority to assess the permissibility of measures

[572] Ayres and Mitchell (n 501).

[573] Cann, 'Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism' (2001) 26 YaleJIntlL 413, 417.

[574] Hahn, 'Vital Interests and the Law of GATT: Analysis of GATT's Security Exception' (1991) 12 MichJIntlL 558, 567, 569.

adopted under the security exceptions. In the absence of third-party scrutiny, the exception clause may become an 'unreviewable trump card'[575] allowing States to excessively rely on such grounds to escape their trade obligations.

This sub-section discusses, first, the arguments raised regarding the interpretation of the WTO security exceptions before the first comprehensive WTO report on the matter in order to set the background for the analysis of the relevant case law (a). It then turns to the WTO reports that have examined the security exceptions so far, fleshing out the criteria for their successful invocation as elaborated by the panels (b).

a. The pre-Russia-Transit era and the self-judging exception arguments

One of the main arguments regarding the WTO security exceptions, which was extensively discussed in the academic literature before the seminal *Russia-Transit* report and is still advanced by Respondents in relevant disputes, is their alleged 'self-judging' character.

There are several variations to this argument. According to one interpretation of Art.XXI GATT, the term 'it considers' qualifies the subparagraphs of Art.XXI(b) within a 'single relative clause' that entirely reserves the subparagraphs to the judgment of the invoking Member.[576] States have a *carte blanche* in deciding when and what measures protect 'essential security interests', whether they relate to one of the enumerated objectives, and whether they are necessary for the exigencies of the situation.[577] On the basis of this interpretation, it has been argued that invocation of the security exceptions

[575] Alford, 'The Self-Judging WTO Security Exception' (2011) 3 UtahLRev 697, 698.

[576] US submissions in *US-Steel-Switzerland(PR)* [7.124]; *US-Origin(PR)* [7.36].

[577] Alford (n 575) 698.

in adjudicative proceedings affords a direct jurisdictional defence to the Respondent.[578] In the GATT 1947 era, this would mean that a Panel should not be established at all as it would have no authority to rule on the matter.[579] In the WTO era, where panels are established in a virtually automatic manner, this argument would constitute a preliminary objection to the Panel's subject-matter jurisdiction or to the admissibility of the dispute, on the grounds of non-justiciability.[580]

A second, more restrictive, interpretation argues that some –but not all– of the elements in Art.XXI GATT are self-judging, whereas others are capable of objective determination. A member State could indeed determine unilaterally that 'it considers' a measure to be 'necessary for the protection of its essential security interests', but whether or not the measure is taken in the context of one of the instances enumerated in Art.XXI GATT may be subject to judicial scrutiny.[581]

Lastly, another interpretation of Art.XXI GATT suggests that any measure adopted under the security exceptions should be subject to a good faith examination.[582] According to this interpretation, at the very least, a Panel may examine whether the State *genuinely considers* that the measures taken were necessary for the protection of its essential security interests.[583] Thus, even if some or all elements of Art.XXI were self-

[578] See overview of relevant arguments in Schloemann and Ohlhoff (n 504) 431.

[579] Akande and Williams (n 504) 374 and references therein. Note, however, the critical findings of the GATT 1947 Panel in its (unadopted) report in the case of *United States-Trade Measures Affecting Nicaragua*, 13 October 1986, GATT Doc. L/6053 [5.17].

[580] See arguments of the US and Nicaragua in *US-Helms Burton* and *Nicaragua-Imports from Honduras and Colombia* and discussion in Akande and Williams (n 504) 376–377.

[581] Hahn (n 574) 586; Akande and Williams (n 504) 386.

[582] Akande and Williams (n 504) 389.

[583] Akande and Williams (n 504) 296.

judging, States' discretion would not be unfettered.

Materials from the GATT negotiating history, which could assist in the interpretation of Art.XXI GATT under Art.32 VCLT, seem to be inconclusive.[584] Although it becomes evident that the drafters added the term 'it considers' to provide flexibility, the majority agreed that elements of the provision would still be subject to judicial review.[585] But they did not specify which elements and under which criteria. Subsequent practice and statements of the GATT parties and WTO members are equally ambiguous.[586] It is also evident that States were aware of the controversy but did not attempt to clarify the matter in any subsequent decisions[587] or, notably, during the Uruguay Round negotiations.

Other international adjudicative bodies have been faced with this issue. As seen in Chapters II and IV, Respondents have consistently argued that treaty exceptions similar to Art.XXI GATT are self-judging, even in the absence of the term 'it considers' in the wording of the provision. ICJ and arbitral case law confirms that issues relating to States' national security are not inherently non-justiciable and that invocation of security exceptions does not remove a dispute from the jurisdiction of an international adjudicative body.[588] Nonetheless, in an effort to buttress these findings, both the ICJ and

[584] Hahn (n 574) 565–569. See similar conclusion in *US-Steel-Switzerland(PR)* [7.145].

[585] See overview of negotiating history in *Russia-Transit(PR)* [7.83ff] and *US-Origin(PR)* [7.164ff].

[586] *Russia-Transit(PR)* [7.80] where the Panel finds that there is no common understanding regarding the meaning of Art.XXI among WTO members.

[587] E.g., Nicaragua's request to the GATT Council to prepare an interpretative note on Art.XXI in the context of its dispute with the US regarding the embargo imposed against it, see (n 579), but the attempt failed due to lack of consensus, see WTO, *Analytical Index: Guide to GATT Law and Practice*, vol 1 (6th edn, WTO 1995) 604.

[588] E.g., *Nicaragua(Merits)* [222]; *Oil Platforms(Objections)* [20]; *CMS* [373]; *Enron* [339]; *LG&E* [212]; *El Paso* [610].

investment tribunals distinguished the clauses before them from Art.XXI GATT. Their analysis suggests that the term 'it considers' in Art.XXI GATT implies the provision's self-judging character.[589] *A contrario*, clauses that do not include this term are capable of objective determination and thus, subject to judicial review.

It was against this background that the Panel in *Russia-Transit* was called to determine the scope and content of the WTO national security exceptions for the first time and its 2019 report was a landmark in WTO case law. More reports followed in a short period of time, suggesting that, despite the long absence of security exceptions from WTO adjudication, their invocation is becoming increasingly common. The following sub-section provides an overview of the relevant reports, before proceeding to a critical evaluation of the WTO approach and an examination of the relationship of security exceptions with general defences in the next section.

b. WTO case law on security exceptions

This sub-section examines the WTO panel reports in *Russia-Transit* (2019), *Saudi-IPR* (2020), *US-Steel* (2022), and *US-Origin* (2022) and discusses their findings with respect to the nature and function of the exceptions, as well as the substantive requirements for their successful invocation. A brief overview of the factual background of these disputes is warranted at this point to provide context for the analysis.

In *Russia-Transit*, Ukraine challenged the legality of Russia's restrictions on traffic in transit from the territory of Ukraine through the territory of Russia to third

[589] E.g., *Nicaragua(Merits)* [222]; *CMS* [370-371]; *Enron* [336]; *El Paso* [593]. *contra, Sempra* [384] citing Matsushita and others (n 501).

countries.[590] This trade dispute formed part of the wider situation of tension between the two States, which is, unfortunately, still evolving. The situation escalated following a change in Ukraine's government in 2014. The new government, which was sworn in in the wake of the Euromaidan events and the 2014 Ukrainian revolution, sought to create closer ties with the EU rather than strengthen the close relationship of the country with Russia. This shift in policy created tensions in certain regions of the country, which escalated into the occupation and annexation of Ukrainian territory, i.e., the Autonomous Republic of Crimea and the city of Sevastopol, by Russia. The events were followed by the imposition of diplomatic and economic sanctions against Russia by several countries. It is in this context that the challenged trade measures were adopted by Russia in 2016. Russia, invoking the security exception in Art.XXI(b)(iii) GATT, argued that its measures were taken for the protection of its essential security interests in view the emergency in its international relations with Ukraine.[591]

Saudi-IPR(PR), was one of several aspects of the broader dispute between the two parties, discussed earlier in the context of *ICAO-2020*.[592] Qatar argued that certain restrictions, imposed in the context of the Quartet's 2017 embargo, affected the intellectual property rights of Qatari nationals. One of such nationals was beIN, a global sports and entertainment company, which had obtained exclusive rights to broadcast prime sporting competitions in the Middle East and North Africa region. Following Saudi Arabia's severance of relations with Qatar, access to beIN's website was blocked and beIN was stripped from its license to distribute media content in Saudi Arabia. Around

[590] *Russia-Transit(PR)* [7.1-7.2].

[591] *Russia-Transit(PR)* [7.3-7.4].

[592] See analysis in (n 332-333).

the same time a new company emerged ('beoutQ') which began the unauthorized distribution and streaming in Saudi Arabia of media content created by or licensed to beIN. Qatar argued that Saudi Arabia stripped Qatari nationals from the ability to protect their intellectual property rights within its jurisdiction and failed to prosecute beoutQ for piracy in breach of its TRIPS obligations.[593] Saudi Arabia's main response was that its acts and omissions fell within the scope of the security exception in Art.73 TRIPS. Following the political resolution of the broader dispute, Qatar terminated the case and thus, the Panel report will remain unadopted. Nonetheless, a Panel can still find 'useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.'[594]

The *US-Steel* reports relate to the US dispute with several States over its import barriers in steel and aluminium. Pursuant to Section 232, the US Secretary of Commerce can initiate investigations to determine the effects on national security of the imports of certain products and submit recommendations to the US President.[595] In 2018 relevant investigations determined that the quantities and circumstances of steel and aluminium imports 'threaten[ed] to impair the national security' of the US as defined in Section 232.[596] The reports referred to the adverse impact of 'excessive' imports, together with the global excess capacity in these products, on the economic welfare of the domestic steel and aluminium industries and their production capacity, which, especially in the

[593] *Saudi-IPR(PR)* [2.46].

[594] *Japan-Alcohol(AB)* p.15.

[595] *US-Steel-Switzerland(PR)* [2.2-2.7].

[596] *US-Steel-Switzerland(PR)* [2.13, 2.23].

case of aluminium, is relevant to critical infrastructure and national defence.[597] Based on these reports, the US President issued proclamations that imposed additional import duties and import quotas on steel and aluminium from several States,[598] which then challenged these measures before the WTO. Some complaints have been settled,[599] whilst others are still under discussion.[600] Four disputes, initiated by China, Norway, Switzerland, and Turkey were decided by panels that shared the same composition and issued their reports in December 2022. Although proceedings remained separate and were not identical in all respects,[601] the reports are almost identical in their treatment of the US defence under Art.XXI and are thus analysed together in this sub-section.[602] The reports remain unadopted as of today. In January 2023, the US notified the DSB of its decision to appeal to the AB certain findings of the panels, thus adding the relevant reports into the pool of appeals 'into the void'– a void that the US itself has created through its blockage of appointment of AB members.[603]

Lastly, *US-Origin* concerned a requirement, enacted under US law in 2020, that imported goods produced in Hong Kong be marked to indicate that their origin is 'China'.[604] The US asserted that certain events in Hong Kong have prompted a

[597] *US-Steel-Switzerland(PR)* [2.13, 2.23].

[598] *US-Steel-Switzerland(PR)* [2.28-2.30].

[599] *US-Steel-Canada*; *US-Steel-EU*; *US-Steel-Mexico*.

[600] *US-Steel-India*; *US-Steel-Russia*.

[601] *US-Steel-Switzerland(PR)* [1.21].

[602] References provided from *US-Steel-Switzerland(PR)* but see also similar analysis in *US-Steel-China(PR)*, *US-Steel-Norway(PR)* and *US-Steel-Turkey(PR)*.

[603] See the critical statements of China and Turkey in response to the US decision to appeal as reported in <https://www.wto.org/english/news_e/news23_e/dsb_27jan23_e.htm>.

[604] *US-Origin(PR)* [7.1].

determination that it was no longer 'sufficiently autonomous to justify differential treatment in relation to the People's Republic of China'.[605] Hong Kong challenged the consistency of the US origin marking requirement with MFN obligations under the GATT, the TBT, and the ARO. In response, the US invoked Art.XXI(b)(iii) GATT. This report has also been appealed into the void by the US and remains unadopted.

The following sub-sections present the findings of the panels regarding the alleged self-judging character of the WTO security exceptions and their function within the WTO Agreements (i) and the substantive requirements for their successful invocation (ii-iii).

i. Alleged self-judging nature and the function of the WTO security exceptions

As foreshadowed in sub-section (a), the first issue that panels dealing with invocations of the WTO security exceptions were called to examine was their alleged self-judging nature. The Respondents in these disputes argued that the security exceptions confer sole discretion on Members to determine the necessity, form, design, and structure of measures that they consider necessary for the protection of their essential security interests under Art.XXI(b) GATT.[606] Accordingly, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the invoking Member and relevant disputes are carved out from the Panel's subject-matter jurisdiction.[607] Moreover, Respondents and third parties argued that the invocation of the

[605] *US-Origin(PR)* [7.1, 7.194-7.197]; US Executive Order 13936.

[606] And its TRIPS equivalent, Art.73(b) TRIPS. See *Russia-Transit(PR)* [7.28]; *US-Steel-Switzerland(PR)* [7.123]; *US-Origin(PR)* [7.29]. Note, however, that Saudi Arabia in *Saudi-IPR* did not raise explicitly this argument, which was only presented by third-parties, but rather focused on arguments relating to alleged non-justiciability, see *Saudi-IPR(PR)* [7.6, 7.8, 7.238].

[607] *Russia-Transit(PR)* [7.56-7.57, 7.103]; *US-Origin(PR)* [7.31].

security exceptions is a political question that goes beyond the scope of trade and economic relations and that there are no legal criteria by which a Member's consideration of its essential security interests can be judged.[608] Thus, the invocation of the security exceptions by a Member is non-justiciable and cannot be reviewed by a Panel.[609]

All four Panels, interpreting Art.XXI GATT (and Art.73 TRIPS, in *Saudi-IPR*[610]) under Articles 31-32 VCLT in accordance with Art.3.2 DSU, confirmed that they *cannot* be interpreted as entirely self-judging.[611] Panels have the power to review whether the requirements of the security exceptions are met and thus, their invocation does not remove the dispute from the Panel's jurisdiction.

The Panels' analysis focused on the meaning of the adjectival clause 'which it considers' in the *chapeau* of Art.XXI(b) GATT and whether it extends to the enumerated subparagraphs, allowing States to unilaterally determine whether their requirements are met. The analysis varies in different reports, with some, such as *US-Origin*, being particularly detailed in their examination of this matter. The main findings are summarised below.

Firstly, the Panels concluded, that a grammatical analysis of the provision, in view of its language and structure, suggests that the subparagraphs, enumerating specific sets of circumstances where action is permitted, operate as limitative qualifying clauses

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[608] *Russia-Transit(PR)* [7.28, 7.52, n183]; *Saudi-IPR(PR)* [7.8-7.9]; *US-Steel-Switzerland(PR)* [7.2-7.3].

[609] ibid.

[610] *Saudi-IPR(PR*) [7.241-7.242] suggested that in view of their identical wording, the TRIPS security exceptions should be interpreted in a manner analogous to the GATT. Thus, the analysis below uses Art.XXI GATT as a point of reference.

[611] *Russia-Transit(PR)* [7.102-7.103]; *US-Steel-Switzerland(PR)* [7.146]; *US-Origin(PR)* [7.185-7.186].

which circumscribe a Member's discretion to adopt measures for the protection of its essential security interests.[612] The subject-matter of each of the enumerated circumstances is capable of objective determination by the Panel on the basis of facts.[613] If they were only subject to a purely subjective, discretionary determination by the invoking Member, then they would have no added value. Such interpretation would be contrary to the principle of effectiveness.[614] Moreover, the textual separation of the subparagraphs into an enumerated list that is distinct from the introductory clause, further refutes the assertion that the subparagraphs form part of a 'single relative clause' qualified by the phrase 'which it considers'.[615]

Secondly, Panels pointed out that the object and purpose of the WTO Agreements supports an interpretation that mandates an objective review of the enumerated subparagraphs.[616] It would be entirely contrary to the security and predictability of the multilateral trading system to interpret the security exceptions as 'subjecting the existence of a Member's…WTO obligations to a mere expression of the unilateral will of that Member'.[617]

Thirdly, the Panels discussed the negotiating history of the clause. Some Panels argued that it supports the interpretation of the security exceptions as subject to review

[612] *Russia-Transit(PR)* [7.65].

[613] *Russia-Transit(PR)* [7.66-7.77].

[614] *Russia-Transit(PR)* [7.65];*US-Steel-Switzerland(PR)* [7.138-7.139].

[615] *US-Steel-Switzerland(PR)* [7.139]; *US-Origin(PR)* [7.53].

[616] *Russia-Transit(PR)* [7.78];*US-Steel-Switzerland(PR)* [7.142-7.143].

[617] *Russia-Transit(PR)* [7.79].

by a Panel,[618] whilst others argued that related materials do not provide clear guidance on the contested issue and did not ascribe significance to relevant arguments.[619] However, in all cases, it becomes clear that the negotiating history of the security exceptions does not lend support to the claim that they were meant to be entirely self-judging and immune from any judicial scrutiny. It seems that the term 'it considers' was meant to signify that members have some latitude to determine what their essential security interests are and the necessity of an action to protect them, but potential abuse of the exceptions was curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the enumerated subparagraphs.[620]

Together with the argument on the alleged self-judging character of the security exceptions, the Panels also rejected the alleged non-justiciability of relevant disputes.[621] Panels confirmed that to the extent that there is 'a legal question capable of a legal answer, [they are] duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue.'[622] Art.11 DSU establishes an obligation for Panels to make an objective assessment of matters properly brought before them and does not provide any discretion to choose whether or not to exercise their validly established jurisdiction.[623] This approach echoes the findings of the ICJ on similar

[618] *Russia-Transit(PR)* [7.83-7.100]; *US-Origin(PR)* [7.163, 7.175, 7.179].

[619] *US-Steel-Switzerland(PR)* [7.145].

[620] *Russia-Transit(PR)* [7.98].

[621] *Russia-Transit(PR)* [7.103]. See similarly *Saudi-IPR(PR)* [7.10-7.23].

[622] *Russia-Transit(PR)* [7.103, n183]. Similarly, *Saudi-IPR(PR)* [7.16-7.17].

[623] *Russia-Transit(PR)* [7.103, n183]; *Saudi-IPR(PR)* [7.11] by reference to *Mexico-Drinks*.

arguments relating to the alleged political character of disputes before it.[624] As stipulated in *Nicaragua* 'the Court has never shied away from a case brought before it merely because it had political implications'.[625] As long as there is a question of legal character,[626] an adjudicative body can discharge its 'essentially judicial task', which is to assess the legality of the conduct of States in view their international obligations.[627]

Lastly, it is important to note, that, in view of the fact that the arguments on the alleged self-judging nature of the security exceptions related to the Panels' jurisdiction and the case's admissibility, some Panels decided to address them first, before any discussion of the complainants' substantive claims.[628] Thus, they reversed the traditional order of analysis followed by WTO bodies in the context of the general exceptions.[629] Nonetheless, their analysis, overall, suggests that they consider the security exceptions as defences on the merits of the dispute that perform a function similar to the general exceptions.

In *Russia-Transit*, the Panel indeed examined all Russian arguments relating to the security exceptions before addressing Ukraine's claims of inconsistency with substantive WTO provisions.[630] However, it explicitly justified this order reversal on the basis of the 'novel and exceptional feature' of the dispute, which was that the Respondent

[624] See analysis in (n 91-98). *Russia-Transit(PR)* [7.103, n183] and *Saudi-IPR(PR)* [7.12] referred to relevant ICJ judgments.

[625] *Nicaragua(Objections)* [96].

[626] *Western Sahara* [15].

[627] *Nuclear Weapons* [13] and references therein.

[628] *Russia-Transit(PR)* [7.24]; *US-Origin(PR)* [7.20-7.21].

[629] See analysis in (n 514-518).

[630] *Russia-Transit(PR)* [7.24].

used the exception to raise a preliminary objection to the Panel's jurisdiction.[631] Although the Panel did not explicitly characterise Art.XXI GATT as an affirmative defence, the rejection of Russia's arguments on jurisdiction implied the Panel's agreement with the arguments of Ukraine and several third parties, which considered Art.XXI GATT as a defence on the merits.[632] Moreover, although, the Panel found that Russia's measures met the requirements of the security exceptions, it still proceeded to examine whether they would be otherwise WTO-consistent under the relevant substantive provisions.[633] Thus, despite the reversal of the order, the Panel overall remains loyal to the two-step approach discussed in the context of general exceptions.

This understanding is also supported by the subsequent report in *Saudi-IPR(PR)*, where the Panel relied heavily on *Russia-Transit(PR)*, and in view of the latter's findings on the issue of jurisdiction, it restored the 'traditional order of analysis' of arguments.[634] It established first a *prima facie* breach of the TRIPS obligations cited by the Complainant and then turned to an examination of Art.73 TRIPS, which was clearly treated in this case as a defence on the merits.[635] The Panels in *US-Steel* followed the same approach, without, however, engaging substantially with the findings in either *Russia-Transit* or *Saudi-IPR*.[636]

Lastly, the *US-Origin* Panel, for the same reasons as *Russia-Transit*, discussed

[631] *Russia-Transit(PR)* [7.24].

[632] *Russia-Transit(PR)* [7.31, 7.37, 7.41-7.42, n109, 7.45]. *contra*, Henckels (n 218) 570.

[633] *Russia-Transit(PR)* [7.152-7.154].

[634] *Saudi-IPR(PR)* [7.6].

[635] *Saudi-IPR(PR)* [7.6, 7.199, 7.221, 7.40].

[636] *US-Origin(PR)* [7.33].

the alleged self-judging character of Art.XXI GATT and its alleged effect on jurisdiction 'upfront', before any discussion on Hong Kong's substantive claims.[637] However, once it reached a conclusion on the 'threshold question' of the provision's reviewability,[638] and found that its invocation is not excluded from judicial scrutiny, it revisited the matter of the order of analysis. Contrary to *Russia-Transit(PR),* it decided to follow the 'common practice' and establish, first, whether a breach of the WTO agreements has taken place and then proceed to examine the exceptions, if necessary.[639] It explained that this order of analysis is appropriate firstly, because 'quite simply,…where there is no breach, there is nothing to justify', and secondly, because 'a justification under any available exception comes with a certain burden, even if minimal… [and] such a burden should [not] be imposed on a Member…in the absence of any finding of breach.'[640] Thus, the report confirms the understanding of Art.XXI GATT as a defence.

It follows from the above that Panel reports so far agree that invocation of the security exceptions is a defence on the merits of the dispute and does not affect the Panel's jurisdiction. Moreover, at least some aspects of the provision, such as the enumerated sub-paragraphs in Art.XXI(b) GATT, are capable of objective determination and are subject to review by the Panel. The following sub-sections discuss the findings of the Panels regarding the requirements for the successful invocation of this defence and the extent/standard of judicial review. The reports touch on two important questions which are addressed below in turn: firstly, what is the scope of the enumerated

[637] *US-Origin(PR)* [7.20-7.21].

[638] *US-Origin(PR)* [7.186].

[639] *US-Origin(PR)* [7.187-7.190].

[640] *US-Origin(PR)* [7.189].

subparagraphs under Art.XXI(b) GATT; and secondly, whether the introductory paragraph or *chapeau* of Art.XXI(b) GATT, which allows for action that the State 'considers necessary or the protection of its essential security interests' establishes any additional requirements for successful invocation of the relevant exception.

ii. The meaning of 'war or other emergency in international relations'

All four reports that have discussed the WTO security exceptions so far, elaborated on the criteria for an action to objectively fall within the scope of the enumerated subparagraphs in Art.XXI(b) GATT. The reports focused on subparagraph (iii) which exempts action 'taken in time of war or other emergency in international relations'. The requirements of sub-paragraphs (i) and (ii) have not yet been subject to scrutiny by panels, except for references made to contextualise the terms used in subparagraph (iii). Thus, this sub-section focuses on the findings relating to the meaning and scope of sub-paragraph (iii). It firstly explains how the relevant terms were defined by Panels and then it discusses how these definitions were applied to the facts of each case.

The reference to 'war' was treated in case law as quite straightforward. Panels confirmed that, despite the fact that the term has, since the drafting of the GATT, fallen into desuetude in public international law, it translates today, into 'armed conflict', whether international or non-international.[641] Panels offered a dictionary definition of the term as 'hostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state' and concluded that it

[641] *Russia-Transit(PR)* [7.72]; *US-Origin(PR)* [7.294].

generally refers to 'a state of conflict characterized by the use of force'.[642]

On the other hand, the term 'other emergency in international relations' was less clear. *Russia-Transit* and *US-Steel* defined 'emergency' as a 'situation, especially of danger or conflict, that arises unexpectedly and requires urgent action', 'a condition requiring immediate treatment', and a 'pressing need…a condition or danger or disaster throughout a region'.[643] *US-Origin* defined the term as 'a juncture or situation, involving danger or conflict, that can be understood to be one outside the ordinary course of events' and involves 'a degree or magnitude of seriousness, as reflected by the need for urgent or immediate action'.[644] According to the Panel, 'the seriousness of the state of affairs requiring urgent action can be best understood as referring to situations of the utmost gravity'. [645] According to the ordinary meaning of the relevant terms, this emergency 'must directly concern' the invoking States' international relations'.[646]

The term 'international relations' was defined as 'relations between nations, national governments, international organizations, etc., esp. involving political, economic, social, and cultural exchanges' or '[t]he various ways by which a country, State, etc., maintains political or economic contact with another'.[647] It was further stipulated that the open reference to 'international relations' suggests that the clause was not intended to apply only with respect to 'some specific types of international relations,

[642] US-Steel [7.156]; US-Origin [7.294].

[643] *Russia-Transit(PR)* [7.72]; *US-Steel-Switzerland(PR)* [7.155]. The same definition was used as a basis for analysis in Saudi-IPR(PR) [7.257].

[644] *US-Origin(PR)* [7.279].

[645] *US-Origin(PR)* [7.289].

[646] *US-Origin(PR)* [7.281].

[647] *US-Steel-Switzerland(PR)* [7.155]; *US-Origin(PR)* [7.280].

for example the exclusively bilateral relations between the invoking Member and the Member affected by the action'.[648]

The greatest challenge for the Panels was to interpret these two terms together and delimit the scope of the term 'emergency in international relations'. In view of the conjunction 'or' and the adjective 'other' in 'war *or other* emergency in international relations', *Russia-Transit* posited that war is one example of the larger category of 'emergency in international relations'.[649] In this light, such an emergency would not be simply a political or economic difference between States, even if urgent. Only 'a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a State' would qualify for the exception.[650]

US-Steel and *US-Origin* also agreed that the term 'war' informs the meaning of 'emergency in international relations'. They found that the emergency must be 'if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations.'[651] In other words, it must represent 'a breakdown or near-breakdown' of such relations and reflect a gravity or magnitude near-comparable to war.[652] This is further confirmed by the context of the clause. The rest of the enumerated subparagraphs 'are clearly related to the defence and military sector'[653] and indicate that the provision is meant to encompass circumstances of 'a certain gravity and

[648] *US-Origin(PR)* [7.280].

[649] ibid.

[650] *Russia-Transit(PR)* [7.75-7.76].

[651] *US-Steel-Switzerland(PR)* [7.157].

[652] *US-Origin(PR)* [7.296-7.297].

[653] *US-Origin(PR)* [7.301].

severity'.[654] In view of this, one 'would expect defence and military matters to normally be implicated' in an 'emergency in international relations'.[655] As suggested in *Russia-Transit*, such situations of heightened tension 'give rise to particular types of interests…i.e., defence and military interests, or maintenance of law and public order interests'.[656]

However, the Panel in *US-Origin*, differentiating its view on this point from *Russia-Transit*, stipulated that it would 'refrain from suggesting that an emergency must necessarily involve defence and military interests'.[657] According to the Panel, what matters is the existence of an emergency and the gravity of its impact. In its analysis, the Panel implied that a breakdown of relations near-comparable to war may conceivably occur under different circumstances, where other values or interests may be at stake, such as the protection of human rights and democratic principles.[658]

According to *US-Origin*, the assessment of the gravity of the situation must be made by the Panel on the basis of certain objective parameters which 'could be conceptualized in a spectrum covering friendly and peaceful interaction between Members, at one end, and the breakdown of relations between two or more countries, or Members, at the other end'.[659] According to the Panel:

> An emergency in international relations on that spectrum lies closer to the extreme of a breakdown in relations between two or more countries, or

[654] *US-Steel-Switzerland(PR)* [7.159].

[655] *US-Origin(PR)* [7.301].

[656] *US-Transit(PR)* [7.76].

[657] *US-Origin(PR)* [7.301].

[658] *US-Origin(PR)* [7.359].

[659] *US-Origin(PR)* [7.309-7.310].

> Members. In contrast, most political tensions and differences among countries, even those that may appear to be of a quite serious nature, would…normally not be situated close enough to that end of the spectrum and would therefore not necessarily constitute an emergency.[660]

Lastly, the term 'in time of' requires that the measures in question are taken *during* the war or other emergency invoked in order to qualify for the exception.[661]

Having established the scope of subparagraph (iii) as defined by the Panels, we will now turn to the application of these findings to the facts of each case.

In *Russia-Transit,* Russia presented no hard evidence in support of its claims, arguing that such information was sensitive and that the events surrounding its emergency are known to the public and Ukraine.[662] The Panel therefore discussed the hypothetical circumstances that Russia presented as similar to those on the ground: unrest within the territory of a neighbouring country in the immediate vicinity of the border; loss of control by that neighbouring country over its border; movement of refugees; and unilateral sanctions imposed by that neighbouring country or by other countries, not authorized by the UN.[663] It found this information sufficient to clearly identify the situation.[664] It further noted that there was sufficient evidence that, during the crucial time for the dispute, relations between the two States had deteriorated to such a degree that they were a matter of concern to the international community.[665] In view this, the Panel concluded that the situation constituted an emergency within the meaning of

[660] *US-Origin(PR)* [7.311].

[661] *Russia-Transit(PR)* [7.70].

[662] *Russia-Transit(PR)* [7.115, 7.118].

[663] *Russia-Transit(PR)* [7.114].

[664] *Russia-Transit(PR)* [7.119].

[665] *Russia-Transit(PR)* [7.122].

Art.XXI(b)(iii) GATT.[666]

In *Saudi-IPR*, the Panel found that severance of all diplomatic and economic ties with another State is 'the ultimate State expression of the existence of an emergency in international relations.'[667] It further referred to the allegations of Saudi Arabia that 'Qatar had, inter alia, repudiated the Riyadh Agreements…, supported terrorism and extremism, and interfered in the internal affairs of other countries' and found that the allegations supported the Saudi claim that there was indeed an emergency.[668] It is interesting to note that, as stipulated by Qatar, the Panel's reasoning in establishing the existence of an emergency was, at least partly, circular: the severance of all diplomatic and economic relations constituted both the 'emergency in international relations' and the 'action which [Saudi Arabia] consider[ed] necessary for the protection of its essential security interests'. The Panel said that the 'action' in question was not the severance of diplomatic and economic relations in general but rather its specific aspects challenged before it.[669] But this does not convincingly address the logical fallacy: the very same measures, which distorted the relations between the two States and were challenged before the Panel, were used as evidence of the existence of an emergency which would justify the taking of such measures in the first place.

Thus, in both *Russia-Transit* and *Saudi-IPR*, the Panels found that the circumstances indeed fell within the scope of 'emergency in international relations'. On

[666] *Russia-Transit(PR)* [7.123].

[667] *Saudi-IPR(PR)* [7.259].

[668] *Saudi-IPR(PR)* [7.263].

[669] *Saudi-IPR(PR)* [7.264].

the contrary, the Panels in *US-Steel* and *US-Origin* reached different conclusions.

In *US-Steel,* the Panel stipulated that the US reports under Section 232 referred primarily to the impact of imports on domestic producers of steel and aluminium. The only reference to a global aspect of the situation was that relating to the global excess capacity in steel and aluminium. It concluded that despite the international engagement and concern on this matter, the situation is not of 'a critical or serious nature' in terms of its impact on the conduct of international relations.[670] Accordingly, it rejected the US defence.[671]

In *US-Origin*, the Panel observed that, although 'events in Hong Kong, China…are, and remain, the subject of tensions and expressions of concern at the international level' and 'have impacted on international relations between China, Hong Kong, China and a range of WTO Members', the situation did not meet 'the requisite level of gravity to constitute an emergency in international relations under Art.XXI(b)(iii).'[672] This was confirmed by the fact that Hong Kong and the US seemed to continue their cooperation, including in the area of trade, as usual, with the exception of their dispute over origin marking.[673] The Panel, therefore, rejected the US arguments.

Having rejected the US defence on the basis that the challenged measures did not fall within one of the numerated subparagraphs, the Panels in *US-Steel* and *US-Origin*, did not proceed in any further discussion of the terms of the *chapeau* in Art.XXI(b). On

[670] *US-Steel-Switzerland(PR)* [7.165-7.166].

[671] *US-Steel-Switzerland(PR)* [7.167].

[672] *US-Origin(PR)* [7.353].

[673] *US-Origin(PR)* [7.354].

the contrary, *Russia-Transit* and *Saudi-IPR*, discussed whether the terms 'action which it considers necessary for the protection of its essential security interests' establish any further requirements for successful invocation of the exception. This matter is discussed in the sub-section below.

iii. The meaning of 'it considers necessary for the protection on its essential security interests'

Panels agreed that the term 'which it considers' in the chapeau of Art.XXI(b) was meant to signify that States enjoy some latitude in invoking the exception. Having rejected the argument that the term extends to the entirety of the provision and renders it wholly self-judging, Panels had to further clarify the meaning of the term and the scope of this latitude. There were two other possible readings of the provision: the adjectival clause could be read to qualify the word 'necessary', i.e., the necessity of the action taken for the protection of a State's essential security interests; or, to qualify also the determination of these 'essential security interests'.[674]

The Panel in *Russia-Transit*, in its seminal report on this issue, concluded that 'by logical necessity' the term 'which it considers', if it is to be given legal affect, certainly qualifies the term 'necessary'.[675] It interpreted this to mean that the determination of the necessity of an action is left at the sole discretion of the invoking State, without any further conditions.[676] Accordingly, the Panel did not examine at all

[674] *Russia-Transit(PR)* [7.63, 7.127-7.129].

[675] *Russia-Transit(PR)* [7.146].

[676] *Russia-Transit(PR)* [7.146-7.147].

the necessity of Russia's measures.[677] Thus, the provision was interpreted, after all, as at least 'partly self-judging'.[678]

As for the term 'essential security interests', the Panel defined them as 'those interests relating to the quintessential functions of the State, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally'.[679] It confirmed that such interests are expected to vary from State to State and with changing circumstances and thus, 'it is left, in general, to every Member to define what it considers to be its essential security interests'.[680] Thus, the invoking State enjoys wide discretion on this matter as well.

Nonetheless, the Panel found that this discretion is not unfettered. According to the Panel, the State is not free to elevate *any* concern into an 'essential security interest'.[681] At this part of the test, the Panel introduced an additional requirement: a Member 'is limited by its obligation to interpret and apply [Art.XXI(b)]…in good faith'.[682] According to the Panel, 'the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties'.[683] This obligation requires an examination of whether a member is re-labelling trade interests as 'essential security interests'.[684] At this point, it seems that the Panel, by reference to good

[677] *Russia-Transit(PR)* [7.146].

[678] *US-Origin(PR)* [7.160].

[679] *Russia-Transit(PR)* [7.130].

[680] *Russia-Transit(PR)* [7.131].

[681] *Russia-Transit(PR)* [7.132].

[682] ibid.

[683] ibid.

[684] *Russia-Transit(PR)* [7.132-7.133].

faith, attempted to introduce to the security exceptions some considerations similar to the *chapeau* of Art.XX GATT.

Nonetheless, the standard that was set for a State to meet this good faith requirement was significantly low, and certainly much lower than what is required under the *chapeau* of Art.XX GATT. According to the Panel, the invoking State should 'articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity'.[685] This articulation should be 'minimally satisfactory' in the circumstances.[686] Then the actions under consideration should meet a 'minimum requirement of plausibility': they must be 'not implausible as measures protective of [the proffered] interests'.[687] This is similar to the threshold for provisional justification under Art.XX GATT, where the measure should be 'not incapable of' addressing the interest invoked.[688] However, in the context of Art.XX, this criterion is part of a broader examination of the measure's 'design', which aims to ascertain the existence of a relationship between the measure and the stated objective. And, of course, there are two further steps of analysis following a measure's provisional justification (required nexus and *chapeau*), which ensure that the threshold to justify a measure under Art.XX GATT is, all things considered, relatively high. In the case of Art.XXI GATT, the 'not implausible' criterion introduced by the Panel seems to be the sole requirement of connection between the measure and the stated objective. Thus, the requirement, as observed by in *Saudi-IPR* which applied the test in a similar manner, is

[685] *Russia-Transit(PR)* [7.134].

[686] *Russia-Transit(PR)* [7.137].

[687] *Russia-Transit(PR)* [7.138].

[688] See analysis in (n 541-546).

'not particularly onerous'.[689]

In light of the test above, the Panel in *Russia-Transit* found that 'despite its allusiveness' Russia's articulation of its essential security interests met the applicable standard as 'there [was] nothing in Russia's expression of those interests to suggest that Russia invokes Art.XXI(b)(iii) simply as a means to circumvent its obligations under the GATT'.[690] The measures at issue cannot be regarded as 'so remote from, or unrelated to, the 2014 emergency, that it would be implausible that Russia implemented them for the protection of its essential security interests arising out of that emergency.'[691] The Panel reached this conclusion despite having acknowledged the evidence presented by Ukraine demonstrating that Russia's measures were direct or immediate responses to the entry into force of the EU-Ukraine Association Agreement, the deterioration of its political relations with Ukraine and the sanctions imposed against it by several countries.[692] These facts, according to the report, were not sufficient indications to rebut the plausibility of Russia's case. Thus, the Panel found that Russia's measures were covered by Art.XXI(b)(iii) GATT.[693]

Similarly, in *Saudi-IPR*, the Panel rejected Qatar's claims that the Saudi formulations were 'vague' and 'imprecise' and found them sufficient to establish a link between the adopted actions and the articulated essential security interests.[694] It further

[689] *Saudi-IPR(PR)* [7.281-7.282].

[690] *Russia-Transit(PR)* [7.138].

[691] *Russia-Transit(PR)* [7.145].

[692] *Russia-Transit(PR)* [7.141-7.142].

[693] *Russia-Transit(PR)* [7.149].

[694] *Saudi-IPR(PR)* [7.281-7.282].

found that the Saudi measures, including denying Qatari nationals access to civil remedies through Saudi courts and preventing law firms from representing them,[695] were aspects of Saudi Arabia's 'umbrella policy of ending or preventing any form of interaction with Qatari nationals' and thus met the minimum requirement of plausibility.[696] However, with respect to the failure of Saudi authorities to prosecute beoutQ for piracy, the Panel found that this was not linked to the security interest invoked, as prosecution requires no interaction with Qatari nationals.[697] Thus, the Panel concluded that the requirements for invoking Art.73(b)(iii) were met in relation to all but one *prima facie* breaches of the TRIPs.[698]

Overall, it emerges from the findings above that WTO Panels have interpreted the WTO security exceptions as establishing significantly more lenient requirements for their successful invocation than those under the general exceptions. The 4-step test elaborated in *Russia-Transit(PR)* and reaffirmed in *Saudi-IPR(PR)* requires the identification of an 'emergency in international relations', a temporal concurrence of the measures in question with the identified emergency, the articulation of an essential security interest in a 'minimally satisfactory' manner, and a 'not-implausible' relationship between the measures in question and the protection of the articulated interest. *Russia-Transit(PR)* and *Saudi-IPR(PR)* did not require any hard evidence that the security interest in question was indeed in jeopardy or any substantial link between the enacted measure and the protection of such interest. They also established a very

[695] Known as 'anti-sympathy measures', criminalising expressions of sympathy for Qatar or objections to the measures adopted against it by the Quartet.

[696] *Saudi-IPR(PR)* [7.286-7.288].

[697] *Saudi-IPR(PR)* [7.289-7.290].

[698] *Saudi-IPR(PR)* [7.294].

lenient good faith requirement, which cannot really prevent States from re-labelling measures as security-related even when they are enacted to pursue a different agenda. Overall, following the reasoning in these two reports and its application to the facts of each case, a very wide spectrum of measures could potentially be justified under the WTO security exceptions.

US-Steel(PRs) and *US-Origin(PR)* examined only the scope of the enumerated sub-paragraphs of Art.XXI(b) and did not elaborate on the *chapeau* of the provision. Thus, they did not offer any insights into how the term 'which it considers necessary for the protection of its essential security interests' informs the relevant test, and did not discuss any possible good faith examination of the measures in question. Their definition of 'emergency in international relations' seems to put more emphasis on the gravity and urgency of the situation than previous reports and suggests an overall high threshold for successful invocation. Still, it must be acknowledged that the disputes in *US-Steel* and *US-Origin* were quite 'easy' in the sense that the relevant US instruments were quite evidently pursuing a particular economic agenda and were not enacted in political contexts as tense as the ones in *Russia-Transit(PR)* and *Saudi-IPR(PR)*. *US-Origin(PR)* even compared the circumstances in that dispute with *Russia-Transit* and *Saudi-IPR* to support their argument that there was, comparably, no emergency in the case before it.[699] It is unclear whether the definitions offered in these reports would be able to prevent abusive invocation of the exception clause in more ambiguous circumstances, especially considering the mere 'non-plausibility' test established so far as a second step in the relevant analysis. These matters are discussed in more detail in the following section.

[699] *US-Origin(PR)* [7.313-7.315].

D. General defences and the WTO Agreements: the lex specialis principle and the role of treaty interpretation

Section C established that general international law on State responsibility is applicable in principle to WTO disputes to the extent that it is not displaced by the WTO Agreements. WTO bodies have directly applied the rules on State responsibility, as enshrined in ARSIWA, to decide on indispensable matters not directly regulated by the WTO Agreements. They have also used such rules as a means of interpreting the WTO provisions. Thus, it was corroborated that general defences under the law on State responsibility are not excluded *a priori* in WTO disputes by virtue of applicable law limitations. Section D provided an overview of the case law on the WTO general and security exceptions and discussed the nature and function of these clauses and the substantive requirements for their successful invocation as crystallised in WTO jurisprudence. It confirmed that WTO general and security exceptions are invoked by WTO members as affirmative defences once *prima facie* inconsistency with the WTO Agreements has been established. Thus, they are in the same pool of rules as general defences. It further confirmed that although in the context of general exceptions we have a large body of relevant reports that reflect an overall balanced test to assess consistency with their requirements, in the context of security exceptions that test proposed in recent jurisprudence is underdeveloped.

As seen from the overview of relevant case law, WTO bodies do not take into consideration general defences when they discuss the scope and content of WTO exception clauses. Except for *Mexico-Drinks*, where, as analysed below, the Panel and

AB discussed the relationship of countermeasures with the WTO Agreements,[700] there are no other reports addressing the relationship of the WTO Agreements with general defences. This is despite the engagement of WTO bodies with the law on State responsibility in other contexts, as seen in Section C(b). The lack of engagement with general defences is also surprising when contrasted with the case law of the ICJ and investment tribunals, where the relationship between general defences and exception clauses has been subject to extensive discussion.[701] This divergence of approach is notable considering the overall similarities between the WTO general and security exception and the exception clauses in the instruments relating to economic cooperation, which were considered in ICJ and arbitral case law.[702]

This section discusses whether the approach of the WTO, which does not engage at all with general defences, is legally sound and practically desirable. It addresses the relationship of the WTO exceptions clauses with the three general defences identified as most pertinent in the introduction of this thesis: self-defence (1), necessity (2), and countermeasures (3).

1. Self-defence and the WTO Agreements

The WTO Agreements have no clear reference to self-defence. Nonetheless, situations of armed conflict fall within the scope of the WTO security exceptions, allowing a State to take 'any action which it considers necessary for the protection of its essential security

[700] See analysis in Ch III(E)(3)(a).

[701] See analysis in Ch II(C)(2)(b) and Ch IV(C)(1)(b).

[702] In fact, several exception clauses are modelled after GATT 1947, Titi (n 221) 173.

interests…taken in time of war or other emergency in international relations'.[703] As seen above, the term 'war' encompasses situations of armed conflict, whether international or non-international.[704]

In view of this, the WTO security exceptions certainly incorporate situations that would fall within the scope of individual self-defence. A lawful measure of self-defence is taken in response to a prior armed attack, i.e., 'in time of war'. Thus, the victim State would certainly be entitled to invoke the security exceptions to justify trade-restrictive measures taken in response to an armed attack.

However, the existence of an armed conflict ('war') is independent of the question of legality of the use of force. The ICTY defined armed conflict as a situation where 'there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[705] The definitions of the term 'war' offered in the WTO reports examined above, also refer more generally to situations of conflict involving use of armed force.[706] Thus, the wording of the WTO security exceptions suggests that States involved in an armed conflict can take action thereunder even if they are the attacking State and not solely in the exercise of their right to self-defence. It seems that the security exceptions kick in in a fashion similar to international humanitarian law. Regardless of the legality of the use of force (*ad bellum*), once States are in a situation of armed conflict (*in bello*)

[703] Art.XXI(b)(iii) GATT.

[704] See analysis in (n 641-642).

[705] *Tadić* [70].

[706] See analysis in (n 641-642).

they are entitled to make use of the security exceptions.[707] The approach in *Russia-Transit(PR)* provides further support to this argument. The Panel stipulated that that 'it [was] not relevant to the determination [of the applicability of Art.XXI GATT] which actor or actors bear international responsibility for the existence of [the] situation to which Russia refer[red].'[708] Similarly, *US-Origin* stipulated that what matters is the gravity of the impact of an emergency rather than the underlying circumstances.[709]

An interesting question that arises in this context is whether the WTO security exceptions would also accommodate measures adopted in the exercise of collective self-defence. *Russia-Transit(PR)* found that only measures taken during a situation involving 'defence and military interests, or maintenance of law and public order interests'[710] could constitute a measure taken 'to protect essential security interests' under Art.XXI(b) GATT. One could argue that trade-restrictive measures adopted for the benefit of a third State that declared itself to be the victim of an armed attack and requested assistance,[711] do not protect the security interests of the invoking State, especially if the armed conflict is geographically remote.

However, *US-Origin(PR)* found that the open reference to 'international relations' in Art.XXI(b)(iii) GATT suggests that 'the emergency does not necessarily

[707] see Preamble, GCAP-I: 'the provisions of the Geneva Conventions…and of this Protocol must be fully applied in all circumstance to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'. See indicatively Okimoto, 'The Relationship between Jus Ad Bellum and Jus In Bello' in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1211–1214.

[708] *Russia-Transit(PR)* [7.121].

[709] *US-Origin(PR)* [7.308].

[710] *Russia-Transit(PR)* [7.75-7.76].

[711] *Nicaragua(Merits)* [195-199]; *Oil Platforms(Merits)* [51].

have to originate in the invoking Member's own territory and bilateral relations'.[712] Accordingly, 'a war taking place between two or more countries, could also give rise to an emergency in international relations affecting other countries' as long as the situation meets the required gravity threshold, i.e., it represents 'a breakdown or near-breakdown' of the relations of the States concerned of a magnitude near-comparable to war.[713] *US-Origin(PR)* also found that such emergency must not 'necessarily involve defence and military interests'.[714] According to this interpretation, trade-restrictive measures adopted in the exercise of collective self-defence can be justified under Art.XXI(b)(iii) GATT even if the armed conflict does not pose a direct security threat to the invoking State. This understanding is supported by the context of the provision which also allows for 'any action in pursuance of [States'] obligations under the United Nations Charter for the maintenance of international peace and security'.[715] Although this primarily refers to action mandated by the UNSC under Chapter VII, the notion of collective security underpins the UN Charter[716] and Art.51 provides the legal basis for action taken by Members until the UNSC takes the necessary measures to respond to the situation.[717]

Another question in this context is whether the criteria for the lawful exercise of self-defence can inform the interpretation of the term 'war'. Such a reading could lead to

[712] *US-Origin(PR)* [7.296-7.297].

[713] ibid.

[714] *US-Origin(PR)* [7.301].

[715] Art.XXI(c) GATT.

[716] Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations' (1948) 42 AJIL 783.

[717] Note also that some States have undertaken additional obligations under bilateral or multilateral treaties to take any action that is deemed necessary in response to an armed attack against any other State party to the treaty, see most relevantly Art.5 NAT.

the conclusion that the security exceptions are only available to a State that has been a victim of a prior armed attack. *Oil Platforms(Merits)* followed such approach in interpreting Art.XX Treaty of Amity.[718] The Court found that the parties to the treaty intended for Art.XX Treaty of Amity to cover measures *involving a use of armed force*. Accordingly, it found that such measures must be consistent with the international law conditions for the legality of the use of force, i.e., the conditions of self-defence.[719] As discussed in Chapter II, this was arguably because the nature of the prohibition of the use of force as *jus cogens* suggested that the parties to the Treaty of Amity did not intend to allow for *armed* measures inconsistent with the relevant rules.[720] However, this approach would not be warranted in the WTO context. The WTO exceptions only cover trade measures regulated by the WTO Agreements. They do not involve a use of armed force. Thus, there is no legal reason to assume that the parties intended to incorporate the requirement of a prior armed attack under the law on self-defence given that the language used in the relevant provision ('in time of war or other emergency in international relations') is evidently more permissive. Besides, reference to 'war' and armed conflict in general, rather than self-defence, in exception clauses is not unknown to international law. For example, Art.15 ECHR also allows derogations 'in time of war' and does not seem to restrict its scope to the exercise of lawful self-defence.[721]

[718] See analysis in (n 254-268).

[719] *Oil Platforms(Merits)* [40].

[720] See analysis in (n 285-287).

[721] The ECtHR has not been required yet to interpret the term 'war'. However, the term is understood as referring to a situation of 'armed conflict'. See Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 594–595. There is no indication that the clause may only be invoked by a defending State. Note, however, that, as stipulated in Art.15 ECHR, any measure adopted under the derogation clause would still be subject to the requirements of necessity and proportionality and the obligation to observe other obligations under international law. Similarly, CCPR General Comment No 29

However, self-defence under general international law is also subject to the customary principles of necessity and proportionality.[722] Although these requirements could be read, through interpretation, into the term 'it considers necessary' in Art.XXI GATT, this has so far been interpreted as entirely self-judging.[723] This thesis argues that this interpretation ignores the rule in Art.31(3)(c) VCLT and results in an overly permissive understanding of the security exceptions. States' margin of appreciation must be limited by considerations of necessity, proportionality, and good faith, prerequisites which are common amongst general defences. This matter is discussed in more detail in the following section in the context of necessity.[724]

In sum, the WTO security exceptions are *lex specialis* to self-defence. The two defences regulate the same subject-matter, i.e., measures taken in a situation of armed conflict or latent armed conflict. The security exceptions establish a broader defence that encompasses cases of individual and collective self-defence, as well as a wider range of security-related circumstances. The term 'it considers necessary' also seems to replace the customary necessity and proportionality requirements for the exercise of lawful self-defence. Nonetheless, as argued further below, these requirements must inform our understanding of necessity in the context of Art.XXI.

2. Necessity and the WTO Agreements

The WTO general and security exceptions have evident similarities in terms of scope of

on Art.4 ICCPR [3] introduces only as an additional requirement that derogations, even during an armed conflict, are 'allowed only if and to the extent that the situation constitutes a threat to the life of the nation'.

[722] See (n 288).

[723] See analysis in (n 675-678).

[724] See analysis in (n 754-764).

application with the defence of necessity under general international law. 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 exceptions and those that fall within the scope of necessity are to a certain degree coextensive. For example, necessity may be used to justify measures adopted for the purposes of environmental protection or the conservation of exhaustible natural resources,[725] 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 necessity. The term 'emergency' in Art.XXI(b)(iii) GATT, in its ordinary meaning as confirmed in relevant case law,[726] is also reminiscent of the grave and imminent peril test of necessity. Further textual similarities are also indications of the link between the two defences. For example, the French and Spanish versions of Art.XXI(b)(iii) GATT speak of 'grave international tension' *in lieu* of the term 'emergency',[727] a wording strongly reminiscent of the grave and imminent peril requirement in general international law. Moreover, in the 'public order' exception of Art.XIV(a) GATS[728] 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'.[729] The language of this footnote is again

[725] *Gabčíkovo-Nagymaros* [53]; *Fisheries-Spain-Canada* [20].

[726] See analysis in (n 643-646).

[727] The terms in Art.XXI(b)(iii) GATT are '*grave tension internationale*' and '*grave tensión internacional*' respectively

[728] 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.

[729] Art.XIV(a)(n 5) GATS.

strongly reminiscent of necessity and shows the influence of general international law in the drafting of the WTO Agreements.

Overall, there is an overlap in terms of subject-matter between necessity and the WTO exception clauses, and an evident 'linguistic proximity'[730] which suggests, at the very least, that necessity is a 'relevant rule of international law applicable between the parties' that shall be taken into consideration in the interpretation of the WTO exceptions in accordance with Art.31(3)(c) VCLT. Nonetheless, the WTO DSS has never considered the interaction of exceptions with necessity. It seems that it treats, *sub silentio*, the WTO exception clauses as a strong form of *lex specialis* to necessity.

The following sub-sections discuss the relationship of necessity with the WTO general (a) and security exceptions (b) and elaborate on the relevance of the key customary requirement of non-contribution to the interpretation of these exception clauses (c).

a. Necessity and the WTO general exceptions

The WTO general exceptions are indeed *lex specialis* to necessity. Their interpretation reveals the intention of the parties to replace necessity with a different treaty-specific arrangement that regulates the same subject-matter in a different manner.

Necessity requires that the State interest in question is 'essential' but there is no list of specific interests for the protection of which the defence may be invoked. As the ILC commentary stipulates '[t]he extent to which a given interest is "essential" depends

[730] On the importance of terminological/linguistic proximity in determining the relevance of a rule under Art.31(3)(c) VCLT, see Merkouris (n 280) 74.

on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole'.[731] Conversely, the WTO general exceptions include an exhaustive list of interests, the protection of which justifies inconsistences with the WTO Agreements. In this sense, the WTO general exceptions are narrower than necessity, in that they may only justify measures adopted on specific grounds, whereas the necessity defence may be used for any kind of interest as long as it is 'essential' to the invoking State. For example, serious financial difficulties may fall within the scope of necessity[732] but could not justify a trade-restrictive measure under the WTO general exceptions.[733]

At the same time, the WTO general exceptions set a test that is different from the requirements of necessity. They require a particular nexus between the measure and the stated objective, which, as discussed above, varies depending on the objective ('necessary', 'essential', 'relating to' *et al*). The careful crafting of the general exceptions reveals the intention of the drafters to create a sliding scale of necessity for successful invocation of each Art.XX GATT sub-paragraph. This sliding scale replaces the nexus under general international law that the measure is 'the only way' for the State to safeguard the objective in question and the requirement that the measure should 'not seriously impair an essential interest of the State or States towards which the obligation exists'.[734]

[731] Art.25 ARSIWA, commentary [15].

[732] States have invoked the necessity defence due to financial difficulties, for example, in *Société Commerciale* p.160 and in the Argentinian cases discussed in Ch IV(C)(1).

[733] Note, however, the limited scope of application of the economic emergency exception in Art.XIX GATT.

[734] Art.25(1)(a-b) ARSIWA.

Moreover, according to WTO jurisprudence, when the stated objective is 'to protect' a certain interest, the State may need to demonstrate a potential risk.[735] But this is not the case for all of the objectives enumerated in Art.XX GATT. For example, it may be true with respect to human, animal, or plant life or health which 'implies a particular focus on the protection from or against certain dangers or risks' but it does not equally apply to the public morals exception, since risk-assessment methods 'do not appear to be of much assistance or relevance in identifying and assessing public morals'.[736] In addition, as discussed above, States can freely decide their desired level of protection and adopt measures accordingly. This differs significantly from necessity, where the State needs to demonstrate not only the existence of a risk but rather of a 'grave and imminent peril'. The term 'peril' evokes the idea of 'risk', while 'grave and imminent' suggests immediacy and proximity, 'a threat to the interest at the actual time'.[737]

In sum, there is indeed an overlap in terms of subject-matter and regulatory scope between the WTO general exceptions and necessity. In the absence of such provisions in the WTO Agreements, States would be able to invoke the general necessity defence to justify measures inconsistent with their trade obligations adopted to safeguard essential State interests. However, the WTO general exceptions are a *lex specialis* which 'excludes the possibility of invoking necessity'.[738] It becomes evident that the intention of the drafters was to deviate from general international law in terms of both the scope of

[735] *EC-Asbestos(PR)* [8.182].

[736] *EC-Seal(ABR)* [5.198].

[737] *Gabčíkovo-Nagymaros* [54] by reference to the ILC commentary on the draft articles. Note, however, that the ICJ accepted that the situation need not be urgent in a strict sense: 'a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.'

[738] Art.25(2)(a) ARSIWA.

application of the defence and the substantive requirements for successful invocation. The text of Art.XX GATT provides an exhaustive list of sanctioned State interests and specific criteria for their invocation. Based on this text, the WTO bodies have elaborated on the test for assessing the compatibility of a measure with WTO law.

However, the absence of any reference to general international law, especially in the early reports on Art.XX GATT, is at odds with the approach of WTO bodies on other matters pertaining to State responsibility. As discussed above, WTO bodies have engaged with the rules of general international law on State responsibility, either to interpret relevant provisions in the WTO Agreements or to resolve indispensable matters that were not regulated thereunder.[739] On the contrary, panels and the AB completely disregarded Art.31(3)(c) VCLT in the context of exceptions and did not seek to clarify the relationship between the WTO general exceptions and relevant general international law. They simply enunciated the criteria for successful invocation of the general exceptions as if they exist 'in clinical isolation' from the defences under general international law.[740] If necessity has been an inspiration in the process of interpreting the WTO general exceptions, this has never been acknowledged expressly in WTO jurisprudence. However, especially in the context of the 'weighing and balancing test' the WTO bodies seem to engage with a necessity and proportionality test that is strongly reminiscent of the necessity requirements. As the ILC Study Group on Fragmentation has stated '[r]eference to general rules of international law in the course of interpreting a treaty is an everyday, *often unconscious* part of the interpretation process'.[741] Still, the

[739] See analysis in Ch III(B)(2)(b).

[740] *Cf US-Gasoline(ABR)* p.17.

[741] Fragmentation Report [414] (emphasis added).

absence of methodological clarity and consistency in the identification and application of the *lex specialis* principle creates uncertainty and unpredictability.

b. Necessity and the WTO security exceptions

This lack of methodology becomes even more evident in the case law on the WTO security exceptions, where the Panels could not rely on a vast body of previous jurisprudence, as in the case of the GATT general exceptions, and were faced with the task of interpreting these clauses almost from scratch. As seen in Section C(2), the scope of the WTO security exceptions has been controversial for a long time. The text of the security exceptions includes several terms that remained undefined, including the notions of 'essential security interests' and 'emergency'. Essential security interests are intimately linked with State sovereignty. Their protection has even been described as 'the first duty of any State'.[742] Member submissions also suggest that the WTO security exceptions are merely a reflection of the 'inherent rights' of States under general international law.[743] Although the inherent 'right to self-preservation' is no longer considered the foundation of the necessity defence,[744] the two notions are closely intertwined, as necessity entails a recognition of States' right to ignore international undertakings if sufficiently vital interests are at stake.[745] Nonetheless, Panels did not take into consideration the relevant rules under general international law for guidance in

[742] Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (2nd edn, Kluwer 1999) 81.

[743] e.g., Communication from the EC, Australia and Canada on Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, L/5319/Rev.1, para. 1(b), quoted also in *Russia-Transit(PR)* [1.22-1.23], referring to measures taken on the basis of 'inherent rights of which Art.XXI of the General Agreement is a reflection'. Similarly, *Saudi-IPR(PR)* [2.29, 7.233] and Saudi Arabia's submission that all measures 'emanat[ed] from exercising its sovereign rights guaranteed by…international law'.

[744] Crawford, *State Responsibility* (n 5) 305.

[745] Agius, 'The Invocation of Necessity in International Law' (2009) 56 NILR 95, 98.

discharging their interpretative task.

According to the Panels' interpretation, invocation of the WTO security exceptions is subject to different requirements from necessity, but it seems that, at least in theory, there are also important similarities. Under general international law, States have broad discretion to define themselves what constitutes an essential interest but must prove the existence of a grave and imminent peril threatening such interest. The peril must also be objectively established and not merely apprehended or contingent.[746] *Russia-Transit(PR)* defined the term emergency, based on its ordinary meaning, as a 'situation, especially of danger or conflict, that arises unexpectedly and requires urgent action', and a 'pressing need…a condition of danger or disaster throughout a region',[747] a definition that is notably similar to necessity. The definitions in *US-Steel* and *US-Origin* bear even more striking similarities to necessity, referring to 'situations of the utmost gravity'[748] or to 'danger or conflict' of 'a certain gravity and severity'.[749]

However, in the context of *Saudi-IPR(PR)* and *Russia-Transit(PR)*, where the relevant circumstances were quite tense and ambiguous, the Panels put no emphasis in practice on the elements of danger and urgency. They also required no evidence that such danger exists. They examined the situation at face value putting emphasis only on whether the international relations between the States parties to the dispute were so tense that they appeared to be broken or near-broken.[750] *US-Origin* clearly stated that Panels

[746] *Gabčíkovo-Nagymaros* [54]; Art.25 ARSIWA, commentary [16].

[747] *Russia-Transit(PR)* [7.72].

[748] *US-Origin(PR)* [7.289]

[749] *US-Steel-Switzerland(PR)* [7.155, 7.159].

[750] *US-Origin(PR)* [7.297].

must examine 'the extent of the deterioration in relations between states or other participants in international relations, irrespective of what caused that deterioration' and that the underlying circumstances of the emergency are relevant context but Panels must not 'review the merits or the veracity of such underlying circumstances or alleged circumstances that may have given rise to the situation examined'.[751] This seems to depart from the notion of danger and the need for urgent action suggested in the relevant definitions. The international relations between States can deteriorate, even to such a grave extent, without the existence of any real 'peril' for States' security interests. *Russia-Transit(PR)* also introduced a plausibility (rather, non-implausibility) test as a nexus requirement between the measures at stake and the identified essential security interest. As long as plausibility exists, the necessity of the measure is to be determined by the invoking State. This is very different to the proportionality requirement in the law of necessity.

This thesis argues that necessity informs the interpretation of security exceptions and dictates that the overall test for their successful invocation should be stricter than that suggested so far. An overly lenient approach to the application of security exceptions entails the danger of creating a very broad policy defence. The restrictive requirements under general international law have a balancing role protecting the system from abuse of the available defences and are pertinent to the interpretation of the WTO security exceptions under Art.31(3)(c) VCLT.

The term 'emergency' has no special meaning in the context of the WTO

[751] *US-Origin(PR)* [7.308].

Agreements.[752] In its ordinary meaning, acknowledged also in relevant case law, and in light of general international law, the term suggests that the Respondent must demonstrate the existence of an actual threat that is 'grave and imminent' and not solely a situation of heightened tension. Moreover, such threat must be security-related, as only essential *security* interests are captured by the relevant clauses. Thus, the threshold should be set higher than suggested in the relevant reports. Moreover, WTO bodies must request and examine relevant evidence in order to objectively determine whether the relevant requirements are met.

As for the term 'it considers', indeed, it suggests that States enjoy some discretion with respect to the necessity of the measure. This was also confirmed in *Russia-Transit(PR)* by reference to the negotiating history of Art.XXI GATT.[753] But it is not entirely clear how the Panel reached its conclusion on the *entirely* self-judging character of the necessity test in Art.XXI GATT. As evidenced by the several different nexus requirements in Art.XX GATT ('necessary', 'essential', 'relating to' etc) there are several options in the 'sliding scale' of necessity.[754] The term 'it considers' would certainly inform a 'weighing and balancing' necessity test, similar to that adopted in the context of the WTO general exceptions, but this does not necessarily mean that the test should be abandoned altogether. Ukraine itself in its submissions in *Russia-Transit(PR)* conceded that 'the wording of the phrase "which it considers necessary" suggests that the standard of review cannot be the same as [that] with respect to the necessity test under

[752] Art.31(4) VCLT.

[753] *Russia-Transit(PR)* [7.98].

[754] See analysis in (n 547-568).

Art.XX [GATT]".[755] But the State should at least be required to demonstrate a positive link between the measure and the stated objective; a 'substantial relationship', which is also the *minimum* required in the context of Art.XX GATT. The Panel should be able to reasonably arrive at the conclusion that the measures are necessary for protecting the identified security interests based on the facts before it. The requirement of 'reasonableness' is also present in ICJ case law relating to provisions that grant substantial margin of discretion to States.[756] The ICJ reviews the government's reasoning for the adoption of the measure in question, guided by considerations of good faith.[757] It assesses the reasonableness of the risk involved and whether the measure is 'reasonable in relation to achieving its stated objectives'.[758] The principle of good faith was also invoked in *Russia-Transit(PR)* but was nonetheless reduced to a mere non-implausibility requirement.

Moreover, the complete absence of a weighing and balancing test in Art.XXI GATT seems incompatible with the general principle of proportionality, which is reflected in the requirements of all customary defences wherever there is a choice of means.[759] Assessing a measure's reasonableness entails an examination of the negative impact of the measure on the exercise of the rights in question, which must not be *manifestly excessive* compared to the protection afforded to the interest invoked.[760] By

[755] *Russia-Transit(PR)* [7.34,n87].

[756] See analysis in (n 313-315)

[757] See e.g., *Mutual Assistance* [145-148].

[758] *Nicaragua(Merits)* [224,282]; *Alleged Violations* [111-112]; *Whaling* [61,67].

[759] Art.21 ARSIWA, commentary [6]; Art.22 ARSIWA, commentary [6] and Art.51 ARSIWA; implicitly in Art.25(1)(a)(b) ARSIWA.

[760] See analysis in (n 315).

analogy to *US-Yarn(ABR),*[761] if a WTO member is subject to a disproportionate and, hence, 'punitive' measure under the legal cloak of national security it would be an 'exorbitant derogation from the principle of proportionality', which 'could be justified only if the drafters of the [GATT] had expressly provided for it'.[762] Art.XXI GATT, like the ATC discussed in *US-Yarn(ABR),* does not seem to expressly derogate from the principle of proportionality. The term 'it considers' cannot be read as an authorisation for obviously disproportionate reactions to alleged security threats.

Thus, a type of weighing and balancing test, which nonetheless affords considerable margin of discretion to the State, seems appropriate in the context of the security exceptions. Nothing in their text suggests that a mere non-implausibility test is what is required for successful invocation. The wording of the provision requires that the measure is taken 'for the protection of' essential security interests. As seen above, this term has been interpreted in the context of the general exceptions as encompassing an element of risk and further implies a genuine relationship between the measure in question and the elimination of such risk.[763] The term should be interpreted in a similar fashion in the context of the security exceptions. This is not only closer to the customary requirements of necessity,[764] but it is also more consistent with the WTO object and purpose of security and predictability.

c. The non-contribution requirement under general international law

[761] See analysis in (n 467-470).

[762] *US-Yarn(ABR)* [120].

[763] See analysis in (n 735-736).

[764] See also *Gabčikovo-Nagymaros* [51], where the Court stipulated that the State concerned 'is not the sole judge of whether [the] conditions [of necessity] have been met'.

Lastly, WTO bodies have so far not considered the non-contribution requirement under general international law when interpreting the WTO general and security exceptions. Under Art.25 ARSIWA, 'necessity may not be invoked by a State as a ground for precluding wrongfulness if…the State has contributed to the situation of necessity.'[765] This requirement, is not only part of the necessity defence but is also present in the general defences of *force majeure* and distress.[766] It embodies the general principle of good faith[767] as well as the principle of law expressed in the maxim *ex iniuria jus non oritur*, according to which unlawful conduct cannot modify the law applicable in the relations between the parties.[768] The requirement of non-contribution to the emergency invoked as a justification for wrongdoing has often been introduced to the interpretation of exception clauses in investment arbitration.[769]

Russia-Transit(PR) referred to the principle of good faith under international law but did not meaningfully engage with its content. It reduced its content to a mere non-implausibility test. Nonetheless, a good faith examination should investigate all relevant circumstances to discern whether the alleged security interest is a mere façade. If the invoking State has 'helped, by act or omission to bring about' the situation of alleged emergency[770] this may constitute an indication that the State is pursuing through its trade restrictions different objectives than the ones declared. For example, the measures in question may be an act of retaliation in the context of a broader dispute, disguised as a

[765] Art.25(2)(b) ARSIWA.

[766] Arts. 23(2)(a),24(2)(a) ARSIWA.

[767] e.g., Art.23 ARSIWA, commentary [9].

[768] *Gabčíkovo-Nagymaros* [133]; *Jadhav* [64].

[769] See Ch IV(C)(1)(b)(ii).

[770] *Gabčíkovo-Nagymaros* [57].

security concern. This should be assessed on a case-by-case basis by the WTO bodies. It is possible that a State has itself created a situation of emergency but is nonetheless genuinely responding to a grave risk to its security interests. By analogy to the analysis above on the relationship of Art.XXI GATT with self-defence under general international law, it seems that the GATT allows a State to benefit from the security exceptions even if it is the wrongdoing State. However, a sufficiently substantial (and not merely incidental, or peripheral)[771] contribution to the situation must still be assessed as part of the good faith examination of the measure, as it may point towards an abusive invocation of the defence. This good faith examination constitutes part of the interpretation of the term 'it considers necessary'. For example, if a State initiates itself or substantially contributes to the escalation of a trade war, which is then used as evidence to prove the existence of an 'emergency in international relations', the 'underlying circumstances' of the emergency may inform the Panel's assessment of the necessity of the challenged measures.[772] Lastly, it should be noted that in the case of the WTO, the only remedy available is the repeal or amendment of the challenged measure.[773] This is substantially different in investment arbitration, where the contribution of a State to the emergency may also be taken into consideration by the Tribunal in deciding the issue of compensation. It is thus, understandable, that this requirement is discussed more extensively in the context of arbitral proceedings than in the WTO.

The requirement of non-contribution could also be pertinent to the interpretation of the WTO general exceptions. As elaborated above, the *chapeau* of Art.XX reflects the

[771] Art.25 ARSIWA, commentary [20].

[772] *Cf US-Origin(PR)* [7.308-7.310]. See also the similar circular reasoning in Saudi Arabia's argumentation in *Saudi-IPR*, which the Panel attempted to defend (non-convincingly), in (n 667-669).

[773] Art.19 DSU.

principle of good faith. The AB has explained that:

> The task of interpreting and applying the chapeau is…essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Art.XX and the rights of the other Members under varying substantive provisions…so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations…The location of the line of equilibrium…is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[774]

The possible contribution of the State to the situation invoked could be examined in the context of assessing whether the measure potentially constitutes a 'disguised restriction on trade' and assist the Panel or AB in locating the 'line of equilibrium' in the case at hand. Besides, the precise content and criteria for the assessment of whether a measure constitutes 'disguised restriction on trade' are yet undefined. *US-Gasoline* stipulated that '[t]he fundamental theme [of the *chapeau*] is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions'[775] and as such the requirement of non-contribution under general international law is certainly pertinent to its interpretation. The State's possible contribution to the situation can be thrown into the mix of factors that are taken into consideration in the context of the weighing and balancing test of necessity under the relevant sub-paragraphs of Art.XX GATT. Admittedly, given the nature of the interests enshrined in the WTO general exceptions it is less possible that a contribution would equal abuse: for example, even if a State has somehow contributed to the existence of a risk to human, animal or plant life or health, the necessity to respond to such risk may still be genuine and may not constitute a disguised restriction on trade. It is part of the Panels' and AB's mandate to apply the test

[774] *US-Shrimp(ABR)* [158-159].

[775] *US-Gasoline(ABR)* p.25.

to each case on an *ad hoc* basis.

In sum, the analysis in this sub-section confirms that the WTO general and security exceptions are indeed *lex specialis* to necessity. There is no room for its residual application in WTO disputes. If the interest in question falls within the scope of one of the objectives enumerated in the general and security exceptions, then the State should be able to justify its measure on that basis. If it does not fall within the enumerated objectives, then it is not amongst the interests that the drafters intended to protect. A residual application of necessity, in order to justify, for example, measures taken for the protection of interests not listed in the general and security exception provisions, would be contrary to the intention of the drafters as reflected in the text of the relevant provisions.

Nonetheless, the requirements of necessity are still relevant to the interpretation of these provisions under Art.31(3)(c) VCLT, and the WTO bodies have erred in ignoring them in the process of clarifying their scope. General international law informs the test for assessing a measure's consistency with the WTO general and security exceptions. Especially in the context of the security exceptions, Art.31(3)(c) VCLT and the requirements of necessity suggest a stricter interpretation that reduces the risk of abuse.

Lastly, the analysis above confirms that there is no difference in the 'analytic character' of the WTO general and security exceptions on one hand and necessity on the other. As established above, they both operate as affirmative defences to defeat a case of *prima facie* inconsistency and they both intend to regulate the same subject-matter, i.e., the right of States to deviate from their obligations due to overriding considerations of public interest. There is no fundamental difference in the nature of the two defences that

would justify the exclusion of the *lex specialis* principle. In fact, the differences described above are attributes of the *lex specialis* and demonstrate the ways in which the drafters of the GATT intended to deviate from general international law. Special Rapporteur Ago, in his eighth report on State responsibility, explicitly refers to Art.XX GATT as an example of treaty provision that 'adapts' the general necessity defence on the basis of 'the specific subject-matter of the convention and the special nature of the obligations laid down'.[776] In this context, he confirms the application of the *lex specialis*, stipulating that:

> The special rule will obviously prevail, and the existence of a situation of necessity such as to justify non-compliance with an obligation will have to be appraised in accordance with the terms of that special rule, and not those of the principle of general international law.[777]

Thus, arguments that attempt to exclude the application of the *lex specialis* principle and advocate for residual applicability of the necessity defence in WTO disputes on the basis that the WTO exceptions are different in nature are unconvincing and seem to disregard the intention of the parties to the WTO Agreements.

3. Countermeasures and the WTO Agreements

The imposition of trade sanctions is traditionally used as a means of exerting pressure on States towards a specific change in policy and inducing compliance with international obligations.[778] Such sanctions are often inconsistent, *prima facie*, with the imposing States' international trade obligations: they often entail partial or total import and export

[776] Ago, 'Addendum to Eighth Report' [67, n148].

[777] ibid [67].

[778] See analysis in (n 1-3 and n 391-393).

bans on goods, restrictions on trade in services in certain economic sectors, limitations on traffic in transit, asset freezes and restrictions on financial transactions, and others. Nonetheless, under general international law such inconsistencies can often be justified as countermeasures. Given that a very large percentage of trade obligations is now subsumed under the umbrella of the WTO, it is important to assess whether such restrictions may also be justified under WTO law and under what conditions.

It becomes clear from the analysis above that the drafters of the GATT envisaged the use of the security exceptions for the justification of unilateral trade sanctions.[779] Practice so far also suggests that the security exceptions are often 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, had itself characterised the very same measures challenged in *Saudi-IPR* as 'lawful countermeasures' in response to Qatar's alleged prior internationally wrongful acts in its public statements and submissions before other international fora.[780] Thus, there is a clear connection between countermeasures and the WTO security exceptions. Nonetheless, Panels have so far refrained from discussing the relationship between the two defences.

Moreover, depending on the nature of the alleged prior internationally wrongful act, some countermeasures may also relate to the subject-matter of the WTO general exceptions. For example, countermeasures in response to breaches of obligations relating to the protection of the environment or exhaustive natural resources are *prima facie* related to Art.XX(b) and (g) GATT. We also witness a new trend of attempting to justify

[779] See analysis in (n 574).

[780] E.g., Saudi submissions in *ICAO-2020* [24].

trade sanctions on the basis of 'public morals' under Art.XX(a) GATT. It is thus important to clarify whether and how countermeasures interact with the WTO provisions.

The following sub-sections discuss, firstly, the findings of the WTO panel and AB in *Mexico-Drinks* (a) and the interaction of the defence of countermeasures with the DSU provisions on dispute settlement and WTO-mandated retaliation measures (b). Then, they explore whether and to what extent measures adopted as countermeasures can be justified under the WTO general and security exceptions (c). Lastly, they examine whether the general defence of countermeasures is residually applicable in the context of WTO disputes (d) and whether WTO adjudicative bodies have the power to examine indispensable incidental issues arising in the context of this defence (e).

a. The Mexico-Drinks dispute

The relationship of countermeasures with the WTO Agreements was only examined once by the WTO, in *Mexico-Drinks*. *Mexico-Drinks* arose in the context of a broader situation of tension between the US and Mexico, which involved proceedings not only before the WTO, but also before arbitral tribunals.[781] The disagreement started with the US imposing measures, which restricted the access of Mexico's surplus sugar produce to the US market. It further escalated by the subsequent failure of the US to take part in the NAFTA dispute settlement proceedings initiated by Mexico with respect to the market restrictions, by blocking the appointment of Panellists contrary to NAFTA Chapter Twenty. Mexico proceeded with a series of measures aiming to protect its domestic sugar

[781] See Ch IV(C)(3). For an overview of relevant proceedings see Losari and Ewing-Chow, 'Legitimate Countermeasures in International Trade Law and Their Illegality in International Investment Law' in Pazartzis and Gavouneli (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Bloomsbury 2016) 413; Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking' (2006) 9 JIEL 197, 198–199.

industry, including a 20% tax on soft drinks using sweeteners primarily used by US companies. In response to US claims that the tax was in breach of its NAFTA obligations, Mexico invoked the defence of countermeasures under general international law, claiming that the tax was lawfully introduced in response to prior US breaches of its NAFTA obligations regarding access of Mexican-produced sugar to the US market and dispute settlement.

In *Mexico-Drinks*, Mexico argued that Art.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 general defence of countermeasures. According to Mexico, the term 'laws and regulations' includes international obligations of WTO members and thus, Art.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 Art.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'.[782] 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.'[783] Thus, they found that Art.XX(d) GATT does not encompass action taken as a

[782] *Mexico-Drinks(PR)* [8.194]; *Mexico-Drinks(ABR)* [75].

[783] *Mexico-Drinks(ABR)* [75].

countermeasure in response to an internationally wrongful act. As Mexico's arguments did not relate to other subparagraphs of Art.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 *Mexico-Drinks* which suggest, more generally, that countermeasures cannot be invoked in a WTO dispute.

Firstly, the AB stressed that, if the term 'laws and regulations' included international obligations then it would also include obligations under the WTO Agreements.[784] Accordingly, Art.XX(d) GATT could also be used to justify measures taken in response to a member's breach of WTO obligations. This would be contrary to Arts.22 and 23 DSU, which provide the obligation to have recourse to the DSU instead of taking unilateral action to seek redress for any alleged WTO breach and the possibility of WTO-mandated suspension of concessions in cases of non-compliance with DSB rulings within reasonable time.[785]

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, WTO bodies would have to determine first whether a prior internationally wrongful act has taken place. This may well relate to a non-WTO obligation (in that case, it related to US obligations under NAFTA).[786] Thus, 'WTO Panels and the Appellate Body would thus become adjudicators of non-WTO

[784] *Mexico-Drinks(ABR)* [77].

[785] ibid.

[786] *Mexico-Drinks(ABR)* [78].

disputes', which is not their function as intended by the DSU.[787] The AB recited to this end Art.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'.[788] Accordingly, it cannot 'be used to determine rights and obligations outside the covered agreements.'[789] Thus, it seems that in the only case where the issue has arisen, the AB held that Respondents cannot rely on the general defence of countermeasures in a WTO dispute due to jurisdictional limitations of the WTO bodies. As seen in Chapter IV, the same approach was adopted by tribunals constituted under NAFTA.[790]

The following sub-sections identify some flaws in the *Mexico-Drinks* reasoning and argue that the defence of countermeasures is residually applicable to WTO disputes.

b. Countermeasures and Articles 22 and 23 DSU

Mexico-Drinks argues that Arts.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. However, this line of reasoning is flawed.

First, it is possible that the *lex specialis*, in our case Arts.22 and 23 DSU, excludes

[787] *Mexico-Drinks(ABR)* [78,56].

[788] *Mexico-Drinks(ABR)* [56,n173].

[789] *Mexico-Drinks(ABR)* [56].

[790] *ADM* [128]; *CPI* [180].

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 consisting in the non-performance of WTO obligations as a response to breaches of the WTO Agreements. 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-Drinks.*[791] Arts.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.[792] 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. Nonetheless, the Panel and the AB seem to suggest that countermeasures as a defence for *prima facie* breaches of WTO obligations are excluded by the WTO Agreements.

This is reminiscent of the approach of the ICJ in *Tehran Hostages*. However, it was argued in Chapter II that the relevant conclusion regarding diplomatic law was justified through an (implicit) interpretation of the VCDR and VCCR, which suggested the inviolability of diplomatic rights.[793] The WTO bodies have not provided any evidence to suggest that the WTO Agreements, in their entirety, imply the inviolability of WTO obligations by means of countermeasures. The Panel only referred in a separate part of

[791] See similar discussion regarding *Tehran Hostages* in (n 177-180).

[792] See (n 176) on the dual role of countermeasures.

[793] See analysis in (n 179-197).

its analysis to the rejection of India's proposal during the negotiations on the International Trade Organisation Charter. India proposed to include into what later became Art.XX GATT a paragraph allowing States to 'temporarily discriminate against the trade of another Member when this is the only effective measure open to it to retaliate against discrimination practised by the Member in matters outside the purview of the [ITO], pending a settlement of the issue through the United Nations'.[794] This was the only argument that could potentially offer some insight into whether the drafters of the GATT intended to exclude countermeasures. But the language of India's proposal does not correspond entirely to the general defence of countermeasures. It only refers to instances of discrimination in areas of international relations other than trade. Moreover, the Panel provided no evidence on the reasoning behind the rejection of India's proposal at that stage.

In sum, it is established that certain countermeasures are indeed displaced by virtue of Arts.22 and 23 DSU. This is the case of WTO countermeasures in response to breaches of the WTO Agreements themselves, which may only be WTO-mandated following dispute settlement proceedings under the DSU. However, there is no reference in the WTO Agreements regarding temporary non-performance of WTO obligations by an injured WTO member against another WTO member responsible for a *non-WTO* internationally wrongful act aiming to induce compliance of the latter with its *non-WTO* international obligations.[795] The reports in *Mexico-Drinks* offered no further insight on this matter.

[794] *Mexico-Drinks(PR)* [8.176] and citations therein.

[795] Art.49 ARSIWA.

The following sub-sections discuss whether the WTO Agreements suggest the exclusion of countermeasures in the context of WTO disputes. The crucial question in this respect, which has not been addressed by the WTO bodies, is whether the WTO general and security exceptions constitute *lex specialis* to countermeasures. A further question in this context is whether and to what extent the law on countermeasures may inform the interpretation of these exception clauses.

c. Countermeasures justified under the WTO security and general exceptions

As discussed above, WTO bodies have not taken into consideration the requirements for successful invocation of countermeasures in interpreting the WTO exception clauses. As a result, WTO exceptions have been interpreted independently (and very differently) from countermeasures under general international law.

Prima facie, the WTO security exceptions do not seem to regulate the same subject-matter as countermeasures. Countermeasures aim at inducing compliance with a State's international obligations that have been previously breached. The security exceptions aim at protecting a State's essential security interests. Still, there is an overlap between the two defences: countermeasures taken in response to a wrongful act that relates to a State's security interests may indeed fall within the scope of the security exceptions. This was, for example, the case in *Saudi-IPR*. In such cases, the disparity between the test for successful invocation of countermeasures on the one hand, and the security exceptions on the other, is striking.

Firstly, in the case of countermeasures, the invoking State must demonstrate that a prior internationally wrongful act was committed by the target State. From the reports discussed above, it becomes clear that successful invocation of the security exceptions

requires only tentative evidence that an essential security interest of the invoking State is affected and that the measure in question plausibly addresses this concern. The invoking State need not prove that the target State has acted in breach of its obligations. This becomes abundantly clear in the case of Qatar. The Quartet characterised its actions as 'lawful countermeasures' in response to Qatar's alleged wrongful acts. Qatar consistently denied these allegations. Nonetheless, the Quartet was not required to provide any evidence of Qatar's alleged wrongdoing for successful invocation of the WTO security exceptions. It was solely based on their unilateral assertion that the situation raises security-related concerns that some of its measures were found justifiable under WTO law. If its trade restrictions were treated as 'lawful countermeasures' under general international law, such an assertion would not suffice for successful invocation of the defence.

Secondly, a countermeasure need not be reciprocal, i.e., relate to the same or a closely related obligation as the internationally wrongful act to which it responds,[796] but it must 'be commensurate with the injury suffered'.[797] This requirement of proportionality entails both a quantitative and a qualitative element: its assessment takes into account not only the damage caused by the act but also 'the importance of the interest protected by the rule infringed and the seriousness of the breach'.[798] Proportionality aims to ensure that the adoption of countermeasures does not lead to inequitable results.[799] Under the WTO security exceptions, there is no need to demonstrate that an injury has

[796] Part III, Chapter II ARSIWA, commentary [5].

[797] Art.51 ARSIWA.

[798] Art.51 ARSIWA, and commentary thereto [6].

[799] ibid.

been suffered[800] or that the response was proportionate. In fact, as seen above, the State is free to determine unilaterally whether the measure is necessary and appropriate to respond to the identified security concern.

Turning to the WTO general exceptions, again, *prima facie*, the two rules do not regulate the same subject-matter. Under the general exceptions, WTO members may adopt trade restrictive measures to serve one of the enumerated interests. Some countermeasures may relate to these interests. That would be the case if the international obligations previously breached by the target State affect the attainment of these objectives. For example, countermeasures taken in response to a breach of obligations relating to the protection of the environment or exhaustible natural resources could be potentially justified under Art.XX(b) or (g) GATT. However, the aim of a countermeasure is 'to induce [a State responsible for an internationally wrongful act] to comply with its obligations'[801] and not 'to protect human, animal or plant life or health', for example. Thus, even if the countermeasure meets the requirements for the 'initial, threshold examination' which seeks to determine the existence of 'a relationship between [the] otherwise [WTO]-inconsistent measure and the protection' of one of the enumerated objectives, it would be harder to prove that it is 'designed' to serve that particular objective.[802] Most importantly, depending on the specific subparagraph of the general exceptions that would be under consideration, it may be even harder to prove that the measure has the required nexus with the stated objective, especially if the required

[800] Within the meaning of Art.42 ARSIWA.

[801] Art.49 ARSIWA.

[802] See analysis in (n 541-546).

nexus is a necessity test.[803]

Thus, some countermeasures, which do not only aim at inducing compliance with an international obligation but *also* have, at the very least, a substantial contribution to the attainment of one of the objectives enumerated in the WTO general exceptions, may be justifiable under these provisions. But this is not the case with all (or most) countermeasures.

d. Residual applicability of the general defence of countermeasures to WTO disputes

Under general international law, a State is entitled to take countermeasures as an 'injured State' in all instances codified in Art.42 ARSIWA: when the obligation breached is owed to that State individually; when it is owed to a group of States, including the State in question, and it is specially affected by the breach; or when the performance of that obligation by the responsible State is a necessary condition of its performance by all the other States to which the obligation is owed.[804] Moreover, under Art.48 ARSIWA a non-injured State is also entitled to invoke a State's responsibility when the obligation breached is established for the protection of a collective interest or owed to the international community as a whole. Art.54 ARSIWA suggests that in cases of such collective interests third parties may also take 'lawful measures against [the responsible State] to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'.[805] In view of these provisions, it seems

[803] See analysis in (n 547-568).

[804] See Arts.42 and 49 ARSIWA.

[805] Note the controversy on whether this provision recognises the right of third-States to take countermeasures, e.g., Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221. On the legality of third-party countermeasures see more generally Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017).

that the range of circumstances in which a State is entitled to take countermeasures under general international law is significantly broader than the types of countermeasures that could be potentially justified under the WTO security and general exceptions, as outlined above. Some examples of countermeasures that do not fall within the scope of the WTO exceptions are for example, unilateral[806] action taken in response to breaches of international human rights or humanitarian law, to breaches of obligations relating to navigation or aviation, diplomatic law *et al*. Moreover, it would be very hard to prove that a third-party countermeasure, assuming its legality under general international law, meets the requirements of the WTO exceptions. A non-injured State would rarely be able to prove that its actions have the required nexus with the objectives enumerated in Art.XX GATT and it would not face a direct security concern that would readily justify recourse to Art.XXI GATT. [807]

WTO case law relating to security exceptions suggests a tendency to broaden their scope so as to encompass cases relating to collective interests.[808] *US-Origin* underscored that its findings:

> [I]n no way question… the importance placed by…WTO Members, on the protection of human rights and democratic principles, or other values or interests they consider important, which may find reflection in their articulation of their essential security interests. At the same time, measures adopted by Members to advance such interests, if defended on the basis of Art.XXI, will need to meet the conditions for its application, which WTO panels will continue to have the responsibility to assess in any dispute

[806] Note that UNSC mandated sanctions would fall within the scope of Art.XXI(c) GATT which refers to 'any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

[807] *Cf* Herdegen, *Principles of International Economic Law* (2nd edn, OUP 2016) 246–247.

[808] See also the analysis above in the context of collective self-defence in (n 710-717).

brought by WTO Members to the DSB in relation thereto.[809]

It also stipulated that an 'emergency in international relations' does not necessarily have 'to originate in the invoking Member's own territory and bilateral relations'.[810] Still, despite this broad definition of the terms in Art.XXI(b)(iii) GATT, the term 'essential *security* interests' informs the notion of emergency. A holistic interpretation of the provision under Art.31 VCLT does not allow for such an expansive understanding of the scope of the *security* exceptions. The analysis above elaborated on the need for a stricter approach to this matter.[811]

Thus, the important question that arises in this context is whether countermeasures that do not fall within the scope of the WTO exceptions are prohibited under WTO law. From an analytical point of view there are two possible approaches to this matter.

The first approach is to assume that, indeed, any countermeasure that does not relate to security concerns or does not meet the requirements of the general exceptions is prohibited under WTO law. The State interests that can be addressed under the WTO exception clauses are specifically enumerated therein and countermeasures, in general, are not amongst them. It also seems that the drafters of the GATT had in mind the possibility that the security exceptions may be used to justify trade sanctions.[812] It can thus be inferred that they purposely excluded other types of countermeasures. There are some further traces of this understanding in the practice of States under the GATT. In

[809] *US-Origin(PR)* [7.359].

[810] *US-Origin(PR)* [7.297].

[811] See analysis in (n 750-764).

[812] See analysis in (n 574).

April 1982, the EEC, Canada, and Australia imposed trade restrictions to Argentina in the context of the Falkland/Malvinas dispute, invoking their 'inherent rights of which Art.XXI of the General Agreement is a reflection'.[813] Argentina challenged whether such measures could be justified under the security exceptions and sought an interpretation of Art.XXI GATT by the Council. Its efforts led to the inclusion of the following clause in the Ministerial Declaration of November 1982: '…the contracting parties undertake, individually and jointly:…to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement'.[814] Still, this is not an interpretative declaration and does not take a clear position on the matter. The issue turns again on what is considered 'consistent' with the GATT and what is not. It is thus doubtful that it amounts to subsequent practice within the meaning of Art.31(3)(b) VCLT.

The second approach is to interpret the lack of specific reference to countermeasures in the WTO Agreements as implicit recognition of its residual applicability. Countermeasures under general international law do not regulate the same subject-matter as the WTO exception clauses. The WTO Agreements do not regulate at all the right of States to temporarily refrain from performing their international obligations as a means to respond to a prior internationally wrongful act and implement the international responsibility of an offending State. This approach is consistent with WTO case law on other issues pertaining to general international law, as seen in Section B(2)(b) and is also consistent with the practice of other adjudicative bodies, which treat the silence of a treaty as indicative of acceptance rather than rejection of the applicability

[813] WTO (n 587) 603 and references therein. See also analysis in (n 743).

[814] WTO (n 587) 603.

of general international law. We saw examples of this approach in the practice of the ICJ in Chapter II. In Chapter IV we also see that tribunals have interpreted NAFTA's silence on the issue of countermeasures as implicit acceptance of their *prima facie* applicability as a defence for non-performance of NAFTA obligations, although they later rejected the applicability of the defence on different grounds.[815]

From a normative perspective, the first approach has important practical implications both for the WTO and for international law more generally. Given that a considerable proportion of current trade relations operate within the framework of the WTO, any trade-related sanction would have to be justified on the basis of WTO law. If the defence of countermeasures is not residually applicable, then States would no longer be able to justify unilateral trade restrictions taken in response to breaches of obligations that do not relate to security interests, or the objectives enumerated in Art.XX GATT. Thus, an important means for the implementation of international responsibility under general international law would be rendered unavailable or would necessarily entail a breach of WTO obligations. In view of this, only UNSC mandated trade sanctions could be used in response to wrongdoing in fields of international law such as human rights or environmental law. And it is well-known that, in practice, the UNSC scarcely adopts relevant decisions as it is, more often than not, driven to deadlock by a climate of antagonism and the permanent members exercising their veto power.[816]

Moreover, this approach increases the risk of abuse of the WTO security exceptions. Respondents will attempt to justify their trade-restrictive measures under the

[815] See Ch IV(C)(3)(a).

[816] For a historic overview of the UNSC sanctions practice see Tzanakopoulos (n 6).

WTO security exceptions, whether there is a genuine security concern or not. If there is no other defence available in this context, States will attempt to stretch the limits of the security exceptions in order to accommodate a broader range of circumstances. The drafters of the GATT left a significant margin of discretion to States in cases that involve essential security interests because of their sensitive character and intimate connection to State sovereignty. At the same time, general international law establishes specific and quite strict requirements for the adoption of countermeasures to minimise the possibility of abuse. Shoehorning a broader range of measures, including alleged countermeasures, into the WTO security exceptions will have the undesirable effect that States will be able to justify unilateral trade sanctions under very loose conditions, largely dependent on the unilateral assessment of the invoking State. A good percentage of trade sanctions will, thus, be justified under the security exceptions under the guise of national security, rendering the customary requirements redundant.

We have also witnessed in recent jurisprudence attempts to justify sanctions on the basis of public morals. In *US-Tariffs*, which examined the legality of the additional duties imposed by the US to products from China in the context of a broader trade war between the two States, the US asserted that its measures 'protect[ed] public morals within the meaning of Art.XX(a) because they have been adopted to "obtain the elimination" of conduct that violates US standards of rights and wrong, namely China's unfair trade acts, policies, and practices'.[817] According to the US, these unfair trade acts related to the acquisition of 'intellectual property, trade secrets, technology, and confidential business information from US companies' through coercion and theft.[818]

[817] *US-Tariffs(PR)* [7.113].

[818] *US-Tariffs(PR)* [7.128].

The US submitted evidence from domestic instruments to show that the Chinese practices are contrary to prevailing standards of public morals in the US. In view of the low threshold in the first step of a measure's provisional justification under the subparagraphs of Art.XX GATT,[819] the Panel found that 'the "standards of right and wrong" invoked by the US (including norms against theft, misappropriation and unfair competition) could, at least at a conceptual level, be covered by the term "public morals" within the meaning of Art.XX(a) [GATT]'[820] but later found that the measures failed to meet the requirements of the necessity test.[821] The broad understanding of the term 'public morals' which was not rejected, in principle, by the Panel, has been criticised as overstretching the limits of the exception.[822] Indeed, several sanctions imposed in the context of broader disputes would fall, at least *prima facie*, within the scope of Art.XX GATT if such interpretation is accepted rendering the exception susceptible to abuse. Moreover, even if we were to endorse such a broad interpretation, States would still be unable to rely on the public morals exceptions to impose trade restrictions in response to breaches of non-WTO international obligations, such international human rights law. Even if sanctioning such violations and inducing compliance with relevant international rules may be classified as a public morals issue, a direct connection between the sanctioned products and the violations in question would have to be established for the necessity test under Art.XX GATT to be met. For example, trade restrictions on a product that is the result of forced labour could be potentially justified on the basis of public morals. However, it

[819] See analysis in (n 541-546).

[820] *US-Tariffs(PR)* [7.140].

[821] *US-Tariffs(PR)* [7.228-7.231].

[822] Delev, 'A Moral Stretch? US–Tariff Measures and the Public Morals Exception in WTO Law' (2022) 21 WTR 249.

is doubtful that concerns over human rights violations that are unrelated to the production of the sanctioned products, as is most often the case, could justify the imposition of trade restrictions under Art.XX(a) GATT.

In view of the above, accepting the residual applicability of countermeasures in the WTO is not only analytically appropriate in view of the residual applicability of general international law in treaty relations, but is also more practical and desirable. When faced with a case resembling a countermeasure, WTO bodies will need to discern whether the measure at hand genuinely falls within the scope of the WTO exceptions or whether general international law on countermeasures should apply instead. The stricter interpretation of the security exceptions proposed above, in view of the customary requirements of necessity, can assist in this respect. If the State can demonstrate a substantial relationship between the measure at issue and an essential security interest that is genuinely at risk in the context of an emergency in its international relations, then the WTO security exceptions and their relatively lower threshold would apply. Similarly, a State may be able to justify a trade restriction on the basis of the general exceptions, if the measure fall within the ambit of one of the enumerated objectives. In all other cases, the WTO bodies should be able to test the measure in question against the requirements for a permissible countermeasure under general international law. If the measure meets such requirements, then it will be justified, i.e., WTO consistent. This approach would protect both the WTO system from the possibility of abuse and the special place that trade sanctions have in international law as a means of inducing compliance with international obligations.

e. Countermeasures in the WTO: addressing the jurisdictional considerations

If we accept the residual applicability of countermeasures in WTO disputes, we also need to address the jurisdictional considerations raised in *Mexico-Drinks*. As seen above, the Panel and AB argued that they have no jurisdiction under the DSU to determine whether a non-WTO obligation has been previously breached so as to rule on the applicability of countermeasures. Thus, they have so far shown a real reluctance to venture outside their domain of expertise and make pronouncements relating to the substantive content of rules of international law beyond the WTO.[823]

If countermeasures are residually applicable but Panels have no jurisdiction to address the defence in its entirety this would have one of the three outcomes discussed earlier in the context of the ICJ.[824] First, the Respondent may be precluded from invoking a defence which is otherwise available to it, contrary to fundamental principles of justice and equality. Second, the Panels could proceed to examine the rest of the requirements of countermeasures, an approach that cannot resolve the jurisdictional hurdle in all cases and entails the risk of an ill-founded judgment. Third, the Panels could opt for a stay of the proceedings until another competent body, judicial or political,[825] rules on the prior internationally wrongful act. However, as discussed earlier, this approach faces several legal challenges and can easily lead to a stalemate. Moreover, it could also lead to significant delays in resolving the dispute and time is of the essence, especially in WTO disputes where no monetary compensation is normally available as a remedy for injuries suffered. It is thus evident that none of these options is satisfactory.

[823] Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2011) 150.

[824] See analysis in (n 342-351).

[825] See e.g. in *Russia-Transit(PR)* [7.8] the Panel's use of UNGA resolutions to implicitly characterize the acts of Russia.

This thesis argues that the jurisdiction of WTO bodies entails the power to determine whether a prior internationally wrongful act has taken place in the context of countermeasures. As discussed in Chapter II, the examination of defences forms an indispensable part of the reasoning of an adjudicative body in deciding on the international responsibility of the Respondent for breach of its international obligations. 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',[826] or more generally, to rule on the content of a State's international responsibility. The several reflections of this principle in case law which were discussed in Chapter II[827] are applicable by analogy to the WTO dispute settlement system.

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'.[828] Accordingly, jurisdiction of an adjudicative body to examine all indispensable incidental issues in the context of defences 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.'[829] WTO bodies enjoy such inherent powers in the exercise of their

[826] Crawford, *State Responsibility* (n 5) 599.

[827] See analysis in (n 340-342).

[828] *Nuclear Tests* [23].

[829] ibid.

functions.[830] 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 in making the recommendations or in giving the rulings provided for in the covered agreements.[831]

Findings on the applicability of a defence are certainly within the mandate of the Panel to make an *objective assessment* and to assist the DSB in making recommendations. Besides, the legal effects of such findings are limited 'to the four corners of the covered agreements' since the WTO DSS would not be able to accompany its finding with appropriate remedies.[832] Such incidental rulings would form integral part of the reasoning of the WTO adjudicative body in deciding the matter properly brought before it.[833] They would not be within the *petita* in the case at hand and thus, they would not be addressed in the report's conclusions and recommendations. Similarly, the DSB in adopting the reports would only be able to make recommendations to the WTO members involved in the dispute with respect to the performance of the WTO obligations that were challenged in accordance with the DSU. The DSB does not have the power to make recommendations or authorise action relating to the performance of non-WTO obligations.

It could be argued that the arguments raised in Chapter II regarding the limits of the jurisdiction of the ICJ cannot be applied by analogy to the WTO bodies in view of their differences in terms of jurisdictional field. The ICJ is a court of general competence.

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[830] See analysis in (n 412-415)

[831] Art.11 DSU.

[832] Gourgourinis, *Equity* (n 353) 209.

[833] Pauwelyn and Salles (n 340) 101.

It can, in principle, exercise jurisdiction over all inter-State disputes under international law, as outlined in Art.36 ICJ Statute. Conversely, the WTO bodies have a more limited scope of competence. As discussed in Section B, according to the DSU, 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'.[834] Thus, the scope of WTO dispute settlement is limited to claims of a specific nature, arising out of the WTO Agreements. One could argue that the ICJ may indeed exercise jurisdiction over indispensable incidental issues, as these would still be within the scope of its jurisdictional field, even if they fall outside the scope of the instrument that established its jurisdiction in the given case. Conversely, a specialised adjudicative body whose jurisdictional field is restricted to specific types of disputes cannot determine matters that are outside the scope of its foundational jurisdiction and could not ever be brought before it as independent claims.

This argument is not persuasive. An incidental issue need not fall within the scope of the adjudicative body's jurisdictional field because, as elaborated above, findings on such issue do not constitute independent verdicts but are, rather, part of the reasoning for the determination of rights and obligations that are indeed *within* its jurisdictional field and its jurisdiction as established in each given case. The function of an international adjudicative body, regardless of its character as general or specialised, is to decide the case that is brought before it in accordance with its statute and rules of procedure. To discharge this function, it may need to look into rights and obligations that are necessarily implicated by the main claim before it. This was most pertinently confirmed in *ICAO-2020*. As discussed in Chapter II, the ICJ found that the jurisdiction *ratione materiae* of

[834] Art.3.2 DSU.

the ICAO Council, a specialised dispute settlement body with limited competence on matters of civil aviation, extends to the examination of issues 'outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction', such as the requirement for a prior internationally wrongful act in the context of countermeasures.[835] Thus, its findings may be applied *mutatis mutandis* to other specialised dispute settlement bodies such as the WTO bodies.[836]

The argument that courts of general competence can have an expansive understanding of their jurisdiction whereas specialised courts should exercise self-restraint seems to imply, essentially, a difference in the competency, adequacy, or suitability of such courts to determine a wider range of issues under international law. Naturally, the competency of the court can only be assessed by reference to its members. In other words, this argument seems to imply that the judges (and not the court) are in one case more 'competent' to determine all issues of international law than in the other. For example, in his declaration in *ICAO-2020* expressing disagreement with certain aspects of the Court's judgment, Judge Gevorgian stipulated that the members of the ICAO Council 'act as representatives of their Governments and need not be well-versed in international law'.[837]

This assumption cannot be easily substantiated in the context of WTO adjudication. Although the professional and academic backgrounds of WTO Panellists and AB members vary, several of them are highly specialised in public international law

[835] *ICAO-2020* [61] and analysis in (n 338-339).

[836] Even more so since the WTO bodies meet the requirements of independence and impartiality which, among others, justify the characterisation of their function as judicial, see Art.8 and 17 DSU and n 412. *Cf ICAO-2020* [60] and criticism in *ICAO-2020-Gevorgian* [10].

[837] *ICAO-2020-Gevorgian* [10].

and have even served as judges in other international adjudicative *fora*. With respect to Panels, which are composed on an *ad hoc* basis, there are procedural avenues to ensure that, whenever matters of international law outside the covered agreements are implicated in the dispute, the Panel comprises individuals that possess the necessary knowledge on such matters. In fact, there is some empirical evidence to suggest that this may already be the case.[838] The DSU already requires members to provide information on the background of individuals that they suggest for inclusion to the indicative list of Panellists, including specific areas of experience or expertise.[839] Panellists for each case are selected on this basis. Moreover, as demonstrated in Section B(2)(b), WTO Panellists already apply and take into consideration general international law in interpreting the WTO agreements. Thus, examination of general defences is not an exercise foreign to their function.

With respect to the AB, the academic and professional qualifications required for the appointment of judges in standing international adjudicative *fora*, promises a high level of understanding of international law, sufficient to interpret and apply a rule to the extent required for an incidental ruling. According to Art.17.3 DSU the AB 'shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject-matter of the covered agreements generally.'

In view of the above, the argument that members of the WTO bodies are not 'well-versed in international law' and thus cannot make relevant incidental findings would not be persuasive.

[838] E.g., appointment of Georges Abi-Saab in *Russia-Transit* and Donald McRae in *Saudi-IPR*.

[839] Art.8.4 DSU.

E. INTERIM CONCLUSIONS

This chapter demonstrated that despite the specialised character and limited jurisdictional scope of the WTO DSS, the law applicable to WTO disputes is not exclusively the WTO Agreements. WTO case law confirms that there is a presumption of applicability of general international law to WTO disputes, subject to the application of the *lex specialis* principle. Specifically, with respect to the law on State responsibility, WTO bodies have often had recourse to the rules enshrined in ARSIWA. They have applied such rules directly in the absence of a provision in the WTO Agreements regulating the same subject-matter; or, they have taken them into consideration in interpreting the terms of the WTO Agreements as relevant rules of international law applicable between the parties under Art.31(3)(c) VCLT. 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. Accordingly, general defences cannot be considered as excluded *a priori* from WTO disputes due to applicable law limitations.

Moreover, WTO bodies are directly mandated under Art.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 Art.31(3)(c) VCLT has an obligatory 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. In view of this, WTO bodies *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.

The chapter then provided an overview of the WTO exception clauses that may partially regulate the same subject-matter as general defences. It started with the WTO general exceptions and explored their scope of application and substantive requirements through a survey of relevant case law. There is an abundance of WTO reports on Art.XX GATT that have crystallised the specific requirements for its successful invocation. Overall, it is a 3-step-test. A Respondent must first demonstrate that the measure in question is designed to address one of the objectives enumerated therein. Second, it must demonstrate that the measure has a sufficient relationship with the objective invoked. The required relationship varies depending on the objective. Some measures need to be 'necessary' for the protection of the objective. Such necessity requirement entails a 'weighing and balancing' test which assesses the measure's contribution to the objective and its trade-restrictiveness compared to other alternatives, as well as the objective's importance. Other measures need to be 'essential' or simply 'relating to' the objective. Third, the measure must meet the requirements of the *chapeau*, which reflects considerations stemming from the general principle of good faith.

On the other hand, regarding the WTO security exceptions, we have less than a handful of WTO reports. This chapter provided an overview of the Panels' findings in the relevant disputes. It argued that the interpretation of the Panels was overly permissive and established a very low threshold for the justification of otherwise WTO inconsistent measures. The Panels found that the State enjoys discretion in defining what is an 'essential security interest' and must only demonstrate that the measure in question is

'not implausible' as protective of the proffered interest. Moreover, according to the Panels, the term 'it considers' in Art.XXI GATT suggests the self-judging character of the necessity requirement, which is thus at the sole discretion of the invoking State. The only element of the security exceptions which is subject to objective determination is the enumerated sub-paragraphs, such as the existence of an 'emergency in international relations'. However, the Panels in the relevant disputes did not request the identification of any specific risk or danger to the States' security interests, the submission of evidence of the urgency of the adopted measure or even any substantial relationship between the measure and the emergency invoked. Good faith considerations were only introduced in the context of the 'plausibility test' in the relationship between the measure and the essential security interest identified by the State.

The chapter critically assessed the relationship of the general and security exceptions with the general defences under the law on State responsibility, in view of the customary rules of treaty interpretation and the *lex specialis* principle. It argued that although the defences of necessity and self-defence are largely displaced by virtue of the *lex specialis* principle, their requirements are still pertinent to the interpretation of the WTO general and security exceptions. The chapter suggested that the non-contribution requirement of necessity should be taken into consideration in the context of the *chapeau* of the general exceptions or the weighing and balancing test of necessity. In the case of the security exceptions, the chapter further argued that the Panels erred in ignoring the requirements of necessity in their interpretation. A more permissive Art.XX-like 'weighing and balancing test' in the context of the security exceptions, including a requirement to provide positive evidence of the risk ('grave and imminent peril') that amounts to an emergency and to demonstrate a reasonable connection between the

measure and the essential interest at risk, is more consistent with both the requirements under general international law and the object and purpose of the WTO Agreements. The requirements of customary international law can offset the implications of the Panels' *laissez faire* approach in the recent disputes relating to the WTO security exceptions and re-establish a viable operational system for the imposition of unilateral trade sanctions in the context of non-trade disputes. Lastly, the chapter argued that the defence of countermeasures is not entirely displaced by the WTO Agreements but rather remains applicable in cases of trade-sanctions that do not constitute a response to prior breach of the WTO Agreements and do not relate to essential security interests, or the objectives enumerated in the general exceptions.

Given this residual applicability, it was further argued that WTO bodies have jurisdiction to determine whether a prior internationally wrongful act has taken place in the context of countermeasures, even when such act is in breach of non-WTO obligations. An adjudicative body has the inherent power to make all findings that are indispensable to discharge its function and rule on the responsibility of the Respondent and its consequences. This power is not affected by the 'specialised' character of the adjudicative body. Such indispensable incidental findings need not be within the body's foundational jurisdiction as they do not constitute independent, enforceable rulings. Thus, the jurisdictional limitations of the WTO bodies cannot exclude the applicability of general defences to WTO disputes.

IV. INVESTOR-STATE ARBITRATION: A SPECIALISED ADJUDICATIVE MECHANISM BETWEEN STATES AND PRIVATE PERSONS

A. INTRODUCTION

Chapter III examined the case law of the WTO DSS, an inter-State specialised dispute settlement system, with exclusive competence to hear disputes arising under the WTO Agreements. The analysis reached similar conclusions to those in Chapter I, relating to the jurisprudence of the ICJ. Despite the specialised character and limited jurisdictional scope of the WTO DSS, general international law, including general defences, remains applicable, in principle, to WTO disputes, to the extent that the WTO Agreements do not contract out of its application. As the WTO general and security exceptions regulate the same subject-matter as the general defences of self-defence and necessity, the chapter concluded that the latter are displaced in the context of WTO disputes due to the application of the *lex specialis* principle. Nonetheless, they remain pertinent to the interpretation of the scope and content of the WTO exception clauses. As for the defence of countermeasures, it was concluded that this remains residually applicable for countermeasures that are not taken in response to WTO violations and do not fall within the scope of the general and security exceptions. WTO adjudicative bodies must assess relevant measures on the basis of the requirements for a lawful countermeasure under general international law and, similar to the ICJ, they are empowered to make all necessary incidental findings in this context, even if they would not be within their scope of jurisdiction *ratione materiae* if they were presented before them as independent claims. Thus, it has been demonstrated so far that the presumption of availability of general defences in international adjudication is not affected by the specialised character or limited jurisdictional scope of the adjudicative body.

This chapter focuses on the case law of investment arbitral tribunals. Similar to the WTO, ISDS is an adjudicative system of specialised competence, charged with the settlement of disputes relating to foreign investments. The jurisdiction of investment tribunals is based on diverse legal instruments, including several different bilateral and multilateral investment treaties. Unlike the ICJ and the WTO, it is a mixed system of international adjudication involving the participation of both States, as Respondents, and private persons (investors), as Claimants.

The investment protection regime is of great significance in the realm of international relations. It is undeniable that foreign investments can be a critical driver of economic growth and productivity for both the host and the home-State and that investment protection commitments are fundamental in fostering a stable, predictable, and transparent investment climate. However, the extent of the protections afforded to foreign investors and the conditions under which they apply have been subject to controversy. Whilst recognising the importance of safeguarding the rights of investors, both States and the civil society have expressed concerns on the effects of investment treaties on States' regulatory autonomy. Investment commitments may hinder States' ability to adopt legislation in areas of public interest, such as environmental protection, labour rights, access to public goods and services, or access to land. Investment treaties, especially in view of how they have been interpreted in ISDS, have also been criticised as prioritising investors' interests at the expense of the host-States' development and social welfare. The risk of being held liable for exorbitant amounts of compensation is believed to result in a regulatory chill in pursuit of public policy objectives.

Against this background, it is crucial to clarify the availability and scope of the defences that host-States can invoke to justify restrictions that affect the rights of foreign

investors in the context of ISDS. Investor-State arbitral tribunals have often been faced with the task of interpreting exception clauses in investment treaties and deciding on their interaction with general defences and the latter's potential residual applicability. However, existing case law on the issue is admittedly confusing, unsettled and often directly contradictory.[840] In fact, the awards on necessity in the disputes that arose in the context of the Argentinian financial, social, and political crisis are often used as a prime example in support of the claim that the fragmented nature of ISDS leads to conflicting decisions on the same subject-matter.[841]

This chapter is divided into two substantive sections. Section B discusses the jurisdictional limits of investment arbitral tribunals and the law applicable to treaty-based investment disputes. It argues that the general international law on State responsibility is applicable in principle to investment disputes, subject, as always, to the application of the *lex specialis* principle. Section C examines the availability of the defences of necessity, self-defence, and countermeasures to Respondents in ISDS, in view of relevant arbitral case law. The analysis focuses on three sets of arbitral awards and decisions: those relating to the 2001-2003 Argentinian crisis, discussing primarily the defence of necessity and its relationship with exception clauses; those relating to investment protection in times of armed conflict, which set the basis for a discussion on the availability of self-defence in investment arbitration; and those in the context of the US-Mexico sugar war, which examined the availability of countermeasures in ISDS. The

[840] Spoorenberg and Viñuales, 'Conflicting Decisions in International Arbitration' (2009) 8 LPICT 91, 92; Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) 423.

[841] Reinisch, 'Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 8 JWIT 191, 212; Spoorenberg and Viñuales (n 840) 92; Cristani, 'The Sempra Annulment Decision of 29 June 2010 and Subsequent Developments in Investment Arbitration Dealing with the Necessity Defence' (2013) 15 ICLR 237, 252.

analysis in Section C, consistently with the findings in the previous two chapters, demonstrates that exception clauses in investment treaties are often *lex specialis* to the general defences of necessity and self-defence, but the customary requirements of the general defences inform the interpretation of the scope and content of treaty exceptions. As for the defence of countermeasures, this chapter argues that exception clauses do not exclude the residual applicability of countermeasures as they regulate different subject-matters, and their relationship cannot be characterised as one of *lex specialis/lex generalis*. It further argues that arbitral tribunals have the power to rule on indispensable incidental matters that arise in the context of countermeasures, despite the limitations in their subject-matter jurisdiction and despite the absence of the investor's home-State from the proceedings.

B. JURISDICTIONAL LIMITATIONS AND THE LAW APPLICABLE TO INVESTMENT DISPUTES

This section discusses first the jurisdictional limitations of investment arbitral tribunals and the law applicable to investment disputes (1). It then elaborates on the applicability of the general international law on State responsibility, including general defences, in the context of ISDS (2).

1. Jurisdiction of investment arbitral tribunals and applicable law provisions

In international investment arbitration, as in international dispute settlement more generally, the fundamental condition for the exercise of jurisdiction by a tribunal is consent of both parties.[842] The distinctive characteristic of ISDS, compared to the ICJ

[842] Broches (n 65) 351; Schreuer, 'Consent to Arbitration' in Muchlinski, Ortino, and Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 831; Amerasinghe (n 127) 437; Sornarajah, *The International Law on Foreign Investment* (5th edn, CUP 2021) 379.

and the WTO, is its mixed nature. One of the parties to the dispute –the Claimant– is a private party[843]: a foreign national initiating proceedings against a State. In some cases, consent of both parties is expressed in a single, joint instrument, e.g., a contract expressing both parties' consent to submit future disputes arising thereunder to arbitration,[844] or an *ad hoc* special agreement.[845] However, consent of the two parties can also be enshrined in separate instruments. The host-State can express its consent to arbitration in its domestic investment protection law,[846] or in a bilateral or multilateral investment treaty. In such cases, the State extends to foreign investors a unilateral, standing offer to arbitrate.[847] The investor can usually[848] perfect this consent by simply initiating proceedings against the host-State in accordance with the applicable provisions.[849]

This thesis focuses on investor-State arbitration initiated on the basis of a dispute settlement clause in a bilateral investment protection treaty concluded between the investor's home State ('home-State') and the investment host State ('host-State'), or in a multilateral treaty with investment protection clauses, to which both States are parties.

[843] For overview of the debate on who qualifies as 'private' party see Dolzer, Schreuer, and Kriebaum, *Principles of International Investment Law* (3rd edn, OUP 2022) 58–59; Schreuer and others, 'Article 25 - Jurisdiction', *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 161–162.

[844] Dolzer, Schreuer and Kriebaum (n 843) 362.

[845] Dolzer, Schreuer and Kriebaum (n 843) 362; Schreuer and others, 'Article 25' (n 843) 192.

[846] Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review 232, 234; Schreuer, 'Consent' (n 842) 831.

[847] Sornarajah (n 842) 381.

[848] Unless the provision requires additional procedural steps, see examples in Schreuer and others, 'Article 25' (n 843) 204.

[849] E.g., *Tradex* p.187; *Generation Ukraine* [12.2-12.3]; Note that it is also possible for the investor to unilaterally consent to arbitration in a general form in a charter, instrument of incorporation, by-law or resolution, see Amerasinghe (n 127) 445.

Both types of treaties are collectively referred to hereafter as international investment agreements or 'IIAs'. In such cases, which constitute the majority of investment disputes,[850] the two States consent in advance, on a reciprocal basis, to investment arbitration, with respect to disputes that may arise between them, as host-States, and foreign investors that are nationals of the other contracting party/ies.

The limits of the subject-matter jurisdiction of an arbitral tribunal in such treaty-based disputes depend on the terms of the applicable IIA.[851] Most commonly, the arbitration clause will confer jurisdiction over disputes arising out of an alleged breach of the treaty in question. A typical clause reads as follows:

> This Chapter/Article shall…apply to a dispute between a Party and an investor of the other Party with respect to its investment, arising out of an alleged breach of an obligation of a Party under…this Treaty' or to '[d]isputes with regard to an investment which arise within the terms of this Agreement…[852]

However, in certain cases, arbitration clauses confer jurisdiction to a tribunal over 'all disputes concerning investments' or 'any legal dispute concerning an investment'.[853] This more general wording may suggest that the parties' consent extends beyond the interpretation and application of the IIA.[854] According to case law, in such cases, the Tribunal's jurisdiction is not restricted to the substantive standards enshrined in the treaty and may encompass, for example, claims arising from a contract in connection with an

[850] Dolzer, Schreuer and Kriebaum (n 843) 364.

[851] Douglas, *The International Law of Investment Claims* (CUP 2009) 145.

[852] E.g., Art.13 India Model BIT; Art.22 Canada Model BIT; Art.8 UK-Argentina BIT.

[853] Art.8 Italy-Morocco BIT; Art.8 Argentina-France BIT; Art.9 Pakistan-Switzerland BIT; Art.VIII(2) Philippines-Switzerland BIT.

[854] Schreuer, 'Consent' (n 842) 838.

investment made under the terms of the IIA.[855] However, despite the generous wording that expands the tribunals' subject-matter jurisdiction, it must be noted that there are still limitations: certain disputes may be of such nature that they obviously do not relate to an investment.[856] Thus, not *any* claim, no matter how remote from the protections enshrined in the treaty, could fit within the confines of such broad arbitration clauses.

It also follows from the wording of IIA arbitration clauses that other treaty provisions setting the conditions for the treaty's application, such as definitional clauses or umbrella clauses, also delineate the Tribunal's subject-matter and personal jurisdiction. For example, the Claimant must be an 'investor' bearing the nationality of the 'other party' to the treaty to properly initiate proceedings. The dispute must arise out of/relate to 'an investment' and must relate to one of the protections guaranteed under the treaty or other applicable instruments covered by the arbitration clause. Each one of these conditions must be fulfilled in accordance with the provisions of the IIA.

Moreover, tribunals, depending on the terms of the relevant IIA, can be set up under the auspices of ICSID, or they can be set up *ad hoc*, outside this institutional framework. When a tribunal is set up under ICSID, which is the case in more than half of treaty-based ISDS,[857] both the IIA under which arbitration was initiated and the ICSID Convention ('ICSID') are pertinent in ascertaining the Tribunal's jurisdictional boundaries.[858] Under Art.25 ICSID, the personal 'jurisdiction of the Centre', and hence,

[855] E.g., *Salini* [59-61]; *Vivendi* [55]; *SGS(Philippines)* [131-135]; *Siemens* [205]. *Cf SGS(Pakistan)* [161] and see relevant criticism in *SGS(Philippines)* [133-134] and *Tokios Tokelės* [52] n 42.

[856] Amerasinghe (n 127) 449.

[857] Out of 1229 known treaty-based ISDS cases, 729 were under ICSID and its Additional Facility, see < https://investmentpolicy.unctad.org/investment-dispute-settlement>.

[858] Sornarajah (n 842) 382.

of the tribunals established thereunder,[859] extends only to disputes 'between a Contracting State…and a national of another Contracting State'.[860] As for its subject-matter jurisdiction, under Art.25 ICSID, the Centre may only exercise jurisdiction over a 'legal dispute arising directly out of an investment'.[861] It is generally accepted that the term 'investment' under ICSID has an objective meaning which limits the freedom of parties to designate *any* activity or transaction as an investment.[862] According to the 'double-barreled' or 'double-keyhole' test,[863] a tribunal can exercise jurisdiction only when both the 'objective' requirements under Art.25 ICSID *and* the 'consensual' requirements under the applicable jurisdictional clause of IIA are met. In a manner similar to Art.36 ICJ Statute, Art.25 ICSID describes the competence of the tribunals established thereunder.[864] In other words, it constitutes a 'jurisdictional gateway'[865] as it describes the outer limits of an ICSID Tribunal's jurisdiction, which cannot be extended or derogated from even by agreement of the Parties.[866] At the same time, the applicable IIA delineates the Tribunal's jurisdiction in the dispute at hand, which may be narrower than the foundational jurisdiction of ICSID tribunals. In cases of *ad hoc* arbitration, both

[859] Note that Art.25 ICSID refers to both arbitration and conciliation proceedings under the auspices of ICSID. See relevant discussion in Schreuer and others, 'Article 25' (n 843) 87–89.

[860] Art.25 ICSID.

[861] ibid.

[862] See Schreuer and others, 'Article 25' (n 843) 117–119. *Salini* is the most prominent decision commonly used as a point of reference for the objective characteristics of an investment. The so-called Salini criteria (financial/economic contribution, duration, risk and contribution to the host-State's development) have been applied widely (although in differing ways) in arbitral practice. See *Salini* [52] and an overview of the relevant case law in Dolzer, Schreuer and Kriebaum (n 843) 91–96.

[863] E.g., *Malaysian Historical Salvors* [55]; *Aguas del Tunari* [278].

[864] Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Brill 2018) 12. See n 66.

[865] Dolzer, Schreuer and Kriebaum (n 843) 90.

[866] E.g., *Joy Mining* [50]; *TSA Spectrum* [134]; Schreuer and others, 'Article 25' (n 843) 83.

the competence and the jurisdiction of the Tribunal flow from the same instrument, i.e., the IIA.

There is a wealth of literature on what constitutes a 'Contracting party', a 'national of another Contracting State', a 'legal dispute', an 'investment' or a 'dispute arising directly out of an investment' for the purposes of ICSID[867] and each applicable IIA.[868] Although some points relating to these notions are discussed later in this chapter, where pertinent, the extensive debates on the content of these terms are beyond the scope of this thesis. What is important to note for the purposes of the present analysis is that investment tribunals, like the WTO bodies, have no general competence over all matters under international law. Their powers are limited to issues arising (directly) out of/with regard to/concerning an investment, as defined in applicable instruments. The specific scope of these powers depends on the wording of the relevant arbitration clause, which may be more or less restrictive. Moreover, the framing of the dispute and the specific claims presented by the Claimant, together with the arguments raised by the Respondent in the form of defences, circumscribe the tribunal's specific powers in the case at hand in accordance with the principle of *non ultra petita*.[869]

Lastly, it must be noted that arbitral tribunals 'must be regarded as endowed with the inherent powers required to preserve the integrity of [their] own process'.[870] Their

[867] Art.25(2) ICSID provides further guidance on what constitutes 'national of another Contracting Party' but does not define the terms 'legal dispute' and 'arising directly out of an investment'. See also other proposed drafts during the preparatory works in History of the ICSID Convention, Vol I, at 110-119. *Cf* comments by Broches suggesting that the terms remained undefined to allow for broader jurisdictional scope of ICSID Tribunals, subject to parties' consent, Broches (n 65) 362–363.

[868] On the definition of investment, some BITs contain exhaustive or illustrative lists that guide the Tribunal, see Sornarajah (n 842) 382.

[869] See (n 77).

[870] *Libananco* [78].

nature as international adjudicative bodies in cases of treaty-based investment disputes is undeniable: they are established on the basis of an international instrument, they settle disputes involving States, and they are mandated to interpret and apply international law.[871] As discussed earlier, the inherent jurisdiction of adjudicative bodies flows from their very identity and exists to assist in the performance of their functions.[872] Art.41(1) ICSID confirms that an ICSID Tribunal 'shall be a judge of its own competence', thus confirming one of the primary aspects of inherent powers, the *Kompetenz-Kompetenz*. Art.44 ICSID further provides that with respect to 'any question of procedure…which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question'. Similarly, Art.19 ICSID Rules provides that '[t]he Tribunal shall make the orders required for the conduct of the proceeding'. These provisions are a 'roundabout way' to confirm that ICSID tribunals have the inherent powers necessary for the fulfilment of their judicial function.[873]

Regarding applicable law, the investment treaty regime 'summons the image of a mosaic of applicable laws'.[874] An investment dispute usually touches on several legal relationships, each governed by a different set of rules, including the domestic laws of the home- and host-State, the IIA in question, and general international law. As stipulated in *AAPL*, an IIA:

> is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are

[871] See (n 56).

[872] See analysis in (n 128-131).

[873] Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' (2012) 5 Investment Treaty Arbitration and International Law 9.

[874] Douglas (n 851) 40.

> integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[875]

As in the case of jurisdiction, the applicable law in treaty-based investment disputes depends largely on the text of the IIA and the procedural setting within which the Tribunal is constituted. Many treaties contain an applicable law clause which stipulates the various sources from which the Tribunal can draw to settle the dispute. Arbitration rules always provide that the law applicable to the substance of the dispute is the one designated by the parties.[876] The parties to an IIA have complete freedom to agree on the law governing their future disputes: they may refer to a national law, international law, a combination of national and international law, or a specific law frozen in time or subject to certain modifications.[877] Arbitration rules may then provide a default rule on applicable law, which kicks in in the absence of an agreement between the parties.[878] In ICSID arbitration, in the absence of agreement 'the Tribunal shall apply the law of the Contracting State party to the dispute…and such rules of international law as may be applicable'.[879] This thesis does not delve into the intricate subjects of the choice of law amongst those listed in applicable law provisions and the role of municipal law in investment arbitration.[880] Rather, in keeping with the research question, it focuses on whether general international law is applicable to all treaty-based investment disputes.

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[875] *AAPL* [21].

[876] Art.33 UNCITRAL; Art.42(1) ICSID.

[877] ICSID Model Clauses, Section V(A), Clause 10.

[878] Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 193; Dugan and others, *Investor-State Arbitration* (OUP 2008) 201.

[879] Art.42(1) ICSID.

[880] Douglas (n 851) 42ff.

2. General international law on State responsibility in ISDS

As explained above, in investment arbitration it is always crucial to investigate the provisions of applicable instruments, including the IIA and arbitration rules. In several cases, the incorporation of international law to the law applicable to an investment dispute is explicit. Many IIAs authorise the Tribunal to decide the issues in dispute on the basis, among others, of 'applicable' or 'relevant' rules or principles of international law.[881] Similarly, under Art.42(1) ICSID, tribunals are directed to look at rules of international law, which, according to the preparatory work for the Convention, includes the full range of sources codified in Art.38 ICJ Statute.[882] In such cases it seems that general international law is, in principle, within the law that tribunals may apply in settling the disputes before them.

One could, however, contest whether the general law on State responsibility and general defences are 'applicable' rules in the context of ISDS, as required by the wording of relevant applicable law clauses. Concerns on its applicability flow primarily from the mixed nature of investment disputes, which involve private entities presenting their claims directly before an international tribunal without the involvement of their State of nationality.

This thesis argues that the general law on State responsibility is applicable in principle to investment disputes, subject, as always, to the application of the *lex specialis* principle enshrined in Art.55 ARSIWA. The general rules codified in ARSIWA 'apply

[881] E.g., Art.1131 NAFTA; Art.26(6) ECT; Art.40 Canada Model BIT; Art.8(4) UK-Argentina BIT; Art.VIII US-Argentina BIT.

[882] Schreuer and others, 'Article 42 - Applicable Law', *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 604ff.

to the whole field of the international obligations of States, whether the obligation is owed to one or several States, *to an individual or group*, or to the international community as a whole'.[883] Part I ARSIWA, which relates to the establishment of 'the internationally wrongful act of the State' and includes Chapter V on general defences, includes no caveat relating to obligations which impact on rights of individuals. The commentary to Art.28 ARSIWA explicitly confirms that Part I 'applies to all the cases in which an internationally wrongful act may be committed by a State' including 'breaches of international law where the primary beneficiary of the obligation breached is not a State.'[884]

On the contrary, Part II, which codifies rules relating to 'the content of the international responsibility of a State', 'has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State.'[885] Art.33 ARSIWA clearly stipulates that the provisions of Part II are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State' and the commentary thereto mentions explicitly 'bilateral or regional investment protection agreements', together with human rights treaties, as examples of cases 'where the primary obligation is owed to a non-State entity [and] some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State.'[886] The question of whether and to what extent investment

[883] ARSIWA, general commentary [5] (emphasis added).

[884] Art.28 ARSIWA, commentary [3].

[885] ibid.

[886] Art.33 ARSIWA, commentary [4].

treaty obligations are indeed 'owed to' the investor is discussed further in Section C(3)(b), but regardless of the debate on this matter, it is clear that IIAs provide for reparations to be made directly to the injured investor, a matter that is not regulated under the general law on State responsibility. Similarly, Part III ARSIWA 'is concerned with the invocation of responsibility by other States' and does not 'deal with the possibility of the invocation of responsibility by persons or entities other than States'.[887] Thus, invocation of responsibility by investors in the context of ISDS is also regulated by the special rules found in IIAs. However, these issues do not seem to affect the applicability of the rules codified in Part I.

It emerges from the above, that although the investment treaty regime deviates from the general rules on State responsibility on several important matters relating to the content and invocation of international responsibility, these rules remain applicable, in principle, to the extent that they are not displaced. Importantly, Part I ARSIWA, which codifies the general rules on the determination of whether an internationally wrongful act of a State has taken place and includes provisions on general defences, is in principle applicable in the context of ISDS, subject to the application of the *lex specialis* principle.

This is the case both in instances when the IIA or the arbitration rules provide for consideration of 'applicable' or 'relevant' rules of international law and in instances where applicable instruments remain silent on the matter.[888] As recognised in most widely used arbitration rules, in the absence of an agreement between the parties on the

[887] ibid.

[888] See indicatively, *Cengiz* [347-349]; *InterTrade* [165]; *Busta* [399]; *Flemingo* [420, 865] where the Tribunals despite the absence of an applicable law clause that explicitly empowers them to apply general international law, they apply the general rules on State responsibility.

matter of applicable law, the Tribunal has the inherent power to apply 'the law or rules of law that it considers most appropriate'. [889] Thus, it has the power to consider rules of general international law to the extent that it deems appropriate to discharge its function and settle the dispute at hand.

C. GENERAL DEFENCES AND INVESTMENT TREATIES: THE LEX SPECIALIS PRINCIPLE AND THE ROLE OF TREATY INTERPRETATION

This section discusses the availability of the three general defences identified as most pertinent in the introduction of this thesis in the context of investment disputes. Firstly, it discusses the availability of the defence of necessity and its controversial relationship with exception clauses (1). Secondly, it discusses whether Respondents can take measures that restrict the rights of foreign investors as a lawful measure of individual or collective self-defence (2). And thirdly, it discusses the availability of countermeasures as a defence in ISDS (3).

1. Necessity and investment treaties

This sub-section discusses the availability of necessity in investment disputes primarily by reference to the awards and decisions issued in the context of the Argentinian crisis. The Argentinian crisis awards are not the only ones addressing the defence of necessity. However, they provide a very good case study for the purposes of this thesis as they touch on all possible obstacles that may preclude the applicability of this general defence, and demonstrate the different methodological approaches to the relationship of general defences with exception clauses in IIAs. References to other cases

[889] See e.g., Art.35 UNCITRAL, Art.21(1) ICC Rules and Art.27 SCC.

are made where appropriate.

The measures that Argentina introduced to respond to its 2001-2003 economic, social and political crisis gave rise to one of 'the greatest wave[s] of claims by foreign investors against a single host state in recent history'.[890] To provide a short overview of the relevant factual background, in the late 1980s Argentina opened its economy to foreign trade and investments and privatized state-owned companies operating in several key societal sectors such as energy, water and transportation. This decision was made in the wake of previous economic crises as the relevant reforms were deemed to ensure financial stability. Argentina introduced further reforms aiming to provide a stable economic environment and attract foreign investors. One such important reform was the 1991 Currency Convertibility Law, which fixed the Argentine peso at par with the US dollar.[891] Argentina also adopted regulations setting the legal framework for the privatisation of key sectors, such as oil and gas. The framework provided assurances and guarantees to investors on which, as was argued by the Claimants in subsequent disputes, the investors relied in making the decision to invest. Following a major economic crisis, Argentina enacted in 2002 an Emergency Law[892] which eliminated some of the rights conferred under the relevant laws and regulations. As a result, Argentina became the object of numerous investment arbitral proceedings initiated by foreign investors who argued that the changes brought about by the Emergency Law were in breach of Argentina's contractual obligations and the guarantees provided under applicable

[890] Alvarez and Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in Sauvant (ed), *YbIntlInvL&P 2008-2009* (OUP 2009) 1.

[891] Law No.23.928; Decree No.2128/91.

[892] Law No.25.561.

IIAs.[893] Argentina attempted to justify measures that had an adverse impact to foreign investments as 'necessary' to preserve its public order and national security interests, invoking the exception clauses of the relevant IIAs as well as the general necessity defence. The relevant arbitral awards discussed the defences available to States to justify the non-performance of international investment obligations during such crises.

The first part of this sub-section discusses the availability of necessity in cases where the relevant IIA does not include an exception clause (a). The second part focuses on disputes under the US-Argentina BIT, which includes exceptions in its Art.XI (b).

a. Applicability of necessity in the absence of textual foothold

Some of the disputes submitted by foreign investors against Argentina were based on IIAs that did not include an exception clause.[894] The question that arises in this context is whether the general necessity defence could be invoked by the Respondent and applied directly by the Tribunal, in the absence of any textual foothold in the IIA.

Most arbitral tribunals in such cases raised no concerns regarding the applicability of the defence. They either proceeded to examine its substantive requirements under general international law, or rejected the applicability of the defence on grounds other than applicable law.[895] This casual approach of considering the defence without expressing any hesitation regarding its applicability, which we also witnessed in

[893] An overview of the relevant facts can be found in the arbitral awards discussed below.

[894] E.g., Argentina-Chile BIT; Argentina-France BIT; Argentina-Italy BIT; Argentina-Spain BIT; Argentina-UK BIT.

[895] *Suez* [257-265]; *Impregilo* [344-360]; *Total* [220-224]; *Metalpar* [208-213]; *SAUR* [458-463]; *Hochtief* [292-301]; *Urbaser* [709-733]; *EDF* [1163-1181] but note the ambiguous language in [1170].

ICJ jurisprudence,[896] suggests that the tribunals consider the defences under general international law as applicable by default to the disputes at hand in the absence of any indication to the contrary in the relevant IIA. It is worth noting that in all cases the applicable law clause in the IIA empowered the Tribunal to apply not only the treaty in question but also relevant applicable 'rules/principles of international law'.[897] Thus, as discussed above, there was no doubt that general international law was squarely within the jurisdictional and applicable law boundaries of the arbitral tribunals in question.

However, in *BG*, the Tribunal took a different view on the applicability of necessity in the absence of an exception clause. It contended that the Respondent was not able to rely on necessity, based on two arguments. Firstly, it argued that necessity relates exclusively to international obligations between sovereign states.[898] As a result, Argentina would not be able to invoke the defence in response to claims raised by a private party.[899] Secondly, the Tribunal argued that the IIA in question implied the exclusion of necessity and thus, the Respondent is prevented from relying on this defence in accordance with Art.25(2)(a) ARSIWA. The Tribunal seems to suggest that the object and purpose of the IIA is to protect investors and thus, it cannot be read as allowing the State to 'unilaterally revoke vested rights…designed precisely to operate in situations where [adverse circumstances]…would lead to a situation of necessity'.[900] According to the Tribunal the currency stabilisation measures adopted by Argentina were designed to

[896] See analysis in (n 133-144).

[897] Art.X(4) Argentina-Chile BIT; Art.8(4) Argentina-France BIT; Art.8(7) Argentina-Italy BIT; Art.X(5) Argentina-Spain BIT; Art.8(4) Argentina-UK BIT.

[898] *BG* [408].

[899] ibid.

[900] *BG* [409]. *Cf Suez* [262] where it was observed that ' [v]iewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity'.

protect investors in precisely such a case of a run on the currency and thus necessity could not be invoked to circumvent such protection.

However, the Tribunal connected this matter directly, and exclusively, to the issue of compensation. It found that:

> There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how BITs operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.[901]

It is thus, unclear whether the Tribunal proposed that necessity does not apply at all, or rather that it may not preclude compensation under such circumstances.[902]

In accordance with the analysis in Section C and the findings in previous chapters, this thesis argues that necessity is directly applicable to disputes based on IIAs in the absence of a clear indication to the contrary in the text of a treaty. In most cases, IIAs either remain silent on the matter, such as the treaties discussed in this sub-section, or they include an exception clause recognising the right of states to act inconsistently with the treaty under specific conditions, such as the US-Argentina BIT discussed below. When the treaty is silent on the matter, general international law, including necessity, is presumed to be applicable to relevant disputes. As stipulated in *National Grid*, 'by concluding the [relevant IIA], the Respondent did not limit its powers that as a sovereign it would have under international law except to the extent provided in the Treaty'.[903]

[901] ibid.

[902] see Art.27 ARSIWA suggesting that the customary law of necessity does not always preclude compensation.

[903] *National Grid* [255].

Indeed, as discussed in previous chapters, in line with the general presumption against normative conflict in international law,[904] States cannot be presumed to have tacitly relinquished rights and obligations under general international law 'in the absence of any words making clear an intention to do so',[905] and 'an implicit exclusion is unlikely to emerge clearly from mere silence'.[906]

The arguments to the contrary raised in *BG* are not convincing. As discussed above, even if we were to accept that rights under IIAs are owed to investors, necessity under the law on State responsibility would still not be displaced.[907] General defences are codified in Part I of ARSIWA relating to the establishment of 'the internationally wrongful act of the State', which applies to the whole field of the international obligations of States, including those with individuals as direct beneficiaries.[908] Thus, the argument in *BG* that necessity cannot be invoked in response to claims under an IIA made by a private party is unsubstantiated.

As for the argument that the object and purpose of the IIA excludes the possibility of invoking necessity, the Tribunal in *BG* does not offer any evidence to that effect. The Tribunal made no arguments by reference to the provisions of the Treaty itself. It rather suggested that the currency stabilisation instruments adopted by Argentina, whose revocation amounted, according to the Claimant, to a breach of the IIA in question, were in place to protect investors in cases of monetary crises. This finding can be seen as

[904] See analysis in (n 276-284).

[905] *ELSI* [50].

[906] Titi (n 221) 250.

[907] See analysis in (n 883-887) and Ch IV(C)(3)(b).

[908] See analysis in (n 883-887).

relevant in the assessment of whether the substantive requirements of necessity were met in the case at hand, i.e., whether there was indeed a grave and imminent peril to an essential State interest and whether the specific measures adopted by Argentina were the only way to safeguard such interests. The analysis did not provide any support for the argument that the IIA in question excluded the invocation of necessity. In general, the text of most IIAs does not suggest that States are precluded from adopting measures in emergency situations. General international law on necessity provides guidance on how to balance the rights protected under a State's international obligations and the right of the State to protect its own essential interests, through the establishment of strict criteria for successful invocation of the defence.

In sum, even in disputes submitted under IIAs which remain silent on the matter of necessity, necessity under general international law is presumed to be directly applicable. The application of necessity may only be precluded if 'the international obligation in question excludes the possibility of invoking necessity'.[909] Such exclusion must be discerned clearly through interpretation of the treaty in question. Although we cannot make an argument with respect to all IIAs currently in force, given the variations observed in their content, structure and language used, there is nothing inherent to the nature of IIAs that suggests an exclusion of necessity on account of their object and purpose. The fact that investors are vested with the right to make claims directly against the host-State before an international tribunal and that IIAs include protections put in place to ensure the smooth operation of investments in foreign territories, do not in themselves suggest that States are stripped of their right to take necessary measures in exceptional circumstances that threaten their essential interests. IIAs like most treaties

[909] Art.25(2)(a) ARSIWA.

do not have a 'single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes'.[910] The purpose of IIAs is the encouragement of foreign investments on a mutual and reciprocal basis, whilst balancing the interests of investors with those of the host-State.[911]

In some cases, the protection of State interests is clearly included in the treaty provisions, in the form of an exception clause. The question of the availability of necessity in such cases raises more complex issues of treaty interpretation. The Tribunal needs to discern whether the exception clause constitutes *lex specialis* and dictates the exclusion of necessity, and further assess the relationship of the clause with necessity and its requirements under general international law. The following sub-sections provide some guidance on these intricate issues of treaty interpretation by reference to relevant arbitral case law.

b. General necessity defence and treaty exception clauses

The most well-known cases in the Argentinian crisis series were those initiated under the US-Argentina BIT, which includes an exception clause recognising the right of States to act inconsistently with treaty obligations under specific exceptional circumstances. Art.XI US-Argentina BIT ('Art.XI') provides that:

> [The] Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

This clause, which is reminiscent of the provisions in Art.XXI(1)(d) FCN and

[910] Sinclair, *The Vienna Convention on the Law of Treaties* (MUP 1973) 130.

[911] *HICEE* [116].

Art.XX(1)(d) 1955 Treaty of Amity, was at the centre of the Tribunals' analysis.

Art.VII US-Argentina BIT provides for the submission of disputes arising out of the treaty to binding arbitration under the auspices of ICSID.[912] All disputes discussed in this sub-section were brought before ICSID tribunals on this basis. The BIT does not have an applicable law provision, and as such, the issue was regulated by Art.42(1) ICSID. Thus, general international law, including necessity, was undoubtedly applicable, in principle, to the dispute. In view of this, the key question discussed by the Tribunals, in varying degrees of detail and reaching varying conclusions, was whether and to what extent Art.XI excluded the application of necessity by virtue of Art.25(2)(a) ARSIWA and the *lex specialis* principle, and whether and how necessity may be pertinent to the interpretation of Art.XI.

The analysis in the following sub-sections critically evaluates the awards and decisions in *CMS*, *Enron*, *Sempra*, *LG&E*, *Continental*, and *El Paso*. It examines, first, the Tribunals' approach to the key question of the analytic character of the exception clause, which, as discussed in previous chapters, may affect the applicability of the *lex specialis* principle (i). It then delves into the modalities of the application of the *lex specialis* principle and the role of Art.31(3)(c) VCLT (ii).

i. The analytic character of exception clauses and the applicability of the *lex specialis* principle

The analytic character of exception clauses in IIAs is a controversial issue in the academic literature. The Argentinian crisis awards did not only provide inspiration and

[912] Among others. See Art.VII(3)(a)(i), US-Argentina BIT.

material for relevant scholarship, but they also constitute the only case study in international case law where this debate was explicitly acknowledged and engaged with.

The awards under the US-Argentina BIT can be broadly classified into two categories: pre- and post- *CMS-Annulment* decision. In the pre-*CMS-Annulment* awards of *CMS*, *Enron*, *Sempra*,[913] and *LG&E* there is no evidence that the Tribunals distinguished the nature and function of Art.XI from that of necessity. They examined Argentina's arguments regarding 'the state of necessity' or 'emergency'[914] after establishing a *prima facie* breach of the BIT substantive provisions.[915] This order of analysis is consistent with the traditional order observed in ICJ and WTO case law, and demonstrates that the Tribunals treated Argentina's arguments as defences that become relevant 'in the alternative',[916] in the event of a finding of *prima facie* breach. The Tribunals, as well as the parties to these disputes, used interchangeably varying terms to describe the function and consequences of successful invocation of Argentina's arguments without differentiating between Art.XI and necessity. According to the awards, exceptional circumstances 'exempt', 'exclude' or 'excuse' Argentina 'from liability' or from 'international responsibility', 'preclude' or 'exclude' 'the wrongfulness' of its measures, or 'rule out compensation'.[917] The nonselective use of these terms regardless of the legal basis of Argentina's arguments indicates firstly, that the Tribunals did not ascribe any particular legal significance to the use of these terms,

[913] *CMS*, *Enron* and *Sempra* are almost identical. All three Tribunals were presided by Francisco Orrego-Vicuña, whilst Marc Lalonde served as an arbitrator in both *Enron* and *Sempra*.

[914] *CMS* [304].

[915] *CMS* [281, 303]; *Enron* [268, 277]; *Sempra* [304; 314].

[916] *CMS* [304]; *Enron* [288]; *Sempra* [325].

[917] *CMS* [304, 306]; *Enron* [288, 294]; *Sempra* [325, 333]; *LG&E* [229, 245, 257, 259, 261, 266].

and secondly, that they did not consider Art.XI and necessity as different in terms of their legal nature and function. Indeed, in these awards, the Tribunals did not make any clear pronouncements on the relationship between Art.XI and necessity. Their approach to the two rules can be generally described as one of conflation,[918] as the two rules are hardly distinguishable in the Tribunals' analyses.

The turning point in the legal analysis on this issue was the *CMS-Annulment* decision. The composition[919] added to the authority and legitimacy of the Committee and its findings, which influenced significantly future awards and relevant scholarship. The Committee's decision crystallised perhaps 'one of the most serious divisions of view between tribunals to emerge to date'.[920] The Committee, despite its limited jurisdiction under Art.52 ICSID, which did not extend to findings on whether the Tribunal 'made any error of fact or law',[921] severely criticised the analysis of the Tribunal in *CMS*[922] (and thus, implicitly, in view of the striking similarities, in *Enron* and *Sempra*) and attempted to clarify the relationship between exception clauses and necessity.

The Committee firstly acknowledged that there is indeed some analogy in the language used in Art.XI and Art.25 ARSIWA.[923] However, it held that:

> Art.XI is a threshold requirement: if it applies, the substantive obligations

[918] Binder, 'Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis' in Kriebaum and others (eds), *International Investment Law for the 21st Century* (OUP 2009) 613.

[919] Gilbert Guillaume, Nabil Elaraby, and James Crawford.

[920] McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 363.

[921] *CMS-Annulment* [121, 136].

[922] *CMS-Annulment* [135]. *Cf* later in *Sempra-Annulment* [222] where the Committee, faced with a similar (if not identical) situation, annulled the original award.

[923] *CMS-Annulment* [129].

> under the Treaty do not apply. By contrast, Art.25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.[924]

This argument suggests that the two rules are 'not on the same footing' as they have a different 'operation and content'.[925] The Committee suggested that if the Tribunal found that the measures in question met the requirements of Art.XI, then there would be no breach of the BIT at all, not even a *prima facie* one.[926] On the contrary, necessity excuses behaviour that is otherwise unlawful and only comes into play once a *prima facie* breach of the primary obligations has been established.[927] Proponents of this view criticise the pre-*CMS-Annulment* awards as ignoring the taxonomy between primary and secondary rules endorsed by the ILC, which, according to their understanding, suggests that necessity, along with the rest of general defences, is to be discussed only in relation to State responsibility and thus, on a secondary level.[928]

Nonetheless, despite this initial statement, which seems to take a clear view on the legal nature of necessity, the Committee later shifted to a more cautious, non-committal approach to this matter. When exploring the relationship between Art.XI and necessity it stated that '[o]ne could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility'.[929] It then

[924] *CMS-Annulment* [129].

[925] *CMS-Annulment* [131].

[926] *CMS-Annulment* [133].

[927] Burke-White and von Staden (n 51) 321; Agius (n 745) 115.

[928] Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Review 200, 210ff.

[929] *CMS-Annulment* [132].

considered two different scenarios.[930] On the one hand, if necessity relates to the lawfulness of the action, both Art.XI and necessity are primary rules and have the same field of application. Thus, the Tribunal should have applied Art.XI as the *lex specialis* on the matter.[931] On the other hand, if necessity pertains only to responsibility, then it is a secondary rule, different from Art.XI. In that case, the Tribunal should have considered first whether there has been a breach of the BIT and whether such breach was excluded under Art.XI.[932] Only if it concluded, after this test, that a breach has indeed taken place, it would have to consider the possible applicability of necessity.[933] In both cases, necessity 'could only be subsidiary to the exclusion based on Art.XI' and thus, the pre-*CMS-Annulment* Tribunals, should have taken a position on the relationship between the two rules so as to determine whether and to what extent they were both applicable.[934] It is, however, doubtful that the Committee took a firm side in favour of either scenario.[935]

CMS-Annulment clearly suggested that there is a difference in the analytic character of exception clauses compared to necessity, and that this difference may affect the relationship between them and hence, the applicability of the general defence in the context of a particular dispute. Nonetheless, the decision is not sufficiently clear as to what exactly is this suggested difference and what are its practical consequences. The Committee asserted, first, that the applicability of the exception clause is a 'threshold

[930] Paddeu (n 840) 414.

[931] *CMS-Annulment* [133].

[932] *CMS-Annulment* [134].

[933] *CMS-Annulment* [134].

[934] *CMS-Annulment* [131-132].

[935] Which arguably created interpretative confusion in subsequent awards, see Desierto, 'Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties' (2010) 31 UPaJIntlL 827, 864.

requirement' that excludes measures from the scope of the treaty, as opposed to necessity that is only relevant once a breach is otherwise established.[936] Then it further asserted that exception clauses are 'primary rule[s]' relating 'to the issue of wrongfulness' whereas the general necessity defence *may* be more properly characterised as a 'secondary rule' relating to 'the issue of responsibility'.[937] Although the committee does not draw any clear distinction amongst these assertions, these two sets of labels do not have the same normative content. The characterisation of a rule as a 'threshold requirement' and as a 'circumstance precluding wrongfulness' may have, in simplistic terms, the same final result, i.e., their successful invocation by the Respondent would render the conduct in question entirely lawful, but the way in which the two types of rules operate and the broader consequences of classifying a rule as one or the other differ significantly. Thus, these characterisations should be addressed separately.

The characterisation of an exception clause as a 'threshold requirement' (or 'carve-out' or 'permission', as seen in previous chapters[938]), which was also adopted later in the post-*CMS-Annulment* awards of *Continental* and *El Paso,*[939] suggests that measures adopted thereunder 'lie outside the scope of the Treaty so that the party taking [them] would not be in breach of the…BIT'.[940] One of the main arguments in support of this approach is that the wording of Art.XI, which follows the typical 'non-precluded-measures-clause' formula,[941] in its ordinary meaning, suggests that relevant measures do

[936] *CMS-Annulment* [129].

[937] *CMS-Annulment* [132-134].

[938] See analysis in (n 218-222 and 523-530).

[939] *Continental* [n236]; *El Paso* [553].

[940] *Continental* [164, n236].

[941] See analysis in (n 50-51).

not fall within the scope of the treaty's substantive obligations.

This thesis argues, firstly, that neither the ordinary meaning, nor the context of the provision supports this view. The term 'shall not preclude' clearly suggests that measures falling within the scope of the exception would normally be regulated by the substantive provisions of the treaty and that the State would be prevented from adopting them. It is for the same reason that the exception clause does not appear in the first provisions of the treaty which provide definitions or delimit the regulatory scope of the agreement, but they rather appear, most of the times, after the provisions describing the substantive protections granted to foreign investors. Moreover, the existence of a necessity test in the text of such exception clauses signifies the temporary and exceptional character of the justification enshrined therein.[942] The term 'necessary' implies that, similar to necessity, 'when and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question…will again have to be complied with'.[943] Successful invocation of necessity, whether under a treaty exception or under general international law, gives only transient relief to the State seeking it and not an permanent 'get out of jail free' card. Thus, the relevant measures not only fall within the scope of the substantive provisions of the treaty but also, once the requirements of the exception clause are no longer met, the measures will be in breach of the treaty if not properly removed. This is not the same as a 'carve out' that simply excludes from the regulatory scope of the treaty or provision in question certain measures/acts/circumstances, either because they are (or should be) regulated

[942] e.g., *LG&E* [261,266] where the Tribunal held Argentina liable for not revoking the measures after the exceptional circumstances have ended.

[943] Art.27 ARSIWA, commentary [2].

elsewhere, or because they are not (or should not be) regulated at all as part of the States' *domaine réservé*. This usually requires only a factual determination of whether the issue in question is amongst those excluded, and the relevant clause, in terms of wording, will clearly stipulate that 'this treaty does not apply to [the relevant issues]'.[944] Indeed, in some exception clauses we see different 'nexus requirements' between the measures adopted and the permissible objective stated in the provision.[945] Some of them may create a more stable, less temporal link between the measure and the objective, such as the term 'relating to', which was discussed earlier in the context of Art.XX GATT,[946] or terms such as 'directed to', 'aimed at', 'for reasons of' or 'to pursue'.[947] But the most common phrasing in exception clauses requires that the measures are 'necessary for' the attainment of the objective,[948] or similar formulations such as 'indispensable for', 'required to', 'have to be taken for' *et al*.

Secondly, characterising and examining exception clauses as carve-outs is not only counter-intuitive, but also jeopardises the soundness of the relevant decisions and sets undue limitations to the role of adjudicative bodies as authoritative interpreters of the law and agents of legal certainty. As seen in *Continental*, accepting the characterisation of exception clauses as carve-outs suggests that their applicability must

[944] Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure' in Muchlinski, Ortino, and Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2012) 508.

[945] Burke-White and von Staden (n 51) 329. For an overview of the different types of nexus requirements in BIT exception clauses see Abedian Kalkhoran and Sabzevari, 'Standards of Review for the Non-Precluded Measures Clause in Investment Treaties: Different Wording, Different Levels of Scrutiny' (2021) 68 NILR 281.

[946] See analysis in (n 560-565).

[947] Abedian Kalkhoran and Sabzevari (n 945) 286.

[948] Abedian Kalkhoran and Sabzevari (n 945) 282.

be assessed before analysing the alleged breaches of the treaty in question.[949] In other words, their examination would be a step after the determination of possible jurisdictional issues and before entering the merits of the dispute. If the measures in question fall within the scope of the clause, then no further analysis would be necessary.[950] The Tribunal would find that the treaty does not apply to the measures in question and would dismiss the case. Arguably, the Tribunal does not even need to issue an award on the merits, or to stipulate that no breach has taken place, as this would be a threshold issue, rather than an issue on the merits. The only finding in the award's *dispositif* would be that the treaty is non-applicable.

However, the requirements of necessity and proportionality, entailed in the examination of whether the measures in question are 'necessary for' the protection of the stated objective, cannot be properly assessed without having first established the extent to which the measures in question are inconsistent, at least *prima facie*, with the State's treaty obligations. The reversal of the order of analysis hinders the proper examination of the clause's necessity test, which requires a weighing and balancing exercise of the measures and the extent to which they disrupt the protections under the treaty, on the one hand, and the exigencies of the exceptional circumstances, on the other. This obstacle is seen in the *Continental* award. *Continental*, in view of the findings in *CMS-Annulment*, decided to 'deal first' with Argentina's arguments under Art.XI and necessity instead of establishing a *prima facie* breach.[951] Even though the Tribunal concluded that

[949] *Continental* [161]; *El Paso* [553-554].

[950] *El Paso* [554].

[951] *Continental* [161].

Argentina's measures (except for one) conformed with the conditions of Art. XI,[952] it still proceeded to examine the substantive arguments of the Claimant to 'evaluat[e] in more detail whether and how far the defence based on necessity under that provision is relevant and available as to the specific claims of breach and with what effects'.[953] The analysis delved further into the requirements of each substantive provision invoked by the Claimant only to conclude again that Argentina could rely on Art.XI.[954] This approach seems at odds with the Tribunal's initial finding that Art.XI operates as a threshold issue that excludes the relevant measures from the BIT scope. The overall treatment of the exception by the Tribunal, even if it was examined before the BIT substantive provisions, is more akin to a defence on the merits than a carve-out or threshold requirement.[955] Indeed, the examination of the substantive claims is necessary in order to evaluate the parameters of the application of an exception clause. The existence of a necessity test in exception clauses is one of the most important indicators that such clauses are more appropriately characterised as defences, rather than carve-outs, and their examination necessitates a prior finding of *prima facie* breach.

What is more, on a normative level, such an approach would not allow the Tribunal to elaborate on the scope and content of the treaty's substantive provisions and on whether the measures in question would constitute a breach of the relevant provisions under different circumstances. This is especially important when we consider the temporary character of the justification provided by the exception clause and the fact that

[952] *Continental* [233].

[953] *Continental* [233].

[954] *Continental* [262-263, 275, 283, 303-304].

[955] See also the characterisation of Argentina's arguments as defences in several parts the analysis, *Continental* [160, 162, 163, 188, 221, 233, 262, 274, 275, 285, 303, 304].

the very same measures may not meet the requirements of the necessity test if they are reassessed under different circumstances. Thus, in the absence of any relevant analysis there is no guidance for the States involved and for future adjudicative bodies regarding the parameters of the permissibility of the act in question. Moreover, even if one could argue that such an approach is consistent with the principle of judicial economy, it is a missed opportunity to clarify the provisions of the IIA in question and to contribute to the creation of a consistent line of investment arbitral jurisprudence.

In sum, this thesis argues, that exception clauses are not threshold requirements or carve-outs and should not be treated as such. They are rather defences on the merits that are examined after a *prima facie* breach has been established.

Turning to the characterisation of exception clauses as 'primary rules' or 'circumstances precluding wrongfulness', as discussed above, *CMS-Annulment* suggested that an exception clause is a primary rule, i.e., a norm of the same character as the rule from which it derogates,[956] and thus relates to the assessment of the action's legality. On the contrary, necessity, arguably, becomes relevant on a secondary level once a breach of the substantive BIT provisions has been established.[957] For the purposes of this thesis, the most important issue to clarify in this context, is whether this alleged difference in the normative operation and consequences of the two rules affects the availability of necessity to an investment dispute. If the two rules operate on different normative levels, then necessity could be invoked by a Respondent on top of an exception

[956] Agius, 'Dying a Thousand Deaths: Recurring Emergencies and Exceptional Measures in International Law' (2010) 2 GoettingenJIntlL 219, 223.

[957] See also (n 221)

clause, even if its measure fails to meet the requirements of the latter.

The first thing to note in this context is that this argument depends largely on the assertion that necessity under general international law is indeed a circumstance relating only to the responsibility of a State (excuse) rather than the wrongfulness of the act (justification).[958] On this matter, it is important to reiterate that the final draft of the ARSIWA clearly titles the relevant section as 'circumstances precluding wrongfulness' rather than circumstances precluding responsibility. Although it is argued that this title did not settle the relevant debate and that it conflates two conceptually distinct types of defences (justifications and excuses) within a single rubric,[959] there is no clear evidence to support the characterisation of necessity as an excuse relating only to issues of responsibility.[960] Even *CMS-Annulment* did not really commit to this view.[961] It stipulated that 'one could *wonder* whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility' and accordingly presented two separate scenarios regarding its relationship with treaty exceptions.[962]

However, *assuming arguendo* that there is indeed a difference in the analytic character and the consequences of successful invocation of the two rules, still this would not affect the application of the *lex specialis* principle.

In all the awards, both pre- and post-*CMS-Annulment*, despite the notable

[958] See on this distinction Lowe (n 18) 406; Paddeu (n 840) 9–11.

[959] Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447, 483.

[960] Paddeu (n 840) 414. Note, however, Paddeu's suggestion to reconceptualise necessity as an excuse.

[961] Note the participation of James Crawford, the final ILC Rapporteur in charge of preparing the ARSIWA, in the Committee's composition.

[962] *CMS-Annulment* [132-133] (emphasis added).

differences in their findings, reasoning, and methodology, the Tribunals acknowledge that there are significant similarities between exception clauses and necessity. In *CMS*, *Enron*, and *Sempra*, the Tribunals, in view of the extent of similarities, conflate the two rules to such an extent that they became indistinguishable.[963] In *CMS-Annulment*, *Continental*, and *El Paso*, despite their findings that the two rules are allegedly different in character, they still acknowledge the existence of links between the two rules.[964] As seen in the Tribunals' analysis, both rules regulate the matter of 'necessity and emergency',[965] they deal with the protection of essential State interests,[966] they 'intend to provide flexibility' for that purpose, and they 'condone conduct that would otherwise by unlawful'.[967] Thus, it becomes clear from the awards that if it were not for the intellectual device of the 'primary/secondary rules' distinction, the exception clause would be treated as a treaty-specific regulation of necessity.[968] Thus, whilst the two rules have the same field of application and they clearly intend to regulate the same subject-matter, it is somehow argued that we can circumvent the application of the *lex specialis* principle and find that both rules are applicable, but on different normative levels. This seems to run contrary to the intention of the parties, which negotiated and drafted a clause providing flexibility to adopt measures not in conformity with the BIT obligations under specific exceptional circumstances. Besides, it seems that:

[963] see Argentina's submissions in *CMS-Annulment* [111].

[964] *CMS-Annulment* [129]; *Continental* [168]; *El Paso* [552].

[965] *CMS* [342]; *LG&E* [245].

[966] *Enron* [333]; *Sempra* [375-376].

[967] *Continental* [168].

[968] See *El Paso* [552], where the Tribunal, despite its agreement with the findings in CMS-Annulment and Continental regarding the nature of Art.XI, still held that 'Art.XI is the *lex specialis* [and] Art.25 ARSIWA, the *lex generalis*'.

> It is also anachronistic to assume....that the negotiators of US BITs (and prior FCNs with comparable exception clauses) had, long before the ILC completed and released [the ARSIWA], not only readily absorbed the implications of the ILC's distinctions between "primary" or "secondary" rules of international law but had sought to replicate these (sub silentio) in these treaties.[969]

Even if we were to conclude that there are indeed differences in the analytic character and operation of the two rules, still this should be treated as an attribute of the *lex specialis/lex generalis* relationship, rather than a factor excluding the existence of such relationship. It is perfectly possible for two States to negotiate a clause which provides that the existence of a state of necessity not only precludes State responsibility or some of its consequences, as it does allegedly under customary international law, but it *also* precludes the wrongfulness of the measure altogether in the context of specific disputes, thereby excluding all consequences of international responsibility, including possible compensation for injuries. In other words, States can create a *lex specialis* (a special defence in this case) which has more far-reaching consequences in terms of its normative operation than the relevant *lex generalis*.

As for the symbolic value of the distinctions between primary and secondary rules or permissions/carve-outs and defences in this context, it has been argued that each of these categories sends a different message to the stakeholders in the system: whether you characterise a conduct as entirely lawful or as unlawful but justified or excused entails a different evaluative judgment.[970] The utility of such a device, even on a

[969] Alvarez and Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in Sauvant (ed), *Yearbook of International Investment Law and Policy, 2008-2009* (OUP 2009) 47–48. Similarly Alvarez and Brink, 'Revisiting the Necessity Defense' in Sauvant (ed), *Yearbook of International Investment Law and Policy, 2010-2011* (OUP 2012) 337.

[970] Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 ICLQ 325, 357; Henckels (n 218) 562.

symbolic/normative level, is doubtful. In all cases it is important for the adjudicative body to treat the relevant rules as defences and to underscore the existence of a *prima facie* breach of the substantive treaty obligations. These findings of *prima facie* breach serve as a yardstick for the evaluation of future conduct by States themselves and other adjudicative bodies in future proceedings. They also assist in understanding the scope and content of the obligations in question. For example, in the cases above, the Tribunals' analysis on *prima facie* breaches of the BIT assists in our understanding of the scope of the expropriation and FET provisions, as well as the umbrella clause in the US-Argentina BIT. This approach also stresses the exceptional character of the measures in question which may only be adopted when necessary, following a careful evaluation of the exigencies of the circumstances. It is important that States understand and treat such clauses as a limited authorisation to act in a manner otherwise inconsistent with their obligations. Ago suggested in the context of ARSIWA that 'anyone invoking a state of necessity is perfectly aware of having deliberately chosen to act in a manner not in conformity with an international obligation.'[971] The awards endorsing the differentiation of exception clauses from general defences seem to imply that this is not the case when the State acts under an exception clause.[972] This understanding ignores the architecture of the treaty and the importance of the necessity test, which signify the exceptional character of exception clauses. It jeopardises the system of investment protection by understating the seriousness of the adoption of measures under the exception clauses. It is, thus, undesirable on a normative level to treat exception clauses in this manner.

[971] Ago, 'Eighth Report' [102]; similarly, Crawford 'Second Report' [278].

[972] See *Continental* [166,n241] arguing that ' [t]his is an argument that would not be applicable to the invocation of Art. XI'.

In sum, this sub-section advances the argument that the *lex specialis* principle can be properly applied in assessing the relationship between exception clauses and necessity. In the first place, it was argued that both rules operate as defences on the merits of the disputes and not as carve-outs or threshold requirements. Secondly, it was argued that necessity and exception clauses such as Art.XI have the same regulatory scope and purpose and are thus same enough to warrant application of the *lex specialis* principle. This sameness is not affected by the alleged difference in the analytic character of the two rules (primary/secondary rules distinction), which, if it exists, should be treated as a feature of the special rule agreed by the parties rather than a factor that excludes the applicability of the *lex specialis*. The following sub-sections elaborate on the modalities and consequences of the application of the *lex specialis* and the use of Art.31(3)(c) VCLT in this context.

ii. The modalities of the lex specialis principle and Art.31(3)(c) VCLT: approaching the scope and content of IIA exception clauses and the residual applicability of necessity

Having concluded that the *lex specialis* principle can be properly applied to assess the relationship between an exception clause and necessity, it is important to discuss the modalities of the operation of this principle in this context and to clarify the relationship between the two rules. Overall, in the awards, we observe not only significant divergence in the approaches of the Tribunals to the application of Art.XI and necessity, but also a general lack of clear and adequate interpretive methodology within the framework of the VCLT. Many of their conclusions were wanting in terms of justification and it is hard to discern the underlying legal reasoning. However, a synthesis and evaluation of the relevant findings, provides some guidance on how to approach the scope and content of

exception clauses similar to Art.XI. This section uses Art.XI and the findings of the Tribunals in the Argentinian crisis disputes under the US-Argentina BIT as a case study, mindful, as always, of the drafting differences observed amongst IIAs which may warrant a different approach on a case-by-case basis.

First and foremost, it emerges clearly from the Tribunals' findings that exception clauses and necessity are indeed 'cast in the same mould'.[973] It is precisely because of the important similarities between the two rules that Tribunals tend to conflate them, use them interchangeably, or read one in view of the other. Necessity and exception clauses have the same field of application, i.e., the protection of essential State interests under exceptional circumstances of necessity or emergency, and clearly intend to regulate the same subject-matter, i.e., the extent of the flexibility of States to adopt measures otherwise inconsistent with their international obligations to respond to said circumstances. It thus becomes evident that Art.XI is a treaty-specific regulation of necessity.[974] As stipulated by the Iran-US Claims Tribunal in *Amoco*, quoted in this context in the *El Paso* award:

> As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant case. On the contrary, the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.[975]

Accordingly, the *lex generalis* remains pertinent in two ways: firstly, it can be used to

[973] See analysis in (n 964-968).

[974] *Continental* [246]; *El Paso* [552].

[975] *Amoco* [112]; *El Paso* [616].

fill in possible gaps in the *lex specialis*; secondly, it can assist in the interpretation and implementation of the *lex specialis*.

With respect to the gap-filling function of the *lex generalis,* indeed, as analysed in previous chapters, the general rule remains applicable to the extent that it has not been displaced by the more specific regulation of the subject-matter. As stipulated in *Sempra*, the lack of express reference to general international law in the treaty text does not mean that 'this source of rights and obligations becomes inapplicable…[as] international law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle'.[976] However, it is hard to discern any gap in the regulation of necessity in Art.XI. There seems to be no room for the direct application of necessity or its requirements in investment disputes initiated under treaties that include such exception clauses.

Firstly, the parties to the treaty agreed to a different arrangement regarding the scope of States' flexibility in protecting essential interests, which sets different conditions from those under general international law. In the case of the US-Argentina BIT, we see that the drafters limited the exception to measures adopted for 'the maintenance of public order, the fulfillment of [a State's] obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests', as opposed to 'an essential interest' more generally, which is the requirement under the general necessity defence. This is not the same as a Treaty being completely silent on the matter of necessity, in which case, as discussed earlier,[977]

[976] Sempra [378].

[977] *Cf* Ch IV(C)(1)(a).

it is presumed that States intended to retain their rights and obligations under general international law as such. To allow States to invoke residually the general defence in order to adopt measures inconsistent with the treaty for the protection of interests other than the ones enumerated in the relevant provision would be evidently contrary to the intention of the parties.

Moreover, the provision sets only one clear requirement for its successful invocation: that the measures in question are 'necessary' for the attainment of the enumerated objectives. Thus, the rest of the requirements of necessity under general international law, i.e., the existence of a grave and imminent peril, the 'only way' test, the requirement that the measures in question do not seriously impair an essential interest of the other party and the non-contribution requirement cannot be considered as directly applicable, residually, just because they have not been explicitly excluded. The interpreter would need to discern to what extent these requirements are reflected in the treaty text, in accordance with the customary rules on treaty interpretation. Thus, these requirements can only become pertinent in such disputes through interpretation of the exception clause.

Lastly, as argued in the previous sub-section, there is no residual application of the necessity defence on the basis of the 'primary/secondary' rules distinction, as suggested by some of the Tribunals.[978] To argue that the Respondent can residually rely on the general defence when the treaty-based defence has failed, this time only to exclude the consequences of responsibility rather than to prove the lawfulness of its act altogether, seems contrary to the intention of the parties and highly artificial as a legal

[978] *Enron* [334]; *CMS-Annulment* [134]; *El Paso* [552]. See also (n 221).

construction.[979] This becomes especially evident in the context of investment arbitration where the main goal of proceedings is for the Tribunal to decide on whether to award compensation to the Claimant. The possible symbolic value of finding that a measure is 'entirely lawful' rather than being 'wrongful, but the Respondent is excused from responsibility, and thus will not pay any compensation' is, to say the least, negligible in investment proceedings. It would make little difference to the Respondent to the extent that they will not be required to pay. What is more, even if the Respondent successfully invokes necessity, compensation may not be excluded, in view of the ambiguity of the rule under general international law, as codified in Art.27 ARSIWA. Thus, residual application of necessity in such cases may enhance to a certain extent the Respondent's 'reputation for trustworthiness'[980] but it would have little practical significance. Perhaps it would be analytically more appropriate, instead of applying necessity as an additional defence through the complex legal device of the primary/secondary rule distinction, to simply take the alleged state of necessity into consideration as a mitigating circumstance in the context of calculating compensation.[981]

Turning to the interpretation of Art.XI in view of the customary requirements of necessity, this is the issue on which we saw the most evident divergence of methods in the Argentinian awards. *CMS*, *Enron* and *Sempra* did not follow a clear interpretative approach: the confluence of the general defence with the exception clause was not justified by clear reference to the rules of interpretation, and the content of the two rules became inseparable in the Tribunals' analysis. In *CMS*, the analysis on Art.XI is a virtual

[979] Similarly, Sloane (n 959) 494.

[980] Bjorklund (n 944) 516.

[981] This matter is not discussed further in this thesis in view of the scope limitations as elaborated in Ch I(C).

extension of the analysis on necessity without any further discussion on the relationship between the two rules.[982] *Enron* and *Sempra* found that the US-Argentina BIT did not deal itself with 'the legal elements necessary for the legitimate invocation of a state of necessity'.[983] For example, the treaty did not define the concept of 'essential security interests'.[984] It was, thus, necessary 'to rely on the requirements of state of necessity under customary international law…so as to evaluate whether such requirements have been met in this case'.[985] For this reason, the Tribunals found that 'the Treaty becomes inseparable from the customary law standard insofar as the conditions for the operation of the state of necessity are concerned'.[986] The analysis implied that the Tribunals used the customary requirements to interpret Art.XI and more specifically, to interpret the term 'essential security interests', but in essence, the two rules were merged into one.[987]

LG&E stipulated that it 'shall apply first, the Treaty, [and] second, the general international law…to the extent required for the interpretation and application of its provisions'[988] but, in practice, it examined the two rules separately and did not provide any guidance on their interrelationship.

CMS-Annulment, despite its extensive analysis on the relationship between the

[982] *CMS* [332].

[983] Sempra [378]; and similarly, *Enron* [334].

[984] *Enron* [333]; *Sempra* [375-376].

[985] *Enron* [333]; Similarly in *Sempra* [375] the Tribunal comments that ' [d]ifferent might have been the case if the Treaty had defined this concept [essential security interests] and the conditions for its exercise, but this was not the case.'

[986] *Enron* [334]; and similarly, *Sempra* [376].

[987] Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (n 970) 341; Binder (n 918) 613.

[988] *LG&E* [206].

two rules, did not discuss the potential relevance of the general defence to the interpretation of the exception clause.

Continental was the first to suggest in explicit terms that necessity 'may be relevant to the interpretation of…Art XI' and that '[t]he Tribunal will…focus on the analysis of Art. XI and the conditions of its application, referring to the customary rule on State of Necessity…only insofar as the concept there used assist in the interpretation of Art. XI itself'.[989] However, it did not specify what rule of interpretation it used in this context. Moreover, in its subsequent analysis on the interpretation of Art.XI it did not explicitly take into consideration at any point the customary rule. On the contrary, the Tribunal criticised the fact that previous tribunals had not clearly distinguished between the requirements of Art.25 ARSIWA and Art.XI and clearly differentiated the two rules where appropriate.[990]

Lastly, amongst the relevant awards, *El Paso* is perhaps the clearest in terms of interpretative methodology. The Tribunal agreed with *Continental* that Art.25 ARSIWA must be taken into account in interpreting Art.XI, arguing further that Art.25 embodies 'general principles of international law'.[991] It then used Art.31(3)(c) VCLT to justify the introduction of the non-contribution requirement, which was the main focal point of its analysis, into the interpretation of Art.XI.[992]

Approaching Art.XI in view of the above, we see that indeed, the treaty text does

[989] *Continental* [168].

[990] *Continental* [178, 180, 192, 234].

[991] *El Paso* [552].

[992] *El Paso* [616-619].

not provide any definition or further guidance on what constitutes 'maintenance of public order' or 'the protection of…essential security interests'. Thus, as pointed out in *Enron* and *Sempra*, 'the specific meaning of these concepts must be searched for elsewhere'.[993] The requirements of necessity inform the content of these terms as relevant rules of international law applicable between the parties in accordance with Art.31(3)(c) VCLT. As discussed previously, Art.31(3)(c) VCLT has compulsory character,[994] mandating the interpreter to take into account rules of general international law in determining the content of relevant treaty terms. The ILC observed in its commentary to Art.25 ARSIWA that 'the extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged'.[995] However, it is evident that the exception clause has a scope narrower than necessity as it only extends to measures relating to public order and a State's 'own essential *security* interests' rather than 'essential interests' more generally. Thus, the customary rule only confirms in this respect that the State enjoys some discretion in distinguishing between a 'security interest' and an '*essential* security interest'.

Nonetheless, in general international law the notion of 'essential interests' is tightly linked to the notion of 'grave and imminent peril'. For the purposes of the general necessity defence, the State must not only show that a measure relates to an essential interest but must rather establish, objectively,[996] that said interest is seriously threatened

[993] *Enron* [333]; *Sempra* [375-376].

[994] See analysis in (n 274-275).

[995] Art.25 ARSIWA, commentary [15].

[996] ibid.

in a manner that is 'certain and inevitable'.[997] This is evident in the *CMS*, *Enron*, and *Sempra* awards where the analysis suggests that for a situation to affect 'essential interests' it must not simply be 'severe' or 'difficult enough to justify the government taking action',[998] but in fact 'out of control or…unmanageable'.[999] In other words, the situation must be of great gravity and severity, i.e., the State must be faced with a 'grave and imminent peril' affecting its quintessential functions. The main question that arises in this context is whether the Respondent invoking the exception clause must indeed establish the existence of such grave and imminent peril to its public order or essential security interests in a manner analogous to the necessity. This thesis argues that the existence of a peril can be read into the terms 'for the maintenance of', 'for the protection of' as well as the terms 'essential' and 'security'.[1000] These terms imply the existence of a danger or threat against which a State must urgently act. In fact, the line separating the notion of an 'essential security interest' from the notion of 'peril' is so thin, that the analysis of the two can hardly be separated.[1001] As stated in *LG&E*, 'peril' need not be a single event but can rather be 'the aggregate' of several conditions that together trigger the protections afforded by the treaty.[1002] It also need not involve military action or war.[1003] All the Tribunals seem to agree that the notion of 'essential security interests'

[997] *Gabčíkovo-Nagymaros* [54].

[998] *CMS* [320-322]; *Enron* [306-307]; *Sempra* [348-349].

[999] *Enron* [307]; *Sempra* [349].

[1000] *Contra* Cristani (n 841) 247; Binder (n 918) 613.

[1001] See similarly, Martin, 'Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-Precluded Measures and the Doctrine of Necessity under Customary International Law' (2012) 29 JIntlArb 49, 61.

[1002] *LG&E* [229-237].

[1003] *LG&E* [238].

also includes, for example, severe economic crises.[1004] One could similarly argue that the notion includes environmental crises, food security or sustainability threats.

The threshold of gravity of such threats that must be reached for the protections under the exception clause to kick in cannot be easily defined. *Enron* and *Sempra* stipulated that the situation must 'compromise…the very existence of the State and its independence'.[1005] International case law indeed supports this high threshold in the context of necessity, implying that the reasoning behind necessity is the idea that a State's 'first duty is to itself' and that 'its own preservation is paramount'.[1006] In the context of non-fulfilment of economic obligations, the Tribunal in *Russian Indemnity* had introduced the same high threshold of gravity by observing that 'the obligation for a State to execute treaties may be weakened if the very existence of the State is endangered, if observation of the international duty is…self-destructive'.[1007] The term 'essential' in Art.XI, especially read in context with the term 'security', supports its interpretation in view of the overall high threshold of gravity under general international law, involving a threat to a State's core, most vital functions.[1008] Even if we were to take a more lenient approach that does not confine the notion to 'existential' threats, the term 'essential security interests' implies a 'danger seriously compromising [a State's] internal or

[1004] *CMS* [319]; *LG&E* [250]; *Continental* [178]. Note, however, a possible different reading of the *CMS* findings in Martin (n 1001) 61. Recognition of economic necessity as a grounds for preclusion of wrongfulness under general international law can be seen already in the early works of the ILC, e.g., Amador, 'Second Report' p.118-119.

[1005] *Enron* [306]; *Sempra* [348]. See similarly, *Sempra* [332] requiring that the 'constitutional order and the survival of the State' are imperilled.

[1006] *French Company*, p.353.

[1007] *Russian Indemnity*, p.443.

[1008] *Iranian Assets(Merits)-Iwasawa* [24,29].

external situation'.[1009] This does not mean that Art.XI requires a 'total collapse' of the country or the existence of a 'catastrophic situation' before the authorities have the right to act.[1010] As stipulated in *Continental*, there is no point in having the protections of an exception clause 'if there is nothing left to protect'.[1011] The determination of whether the situation presents a serious threat to a State's essential security interests requires an 'objective assessment' of all facts at the time that the State was called to make a decision and 'must contain a significant margin of appreciation for the State'.[1012]

As for the term 'necessary' in Art.XI, we observe in the awards a divergence of views on the relevance of the 'only way' test under customary international law. This divergence is partly owed to the misconception regarding the meaning of the 'only way' test under customary international law. *CMS*, *Enron*, and *Sempra* found that there were several alternative ways for Argentina to deal with the crisis, each supported by –at least some– economists or by the past experience of other States in crises.[1013] Their findings suggest that they interpret the 'only way' requirement quite literally: as long as the measures in question are not 'the only steps available',[1014] the plea of necessity fails. Asserting that it is not their task to recommend the most appropriate alternative or 'substitute for the governmental determination of economic choices',[1015] the Tribunals did not discuss at all whether these other alternatives would be equally effective, truly

[1009] *LG&E* [251].

[1010] *Continental* [180, n264].

[1011] *Continental* [180].

[1012] *Continental* [181].

[1013] *CMS* [323]; *Enron* [308]; *Sempra* [350].

[1014] *CMS* [323-324]; *Enron* [309].

[1015] *CMS* [323]; *Enron* [309]; *Sempra* [351].

available, or truly less restrictive.

However, this narrow understanding of the 'only way' requirement under general international law is unsupported. *LG&E* provided a more apt description of its meaning, which is that the State must first have exhausted all available legal means before proceeding to acts incompatible with the international obligation in question, and that such acts must not go beyond what is strictly necessary.[1016] The Tribunal rejected this test in the context of interpreting Art.XI. It found that 'Art.XI refers to situations in which a State had no choice but to act' but 'a State may have several responses at its disposal to maintain public order or protect its essential security interests'.[1017] However, the term 'necessary' in Art.XI implies not only that the State had 'no choice but to act' but also that the State had 'no choice but to act *in the way it did*', i.e., in a manner incompatible with its international obligations. Thus, in line with the 'only way test' under customary international law, a State cannot possibly meet the requirements of the necessity test under a treaty exception when there are legal means available that could adequately respond to the crisis.[1018] It does not follow that whenever there are several different options available to the State, the defence would fail. This would render the defence practically unavailable in most circumstances, especially in cases such as the Argentinian financial crisis when there will always be conflicting opinions regarding the best economic policy to be adopted.[1019]

[1016] *LG&E* [250]. See similarly *CMS* [324] by reference to Art.25 ARSIWA, commentary [15]: 'The plea is excluded if there are other (otherwise lawful) means available…'.

[1017] *LG&E* [239].

[1018] Art.25 ARSIWA, commentary [15]; Agius (n 745) 104; Crawford, *State Responsibility* (n 5) 311.

[1019] Reinisch (n 841) 200; Bjorklund (n 944) 485; Titi (n 221) 254.

The 'only way' test together with the requirement under general international law that the measure taken in a state of necessity 'does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole' reflect the principle of proportionality.[1020] This is also implied in the term 'necessary' found in exception clauses such as Art.XI. The principle of proportionality dictates a weighing and balancing test, which requires that the measure in question does not go beyond what is strictly necessary under the exigencies of the circumstances. Where there are several alternative ways for the State to react, the State must select the one that encroaches the least on the rights bestowed under the terms of the treaty. For an adjudicative body to reject the Respondent's defence on the basis that there were other means available, it would have to demonstrate that those other means, which must be specifically identified, were indeed available, equally effective in eliminating the identified threat and, overall, less disruptive of the relations under the treaty. In this respect, the vague findings of the Tribunals in *CMS*, *Enron*, and *Sempra* that there were other alternatives available to Argentina were 'weakly argued'.[1021]

WTO case law can be helpful in elucidating the methodology and criteria for conducting this weighing and balancing test. The Tribunal in *Continental*, in an effort to avoid the mistakes of previous tribunals which conflated Art.XI with necessity, was confronted with the need to come up with different criteria to assess the necessity of Argentina's measures under Art.XI.[1022] In this context it found 'more appropriate' to

[1020] Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015) 28.

[1021] Schill, 'From Calvo to CMS: Burying an International Law Legacy - Argentina's Currency Reform in the Face of Investment Protection: The ICSID Case CMS v. Argentina' (2006) 3 TDM 13. See also *Enron-Annulment* characterising the Tribunal's failure to testing the existence and 'relative effectiveness' of alternative measures as failure to state reasons [368-372, 377].

[1022] Alvarez and Brink (n 969) 326.

refer to relevant GATT and WTO case law.[1023] The Tribunal summarised the WTO necessity test as 'a process of weighing and balancing of factors', including the relative importance of the interests in question, the contribution of the measure to the furtherance of said interests and its restrictive impact on international commerce.[1024] It further recalled that according to WTO case law a measure is not necessary if there are other alternatives 'treaty consistent, or less inconsistent', i.e., less trade-restrictive, which are 'reasonably available'.[1025] It then proceeded to apply these requirements to the Argentinian measures. This was the first award that engaged in this form of 'cross-fertilisation' in the context of defences. However, analogies between the protections under the WTO Agreements and IIAs have been drawn before, especially in the context of the national treatment obligation, demonstrating an 'increasing willingness of investment tribunals to acknowledge the interconnectedness of international economic law's different strands.'[1026] The only explanation offered for this methodological choice was that Art.XI derives from the parallel model clause of US FCNs which in turn 'reflect[s] the formulation of Art. XX of the GATT 1947'.[1027] However, as discussed in Chapter III, the weighing and balancing test employed by the WTO in assessing a measure's necessity is also reflective of the customary principles of necessity and proportionality. It is thus appropriate to transpose the test proposed by the WTO bodies

[1023] *Continental* [192ff].

[1024] *Continental* [194, n294] citing *Brazil-Tyres(PR)* [7.104].

[1025] *Continental* [195] citing *US-Gambling(ABR)* [308].

[1026] Henckels and Mitchell, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14 ChiJIL 93, 114.

[1027] *Continental* [192]. Note that Continental challenged in *Continental-Annulment* the application of WTO standards. The Committee responded that 'the Tribunal was clearly not purporting to apply that body of law, but merely took it into account as relevant to determining the correct interpretation and application of Art.XI of the BIT', see *Continental-Annulment* [133].

to the context of investment arbitration, as the test spells out the methodological steps to be followed in the application of customary rules. The general defences and their requirements under general international law are at the background of the application of treaty exceptions in both the WTO Agreements and investment arbitration and inform their scope and content in a similar manner.

In view of the above, this thesis further argues that the relevance of the customary requirement that the measure 'does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole' in the context of IIA exception clauses is confined to its underlying principle of proportionality. As observed by some of the Tribunals, it is unlikely that measures impacting on the rights of foreign investors 'seriously impair' the 'essential interests' of other State parties to the IIA.[1028] Although protection of its investors may be an important State interest[1029] it would be too tenuous to argue that this interest is 'essential' in view of the interpretation of the term elaborated above. On the other hand, it is only natural that most, if not all, measures reducing or eliminating the protections afforded to investors under an IIA seriously impair the essential interests of said investors.[1030] In view of this, aside from the argument that the obligations under IIAs exist towards the other States parties and not towards the investors and thus the essential interests of investors are irrelevant in this context,[1031] introducing further considerations regarding the interests of investors in the assessment of a measure's necessity under the exception

[1028] *CMS* [358]; *Enron* [341]; *Sempra* [390]; *LG&E* [257].

[1029] *CMS* [357].

[1030] *Enron* [342]; *Sempra* [391].

[1031] See analysis in Ch IV(C)(3)(b).

clause would render such clause redundant or inefficient, contrary to the principle of effective interpretation.[1032] The very existence of an exception clause in the text of the treaty suggests the overriding importance of certain State interests, the protection of which trumps the interests of protected investors. It is thus argued that it all comes down to whether the impairment to the investors' interests under the treaty is truly necessary and proportionate to the threat faced by the host-State, as required by the terms of the exception.

Lastly, with respect to the requirement that the State has not 'contributed to the situation of necessity', again we observe different approaches in the Argentinian arbitral awards. However, despite the different methodologies, all Tribunals agreed that the criterion is, in one way or another, relevant to the overall assessment of State conduct under the treaty exception. The absence of such a requirement in the wording of the provision signifies that it could only become relevant in the assessment of a measure's necessity. Indeed, *Continental* and *El Paso* introduced the non-contribution requirement in their analysis of the term 'necessary' in Art.XI.[1033]

Continental examined 'whether Argentina could have adopted at an earlier time different policies that would have avoided or prevented the situation that brought about the adoption of the challenged measures'.[1034] It concluded that 'Argentina made reasonable efforts to take measures that would have…respect[ed] its international obligations' and that 'the causative link between [the suggested] "pre-emptive" policies and the Measures at issue would have been possibly too tenuous to consider them as

[1032] See (n 169).

[1033] *Continental* [227]; *El Paso* [624].

[1034] *Continental* [223ff].

alternatives that would have rendered these measures unnecessary under Art. XI.'[1035] It further stipulated that:

> [N]ot every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect towards international obligations…before a breach of those obligations can be considered justified as being necessary under [the] BIT. The standard of reasonableness and proportionality do not require as much'.[1036]

The Tribunal at this point referred once more to WTO case law to suggest that an alternative is not to be considered reasonable if it imposes 'undue burden' or 'prohibitive costs'.[1037] Thus, the Tribunal seems to have, implicitly, introduced the requirement of non-contribution under general international law into the analysis of the measures' proportionality and the availability of reasonable alternatives.

El Paso used various interpretative elements to suggest that the 'Treaty cannot possibly allow for the possibility that if the host State itself has caused or significantly helped to cause, intentionally or by omission, the situation and the consequences complained of, that State may shirk its obligations under the BIT by invoking Art.XI'.[1038] Firstly, in accordance with Art.31(1) VCLT, it invoked the BIT's object and purpose, which, according to the Tribunal is, *inter alia*, to provide stability for the status of investment, and concluded that not including a non-contribution criterion in Art.XI would be contrary to such object and purpose.[1039] Secondly, the Tribunal used Art.31(3)(c) VCLT and suggested that non-contribution under Art.25(2)(b) ARSIWA is

[1035] *Continental* [227,231].

[1036] *Continental* [227].

[1037] *Continental* [n343].

[1038] *El Paso* [615].

[1039] *El Paso* [615].

a ‘general rule of international law’ applicable between the parties which is relevant to the interpretation of Art.XI.[1040] The Tribunal further referred to *force majeure* and distress enshrined in Arts.23 and 24 ARSIWA, which also include some form of the non-contribution requirement.[1041] In view of this, it suggested that non-contribution is a general principle of law under Art.38(1)(c) ICJ Statute.[1042] Acknowledging the methodological challenges of identifying such principles in international law, it further referred to the UNIDROIT Principles on International Commercial Contracts, which also suggest that contributory behaviour may result in the non-availability of relevant defences.[1043] It concluded that, in view of its status as a general principle of international law it informs the notion of necessity in Art.XI, in accordance with Art.31(3)(c) VCLT.[1044] Applying this principle to the facts of the case, the majority concluded that Argentina contributed to the crisis to a substantial extent, so that Art.XI cannot be invoked.[1045]

In line with the conclusions reached in Chapter III, this thesis argues that non-contribution can indeed be taken into consideration in assessing the measure’s necessity, but it is only part of the overall weighing and balancing test that the adjudicative body needs to undertake in determining whether the act in question is a genuinely necessary and proportionate measure responding to a real threat, objectively identified. It is a

[1040] *El Paso* [617-618].

[1041] *El Paso* [620].

[1042] *El Paso* [621ff].

[1043] *El Paso* [621-623].

[1044] *El Paso* [624].

[1045] *El Paso* [656-665]. Note Arbitrator Stern’s dissent at [666-670]. See also endorsement in *El Paso-Annulment* [248].

manifestation of the principle of good faith, which would preclude an abusive invocation of the exception clause for reasons other than the ones enumerated thereunder. It is also essential for the Tribunal to determine whether the contribution was significant enough to deprive the State of its right to invoke the defence.[1046] In some of the Argentinian crisis awards, the Tribunals took a very restrictive approach to the contribution requirement, which renders invocation of the defence virtually impossible.[1047] Based on this approach, in cases of emergencies that 'originate from political crises', the defence 'would be virtually excluded as regularly a certain (political) contribution or responsibility of the host state can be spotted that later on materializes in a state of necessity.'[1048] The same applies in emergencies originating from financial crises, as seen in the Argentinian awards, and can equally apply in most emergency scenarios. It is, thus, important to stress that not *any* contribution would amount to a factor excluding necessity, and to be mindful of the underlying principle of good faith and, and its corollary, the principle of *ex iniuria jus non oritur,* that inform this requirement under general international law.[1049]

2. Self-defence and investment treaties

Armed conflicts significantly increase the likelihood of interference with foreign investments. They lead to instability and uncertainty in the economic, political, social, and legal order of the host-State, resulting in disruptions to foreign investors' operations and limiting their capacity to make full use of their investment. In addition, the likelihood

[1046] e.g., *Enron-Annulment* criticizing the Tribunal for failing to address what would amount to a 'fault' of the State [389-390].

[1047] *CMS* [329]; *Enron* [311-312]; *Sempra* [353-354].

[1048] Schill (n 1021) 14.

[1049] *Sempra* [353]; *Enron-Annulment* [388].

of invested assets sustaining damage or complete destruction rises during armed conflicts. This includes physical interference, as well as expropriation, seizing and freezing of assets and other measures that may eliminate or decrease an investment's value.

More than 30 treaty-based investment arbitrations have been initiated that concern measures taken in the context of armed conflicts and military operations.[1050] Indicatively, several arbitrations by Ukrainian investors were initiated under the Russia-Ukraine BIT seeking compensation for losses suffered in Crimea and other parts of Ukrainian territory following Russia's invasions in 2014 and 2022.[1051] Similarly, Russian investors have announced their intention to pursue claims under the Russia-Ukraine BIT due to Ukraine's decision to allow seizure of their assets in Ukraine in the context of the ongoing armed conflict between the two States.[1052] Investors of third States have also had recourse to arbitral proceedings against the two States under applicable IIAs for damages suffered in the context of their armed conflict.[1053] Several cases were also initiated by foreign investors against Libya,[1054] Syria[1055] and Egypt[1056] for losses suffered during the respective civil wars. These disputes raise several intricate legal questions,

[1050] See UNCTAD, IIA Issues Note, Issue 1 (2022), 9.

[1051] *Ukrnafta*; *Stabil*; *PrivatBank*; *Lugzor*; *Everest*; *Belbek*; *Oschadbank*; *Naftogaz*; *DTEK*; *Ukrenergo*. See also Akhmetov's SCM Group announcement that he has filed a claim under the Ukraine-Russia BIT 'Ukraine's richest man brings treaty claim against Russia' *GAR* (11 April 2023).

[1052] As reported in 'Two Russian banks threaten treaty arbitration against Ukraine following seizure of their assets in the context of the ongoing Russia-Ukraine war' *IA Reporter* (12 May 2022).

[1053] E.g., *Ostchem* and threats of AMIC Energy to initiate proceedings against Ukraine as reported in 'Seizure of gas stations allegedly linked to Russian interests prompts threat of investment arbitration against Ukraine' *IA Reporter* (10 May 2022).

[1054] *Trasta*; *Cengiz; D.S. Construction; Güriş; Strabag; Tekfen.*

[1055] *Gamesa; Güriş and others.*

[1056] *Ampal*.

including issues relating to jurisdiction and applicability of the relevant treaties, the nationality of investors, the attribution of the challenged measures, the scope of the substantive standards of protection of foreign investors under IIAs and others. Many of the relevant arbitrations are still pending and from those that have been concluded only few awards have been made public and are often redacted.

This section, in keeping with the subject of the thesis, focuses only on the following question that arises in the context of an armed conflict: whether a host-State has the right to take measures affecting foreign investments in its territory that are *prima facie* inconsistent with its obligations under applicable IIAs as 'a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.[1057] The arbitral awards relating to armed conflicts that have been issued so far and are available to the public do not touch on self-defence under general international law. Thus, the analysis below is primarily doctrinal, discussing the availability of the defence in view of the customary rules of treaty interpretation and the *lex specialis* principle, taking into consideration the analysis in previous sub-sections and any relevant findings in awards relating to investment protection in armed conflicts. It discusses whether self-defence under general international law is available in investment disputes arising under IIAs that do not include an exception clause (a); whether self-defence is excluded by the 'full protection and security' ('FPS') standard (b); the relationship of self-defence with exception clauses (c); and its interaction with so-called 'war clauses' (d).

a. Applicability of self-defence in the absence of textual foothold

As discussed in the context of necessity, several IIAs do not include any clauses relating

[1057] Art.21 ARSIWA.

to exceptional circumstances, such as armed conflicts. In such cases, it is important to investigate whether the host-State retains its right to act inconsistently with its investment obligations in the exercise of self-defence.

As explained above, the relevant arbitral awards that are available to the public do not discuss the availability of self-defence. Nonetheless, case law on the defence of necessity can inform our understanding of the interaction of self-defence with investment treaties. The casual approach that we saw in the awards discussed in Section C(1)(a) and in ICJ jurisprudence,[1058] suggests that general defences, including self-defence, are presumed to be applicable in the context of all international disputes, in the absence of an indication to the contrary in the text of the treaty under consideration. The silence of a treaty cannot be interpreted as depriving a State of its rights under general international law. The same arguments that were raised in the context of necessity apply *a fortiori* in the case of self-defence, as an armed attack against a State is the most paradigmatic example of a 'grave peril'. The requirements for the exercise of lawful self-defence under general international law, enshrined in Art.51 UN Charter and customary international law, must be fulfilled for the wrongfulness of the act in question to be precluded, as stipulated in Art.21 ARSIWA.[1059] This means that the host-State would need to demonstrate that an armed attack has occurred against a Member of the United Nations and that the measure in question fulfils the customary requirements of necessity and proportionality.[1060]

The general defence in such cases can certainly capture cases of inter-State armed

[1058] See analysis in (n 133-144).

[1059] See analysis in (n 152-155) on the applicability of Art.21 ARSIWA to non-forcible measures.

[1060] Art.52 UN Charter; see also analysis in (n 722).

conflicts that are already in progress. It is unclear whether such defence could also extend to acts in response to attacks launched by non-State actors, or cases of 'anticipatory' or even 'pre-emptive' self-defence, as the existence of such rights has long been the subject of extensive debate within the international community and the community of legal scholars.[1061] These issues are beyond the scope of the present thesis. Nonetheless, the broader, in terms of regulatory scope, necessity defence may be used in such cases, provided that its requirements are met. It is thus, arguably, unnecessary to attempt to fit all such scenarios within the scope of self-defence in cases of *prima facie* breaches of obligations that do not consist in a use of armed force, such as *prima facie* breaches of an IIA.[1062] Moreover, in the first place, self-defence would only be available to the victim State and not to other belligerent parties. This raises some additional jurisdictional questions for the Tribunal, which would need to establish first whether an armed attack has indeed occurred and under what circumstances, a matter that falls, at least *prima facie*, outside the limits of its subject-matter jurisdiction and field of competence. This issue is discussed further in the next section, together with similar questions arising in the context of countermeasures.[1063]

A more pressing question is, however, whether the right to collective self-defence would also afford a defence to the Respondent in ISDS. Cases of individual self-defence involve direct attacks against a State which threaten its quintessential functions. A host-

[1061] See indicatively, Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP 2002) ch.7; Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 EJIL 209; Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359; Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 LJIL 801.

[1062] With the caveat that successful invocation of self-defence or necessity may yield different results with respect to remedies, which is not examined in this thesis.

[1063] See Ch IV(C)(3)(c-d).

State cannot reasonably be expected to operate on a business-as-usual basis in situations of such utmost urgency. The right to collective self-defence, which allows actions for the benefit of a third State that declared itself to be the victim of an armed attack and requested assistance,[1064] can encompass situations of armed conflict that may be geographically very remote from the host-State. In such cases, the host-State is not itself faced with a situation of urgency triggering a necessity to take measures that affect the rights of foreign investors. Nonetheless, Art.21 ARSIWA provides a clear *renvoi* to the UN Charter, which in turn recognizes the 'inherent right of individual *or collective* self-defence'.[1065] The ICJ in *Nicaragua* has also affirmed the customary nature of the right to exercise collective self-defence for the benefit of a victim State.[1066] Doctrinally, there is no reason to exclude the availability of collective self-defence. It would be artificial and unsupported to divide the right to self-defence under general international law into two parts, and only acknowledge one part as relevant in the context of investment arbitration. An IIA that remains silent on the matter cannot provide a valid basis for such interpretation. However, destruction or interference with property in the territory of a State that is not itself in a situation of armed conflict on the basis of collective self-defence may fail to meet the customary requirements of necessity and proportionality[1067] since a response in self-defence must not go beyond what is necessary to halt or repeal the armed attack to which it responds.[1068]

[1064] *Nicaragua(Merits)* [195-199]; *Oil Platforms(Merits)* [51].

[1065] Art.51 UN Charter (emphasis added).

[1066] *Nicaragua(Merits)* [194,199].

[1067] See (n 722).

[1068] Trapp, 'Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 ICLQ 141, 146. See also relevant discussion on permissible objectives of self-

b. Self-defence and the FPS standard

IIA provisions on FPS are the most pertinent in situations of armed conflict. Most IIAs include some form of FPS clause,[1069] and its origins can be traced in customary international law on the protection of aliens.[1070] The main question that arises in this context is whether the FPS standard implies the exclusion of self-defence as a defence for *prima facie* breaches of investment obligations. In other words, whether the host-State is required to guarantee FPS at all times. The analysis below also addresses similar arguments that can be raised with respect to the necessity defence and its relationship with FPS.

FPS provisions require the protection of foreign investors and investments in situations of forcible interference.[1071] This seems to include, at least *prima facie*, actions that threaten the integrity of investments in the context of an armed conflict, whether international or non-international. It is generally accepted that FPS involves both a positive duty of the State to protect the investment from actions of third parties (such as protestors or non-state armed groups) and a negative duty to refrain itself from actions that may harm the investment.[1072] As to the scope of the protection afforded under FPS,

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defence in Akande and Liefländer, 'Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defence' (2013) 107 AJIL 563, 568–569.

[1069] With textual variations, such as, indicatively, 'full protection and security' in Art.1105 NAFTA; 'most constant protection and security' in Art.10(1) ECT. Such variations don't seem to carry much significance in arbitral practice, see Cordero Moss, 'Full Protection and Security' in Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 134; Schreuer, 'War and Peace in International Investment Law' in Fach Gómez, Gourgourinis, and Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 10–11. See sample of different FPS provisions in Reinisch and Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020) 536–540.

[1070] Although the scope of the relevant custom and the extent of overlap with FPS provisions remains unclear, see discussion in Reinisch and Schreuer (n 1069) 545–550.

[1071] *Saluka* [483]; *Cengiz* [403].

[1072] E.g., *Biwater* [730]; *Ampal* [245]; *Cengiz* [403].

it is undeniable that it creates an obligation of police protection, i.e., the physical protection of the investor and its assets.[1073] Whether the protection also extends to legal security remains under contestation in arbitral practice.[1074]

However, it is now established[1075] that the FPS standard does not entail the host-State's strict or absolute liability, but it is rather a due diligence or 'all reasonable measures' obligation to prevent wrongful injuries to investors and investments within its territory.[1076] It must exercise 'vigilance and care',[1077] but is not required to ensure FPS at all times and under all circumstances. FPS cannot be construed as 'a warranty that property shall never in any circumstances be occupied or disturbed'.[1078] As pointed out in *Pantechniki*, 'it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places.'[1079] There is an 'element of proportionality' in applying this protection standard:[1080] 'a government is only obliged to provide protection which is reasonable in the circumstances.'[1081]

The nature of FPS as a relative standard that 'must be assessed according to the

[1073] Reinisch and Schreuer (n 1069) 558.

[1074] See overview of relevant awards in Reinisch and Schreuer (n 1069) 568–579. Note, however, that some BIT explicitly extend FPS to legal protection, see e.g. Art.2.2 Ukraine-Russia BIT. See relevantly *Tatneft* [423-425].

[1075] Through '*jurisprudence constante*' as described in *Mamidoil* [821].

[1076] E.g., *AAPL* [50]; *Tecmed* [177]; *Saluka* [484]; *Pantechniki* [77]; *Pezold* [596]; *Ampal* [241]; *Wena* [84]; *Cengiz* [406]; See also *ELSI* [108].

[1077] *Ulysseas* [272].

[1078] *CME* [353].

[1079] *Pantechniki* [77].

[1080] *Pantechniki* [77].

[1081] *CME* [353].

particular circumstances in which the damage occurs'[1082] suggests firstly, that the standard itself can accommodate some flexibility for States in situations of urgency, including in an armed conflict, and secondly, that it is not an absolute rule. Unlike IHL, human rights treaties, or treaties on diplomatic and consular rights, IIAs do not indicate that the rights provided therein cannot be limited or reduced.[1083] In many cases, FPS provisions co-exist with exception clauses which allow for derogations from the treaty's substantive standards of protection.[1084] In the same fashion, a host-State can also invoke defences under general international law to justify *prima facie* breaches of the FPS standard.[1085] Thus, the existence of FPS provisions in IIAs cannot be interpreted as an implicit exclusion of the right to self-defence or the right to take measures in situations of necessity.

c. Self-defence and treaty exception clauses

Exception clauses such as Art.XI apply par excellence to situations of armed conflict. As explicitly confirmed by the ICJ in *Nicaragua* and *Oil Platforms*, a measure adopted by a State that has been the victim of an armed attack is a prime example of a measure 'necessary to protect' the 'essential security interests' of a party.[1086] In such cases, as discussed earlier in the context of the WTO security exceptions, a State is in fact afforded a defence broader than self-defence under general international law, as the existence of

[1082] *Ampal* [241].

[1083] *Contra*, Schreuer, 'War and Peace' (n 1069) 20.

[1084] E.g., NAFTA, ECT.

[1085] See the examination of necessity in *Pezold* [658] where the Tribunal confirmed that 'it cannot be said that the BITs preclude Zimbabwe from invoking necessity'. Note, however, the criticism of the Tribunal's interpretation of FPS and application of necessity in Tzouvala, 'Full Protection and Security (for Racial Capitalism)' (2022) 25 JIEL 224.

[1086] *Nicaragua(Merits)* [224]; *Oil Platforms(Merits)* [40].

a threat to its security interests may be demonstrated even in the absence of an actual armed attack launched against it.[1087] Self-defence is 'part of the wider category of measures'[1088] that fall within the scope of exceptions relating to 'essential security interests.'

The defence under exception clauses would also extend to the attacking State as security concerns may arise in the context of an ongoing armed conflict regardless of who launched the first attack. The argument that the requirements for the lawful exercise of self-defence can inform the interpretation of the term 'essential security interests' or even the term 'war' in clauses where such explicit reference appears,[1089] cannot be sustained.[1090] The measures challenged in the context of an investment arbitration do not involve a use of armed force. Thus, despite the *jus cogens* character of the prohibition of use of force under general international law, there is no legal reason to assume that the parties intended to incorporate the requirements of self-defence into the exception clause given that the language used in such provisions is evidently more permissive.

A more intricate interpretative question that arises in this context is whether the right to collective self-defence can be accommodated within the scope of security exceptions in IIAs. The ICJ in *Nicaragua* and *Oil Platforms* explicitly confirmed that 'self-defence, individual or collective' falls within the scope of the similar exception clauses in the FCN and Treaty of Amity.[1091] However, as discussed above, in the context

[1087] See Ch III(D)(1).

[1088] *Nicaragua(Merits)* [224]; *Oil Platforms(Merits)* [40].

[1089] Some investment treaties include security exceptions resembling Art.XXI GATT, e.g., Art.2102 NAFTA; Art.22(4) 2021 Canada Model FIPA.

[1090] See similar arguments in Ch III(D)(1).

[1091] *Nicaragua(Merits)* [224]; *Oil Platforms(Merits)* [40].

of ISDS the alleged breach must take place within the jurisdiction of the host-State in order to fall within the scope of the IIA. It would thus be challenging to argue that a measure affecting the rights of a foreign investor within the territory of a third State that is not actively involved in hostilities is taken in the exercise of collective self-defence on behalf of another State that has been a victim of an armed attack. The requirements of necessity and proportionality may not be met under such circumstances.[1092] Moreover, contrary to the FCN, the Treaty of Amity and the WTO Agreements, which refer more generally to the right of a party to protect 'its essential security interests', certain IIAs such as the US-Argentina BIT refer to a State's '*own* security interests'.[1093] This difference in the wording of these provisions may be interpreted as excluding situations where a State is exercising the right to self-defence on behalf of a third State or the international community as a whole.

d. Self-defence and treaty clauses regulating compensation for losses ('War clauses')

Certain IIAs do not include an exception provision but include a so-called 'war clause'[1094] or 'armed conflict clause'[1095], which, in its 'basic' form, provides that:

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such

[1092] See analysis in (n 722).

[1093] Art.XI US-Argentina BIT.

[1094] E.g., Schreuer, 'War and Peace' (n 1069) 14.

[1095] Ackermann, *The Effects of Armed Conflict on Investment Treaties* (CUP 2022) 117. Nevertheless, as Ackermann suggests, these terms somewhat misrepresent the clauses' scope of application, as seen also in the analysis below.

losses. [1096]

States have attempted to use such clauses as a defence claiming that they establish a special regime applicable to investors in situations of emergency, during which, the only treatment owed to investors is to treat them no less favourably than national investors or investors from any third country.[1097] This technique has been used by Respondents in disputes relating to armed conflicts, as well as in other cases of necessity such as the Argentinian crisis. The main question addressed in this section is whether such clauses may constitute *lex specialis* to general defences such as self-defence or necessity.

Tribunals have in most cases found that such provisions 'mean what they say'[1098] and nothing more. They impose a distinct obligation[1099] of equality of treatment, which constitutes a specific expression of the NT and MFN principles[1100] and establishes the floor treatment[1101] to be afforded to investors with respect to measures directed at offsetting or minimising losses suffered in the circumstances enumerated therein. Such provisions do not afford States any defence on the merits of the dispute and do not exempt them from other treaty obligations.[1102]

At the same time, the ordinary meaning of such clauses does not seem to create a

[1096] Art.IV(3) Argentina-US BIT. See similarly, e.g., Art.4 Argentina-UK BIT; Art.5(3) Argentina-France BIT; Art.4 Argentina-Italy BIT; Art.6 China-Netherlands BIT; Art.7 Netherlands-Zimbabwe BIT; Art.5 Libya-Turkey BIT; Art.5 Austria-Libya BIT; Art.5(1) Cyprus-Libya BIT; Art.6 Russia-Ukraine BIT; Art.4(3) Germany-Zimbabwe BIT; Art.3 Egypt-Germany BIT; Art.IV Egypt-US BIT.

[1097] *Suez* [267].

[1098] *Suez* [271].

[1099] *Cengiz* [453].

[1100] *BG* [282].

[1101] *CMS* [375].

[1102] *AMT* [6.23-6.24]; *CMS* [375]; *National Grid* [253]; *Funnekotter* [104]; *Suez* [270-271]; *Total* [229]; *Impregilo* [339]; *EDF* [1157, 1161]; *Cengiz* [360-370].

substantive right to restitution or compensation for foreign investors under the enumerated circumstances either.[1103] According to one view, war clauses imply a *renvoi* to other substantive provisions of the treaty, most relevantly, those on FPS. [1104] War clauses only apply once it has been proven that the State has indeed breached other substantive obligations and that reparation is due.[1105] Another reading of such provisions suggests that they apply in cases where the host-State decides to grant redress or reparation for losses suffered by investors either 'by operation of another treaty, domestic law, or simply on a discretionary basis'.[1106] In other words, the source of the obligation to provide reparations is not within the IIA, or there is no obligation at all but rather the State chooses to provide reparations (by introducing, for example, a programme of indemnification) as a matter of policy and practice. In such cases, the war clause dictates that the host-State must still observe an obligation not to discriminate against investors of the other contracting party.[1107]

In a couple of cases, the Tribunals seem to take a different view regarding the nature of war clauses. *LESI* argued that the substantive standards of the treaty in question –most importantly, FPS– guarantee investors a level of protection and security that is superior to and difficult to reconcile with that resulting from the simple obligation of

[1103] Schreuer, 'War and Peace' (n 1069) 14.

[1104] *AAPL* [66-67].

[1105] *AAPL* [66-67]. See also Manciaux, 'The Full Protection and Security Standard in Investment Law: A Specific Obligation?' in Fach Gómez, Gourgourinis, and Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 226. *Cf* Ackermann (n 1095) 119 arguing the AAPL reading of the provision is incorrect.

[1106] Salacuse, *The Law of Investment Treaties* (3rd edn, OUP 2021) 447.

[1107] *EDF* [1160]. See also *AAPL-Asante* p.581, further arguing that war clauses simply 'restate the general customary international law principle that excludes liability for compensation where investments suffer losses owing to' the enumerated circumstances.

'treatment no less favourable' provided for in war clauses.[1108] As such, these standards cannot be applied cumulatively.[1109] In the Tribunal's view, war clauses constitute a special rule derogating from the general rule of FPS in the event of war or other armed conflict, revolution, state national emergency and other similar circumstances.[1110] According to this argument, war clauses are *lex specialis* to the FPS standard and thus, when the conditions for their application are met (such as in cases of armed conflict), the host-State is no longer required to provide FPS, which, according to *LESI* 'would be impossible to ensure'.[1111] Rather, it is simply required to offer treatment no less favourable than that granted to its own nationals or to those of the most favoured nation.[1112] In other words, war clauses establish an exception to the general rule of FPS, which substantially reduces the level of investor protection under the enumerated circumstances.[1113]

The argument that FPS and war clauses cannot be applied concomitantly is not persuasive. Indeed, the phrasing of such general war clauses does not seem to establish an exception to FPS or to any other substantive obligation to protect investments in the enumerated circumstances. War clauses seem to be agnostic regarding the legality of the acts that brought about the losses in question. They are inspired by the indisputable fact

[1108] *LESI* [174].

[1109] *LESI* [174].

[1110] *LESI* [174].

[1111] *LESI* [175].

[1112] *LESI* [175,182]. *LESI* [174] notes the different approach in *AAPL* and relies on the *AAPL-Asante*, to support its *lex specialis* argument. Nonetheless, Asante's argument referred to the extended version of the war clause in Art.4(2) Sri Lanka-UK BIT, as discussed below.

[1113] *LESI* [175]. See also *Pezold* [592, 598] where the Tribunal also characterised the war clause as an 'exception' to FPS but found that it was not applicable to the case at hand.

that in times of 'war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or other similar events' investors often suffer losses, and simply establish an obligation not to discriminate in providing possible reparations for such losses. They do not seem to exclude the possibility of reliance on available defences, whether under the same treaty (e.g., an exception clause) or under general international law. They do not constitute *lex specialis* to such defences as they do not regulate the same subject-matter.[1114] Self-defence and necessity (as well as IIA exception clauses) regulate States' right to take action that is *prima facie* in breach of its obligations in order to respond to an armed attack or protect essential interests from a grave and imminent peril and describe the conditions for the exercise of such right. War clauses do not touch on these issues. They kick in at a later stage 'when a State tries to mitigate the consequences of a situation of war or other emergency'.[1115] In other words, war clauses 'leave.. [the] customary rules [relating to exceptional circumstances] untouched and indeed supplement.. their content by requiring equality of treatment in response to such extr[a]ordinary circumstances.'[1116]

Nonetheless, some IIAs include an additional provision complementing the typical war clause as quoted above. Such provisions, known as 'extended war clauses'[1117] provide that in the event that the losses described above:

> result…from: (a) requisitioning of their property by its forces or

[1114] *Contra*, Spears and Agius, 'Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties' in Fach Gómez, Gourgourinis, and Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 309.

[1115] *Impregilo* [341].

[1116] *EDF* [1159].

[1117] E.g. Ackermann (n 1095) 121; Schreuer, 'War and Peace' (n 1069) 14; Dolzer, Schreuer and Kriebaum (n 843) 307.

> authorities, or (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation, [investors] shall be accorded restitution or adequate compensation [and] payments shall be freely transferable.[1118]

The wording of these provisions suggests that indeed in certain cases where damage takes place during hostilities and results directly from conduct attributable to the host-State, there is an obligation to provide prompt, adequate and effective compensation analogous to that required in cases of expropriation.[1119] Unlike the typical non-discrimination war clauses, this type of clauses seems to grant substantive rights to investors[1120] and constitutes *lex specialis* on the issue of reparations for losses in the context of an armed conflict. Although this thesis does not deal with issues of compensation, it is important to note that such clauses differentiate between 'requisitioning', which seems to bring about a duty to make reparations regardless of military necessity, on the one hand, and 'destruction of property' which seems to result in a duty to compensate only insofar as the damage 'was not caused in combat action' or 'was not required by the necessity of the situation', on the other.[1121] Whilst the latter seems to accommodate issues of military necessity, the former seems to impose a duty of compensation for requisitioning 'even

[1118] Art.4(2) UK Model BIT. See similarly, Art.12(2) ECT; Art.4(2) Sri Lanka-UK BIT; Art.4 Panama-UK BIT; Art.7(2) Switzerland-Zimbabwe BIT; Art.4(2) Czech Republic-Yemen BIT; Art.4(2) UK Model BIT; Art.6 Denmark-Laos BIT; Art.IV:2 US-Zaire(DRC) BIT; Art.5(5) US Model BIT.

[1119] Note that some of provisions provide a direct renvoi to the expropriation provisions of the same treaty, see e.g. Art.IV:2 US-Zaire(DPRK) BIT.

[1120] Schreuer, 'War and Peace' (n 1069) 15.

[1121] This is consistent with IHL, where belligerent parties are required to distinguish between civilian objects and military objectives (Art.48 GCAP-I and Art.13(2) GCAP-II) and observe the proportionality principle regarding 'collateral damage' (Art.51(5)(b) GCAP-I). A (tangible) investment would be considered protected civilian property but it may transform it into legitimate military target in cases enshrined in Art.52 GCAP-I. Reparations under such war clauses is only owed if the destruction was not dictated under the applicable IHL rules, see Schreuer, 'The Protection of Investments in Armed Conflicts' in Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013) 14. Conversely, it seems that compensation is always owed for requisitioned private property under customary international law, see Ackermann (n 1095) 123.

without liability for an illegal act'[1122], as is also the case under the rules of international humanitarian law.[1123]

Such far-reaching clauses adopt a specific standard of responsibility with respect to reparations, which is only applicable in the specific circumstances enumerated therein.[1124] This is confirmed by the fact that in certain treaties, such as the ECT, the exception clause explicitly exempts from its scope of application the treaty's war clauses, as well as clauses relating to expropriation.[1125] It must also be noted that there are instances of war clauses that establish an even more far-reaching model of strict liability. They require the host-State to offer 'adequate compensation' in respect to all losses or damages 'due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events', adding explicitly in some cases that this obligation applies 'irrespective of whether such losses or damages have been caused by governmental forces or other subjects'.[1126] Nonetheless, this seems to be rare in international treaty practice.[1127]

3. Countermeasures and investment treaties

The defence of countermeasures in the context of investment arbitration was discussed

[1122] Schreuer, 'War and Peace' (n 1069) 15.

[1123] Art.52 Hague Regulations.

[1124] *AAPL* [57]; *AAPL* Dissenting Opinion of Samuel Asante [580-592] arguing that such clauses are *lex specialis* to the FPS standard.

[1125] Art 24(1) ECT.

[1126] Such clauses are found, e.g., in Art.4 Bangladesh-Italy BIT and Art.IV Italy-Yemen BIT, as well as in several older Italian BITs that have now expired such as Art.4 Armenia-Italy BIT; Art.4 Azerbaijan-Italy BIT and Art.4(1) Italy-Syria BIT.

[1127] Spears and Agius (n 1114) 297.

primarily in three NAFTA-based disputes: *ADM*, *CPI*, and *Cargill*. These disputes arose in the context of the same broader situation of tension between the US and Mexico, as the WTO dispute of *Mexico-Drinks*.[1128] As in the relevant WTO proceedings, Mexico, the Respondent, invoked the defence of countermeasures under general international law, claiming that the measures challenged by the Claimants in investment arbitral proceedings were lawfully introduced in response to prior breaches by the US of its NAFTA obligations.

Even though all three disputes were based on the same factual matrix and legal instrument, the awards differed significantly in terms of reasoning. Proceedings for the three cases took place largely in parallel. *ADM* and *CPI* were unaware of each other's findings and there are no cross-references between the two awards or engagement with each other's reasoning. *Cargill* received the *ADM* award during its deliberations along with comments from both sides and had the opportunity to engage with its findings.[1129]

This sub-section critically engages with the findings in the *ADM*, *CPI*, and *Cargill* awards regarding the application of the *lex specialis* principle (a), the nature of investors' rights under IIAs (b), and the limits of their subject-matter (c) and personal jurisdiction (d) in the context of the defence of countermeasures.

a. Applicability of countermeasures to investment disputes and the lex specialis principle

All three disputes discussed in this sub-section were submitted to arbitration pursuant to

[1128] See Ch III(E)(3)(a).

[1129] *Cargill* [45-51,380,410-9].

NAFTA Chapter Eleven,[1130] for alleged breaches of, *inter alia*, the national treatment and expropriation provisions of NAFTA by Mexico.[1131] The Tribunals were constituted under the auspices of ICSID. Art.1131(1) NAFTA provides that '[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.' Thus, there is no question that the NAFTA applicable law provision,[1132] empowers, in principle, the Tribunals to apply rules of general international law, including general defences.[1133] Nonetheless, the Tribunals must still investigate whether an interpretation of the NAFTA provisions suggests that the defence of countermeasures is otherwise excluded in the context of disputes arising thereunder, including through the adoption of a relevant *lex specialis*.

Only *ADM* discussed the NAFTA applicable law clause and explored the interaction of countermeasures with NAFTA provisions to discern whether countermeasures can be invoked in a Chapter Eleven NAFTA dispute. It began its analysis by reference to Art.1131(1) NAFTA and confirmed that it 'includes the application of rules of customary international law with respect to claimed breaches [of NAFTA provisions]',[1134] including the law on countermeasures. It then examined the Claimants' arguments that, despite this broad applicable law clause, NAFTA otherwise excludes the application of countermeasures. According to the Claimants:

> Chapters Nineteen and Twenty [of NAFTA] establish the regime for dispute resolution that governs the 'existence of an internationally

[1130] Art.1120 NAFTA.

[1131] Arts.1102,1110 NAFTA.

[1132] See also Art.42(1) ICSID.

[1133] IV(B)(2).

[1134] *ADM* [111].

> wrongful act' and the 'content' of the international responsibility of the Parties in the event of a breach of their obligations under the NAFTA…In other words, by signing the NAFTA, the Parties have deliberately forgone the residual right to take countermeasures under customary law.[1135]

In response to this argument, *ADM* acknowledged that NAFTA indeed offers a form of *lex specialis* to supplement the standards of customary international law on a number of issues such as the treatment of aliens and diplomatic protection.[1136] This 'express content'[1137] of the treaty, which clearly deviates from –and goes beyond– the relevant rules of customary international law, constitutes *lex specialis* and is applicable to the exclusion of the relevant customary rules. However, according to the Tribunal, customary international law 'continues to govern all matters not covered' by NAFTA provisions.[1138] To this end, it found that 'Chapter Eleven [NAFTA] neither provides nor specifically prohibits the use of countermeasures. Therefore, the question of whether the countermeasures defence is available to the Respondent is not a question of *lex specialis*, but of customary international law.'[1139] The Tribunal confirmed that the only reference to countermeasures in NAFTA was as a means of penalty for non-compliance with a decision rendered in a Chapter Twenty State-to-State arbitration.[1140] In that case, no such decision has been rendered. Accordingly, it found that countermeasures can, in principle, be invoked as a defence in a Chapter Eleven dispute subject to the conditions specified in general international law.[1141] In other words, the silence of Chapter Eleven on the issue

[1135] *ADM* [114].

[1136] *ADM* [117-8].

[1137] *ADM* [119].

[1138] ibid.

[1139] *ADM* [120].

[1140] *ADM* [122]. *Cf* NAFTA, Art.2019.

[1141] *ADM* [123].

of countermeasures was interpreted as implicit acceptance of the relevant rules of general international law.

ADM confirms, in the first place, the presumption of applicability of general international law, including general defences, to treaty-based claims. The Tribunal's analysis on *lex specialis* suggests that the absence of explicit derogation must be regarded as a continuation, or rather, implicit acceptance of the existing rules under general international law. This is similar to the Tribunals' approach regarding the general necessity defence.[1142]

Nevertheless, Chapter Twenty NAFTA establishes a *lex specialis* that displaces at least some countermeasures: those in response to breaches of NAFTA itself. Countermeasures in international law have a dual character: they constitute a means of implementing international responsibility and at the same time a defence against a claim of breach.[1143] Like the WTO Agreements,[1144] NAFTA specifies the means by which international responsibility may be implemented for breaches of its own provisions by one of its parties. In such cases the parties may resort to NAFTA's dispute settlement provisions and the provisions on suspension of benefits (NAFTA 'countermeasures' aiming to induce compliance with panel decisions). These provisions constitute *lex specialis* with respect to *some* countermeasures: those in response to a prior breach of the same treaty. They do not, however, preclude *all* countermeasures. If, for example, the Respondent argued that non-performance of its NAFTA obligations was in response to prior breach by another NAFTA State party of its obligations in the field of human

[1142] See analysis in Ch IV(C)(1)(a).

[1143] See (n 176).

[1144] See analysis in Ch III(D)(3)(b).

rights or environmental protection, this scenario would not be covered by the NAFTA dispute settlement or suspension of benefits provisions, and thus, it would not be governed by the *lex specialis*. *Lex specialis* prevails over the relevant *lex generalis* only to the extent that the two rules are co-extensive and in genuine conflict.[1145]

The Tribunal referred to the provisions on countermeasures under Chapter Twenty and stipulated that since there has been no panel decision under Chapter Twenty they were inapplicable. But it did not acknowledge that the dispute settlement arrangement under Art.2004 NAFTA establishes a *compulsory* procedure that displaces other unilateral means for the implementation of responsibility with respect to NAFTA breaches. Art.2004 provides that:

> The dispute settlement provisions of this Chapter *shall* apply with respect to the avoidance or settlement of *all* disputes between the Parties regarding the interpretation or application of this Agreement or *wherever* a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement…[1146]

Unilateral countermeasures in the form of suspension of obligations under another NAFTA Chapter in order to induce compliance with NAFTA Chapter Twenty is incompatible with this provision.

In *ADM*, Mexico invoked countermeasures with respect to US breaches of NAFTA itself. In principle, this situation would indeed be regulated by the *lex specialis*, i.e., the NAFTA provisions on State-to-State dispute settlement. The Tribunal introduced an artificial distinction between different chapters of the same instrument and stipulated that only in Chapter Twenty we find any reference to countermeasures, whilst the dispute

[1145] Art.55 ARSIWA, commentary [4]; Fragmentation Report [23-5].

[1146] Art.2004 NAFTA (emphasis added).

at hand was initiated under Chapter Eleven.[1147] However, this argument, on its own, is not convincing. In principle, any grievances for alleged breaches of NAFTA are subject to the dispute settlement provisions of Chapter Twenty. A State is not entitled to adopt unilateral countermeasures to address such grievances. This approach is in line with the principle of effective interpretation: the Tribunal should not read a treaty in a manner that leads its provisions (in this case, the dispute settlement provisions under Chapter Twenty) to redundancy or inefficiency.[1148]

The Tribunal's findings in *ADM* were probably motivated, albeit implicitly, by another factual aspect of the dispute. As the Respondent submitted before the Tribunal, the means described in NAFTA Chapter Twenty for implementing the international responsibility of the US were not available to Mexico, as the US has blocked Mexico's access to a NAFTA panel.[1149] This very fact constituted one of the breaches of NAFTA to which Mexico claimed to be responding with the measures in question.[1150] Therefore, neither the dispute settlement nor the countermeasures' provisions under NAFTA were *actually* available to Mexico in that case. In the words of Mexico, 'a State party cannot be bound by a *lex specialis* that has proved impossible to invoke'.[1151] The Tribunal, through its findings, seems to implicitly side with this argument. This approach can also be justified on the basis of general principles of international law. The principle of law expressed in the maxim *ex iniuria jus non oritur* dictates that unlawful conduct cannot

[1147] See *ADM* [123]: 'Countermeasures may serve as a defence under a Chapter Eleven case, as this is a matter not specifically addressed in Chapter Eleven'.

[1148] See (n 169).

[1149] *ADM* [115].

[1150] *ADM* [4].

[1151] ibid.

modify the law applicable in the relations between the parties, or, in other words, that States should not benefit from their own wrong.[1152]

b. The nature of investors' rights under investment protection treaties

Tribunals were faced with an additional question in deciding the applicability of countermeasures to disputes under Chapter Eleven NAFTA. The Respondent (host-State) invoked countermeasures as a response to an alleged prior internationally wrongful act of the investor's home-State. Nonetheless, the home-State is not a party to the dispute. It is rather the investor, a private individual, that takes part in Chapter Eleven proceedings. *ADM*, *CPI*, and *Cargill*, discussed in this context the nature of investors' rights under Chapter Eleven and whether such nature affects the applicability of countermeasures in ISDS. The Claimants have argued that investors under Chapter Eleven NAFTA:

> are vested with direct independent rights and…are immune from the legal relationship between the Member States. The investor's cause of action is grounded upon substantive investment obligations which are owed to it directly. A breach of these obligations does not therefore amount to a breach of an inter-state obligation; thus the general rules of state responsibility –including those regarding the circumstances precluding wrongfulness– cannot be presumed.[1153]

In other words, according to the Claimants, countermeasures could not be invoked as a defence to justify non-performance of obligations under Chapter Eleven, because such obligations are owed to investors directly and not their home-State. According to this argument, the investor is a third party to the dispute between its home-State and the host-

[1152] See (n 768).

[1153] *ADM* [162].

State.

Mexico, on the other hand, argued that obligations under NAFTA, including Chapter Eleven, are owed to the investors' home-State. According to this line of arguments, investors are either 'stepping into the shoes and asserting the rights of their home-State' when initiating arbitration (derivative theory) or are 'vested only with an exceptional procedural right to claim State responsibility' (intermediate theory).[1154] The relevant substantive obligations remain always inter-State and thus, the defence of countermeasures can be properly invoked against the home-State for prior internationally wrongful acts that it has committed.

Indeed, under customary international law, countermeasures 'must be directed against' a State which is the author of the internationally wrongful act.[1155] Accordingly, the wrongfulness of an act taken as countermeasure is precluded only with respect to obligations owed to a responsible State and not obligations owed to another party.[1156] On the other hand, a countermeasure can affect the interests of third parties as an 'indirect or collateral effect'.[1157] Thus, it must be determined whether an investor under NAFTA 'has rights of its own, distinct from those of the State of its nationality, or merely interests.'[1158]

ADM sided with the view that investment rights are derivative and thus countermeasures can be invoked as a defence as they do not affect 'individual substantive

[1154] *ADM* [163].

[1155] Art.49 ARSIWA and commentary [4]; *Gabčíkovo-Nagymaros* [83]; *CPI* [163].

[1156] ibid.

[1157] Art.49 ARSIWA, commentary [5]; *CPI* [164].

[1158] *CPI* [165].

rights'.[1159] It found that:

> [T]he proper interpretation of the NAFTA does not substantiate that investors have individual rights…Nor is the nature of investors' rights under Chapter Eleven comparable with the protections conferred by human rights treaties. Chapter Eleven may share…with human rights treaties the possibility of granting to non-State actors a procedural right to invoke the responsibility of a sovereign State before an international dispute settlement body. But the fundamental difference between…NAFTA and human rights treaties in this regard is…that Chapter Eleven does not provide individual substantive rights for investors, but rather complements the promotion and protection standards of the rules regarding the protection of aliens under customary international law.[1160]

According to *ADM* the substantive obligations under Chapter Eleven establish specific standards for State conduct, which are complemented by customary international law to the extent that it is not displaced by the treaty, and remain inter-State.[1161] They are binding by virtue of the agreement between the States parties and cannot be waived by the investors.[1162] On the contrary, the right of investors to trigger arbitration against the host-State is a purely procedural one.[1163] Investors are given the 'exceptional right of action through arbitration that would not otherwise exist under international law'[1164] and it is a right that they may choose to exercise or waive, at their own discretion. When an investor files a request for arbitration, it accepts a standing offer by the host-State and creates a direct legal relationship in the form of an arbitration agreement.[1165] This is the

[1159] *ADM* [127, 173-9]; *contra*, *ADM-Rovine*.

[1160] *ADM* [171].

[1161] *ADM* [173].

[1162] *ADM* [174].

[1163] *ADM* [173].

[1164] ibid.

[1165] *ADM* [174].

only direct relationship under international law. The relationship between the home-State and the host-State remains unchanged.

By contrast, *CPI* and *Cargill* took a different approach to this issue. They found that rights under Chapter Eleven NAFTA are not merely procedural.[1166] Rather 'NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals.'[1167] *CPI* stipulated that the main question is 'whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.'[1168] In the case of NAFTA, the Tribunal found that the parties' intention was to confer substantive rights directly upon investors.[1169] This was, according to the Tribunal, evident from the language of the treaty and from the fact that procedural rights are also conferred upon the investors.[1170] The Tribunal observed that '[t]he notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive.'[1171]

Further to this textual interpretation of NAFTA, *CPI* referred to the rights of aliens under customary international law. It argued that 'the notion that in diplomatic protection cases the State was asserting a right of its own' was just a fiction, which was only necessary because procedurally private persons could not bring an international

[1166] *Cargill* [424].

[1167] *CPI* [167].

[1168] *CPI* [168].

[1169] *CPI* [168-9].

[1170] *CPI* [169].

[1171] ibid.

claim.[1172] It further argued that this fiction did not reflect the substantive reality, something that is evident 'not only in the juristic writing but also in various rules of law surrounding diplomatic protection claims' such as the rule on exhaustion of local remedies and the doctrine of continuing nationality.[1173] According to the Tribunal, if the rights in question were State rights then there would not be a requirement to bring a case first before domestic courts. Similarly, if an injury to the national is a breach of the rights of the State, then the victim's nationality after the date of the injury would not be of legal relevance. Thus, the Tribunal implies that even under customary international law, the substantive rights of investors are essentially direct. Accordingly, the investor 'is a third party in any dispute between its own State and another NAFTA Party and a countermeasure taken by that other State against the State of nationality of the investor cannot deprive that investor of its rights.'[1174]

Cargill offered a different reasoning in support of its finding that investors' rights under NAFTA are substantive. It drew a distinction between those rights and diplomatic protection under general international law. According to *Cargill*, 'in the case of diplomatic espousal… the claim is owned by the espousing State and the espousing State is the named party. Moreover, the operative paragraph of the resulting award…names the espousing State, and not the national'.[1175] Conversely, in arbitration under NAFTA Chapter Eleven, the investor itself initiates proceedings, is the named party to such

[1172] *CPI* [170].

[1173] *CPI* [170-3].

[1174] *CPI* [176].

[1175] *Cargill* [424].

proceedings, and is named in the *dispositif* of the award.[1176] According to the Tribunal, the fact that 'the origin of individual rights may be found in the act of a sovereign, or in the joint act of sovereigns, does not negate the existence of the rights conferred'.[1177] It concluded that countermeasures cannot afford a defence in respect of claims asserted under Chapter Eleven by a national of the allegedly offending State.[1178]

The analysis of the Tribunals on this matter in all three cases is twofold. In the first instance, it seems that they interpret NAFTA to discern whether the rights enshrined therein are directly ascribed to the investor or derivative of the inter-State relationship. Through this first limb of analysis, they appear to suggest that the issue of the nature of investors' rights is not a theoretical question to be determined *in abstracto*. As Paparinskis points out '[t]he nature of investors' rights may at least in principle differ in different investment treaty rules, having important consequences for the applicability of countermeasures'.[1179]

However, the second part of the Tribunals' reasoning traces the nature of investment rights back to customary international law. For example, *ADM* suggests that IIAs are simply an extension of the customary rules regarding the protection of aliens, which are already binding on all States. According to *ADM*, although the institution of diplomatic protection is displaced by the establishment of a different dispute settlement mechanism for the implementation of responsibility under IIAs, the nature of the substantive obligations regarding the protection of aliens, that already existed under

[1176] *Cargill* [425].

[1177] *Cargill* [426].

[1178] *Cargill* [429-430].

[1179] Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 176) 335.

customary international law, remains unaffected by the addition of further obligations in IIAs. Although the Tribunal in *ADM* did not expressly characterise it as such, its reasoning was in essence an interpretation of the obligations under NAFTA in view of relevant rules of customary international law. The Tribunal in *CPI*, although it reached a different conclusion, followed a similar approach. First, it offered an interpretation of NAFTA and argued that it confers substantive rights to the investors. Then, it further buttressed this argument by recourse to customary international law. According to *CPI*, evidence suggests that even under the traditional institution of diplomatic protection, where the State brings the investor's claim to the international plane, the rights are, in reality, owned by the investor. Accordingly, the provisions of NAFTA, read in light of customary international law, suggest that investors' rights are independent from their home-State. In *Cargill*, the Tribunal had recourse to the customary law on diplomatic protection in the context of an *a contrario* argument. It argued that diplomatic protection is diametrically different to contemporary investment arbitration and that such differences lead to the conclusion that investors rights under IIAs are direct, whereas under customary international law and the rule on diplomatic protection they remained tied to the home-State. It emerges from the above that all three tribunals are using the same evidence relating to the protection of aliens and the institution of diplomatic protection under customary international law in interpreting the NAFTA but reach very different interpretative results.

This thesis, mindful of possible drafting differences in IIAs which may affect a final assessment on the nature of the rights enshrined thereunder, takes the view that, investors' rights cannot be considered as independent and cannot be disengaged from the

rights and obligations of their home-States.[1180] Although it is undeniable that IIAs provide at least some direct rights to investors, such as the procedural right to bring a claim to international arbitration and the right to reparation for injury caused,[1181] these remain firmly anchored to the realm of public international law and to their foundational agreement, which was concluded between sovereign entities. This argument is supported by the following evidence.

Firstly, the default applicability of general international law[1182] suggests that substantive obligations assumed by States under IIAs are simply in addition to existing customary obligations and do not alter their scope and nature, unless such change is explicitly provided for. Thus, as observed in *ADM*, only the procedural aspects of implementation of international responsibility are affected by IIAs that provide for investor-State arbitration. Moreover, under general international law, certain obligations assumed by States which have individuals are beneficiaries, such as 'obligations for the protection of fundamental human rights', are listed in Art.50 ARSIWA as obligations that cannot be affected by countermeasures. There is no evidence to suggest that such list under customary international law has been expanded through state practice and *opinio juris*. The awards examined above did not refer at all to this list of non-derogable obligations in interpreting NAFTA.

Other provisions that are typically included in IIAs further suggest that the

[1180] *Contra*, Douglas (n 851) 32–38. Note, however, that although Douglas is often referred to as a supporter of the 'direct rights' theory, his book presents two different models, one of which suggests that substantive rights remain on the inter-State plane and cannot be waived, as opposed to investors' direct procedural rights.

[1181] Douglas (n 851) 35.

[1182] See Ch IV(B)(2).

protection of investors is not immune to changes in the relationship between the host-State and the home-State. For example, Art.2102 NAFTA allows for actions that the State 'considers necessary for the protection of its essential security interests…taken in time of war or other emergency in international relations'.[1183] It becomes evident that under such clauses, an emergency in the relations between the home-State and the host-State would justify the taking of measures that are *prima facie* incompatible with the obligations of the host-State under the investment agreement. This is the case more generally with exception clauses that allow for measures necessary for the protection of the host-State's 'essential security interests'. Such clauses are commonplace in IIAs and suggest that investors, through no fault of their own, may be affected by a deterioration of the relations between their home-State and the host-State to the extent that the essential security interests of the host-State are at risk. Countermeasures taken in response to a prior internationally wrongful act of the home-State may affect the interests of the investor in a similar fashion.

Provisions allowing the home-State to make submissions before a tribunal on issues relating to the interpretation of the IIA,[1184] as well as provisions on joint interpretative statements by the contracting parties,[1185] further attest to the continuing relevance of the home-State in ISDS. The home-State retains, together with the host-State, the power to shape the scope and content of the IIA's substantive obligations.[1186] Thus, investors' substantive rights are never fully independent from the States that

[1183] See similarly, art 24 ECT; art 10(4) Canada Model BIT; art 16 Japan-Korea BIT; Art.16; art 76 New Zealand-Singapore FTA.

[1184] See analysis in (n 1242-1250).

[1185] E.g., Art.1131(2) NAFTA.

[1186] Subject to concerns regarding the principle of non-retroactivity, see *Pope & Talbot* [48-51].

conferred them through the IIA. The interpretive authority of the Tribunal is always shared with the treaty parties, which entrusted the Tribunal with specific powers through delegation.[1187] In submitting interpretative statements under such provisions, States have also asserted that '[t]he obligations undertaken by the…Parties…are owed…to one another…They are not owed directly to individual investors'.[1188] Moreover, provisions that allow home-States to participate in ongoing proceedings as *amici curiae* provide even broader scope for the home-State to influence the outcome of an investment dispute.[1189]

These powers of home-States can be exercised to the advantage or to the detriment of the investor. The record of home-State interventions under provisions allowing for interpretative statements suggests that they do not usually endorse the position of the Claimant, i.e., its own national, but rather side with the interpretation offered by the responding State.[1190] However, it has also been argued in the literature that provisions allowing for broad participation of the home-State as *amici curiae* may amount to 'covert diplomatic protection'.[1191] In any event, the fact that IIAs provide such opportunities for States parties to get involved in ISDS proceedings and inform the Tribunal's understanding of a treaty's substantive standards suggests that ISDS is

[1187] Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 185.

[1188] E.g., *Methanex*, Canada's submission under Art.1128 NAFTA [9], referring to obligations under Chapter Eleven NAFTA. Similarly, in *Lowen*, Mexico's submission under Art.1118 NAFTA [28] and US Response, 9.

[1189] See analysis below in (n 1251-1256).

[1190] Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?' in Boisson de Chazournes, Kohen, and Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Brill 2012) 314.

[1191] Kaufmann-Kohler (n 1190) 321.

'embedded' in a system of inter-State control.[1192] The role of the subsequent practice and subsequent agreements of the States parties to the treaty under the customary rules of treaty interpretation further substantiates this conclusion.[1193]

The existence of State-to-State arbitration options in IIAs, even if scarcely used, is a further indication that investors are not fully disengaged from their home-State. The same is true with respect to the possible residual applicability of the customary institution of diplomatic protection, to the extent that this is not displaced by the IIA or the arbitration rules.[1194] Investment treaties 'institutionalize and reinforce (rather than replace) the system of diplomatic protection'.[1195] The co-existence of different avenues for redressing breaches of the same substantive obligations under a IIA suggests that, at the very least, IIA rights are held by investors and home-States on a joint, interdependent basis.[1196]

Lastly, States retain at all times the right to terminate or refuse to renew IIAs, or to withdraw consent from multilateral dispute settlement frameworks such as ICSID.[1197] These actions may not influence the outcome of an ongoing dispute or affect acquired

[1192] Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration' in Lalani and Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2015) 301.

[1193] *Cf* Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power' in Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 101–102 arguing for a differentiated approach to the VCLT depending on the nature of the treaty.

[1194] E.g., Art.27(2) ICSID. For investment arbitration as *lex specialis* to diplomatic protection see Dugard, 'Fourth Report on Diplomatic Protection' (2003) UN Doc A/CN.4/530 [112] and, indirectly, *Diallo(Objections)* [88-90].

[1195] Crawford, 'Retrospect' (n 37) 888 describing the 'derivative rights' theory.

[1196] Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 HarvIntlLJ 43.

[1197] E.g., Art.71 ICSID.

rights,[1198] but the right of States to do so constitutes evidence of the dependence of investors' rights on the conduct of their home-State. Conversely, investors may be able to enter into a settlement agreement with the host-State and waive their procedural right to arbitration,[1199] as they retain functional control over their claims,[1200] but the notion that they can alter the scope of substantive treaty provisions fits uneasily with the nature of investment agreements under public international law.[1201]

In view of the above, this thesis argues that the nature of investors' rights under IIAs does not preclude reliance of the Respondent on countermeasures, as investment protection obligations remain always dependent on the relationship of the States parties to the treaty. The academic debate on whether investors' rights are 'direct' or 'derivative' and the quest to define their nature deflects attention from the core question in the context of countermeasures, which is whether the conduct of the home-State can justify a deviation from the standards of protection promised in an international agreement. The evidence above suggests that investors are very much dependent on the relations between their home- and host-States and that the substantive standards of protection that are attached to inter-State agreements 'stem… from a corner of public international law'.[1202]

c. The customary requirements for a lawful countermeasure and the jurisdictional

[1198] See Art.72 ICSID. The rule is an extension of Art.25(1) ICSID which provides that consent, once given, cannot be withdrawn unilaterally. See also Schreuer and others, 'Article 72 - Continuing Effect of Consent', *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 72.

[1199] *Eureko* [175].

[1200] Douglas (n 851) 17.

[1201] Duijzentkunst, 'Treaty Rights as Tradable Assets: Can Investors Waive Investment Treaty Protection?' (2010) 25 ICSID Review 409, 414.

[1202] *Loewen* [233].

limits of arbitral tribunals

Arts.22 and 49-53 ARSIWA were treated in the relevant awards 'as an authoritative statement of customary international law on countermeasures'.[1203] Art.49 ARSIWA provides that an injured State may take countermeasures in the form of limited and temporary non-performance of international obligations against a State which is responsible for an internationally wrongful act, to induce compliance of that State with its international obligations. Art.51 ARSIWA further establishes the requirement of proportionality, i.e., that the effects of the countermeasure must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. [1204] The awards also referred to the ICJ findings in *Gabčikovo-Nagymaros*,[1205] which establish the same criteria as those reflected in ARSIWA.[1206]

The first requirement under customary international law, i.e., the existence of a prior internationally wrongful act, raises important jurisdictional questions in ISDS. The Tribunals would have to determine whether such a prior breach has taken place to rule on the applicability of the defence, but such breach may be outside the limits of its subject-matter jurisdiction. The kind of claims that may be submitted to ISDS under Art.1120 NAFTA, for example, are specified in Arts.1116 and 1117, which accordingly, along with the application of the claimant, establish the scope of NAFTA tribunals'

[1203] *ADM* [125-6]; *CPI* [145-9]; *Cargill* [420].

[1204] Note that neither the parties nor the Tribunals referred to the procedural requirements of countermeasures in Art.52 ARSIWA.

[1205] *Gabčikovo-Nagymaros* [82ff].

[1206] Note the feedback loop (inter-temporal twist) between the ILC work and ICJ findings. *Gabčikovo-Nagymaros* [83] relies, among others, upon the ILC work on countermeasures as codified at the time in Arts.47-50 Draft ARSIWA (1996). A few years later, the ILC refers to *Gabčikovo-Nagymaros* to support its conclusions, see Art.49, commentary [2]; Art.51, commentary [4]; on this matter, Sloane (n 959) 452–453; Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 176) 318.

subject-matter jurisdiction.

Firstly, as confirmed in *CPI*, 'the requirement of a prior violation of international law is an absolute precondition of the right to take countermeasures'.[1207] Mexico had argued that it did not need to prove that the US had indeed violated its obligations. Rather, it only needed to establish that, at the time of taking the countermeasure and while it was in place, it had 'a genuine belief that it had a reasonable prospect of succeeding in establishing that the United States was in breach, should that question come before a competent tribunal.'[1208] Accordingly, the Tribunal would not need to exceed the limits of its jurisdiction, as it could decide on whether Mexico had such genuine belief without examination of the US actions *per se*. The Tribunal rejected this argument as an attempt by Mexico to 'square the circle' confirming that the jurisdictional concern cannot be circumvented.[1209]

On the issue of jurisdiction, *ADM* recalled that it was established under Chapter Eleven for the settlement of an investment dispute, comprising allegations of breaches by the respondent of Arts.1102, 1106 and 1110 NAFTA. Thus, it had no jurisdiction to decide whether the US breached any of its international obligations complained by Mexico, since those were prescribed under NAFTA Chapters Three, Seven and Twenty.[1210] Mexico argued that the Tribunal's jurisdiction entailed the power to examine its argument on countermeasures as this was invoked as a defence precluding its

[1207] *CPI* [185].

[1208] *CPI* [184].

[1209] *CPI* [185].

[1210] *ADM* [127-9].

international responsibility,[1211] but the Tribunal rejected this line of reasoning.

Nonetheless, it found that it had jurisdiction to examine the rest of the customary requirements of countermeasures. It stipulated that '[b]oth parties agree that the Tribunal has jurisdiction to decide any defense under Chapter Eleven, including a countermeasures defense'.[1212] Thus, the Tribunal acknowledged the nature of countermeasures as a defence and its jurisdiction to rule on applicable defences, but still found that its power does not extend to *all* the customary requirements of such defence. Accordingly, the Tribunal examined whether Mexico's tax measure was taken in response to the alleged US breaches, whether it aimed at inducing the US to comply with NAFTA obligations and whether it was proportionate to such aim, without first establishing that a wrongful act has indeed taken place.

The Tribunal found that, based on available evidence, the 'true motive and intent' of Mexico's tax measure was the protection of the Mexican sugar industry rather than inducing compliance by the US with its NAFTA obligations.[1213] For the same reason, the measure also failed to meet the proportionality requirement, as it was not appropriate for the purpose of securing compliance and, in the Tribunal's view, this purpose could have been attained by other measures not impairing investment protection standards.[1214] The Tribunal did not elaborate on what such alternative measures could be. It only suggested in passing that:

> [T]he obligations allegedly breached by the United States do not involve

[1211] *ADM* [129-30].

[1212] *ADM* [132].

[1213] *ADM* [148-150].

[1214] *ADM* [153, 159].

> investment protection standards for private individuals and companies, but only provide inter-state obligations concerning international trade and the settlement of state-to-state disputes. However, the [Mexican measure] resulted in the non-performance by the Respondent of its obligations [relating to investment protection]'.[1215]

The Tribunal here seems to imply that proportionality under customary international law requires some degree of correlation between the prior internationally wrongful act and the obligation suspended as countermeasure. No justification was offered for this assertion.[1216] In sum, *ADM* found that the Mexican measure did not meet the rest of the requirements of countermeasures and rejected the defence on that basis, thereby avoiding the question of the prior internationally wrongful act and effectively 'circumventing' relevant jurisdictional considerations.

The Tribunal in *CPI* reached a similar conclusion regarding the limits of its jurisdiction. In an *obiter dictum*,[1217] it held that it would not have jurisdiction to determine whether Mexico's allegations against the US were well-founded or not, because 'it d[id] not have jurisdiction to determine whether any provision of the NAFTA falling outside Chapter XI ha[d] been violated'.[1218]

We see that both Tribunals took a restrictive approach to their subject-matter jurisdiction. They required that the incidental matter arising in the context of countermeasures, i.e., the existence of a prior internationally wrongful act, would also fall within their jurisdiction if submitted before them as an independent claim. This

[1215] *ADM* [158].

[1216] This is not supported by the current understanding of the general international law on countermeasures, see analysis in (n 796-797).

[1217] Having already rejected the defence on the basis that investors' rights are substantive, see *CPI* [180].

[1218] *CPI* [182].

approach, seen already in the context of the WTO,[1219] introduces a *Monetary Gold*-like consideration with regards to subject-matter jurisdiction.[1220]

As discussed earlier, tribunals established under an IIA usually have jurisdiction to rule on disputes 'with respect to/with regard to/concerning an investment' and 'arising out of an alleged breach of an obligation under the Treaty in question'.[1221] Even in their more permissive form, arbitration clauses still confer jurisdiction over 'disputes concerning investments'.[1222] In the case of ICSID tribunals, the objective definition of 'investment' under Art.25 further restricts the outer limits of the Tribunal's jurisdiction.[1223] A prior internationally wrongful act in the context of countermeasures will rarely consist in a breach of the same IIA that forms the basis of the Tribunal's jurisdiction. Similarly, even if we opt for a broad interpretation of the term 'investment' certain disputes will 'obviously…not relate to an investment'.[1224] That would be the case, for example, if the alleged prior internationally wrongful act is an unlawful use of force, a breach of human rights or humanitarian law obligations, or a breach of rules on environmental protection. Thus, according to *ADM* and *CPI*, even if countermeasures are applicable to an investment dispute, the Tribunal's jurisdictional limitations would bar the Respondent from invoking the defence in most cases.

This thesis argues against this restrictive understanding of an adjudicative body's

[1219] See Ch III(E)(3)(a).

[1220] See (n 361).

[1221] See analysis in (n 851-869).

[1222] ibid.

[1223] ibid.

[1224] Amerasinghe (n 127) 449.

subject-matter jurisdiction. As argued in previous chapters, the subject-matter jurisdiction of an adjudicative body entails the inherent power to rule on all indispensable incidental matters arising in the context of an applicable defence.[1225] It forms essential part of its adjudicative function, which is to decide on the content of the Respondent's international responsibility. As confirmed in *ICAO-2020*, the integrity of an adjudicative body's function would not be affected if it examined issues outside that would not fall within its subject-matter jurisdiction as independent claims, if it does so 'for the exclusive purpose of deciding a dispute which falls within its jurisdiction.'[1226] In the case of investment tribunals, the dispute is still on the substantive standards of treatment under the relevant IIA and arises directly out of the investment in question. The prior internationally wrongful act (or the prior armed attack in the context of the defence of self-defence) is only examined in the context of the Tribunal's reasoning for the exclusive purpose of ruling on the applicability of a defence which is found to be applicable based on interpretation of the IIA in question.

Incidental findings on the prior internationally wrongful act in this context are not the same as deciding on an incidental claim or counter-claim introduced in investment proceedings.[1227] As discussed earlier, in the case of countermeasures the Respondent will not obtain an enforceable ruling on the actions of the home-State. The Tribunal's finding of a prior breach will only constitute part of its reasoning to determine the case brought before it by the Claimant. It would normally not appear in the award's *dispositif* and it would not generate any rights to remedies. This is a key difference which suggests that

[1225] See analysis in Ch II(D) and III(D)(3)(e).

[1226] *ICAO-2020* [61].

[1227] *Cf* Art.46 ICSID and the jurisdictional limitations enshrined therein.

Monetary Gold-like considerations and analogies with the rules on counterclaims are misplaced.

As discussed in the context of the WTO, the specialised jurisdictional field of arbitral tribunals does not affect this power to rule on indispensable incidental issues in the context of defences. The function of an international adjudicative body, regardless of its character as general or specialised, is to decide the case that is brought before it in accordance with its statute and rules of procedure. To discharge this function, it may need to examine rights and obligations that are necessarily implicated by the main claim before it. The ICJ findings in *ICAO-2020* clearly support this argument.[1228] As to whether an arbitral Tribunal is competent to rule on broader issues of international law, i.e., whether it is a suitable forum in terms of substantive knowledge of this field of law, this would naturally depend on the Tribunal's composition.[1229] Although the professional and academic backgrounds of arbitrators vary, several of them are highly specialised in general public international law and have even served as judges in other international adjudicative *fora*.[1230] When broader matters of international law are implicated in the dispute, the Tribunal should comprise individuals that possess the necessary knowledge. This is a matter that relates to the selection of arbitrators in any given case.

d. Monetary Gold and procedural avenues for home-State intervention

CPI raised an additional jurisdictional concern regarding the examination of a prior

[1228] *ICAO-2020* [61].

[1229] See similar analysis in (n 835-837).

[1230] E.g., ICJ judges have participated ('moonlighted') as arbitrators or as members of ICSID annulment committees, until the Court's decision to restrict the practice, see ICJ, 'Speech by HE Mr Abdulqawi A Yusuf, President of the International Court of Justice, on the occasion of the Seventy-Third Session of the United Nations General Assembly' (25 October 2018).

internationally wrongful act in ISDS. It underlined that not only it does not have the power to rule on provisions outside Chapter XI NAFTA but also that 'the United States is not a party to the… proceedings'.[1231] This is a more traditional *Monetary Gold*-like consideration, which we have not seen in the context of inter-State disputes discussed in previous chapters: the investor's home-State, who is the author of the alleged internationally wrongful act is absent from the proceedings. Thus, the tribunals are called to discuss the international responsibility of a non-participating State.

The arguments made above regarding the tribunals' subject-matter jurisdiction apply *mutatis mutandis* to concerns regarding the absence of the home-State from the proceedings. The *Monetary-Gold* principle, as enunciated by the ICJ, precludes an adjudicative body from hearing a case if 'the very subject-matter of the decision' is the rights and obligations of a State that has not consented to the dispute settlement proceedings in question.[1232] Nonetheless, the principle does not extend to cases where the interests of a non-participating State are 'only affected' by the adjudicative body's decision.[1233] Indeed in the case of countermeasures, the Tribunal would need to make a determination on the 'lawful or unlawful character of certain actions' of the home-State in its absence.[1234] However, this incidental finding does not form the 'very subject-matter' of the dispute in question, which is the international responsibility of the responding host-State and not the investor's home-State. Moreover, the incidental finding does not prejudice the juridical position of the home-State and the ruling has no

[1231] *CPI* [182].

[1232] *Monetary Gold*, 32; *East Timor* [28]; *Nauru* [55].

[1233] *Monetary Gold*, 32; *El Salvador/Honduras* [56].

[1234] *Monetary Gold*, 32.

legal force beyond the confines of the IIA and the dispute under consideration. The principle that a judicial decision 'has no binding force except between the parties and in respect of that particular case'[1235] protects the home-State from unintended practical effects flowing from the relevant award.[1236] As stipulated in *Nicaragua*:

> Where…claims of a legal nature are made by an Applicant against a Respondent in [adjudicative] proceedings…and made the subject of submissions, the [adjudicative body] has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State.[1237]

Thus, where the submissions of the Claimant are directed at the conduct of the Respondent the adjudicative body can decide upon those submissions even where the decision would by implication touch on the legal interests of a third State.[1238] Thus, the examination of the indispensable incidental issue is still within the limits of the consent of the home-State as a party to an IIA, which has been found, through interpretation, to allow invocation of countermeasures. The key consideration in this context, as in the context of jurisdiction *ratione materiae*, is the special place that defences hold in international adjudication as an indispensable matter affecting the determination of a State's international responsibility. The home-State has consented to arbitration on the obligations enshrined in an IIA, which necessarily entails consent for the Tribunal to

[1235] Art.59 ICJ Statute; also implied in Art.53 ICSID. Similar provisions can be found in the constitutive instruments of virtually all international courts and tribunals and the rule is considered to have universal acceptance, see Brown, 'Article 59' in Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (3rd edn, OUP 2019) 1562–1563.

[1236] See *East Timor*, Separate Opinion Shahabudeen, 124, introducing as a factor for the application of the *Monetary Gold* principle whether the requested judgment would deprive a third party of concrete benefits and would not be protected by Art.59 ICJ Statute.

[1237] *Nicaragua(Objections)* [88].

[1238] Ajibola, 'The International Court of Justice and Absent Third States' (1996) 4 AfrYIL 93 by reference to the ICJ findings in Nicaragua.

make all incidental findings necessary for a ruling on the Respondent's responsibility.

There is, however, a valid consideration of a procedural nature that arises in this context. The Tribunal would need to make an objective assessment of the facts and the law in the context of its reasoning in order to make a determination on the legality of the home-State's prior conduct. This would require submission of arguments and evidence on both sides of this 'nested' sub-dispute. Nonetheless, as a general rule, the home-State does not participate at all in investment arbitration. Thus, one of the two sides of the argument regarding the prior internationally wrongful act would not be represented in the proceedings. Although it is in the interest of the Claimant that the Tribunal finds the conduct of the home-State to be legal, it is doubtful that the Claimant and its legal team can adequately represent the home-State and defend its actions. Moreover, although the incidental finding will have no binding effect or remedial consequences, it will entail a legal characterisation of the home-State's conduct. Thus, the host-State's interests may be affected by the award. In the context of the ICJ, a State with an 'interest of a legal nature which may be affected by the decision' can make submissions to the Court through the institution of intervention.[1239] The intervening State has the opportunity to make its view known and influence the Court's decision,[1240] whilst remaining unbound by said decision.[1241] In ISDS there is no equivalent institution allowing the home-State to present arguments before the Tribunal and have access to relevant documentation and evidence.

Despite the absence of a procedure specifically dedicated to such intervention, there are still procedural avenues that may be used by the home-State to present

[1239] Art.62 ICJ Statute; Arts.81-86 ICJ Rules.

[1240] Ajibola (n 1238) 87.

[1241] *El Salvador/Honduras* [423].

arguments in an ongoing arbitration. Firstly, some IIAs allow non-disputing States parties to the treaty under consideration (NDSPs), including the home-State, to participate in the proceedings. The extent of this participation depends on the relevant provisions.[1242] In most cases the NDSP is allowed to make written or oral submissions to the Tribunal and is granted access to relevant documents and evidence.[1243] However, provisions on NDSPs' participation, found mostly in FTAs and regional or multilateral treaties and more rarely in IIAs,[1244] usually allow only for submissions on questions of interpretation.[1245] The underlying idea of this mechanism is that States parties to a treaty have a systemic interest to intervene in relevant proceedings,[1246] as interpretation of the treaty in a particular manner is likely to affect their interests even if they are not acting as Respondents in the given dispute.[1247] Such provisions were not intended to provide a right to NDSPs to make submissions on the particular case.[1248] States making submissions under this mechanism tend to emphasise that they are only seeking to clarify the provisions of the treaty and do not 'take a position on issues of fact or on how

[1242] Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2019) 169.

[1243] E.g., Arts.1128-1129 NAFTA; Arts.G-29-G-30 Canada-Chile FTA; Arts.831-832 Canada-Peru FTA; Art.10.21 Australia-Chile FTA; Arts.10.19(2), 10.20 Chile-US FTA; Arts.10.19(2), 10.20 Oman-US FTA; Arts.15.19(2), 15.20 Singapore-US FTA; Arts.10.20(2), 10.21 Panama-US FTA; Arts.10.19(2), 10.20 Morocco-US FTA; Arts.11.24(2), 11.25 Central America-Mexico FTA; Arts.95-96 Chile-Japan FTA; Arts.10.29-10.30 Panama-Taiwan FTA; Arts.28(2), 29 US Model BIT; Arts.28(2), 29 Uruguay-US BIT; Arts.28(2), 29 Rwanda-US BIT; Arts.34-35 Canada Model BIT; Arts.34-35 Canada-Peru BIT.

[1244] Polanco (n 1242) 168–169; Alschner (n 1192) 310–311; Kaufmann-Kohler (n 1190) 313.

[1245] See (n 1243).

[1246] Kinnear, Bjorklund, and Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006) 1128–2.

[1247] Similarly, Art.63 ICJ Statute.

[1248] Hunter and Barbuk, 'Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations' in Weiler (ed), *NAFTA Investment Law and Arbitration* (Brill 2004) 163.

the…interpretation [offered] applies to the facts of this case'.[1249] However, they have been criticised as overstepping the mandate of the NDSPs provisions and making more general submissions in practice.[1250] Still, and despite this practice, it would, admittedly, be tenuous to argue that arguments on the existence of a prior internationally wrongful act relate to the interpretation of the IIA in question. It would require an overly permissive interpretation of NDSPs provisions to allow for such submissions. However, the mechanism could be re-imagined or transformed through practice to encompass such a procedural right to intervene in the context of an applicable defence.

Secondly, there is an alternative procedural avenue that provides an opportunity for the home-State to make relevant submissions. This is the institution of *amici curiae*, which permits the participation of non-disputing parties to assist the Tribunal in discharging its duties under the treaty. When we discuss *amici curiae,* we typically have in mind non-State actors, such as NGOs and members of the civil society, seeking to influence the outcome of an arbitration. However, a non-disputing State, including the home-State, also falls within the scope of these provisions. Provisions on the participation of *amici curiae* are broader in scope than provisions on submissions by NDSPs.[1251] A non-disputing party may apply for permission to make oral or written submissions before the Tribunal on any issue, including legal and factual aspects of the dispute without distinction.[1252] Some treaties and procedural rules, such as ICSID,

[1249] E.g., submissions of US, Canada, and Mexico under Art.1128 NAFTA such as in *ADF*, *Myers*, *Fireman's Fund*.

[1250] See examples in Hunter and Barbuk (n 1248) 163–164.

[1251] Kaufmann-Kohler (n 1190) 312.

[1252] E.g., Art.28(3) US Model BIT; Art.28(3) Uruguay-US BIT; Art.28(3) Rwanda-US BIT; Art.10.20(3) Panama-US FTA; Art.11.24(3) Central America-Mexico FTA; Art.10.20(2) Australia-Chile FTA; Art.10.19(3) US-Chile FTA; Art.15.19(3) Singapore-US FTA; Art.10.19(3) Morocco-US FTA; Art.10.19(3) Oman-US FTA. Note, however, the counter-argument suggesting that amicus curiae

provide further guidance to the Tribunal, which, in deciding whether to accept the request of a party to make submissions, shall consider, among others, the following factors: whether the submission would assist the Tribunal in the determination of a legal or factual issue in dispute by providing a particular perspective, knowledge, or understanding; whether the submission would address an issue within the scope of the dispute; whether the non-disputing party has a significant interest in the arbitration; and whether there is a public interest in the subject-matter of the arbitration.[1253] Submissions by the home-State in the matter of defences would certainly meet these criteria. Moreover, several *amici curiae* provisions include the caveat that submissions must not 'unduly burden or unfairly prejudice' one of the disputing parties,[1254] a consideration that also permeates arbitration rules and informs the Tribunal's power to make decisions on matters left at its discretion.[1255] In the case of countermeasures it is in the interest of everyone involved to allow for home-State intervention if the defence of countermeasures is found by the Tribunal to be applicable to the dispute: the Respondent wants the alleged prior internationally wrongful act to be examined in order to be absolved of international responsibility; the investor wants the defence of countermeasures to fail on the merits; and the home-State wants to quash the Respondent's allegations. However, it remains at the Tribunal's discretion in each case to permit the intervention of an *amicus curiae*, as opposed to provisions on NDSPs

submissions of the home-State must always be limited to issues of interpretation, Kaufmann-Kohler (n 1190) 321.

[1253] E.g., Rule 67 ICSID Arbitration Rules; Art.25 Colombia-Peru BIT; Art.39 Canada-Peru BIT. See also similarly, Art.831 Canada-Colombia FTA; Art.9.31 Canada-Panama FTA.

[1254] E.g., Rule 67(4) ICSID Arbitration Rules; Art.831 Canada-Colombia FTA.

[1255] E.g., Art.15(1) UNCITRAL.

interpretative statements, which confer an absolute right on the NDSPs to intervene.[1256]

Lastly, even if no specific procedural avenue is available in the rules applicable to the arbitration, the Tribunal, in the exercise of its inherent powers, has the right to seek information and to decide on any question of procedure not covered by the arbitration rules, usually upon consultation with the parties to the dispute and subject to considerations regarding the equality of the parties.[1257] There is precedent in arbitral case law where the home-State was asked or allowed to file a submission in an ongoing arbitration, despite the absence of a relevant provision in the treaty or rules in question.[1258] The parties to the dispute, i.e., the host-State and the investor, through mutual agreement, can also request the Tribunal to allow for a limited intervention of the home-State to present arguments on the indispensable incidental issue arising in the context of the Respondent's defence, in view of their power to modify aspects of the arbitral procedure.[1259]

In sum, the *Monetary Gold* principle is not applicable with respect to indispensable incidental issues that arise in the context of a defence that is found to be applicable in an ISDS dispute based on an interpretation of the IIA in question. Moreover, there are procedural avenues that allow the home-State to intervene, to a limited extent, to ongoing arbitral proceedings, to present arguments regarding the alleged prior internationally wrongful act which generated the defence of countermeasures invoked by the

[1256] Kinnear, Bjorklund and Hannaford (n 1246) 1128–2.

[1257] See reflections of this principle in Art.44 ICSID; Arts.27, 34 ICSID Arbitration Rules; Art.15(1) UNCITRAL

[1258] E.g., *Aguas del Tunari* [Appx IV], *Achmea* [154ff].

[1259] E.g., Art.44 ICSID: '…arbitration…shall be conducted… except as the parties otherwise agree, in accordance with the [ICSID] Arbitration Rules…'.

Respondent.

D. INTERIM CONCLUSIONS

This chapter aimed to clarify the availability of defences to host-States in the context of ISDS for measures adopted in response to public policy objectives that are *prima facie* inconsistent with their commitments under applicable IIAs. To this end, the chapter examined the scope of exception clauses in IIAs and investigated the availability of the general defences of necessity, self-defence, and countermeasures to Respondents in ISDS.

It was firstly established that, despite deviations of the investment protection regime from the general rules on State responsibility in various significant aspects, including the content and the means of invocation of the international responsibility of host-States, the general law on State responsibility remains applicable in principle, to the extent that it has not been superseded by a more special arrangement evident through interpretation of the relevant IIAs. Section B of this chapter demonstrated that the mixed nature of ISDS does not preclude the applicability of the general rules codified in Part I ARSIWA, including general defences, as they apply 'to all the cases in which an internationally wrongful act may be committed by a State' including 'breaches of international law where the primary beneficiary of the obligation breached is not a State.'[1260]

The chapter then proceeded to examine whether despite this *prima facie* applicability there are other factors that affect the availability of general defences in

[1260] Art.28 ARSIWA, commentary [3].

ISDS. It discussed the relationship of the general defences of necessity, self-defence, and countermeasures with the provisions of IIAs, as it emerges through arbitral case law.

Regarding the defence of necessity, this chapter used as case-study the awards and decisions issued in the context of the Argentinian crisis. It firstly examined disputes in which Argentina invoked the defence of necessity directly under general international law in the absence of any textual foothold in the treaty that formed the basis of the arbitration. Like the ICJ and the WTO, most tribunals seem to apply the necessity defence without hesitation and without further justifying its applicability in treaty-based disputes. The sovereign power of States to adopt measures in circumstances that seriously threaten their essential interests cannot be considered as having been waived implicitly through a treaty's silence on the matter and there is nothing in the text of IIAs that reveals such intention (as a general rule and subject, of course, to the textual particularities of each IIA).

Secondly, the chapter critically evaluated the awards and decisions based on the US-Argentina BIT, on which much ink has been spilled. The cases of *CMS*, *Enron*, *Sempra*, *LG&E*, *Continental*, and *El Paso*, demonstrate the various approaches to the interaction of necessity with exception clauses such as Art.XI US-Argentina BIT. The chapter dissected these awards and decisions and outlined their findings and reasoning. It becomes evident that despite being based on the same treaty, and on a strikingly similar set of facts, they differ vastly in their methodology, reasoning, and final conclusions. It emerges from the analysis that they not only directly contradict each other, but they also fail to demonstrate a clear interpretative methodology and adequately justify their conclusions by recourse to the customary rules of treaty interpretation.

In critically evaluating the substance of the relevant findings, this chapter makes the following arguments. First, exception clauses are a treaty-specific regulation of necessity and thus, the former supersedes the latter in accordance with the *lex specialis* principle. There seems to be no room for residual application of the necessity defence in cases where the IIA itself provides the grounds and conditions for the adoption of measures under exceptional circumstances. Second, the *lex generalis* of necessity remains in the background and provides interpretative guidance regarding the scope and content of exception clauses in accordance with Art.31(3)(c) VCLT. The analysis demonstrated that the notions of 'essential interests' and 'grave and imminent peril' inform the interpretation of terms such as 'maintenance of public order' or 'the protection of…essential security interests'. Similarly, the term 'necessary' in exception clauses is interpreted in light of the customary principles of necessity and proportionality. The analysis also demonstrated that WTO jurisprudence on the notion of 'necessity' can assist in elucidating the methodology for assessing a measure's necessity and proportionality through a weighing and balancing test. This is because the WTO exception clauses, like the exception clauses in IIA, are treaty adaptations of the general necessity defences. The test applied by WTO bodies to assess a measure's necessity reflects the relevant customary requirements and provides guidance for their application in the context of treaty-based disputes.

Regarding self-defence, the chapter examined the awards issued in disputes relating to situations of violence, including international and non-international armed conflicts. Although self-defence has not been addressed in the relevant awards that are available to the public, the chapter argues that self-defence (both individual and collective) is directly applicable, in principle, in ISDS in a manner similar to necessity.

The analysis demonstrated that substantive standards of protection in IIAs, and most pertinently the FPS standard, do not preclude reliance on self-defence as they do not generate an absolute right of protection and do not entail the State's strict liability for any losses suffered by the investor in situations of violence. As for the interaction of self-defence with exception clauses, the chapter argued that exception clauses apply par excellence to situations of armed conflict and the notion of 'essential security interests' certainly includes measures taken in response to an armed attack. Consistently with the analysis in previous chapters, this chapter also argues that exception clauses usually afford a defence broader than self-defence, as the notion of 'essential security interests' can capture measures adopted in the context of an armed conflict even if the adopting State is responsible for the initiation of said conflict. Lastly, the chapter discussed the so-called 'war clauses' which establish an obligation of 'non-discrimination' with respect to any reparation or compensation accorded to investors to mitigate losses suffered in the context of an armed conflict or other similar circumstances. It argued that such clauses do not establish an obligation to provide reparations and do not provide a defence on the merits of the dispute. As such, they cannot be considered as *lex specialis* to the general defences. Nonetheless, 'extended war clauses' which establish an obligation to compensate for requisitioning or destruction of property adopt a specific standard of responsibility with respect to reparations, which at times may supplement the rules under general international law.

Finally, regarding countermeasures, this chapter discussed the limited existing case law and demonstrated that the silence of an IIA on the matter is interpreted as implicit acceptance of the applicability of the general defence. With respect to the availability of countermeasures in ISDS and the nature of investors' rights under IIAs,

this chapter argued that there is no evidence to suggest that the commitments under an investment treaty concluded between two or more States, are detached from the inter-State relations of the parties. Customary international law on the protection of aliens and the institution of diplomatic protection informs the content of IIAs and suggests that the protections enshrined therein are an extension of such customary law, complemented by a procedural right to initiate proceedings without the involvement of the home-State. The text and context of IIAs provides further support to this argument. Lastly, the chapter argued, consistently with the analysis in Chapters II and III, that the power of an adjudicative body to rule on all indispensable incidental matters that arise in the context of an applicable defence in order to rule on the claims properly brought before it is inherent. Thus, tribunals can make incidental findings on the existence of a prior internationally wrongful act in the context of countermeasures, and similarly, on the existence of an armed attack in the context of self-defence. Findings on such incidental matters form part of the reasoning of the Tribunal and thus, the limited scope of its subject-matter jurisdiction and the absence of the home-State from the proceedings do not affect such power.

V. CONCLUSIONS

This thesis examined the availability of general defences in international adjudication. It aimed to discern whether certain legal arguments are always presumed to be at the disposal of States as Respondents in international adjudicative proceedings to defeat on the merits a claim that they bear responsibility under international law, and under which circumstances their availability may be excluded.

The thesis focused on a specific set of general defences, i.e., those under the law on State responsibility as codified in Part I, Chapter V ARSIWA. The ARSIWA were intended as a set of rules that apply to all States and to the whole field of their international obligations regardless of their content and source.[1261] The defences enshrined thereunder formed part of the ILC's intended 'permanent contribution to general international law'.[1262] As such, they are considered general, in terms of both their personal scope (applicable and binding to all States) and their subject-matter (in principle applicable to all international disputes regarding State obligations). The thesis tested this presumption of general applicability of the defences under the law on State responsibility by reference to international case law. It discussed whether, despite their *prima facie* general character, a Respondent may nonetheless be unable to invoke these general defences in the context of certain disputes.

Each substantive chapter analysed the case law of a different adjudicative body or system, each with its own distinguishing features. It started with a discussion on the jurisprudence of a permanent inter-State court, which can in principle rule on any inter-

[1261] See analysis in (n 35-39).

[1262] See (n 46).

State dispute under international law (ICJ); it then proceeded with the case law of an inter-State specialised dispute settlement mechanism, which comprises both *ad hoc* panels and –in principle– a standing Appellate Body (WTO); and finally, it examined the practice of a mixed adjudicative system which involves the participation of private persons in arbitral proceedings (ISDS). The thesis evaluated the reasoning and findings of the adjudicative bodies in question primarily from a doctrinal/analytical perspective, whilst also offering some overarching normative conclusions. In view of the different characteristics of each adjudicative body and of the legal instruments that formed the basis of their jurisdiction in the cases examined, the sample in this thesis is sufficiently representative to draw some general conclusions on the availability of general defences in international adjudication.

Each chapter assessed the three factors identified in the introduction as potentially excluding the applicability of general defences in the context of international adjudicative proceedings: firstly, limitations to the law that the adjudicative body may apply to settle the dispute; secondly, the interpretation of the treaty that forms the basis of the claim and the application of the *lex specialis* principle; and thirdly, jurisdictional constraints of the adjudicative body in question. The analysis of the case law revealed some common patterns across all three adjudicative bodies/systems under consideration as well as certain divergences of approach. The arguments of this thesis on each of these three factors are encapsulated below.

A. PRESUMPTION OF APPLICABILITY OF GENERAL DEFENCES

The thesis demonstrated that there is indeed a presumption of applicability of general international law, including the law on State responsibility, to all international disputes

relating to State obligations. This is the case even in the absence of explicit reference to general international law in the instrument that forms the basis of the claim and the adjudicative body's jurisdiction.

For the ICJ, case law suggests that even in cases of claims submitted under a treaty's compromissory clause referring to the 'interpretation or application' of said treaty, without any further stipulation regarding applicable law, general international law is presumed to be applicable to the dispute together with the treaty under consideration. Similarly, WTO case law indicates that the law applicable to WTO disputes is not exclusively the WTO Agreements. WTO panels and the AB have often had recourse to general international law, including the law on State responsibility, in the absence of a provision in the WTO Agreements regulating the same subject-matter. Thus, despite early claims that the WTO constitutes a self-contained regime, it becomes evident in practice that general international law remains applicable to the extent that the WTO Agreements do not contract out of its application. Lastly, arbitral case law also shows that general international law is in principle applicable to investor-State disputes, to the extent that it has not been superseded by a more special arrangement evident through interpretation of the relevant investment treaties. The law on State responsibility is applicable in principle to ISDS despite the mixed character of the proceedings, as the general rules codified in Part I ARSIWA apply in all cases relating to State obligations, even where the primary beneficiary of the obligation breached is not a State.

Overall, the case law examined in this thesis suggests that the power of international adjudicative bodies to apply general international law, even in the absence of an explicit mandate to do so, is inherent as it forms indispensable part of their reasoning in settling the dispute in question and discharging their functions under their

constitutive instruments and the instruments that forms the basis of their jurisdiction.

Expanding on these findings, this thesis demonstrated that general defences are also presumed to apply in the context of all international disputes relating to State obligations. The right of States to derogate from their international obligations under specific circumstances whilst fulfilling specific legal preconditions is part of the corpus of general international law and remains residually applicable to the extent that States have not explicitly derogated from it. The thesis argues that traces of this idea can be found in the case law of the ICJ, despite the lack of a clear methodology in the reasoning of the relevant judgments. The ICJ applies general defences without hesitation or further justification of its recourse to these rules of general international law. In the context of the WTO, there is a lack of case law on the potential direct applicability of general defences, with the notable exception of a single dispute discussing the availability of countermeasures. The reports in *Mexico—Soft Drinks* seem to endorse the understanding that general defences as part of the general international law on State responsibility are applicable in principle to WTO dispute (but they later suggest that the interpretation of the WTO Agreements and the application of the *lex specialis* doctrine dictate their full or partial displacement in the context of WTO disputes). Lastly, in ISDS, case law also provides strong evidence that general defences are presumed to be applicable to the extent that they are not displaced by IIAs. In several cases where the IIA under consideration remained silent on the matter of defences, tribunals considered general defences as directly applicable to the disputes in question.

In sum, general defences as part of the general international law on State responsibility are presumed to be applicable in the context of all international disputes relating to State obligations.

B. A REBUTTABLE PRESUMPTION: LEX SPECIALIS AND THE PRINCIPLE OF SYSTEMIC INTEGRATION

Nonetheless, in the consent-based system of international law, this presumption of applicability of general defences is rebuttable. States are free to deviate from general international law and make special arrangements, so long as such deviations do not conflict with rules of a *jus cogens* character. This issue is of key importance primarily in treaty-based disputes. The treaty under consideration may reveal the parties' intention to exclude the applicability of all or some general defences.

These deviations should be positively identified through interpretation of the instrument in question and through proper application of the *lex specialis* principle. This case-by-case interpretation must be principled and methodologically clear. It cannot be reduced to mere findings that a treaty constitutes a 'self-contained regime' or to an arbitrary conflation of a treaty standard with the relevant rules under general international law.

The customary rules on treaty interpretation provide guidance on the methodology to be followed by adjudicative bodies in ascertaining the relationship between a treaty and general international law. The thesis demonstrates that Art.31(3)(c) VCLT establishes an obligation for interpreters to consider a treaty's normative environment, i.e., general international law, and this includes the consideration of general defences. 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.'[1263] This is the *rationale* behind Art.31(3)(c) VCLT which has been described as establishing the principle of systemic integration.

In view of this obligation, an adjudicative body must interpret relevant treaty provisions using all the elements of the interpretative rule codified in Arts.31 VCLT (and to the extent necessary, the supplementary means codified in Art.32 VCLT), with a view to discerning whether and to what extent they are in genuine conflict with general defences and their customary requirements. The general rules remain applicable to the extent that they are not displaced by the treaty and provide interpretative guidance in ascertaining the scope and content of any relevant special rule established thereunder. Accordingly, the interpretation of the instrument in question may lead to one of the following results: it may reveal an intention of the parties to exclude the application of all or certain general defences altogether; it may show an intention to modify (restrict or broaden) the scope of such defences; or it may show a clear intention to fully incorporate general defences and their customary requirements into the treaty text. In a nutshell, treaty interpretation may lead to the conclusion that all or some general defences are not available to the Respondent.

A treaty may exclude the applicability of general defences in several ways. As seen in the context of diplomatic law, a treaty in its entirety may reveal the intention of the parties to exclude all general defences. The object and purpose of the treaty and the nature of the rights established thereunder, as determined through interpretation, must be considered in reaching this conclusion. However, seldom will we find a treaty that intends to be completely non-derogable. As seen in *Tehran Hostages*, even the most

[1263] Fragmentation Report [414].

inflexible legal regimes will provide some flexibility for States to deviate from certain obligations under specific conditions. Thus, any claims that a treaty excludes the possibility to rely on general defences *sub silentio* without establishing some special arrangement to replace the customary rights of States must be firmly substantiated through interpretation. The analysis demonstrated that relevant arguments made in the context of investment arbitration cannot be sustained as there is no convincing evidence to support an interpretation of investment treaties as establishing non-derogable obligations.

A more intricate question is that of the interaction of general defences with exception clauses that are often included in the text of treaties. The thesis examined whether the existence of such clauses excludes the possibility to invoke general defences and whether and to what extent general defences inform the scope and content of such clauses. The analysis dissects the relevant judgments, reports, awards, and decisions and critically evaluates their reasoning. The analysis is mindful not only of the textual differences observed in the wording of exception clauses in various treaties, but also of the fact that each treaty is a unique creature with its own distinct characteristics and course of development. It is thus impossible to reach one-size-fits all conclusion on the availability of general defences in all treaty-based disputes, especially in the context of the ICJ and ISDS where the adjudicative bodies are faced with a variety of legal instruments. The conclusions presented below must be read with this caveat in mind. Nonetheless, the thesis argues that customary international law on treaty interpretation spells out the analytical steps to be followed in reaching relevant conclusions on a case-by-case basis. The thesis provides a general methodology for the assessment of the interaction of general defences with treaty exception clauses based on these analytical

steps.

First of all, the analysis in this thesis demonstrated that exception clauses perform the same normative function and often regulate the same subject-matter as general defences, i.e., the right of States to deviate from its international obligations to serve other public policy objectives that are considered as 'overriding' in terms of significance and to respond to exceptional circumstances. As such, to the extent that they regulate the same subject-matter, exception clauses are the *lex specialis* and displace the *lex generalis*. However, the *lex generalis* remains pertinent in the process of interpreting exception clauses as it assists in discerning their scope and content. The thesis rebutted arguments that attempt to exclude the applicability of the *lex specialis* principle based on an alleged difference in the analytic character of general defences compared to exception clauses (secondary vs primary rules, excuses vs justifications, defences vs carve-outs). The analysis suggested that they all operate as defences on the merits of the dispute and that any possible differences in the consequences of successful invocation of each defence (e.g., on the issue of whether compensation is owed) are attributes of the *lex specialis* rather than factors suggesting the non-applicability of the principle. To the extent that both rules spell out the requirements for permissible State conduct in the same set of circumstances it cannot be argued convincingly that each set of rules within these suggested categories is 'locked into acoustically sealed chambers, and…[cannot] 'hear' the normative messages the law transmits' on the other side.[1264]

To demonstrate the analytical steps in assessing the interaction of a general defence with exception clauses, the thesis used three general defences as case studies:

[1264] By analogy to Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 HLR 625, 631.

necessity, self-defence, and countermeasures.

Regarding necessity, the thesis argued that, more often than not, the general defence is displaced by treaty exception clauses. Exception clauses are treaty-specific regulations of necessity and set out what is considered as 'essential interest' and under what conditions it may be safeguarded in the context of the treaty relations under consideration. In view of this, this thesis argued that there is no space for a residual application of necessity on top of a treaty exception clause in relevant disputes. Nonetheless, the customary requirements of necessity remain pertinent to the interpretation of exception clauses and the thesis demonstrated in each chapter how the consideration of necessity and its requirements could inform the legal interpretations of the adjudicative bodies in question.

Similarly, the customary requirements of self-defence are also pertinent to the interpretation of exception clauses, insofar as such clauses allow for the adoption of measures that involve a use of armed force. This is a result of the *jus cogens* character of the prohibition of the use of force, which creates a presumption that States did not intend to create a defence that deviates from the customary requirements. However, exception clauses that allow for the adoption of measures necessary to protect a State's 'essential security interests' through the adoption of non-forcible measures are *lex specialis* to self-defence and establish a broader defence with more lenient requirements than those under general international law. A State's security interests may be engaged even if the State is not a victim of an armed attack, or indeed if the State is itself responsible for the initiation of an armed conflict. Such exception clauses apply par excellence to situations of armed conflict that pose a threat to the quintessential functions of a State. Still, the customary requirement of necessity and proportionality under the law on self-defence inform the

interpretation of the term 'necessary' that appears in the text of most security-related exception clauses. As for so-called 'war clauses' which establish an obligation of 'non-discrimination' with respect to any reparation or compensation accorded to investors to mitigate losses suffered in the context of an armed conflict or similar circumstances, the thesis demonstrated that such clauses do not establish an obligation to provide reparations and do not provide a defence on the merits of the dispute. As such, they cannot be considered as *lex specialis* to the general defences. Nonetheless, 'extended war clauses' establishing an obligation to compensate for requisitioning or destruction of property adopt a specific standard of responsibility with respect to reparations which at times may supplement the rules under general international law.

Finally, regarding countermeasures, the thesis argued that the defence is often residually applicable to treaty-based disputes, assuming they are not explicitly precluded by the terms of the treaty. As seen in the analysis of relevant case law, some countermeasures which relate to essential security interests or other enumerated objectives may fall within the ambit of exception clauses and may be justified thereunder, following the relevant treaty test, which is usually more permissive than the test for the adoption of lawful countermeasures under general international law. Nonetheless, exception clauses do not regulate the same subject-matter as countermeasures under general international law: exceptions aim to provide flexibility for States to adopt measures for the protection of important State interests, whereas countermeasures are a means of implementing international responsibility and inducing compliance with the target State's international obligations. Thus, the two defences are not in genuine conflict and are not mutually exclusive. Countermeasures taken in response to prior internationally wrongful acts that do not present a threat to States' security interests and

do not relate to other objectives enumerated in the text of exception clauses, can be justified based on general international law, which remains residually applicable to the treaty-based dispute, provided, of course, that they meet the relevant legal requirements. This is also important from a normative perspective: if we were to conclude that the defence of countermeasures is not available to justify restrictive measures that are *prima facie* inconsistent with States' obligations under international economic law instruments such as the ones examined in this thesis, then several of the economic sanctions that are imposed today in the context of various sensitive international disputes, would entail the international responsibility of the imposing States. Thus, an important tool at the disposal of States for the implementation of international responsibility and the maintenance of the international rule of law would, actually, be illegal.

In the context of ISDS, the thesis further discussed whether the mixed character of the dispute and the fact that private persons are the beneficiaries of the relevant international obligations affects the availability of countermeasures. It was argued that the provisions of international investment treaties usually suggest that State commitments enshrined thereunder are not detached from the inter-State relations of the parties and thus, they do not exclude reliance on the defence of countermeasures.

C. INDISPENSABLE INCIDENTAL ISSUES IN THE CONTEXT OF GENERAL DEFENCES: THE LIMITS OF SUBJECT-MATTER AND PERSONAL JURISDICTION

The last factor identified as potentially affecting the availability of general defences in international adjudication was possible limitations to the jurisdiction of the adjudicative body in question.

The analysis in this thesis showed that the limited jurisdictional scope *ratione*

materiae of an adjudicative body as established in each dispute, cannot preclude it from examining an applicable defence in its entirety. The examination of applicable defences and their requirements is a prerequisite for the adjudicative body to determine whether the Respondent bears international responsibility and what are the ensuing consequences. For these reasons, subject-matter jurisdiction in any given case always entails the power to examine all indispensable incidental issues arising in the context of an applicable defence. This means that an adjudicative body has the power to make incidental findings on the prior internationally wrongful act in the context of countermeasures, and, similarly, on the existence of a prior armed attack in the context of self-defence. This power is inherent and follows from the principle that an adjudicative body is fully empowered to make all findings necessary to exercise its judicial function and to provide for the orderly settlement of the dispute before it.

Findings made in this context are for the sole purpose of ruling on the main claims properly brought before the adjudicative body in accordance with relevant jurisdictional rules. Thus, in cases of treaty-based claims, the final decision only rules on possible breaches of the treaty in question and all incidental findings form part of the reasoning of the judgment and are confined to the four corners of the treaty and/or the claim in question. They are not independent findings in the operative provisions of the judgment, and they are not able to generate claims for remedies, as opposed to counter-claims or incidental claims. Thus, such incidental findings in the context of defences fall squarely within the mandate of the adjudicative body to 'apply' the treaty in question.

This inherent power is not affected by the specialised character of the adjudicative body. Such indispensable incidental findings need not be within the adjudicative body's foundational jurisdiction as they only form part of its reasoning and cannot generate

remedial consequences. Thus, the limited competence of the WTO bodies or investment arbitral tribunals cannot exclude the applicability of general defences to relevant disputes. For the same reason, the mixed character of ISDS and the absence of the investor's home-State from the proceedings do not constitute an obstacle to the applicability of general defences either. *Monetary-Gold*-like arguments do not apply in this context as the incidental issue does not form the very-subject-matter of the dispute but only a step in the adjudicative body's legal reasoning.

D. CONCLUDING REFLECTIONS

International law, like any other legal order, must 'cater to, or accommodate, the exceptional, the uncertain, the unforeseen.'[1265] This thesis examined the defences that are available to States in such circumstances and the obstacles that they may face when invoking them in the context of international adjudicative proceedings.

The subject explored in this thesis is of great significance in today's international legal arena. As described in the introduction, the extent of the right of States to take measures that are *prima facie* inconsistent with their international obligations in order to further public policy objectives, respond to emerging or current crises, or ensure the implementation of the international rule of law, has always been at the heart of international governance. But today it is, arguably, more critical than ever. The world is facing a range of increasingly complex and interconnected challenges that call for urgent and effective action, from climate change, pandemics, and armed conflicts to economic inequality and other impediments to inclusive social development. The international community must find ways to respond to such challenges collectively. But the

[1265] Paddeu (n 840) 6.

negotiation and conclusion of new international agreements or the amendment of existing treaties is notoriously slow, and in some cases, the possibility of achieving consensus for the adoption of concrete solutions seems impossible.

Legal defences, whether under general international law or under treaty exceptions, provide some flexibility to States that are willing to take action to do so within the confines of the existing legal framework. For example, exception clauses may be able to accommodate, in certain cases, restrictive economic measures adopted in the context of climate change mitigation strategies, even in the absence of an international consensus on this matter.

At the same time, there is a clear possibility of abuse or misuse of these legal flexibilities to advance national agendas that run contrary to the object and purpose of relevant international obligations. The China-US trade war and the US tariff increases and quotas on steel and aluminium are characteristic examples of this danger of abuse. As discussed in Chapter III, when US restrictions were challenged before the WTO DSS, the US attempted to justify its measures, which had clear economic and political objectives, on the basis of alleged security interests or public morals considerations.

In the area of economic sanctions, which, as explained in the introduction, contributed to the development of the research question of this thesis, this danger of abuse is particularly evident. The European Union and the United States alone, which boast two of the most sophisticated sanctions regimes internationally, have currently approximately 40 active sanctions programmes each, most of which involve trade and other economic restrictions imposed on foreign States. The numerous restrictions adopted under the umbrella of these programmes have rarely been challenged before

international adjudicative bodies.[1266] Thus, their legality under international economic law has not been put to the test. At the same time, States targeted by economic sanctions, such as Russia at present, adopt retaliatory economic measures in response to international sanctions, invoking in turn their own national security interests. It remains unclear whether and to what extent these economic restrictions, which are *prima facie* inconsistent with States' international obligations in the field of economic relations, are justified under the flexibilities provided by international law.

This thesis, in discussing the defences available to States in international adjudicative proceedings, offered some conclusions on the legality of restrictive economic measures, and suggested an approach to relevant rules that aims to balance conflicting interests and minimise the possibility of abuse or misuse. International courts and tribunals can play a pivotal role in the elucidation and implementation of these rules. Although they are only a 'subsidiary means' for the determination of the rules of international law and not a source of law *per se*,[1267] judicial decisions undoubtedly hold a special place within the international legal system.

Firstly, despite the lack of a formal rule of precedent in the international adjudicaticative bodies examined in this thesis, there is a tendency to rely on past jurisprudence. As eloquently explained by the WTO AB, 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.'[1268] In this context, the prime importance of methodological clarity and consistent

[1266] See the list of active sanctions programmes online at <https://sanctionsmap.eu/#/main> for the EU and <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information> for the US.

[1267] Art.38(1)(d) ICJ Statute.

[1268] *US-Stainless Steel-Mexico(ABR)* [160].

use of the customary rules on treaty interpretation cannot be overstated. Decisions that are based on clear reasoning that follows the appropriate analytical steps not only boost legal certainty but also provide coherent guidance to the users of international law. If the legal steps leading to a judgment's conclusions are not clearly outlined, then the analogous application of findings in future disputes can be difficult and may appear arbitrary, thus hampering the creation of a consistent body of international jurisprudence. Legal scholars also use case law as a primary reference to support their arguments. To the extent that the writings of scholars assist in the process of international law-making and in the process of interpretation as subsidiary means for the determination of the law, it is important that their primary reference material offers clear guidance on interpretative tools and methods. In other words, a methodologically clear and consistent approach by international adjudicative bodies can contribute to the 'rule-ness' of interpretation in international law, which assists in the principled determination of the scope and content of the rules of international law,[1269] including the extent of the right of States to derogate from them. This 'rule-ness' also sets the contours within which international legal debate is to be conducted as it sets the outer limits of acceptable legal arguments.[1270]

The matter of methodology is of particular importance in the context of the ICJ. As Hernandez eloquently points out, '[s]tructured in their particular judicial form, the…pronouncements [of the ICJ] resonate throughout international society more significantly than academic writings, the writings of *ad hoc* arbitration bodies, domestic courts, or even the policies of States.'[1271] Indeed, the ICJ remains the most prestigious of

[1269] Lekkas, 'The Hybridity of International Lawmaking: Impressions and Afterthoughts from the ESIL 2021 Stockholm Conference' (2022) 32 EJIL 1, 6.

[1270] Lekkas (n 1269) 6.

[1271] Hernández (n 61) 5.

all international adjudicatory mechanisms[1272] and its pronouncements carry great weight within the system of international law.[1273] There is no doubt that the Court is an important player in the process through which rules of international law are crystallised or even created, with scholars asserting that this is one of the Court's derivative functions.[1274]

Similarly, the WTO dispute settlement system was until recently praised precisely because of the relatively consistent line of jurisprudence, which was facilitated by the existence of a standing Appellate Body. The Appellate Body had the ability to correct errors in the legal reasoning of panel reports and as such it assisted in elucidating clear analytical steps in the assessment of a measure's consistency with the WTO Agreements. This is undoubtedly one of the great losses of the multilateral trading system following the demise of the Appellate mechanism. The analysis discussed how the WTO bodies have developed a relatively coherent jurisprudence with respect to the interpretation of Art.XX GATT which not only provides guidance for WTO States and future panels but can also assist in the development of a coherent test for the examination of exception clauses before other adjudicative bodies. This cross-fertilisation, examples of which are already seen in the context of ISDS, is only possible if the reasoning in the relevant judgment is sufficiently clear so that the test can be transposed in the context of a different dispute. Taking this reasoning a step further, one could even argue that since treaty exception clauses are treaty-specific adaptations of the customary defence of necessity, commonalities in these exceptions, crystallised through the practice of international courts and tribunals, can also assist in a better understanding of the content

[1272] Pellet and Müller (n 60) 949.

[1273] Mendelson (n 99) 88.

[1274] Pellet and Müller (n 60) 837.

of necessity under general international law. Admittedly, the contours of this customary rule remain quite foggy. The case law examined in this thesis provides evidence of an 'evolving jurisprudence on necessity that is refined over time by a method approximating that of the common law'.[1275] Perhaps further studies are necessary not only on what the general necessity defence has to offer to the interpretation of treaty clauses, but also what treaty clauses have to offer to our understanding of necessity.

In the context of ISDS, the concerns of many States that the current system of investment protection prioritises private and commercial interests over public policy objectives and reduces the flexibility of States to make sovereign decisions have been fuelled by the lack of clear reasoning in arbitral awards. The methodologically unclear analysis of arbitral tribunals in the context of the defence of necessity and the resulting awards that directly contradict each other, led to uncertainty regarding the scope of the States' right to introduce measures in pursuance of important societal objectives. This fed into the fears of States that the investment regime and ISDS take away their sovereign powers and delegate them to an (often investor friendly) panel of arbitrators. As Van Harten suggested by reference to *CMS*, the Argentinian crisis investment arbitrations demonstrate that:

> [P]rivate arbitrators have a new-found power to review and discipline states [which] interacts with the lives of ordinary people and the way they are governed. It is true that the raft of claims against Argentina was an exceptionally dramatic episode in the recent expansion of investment treaty arbitration, but it remains indicative of a much wider phenomenon.[1276]

Although the multitude of investment treaties, each with its own textual particularities,

[1275] Sloane (n 959) 493.

[1276] Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 3 (footnotes omitted).

poses additional challenges, the adoption of a coherent analytical framework could lead to more consistent interpretations of investment treaties and improve predictability while respecting the will of the contracting States. It could also boost the legitimacy of ISDS and its reputation in the eyes of the public.

This is not to say that international adjudication is always the most appropriate forum for the resolution of relevant disputes or that it does not have its own shortcomings. As evidenced from the analysis in this thesis, international decisions are far from perfect. However, the findings of international courts and tribunals, especially when their reasoning can be clearly discerned from the relevant judgment, can initiate an interactive process that assists in the clarification and development of the law on the matter under consideration. They prompt reactions from States –whether positive or negative– which can in turn be taken into consideration in the interpretation of relevant rules, or in the identification or crystallisation of relevant custom. They also form the basis of academic studies and scholarly writings, which together with judicial decisions, are subsidiary means for the determination of the rules of international law. Lastly, they can trigger international negotiations and processes for consensus building. Thus, the judicialisation of international disputes is often an important step in the systematisation of the relevant legal regime.

Another issue that emerges from the analysis in this thesis is the role of international adjudicative bodies more broadly within the system of international law. The thesis argued in favour of an expansive understanding of the jurisdiction of international adjudicative bodies. A doubt may be raised as to whether this approach overstretches the limits of State consent to international dispute settlement. Adopting this thesis' approach to incidental issues in the context of defences may feed the existing

criticism and scepticism of certain States that are expressing concerns over the powers of international courts and their alleged tendency towards judicial activism.[1277] However, international dispute settlement cannot ignore the inextricable link between international rules and legal defences. When a State is entitled to invoke a defence to justify inconsistencies with its international obligations, an adjudicative body which has jurisdiction to examine such obligations should also be able to examine any applicable defences. Any other approach is not in the interest of international justice and would create uncertainties regarding the scope of the international obligations assumed by States. Such affirmation would ensure both the right of States to take retaliatory action against wrongdoing States by withholding international obligations *and* that such action is compliant with the requirements under general international law. Besides, the compartmentalisation of international disputes under the current system of consent-based international adjudication is an exercise of politics by 're-definition': States strategically isolate specific aspects of broader disputes in order to benefit from the application of the technical rules of a specific sub-system of international law and its attendant structural bias.[1278] Characterising a particular dispute as a trade-only or investment-only dispute 'work[s] to push forward some actors or interests while leaving others in the shadows'.[1279] The examination of all applicable defences in international adjudicative proceedings serves to bridge this gap to a certain extent.

This approach would also vest international courts and tribunals with broader powers in the maintenance of the international rule of law. Most international legal

[1277] See e.g., the concerns of the US regarding the functioning of the WTO AB, in United States Trade Representative, *Report on the Appellate Body of the World Trade Organisation* (February 2020) p.47ff.

[1278] Koskenniemi, 'The Politics of International Law - 20 Years Later' (2009) 20 EJIL 7, 11.

[1279] Koskenniemi (n 1278) 11.

scholars are always treading lightly when it comes to suggesting such broader powers. Indeed, in the field of international dispute settlement, as in international law more generally, we tend to put emphasis on the limits of State consent. The failure of the international community to establish a compulsory system of international dispute settlement during the negotiations for the adoption of the UN Charter and the ICJ Statute is considered as a sign that the international community, even when it was emerging from one of the darkest chapters in its history, was 'not favourable to a judicial approach to international relations' and wanted to save the UN from excessive 'legalism'.[1280] However, a closer look into the preparatory works and the records of negotiation for the adoption of the ICJ Statute, paints a different picture. States attributed, at least partly, the breakdown of international law and order during World War II to the limited scope and the lack of effectiveness of methods for the peaceful settlement of international disputes.[1281] They envisaged the ICJ as a central pillar of the new world order and an agent for peace. Most State representatives supported in principle the establishment of a court with compulsory jurisdiction over international inter-State disputes during all stages leading up to the final drafting and adoption of the ICJ Statute.[1282] However, the opposition of the US and the USSR to the idea of compulsory jurisdiction forced States to compromise and accept the middle ground of keeping the optional clause system whilst also encouraging States to submit declarations thereunder. Perhaps it is time for

[1280] Kolb (n 62) 58.

[1281] See e.g., Inter-American Juridical Committee, Recommendation on Post-War Problems p. 29, and Inter-American Conference, Final Act, p 73, Resolution XXX.

[1282] See e.g., Selected Documents relating to the Drafting of the Statute, pp. 33-52, relevant statements by State representatives at different stages of the drafting process in San Francisco Documents, Vol I, XIII and XIV and the summary of records from the Washington Committee of Jurists in Dubisson (n 62) 19. The records suggest that if it wasn't for the strong opposition of mainly two States and a few allies, the majority of the international community would have adopted the model of a World Court with compulsory jurisdiction.

the international community to re-evaluate the role of State consent to international dispute settlement and reflect on who benefits from a no-courts approach to international relations.

Lastly, this thesis expands on the notion of general international law and its function. It emerges from the analysis above that international case law endorses an understanding of international law as a 'normative system'[1283] that is held together by the glue that is general international law. In the context of such system 'each distinct treatment of a particular issue forms part of a "whole"'.[1284] General international law sets 'the rules of the game' or 'provides the necessary premises for the game to be played'.[1285] Thus, it is always in the background of and can complement 'special' rules of international law. As Trachtman explains, 'no institution is an island: each exists in a broader institutional setting. This setting penetrates the institutions at various points, to complete contracts and to supply broader institutional rules where appropriate'. [1286] In international law, the rules of general international law provide such 'institutional setting' and complete its sub-systems, providing formal unity and cohesion, and assisting in the creation of a 'consistent and comprehensive body' of international law.[1287] The ILC Study Group on fragmentation explained that 'a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles outside it'.[1288] This statement was characterised by Higgins as a 'truism':

[1283] Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) 1.

[1284] Gourgourinis, 'General/Particular' (n 25) 996.

[1285] Papadaki (n 32) 21, 26 and citations therein.

[1286] Trachtman (n 386) 346.

[1287] On this 'search for coherence' see Lowe (n 482) 30.

[1288] Fragmentation Report [193].

no treaty can exist is isolation from general international law.[1289] Indeed, this thesis demonstrated that all 'special' legal regimes speak a language in which the common grammar is 'general international law'.[1290]

[1289] Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791, 803; McLachlan (n 920) 372.

[1290] Borrowing the metaphor of Dupuy in Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation"' (2007) 1 EJLS 1, 5.

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