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Gatt article XXI and aggression: Towards an interpretation compatible with the unity of the international legal order*

El artículo XXI del GATT y la agresión: hacia una interpretación compatible con la unidad del orden jurídico internacional

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Abstract: This article contends that the World Trade Organization (WTO) rules are affected by the gravity of aggression and the consequences of its prohibition on international law. In this regard, article XXI of the General Agreement on Tariffs and Trade (GATT), by enabling the adoption of measures necessary for the protection of the essential security interests of a State «in times of war», must be interpreted in the light of general provisions on aggression. This objective will necessarily lead us to consider whether the bodies of the WTO dispute settlement system (DSS) are competent to understand, in a situation where an act of aggression has been committed and in general terms, what implications—mainly legal, but also institutional and political in nature—the violation of the *jus cogens* has in a dispute before the DSS. To this end, this investigation explores the content and scope of GATT's article XXI and its interpretation, in particular, of the meaning of the term «war» in subparagraph b, subsection iii, and then considers the implications of its possible application in the light of international rules on aggression and the jurisdiction of SSD bodies in this regard. The article assesses the alternatives that a panel might face in view of an invocation of article XXI by an aggressor State and, rejecting the possibility of an interpretation and application of the provision isolated of the rules on aggression, explores possible solutions to which the panel may enter, maintaining the balance between the efficacy of the system and the unity of the legal order.

Key words: GATT's article XXI, WTO dispute settlement system, aggression, *jus cogens*

Resumen: En este artículo se sostiene que las normas de la Organización Mundial del Comercio (OMC) no resultan ajenas a la gravedad de la agresión ni a las consecuencias de su prohibición en el derecho internacional. En ese sentido, el artículo XXI del Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT, por sus siglas en inglés), al permitir la adopción de medidas necesarias para la protección de los intereses esenciales de la seguridad de un Estado «en tiempos de guerra», debe ser interpretado a la luz de las disposiciones

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generales en materia de agresión. Este objetivo nos llevará necesariamente a considerar si los órganos del sistema de solución de diferencias (SSD) de la OMC son competentes para entender en una situación en la que se ha cometido un acto de agresión y, en términos generales, qué implicancias —principalmente jurídicas, pero también políticas e institucionales— tiene la violación del *ius cogens* en una diferencia ante el SSD. Con tal fin, esta investigación explora el contenido y alcance del artículo XXI del GATT y su interpretación, en particular, acerca del significado del término «guerra» en su apartado b, inciso iii, para luego pasar a considerar las implicancias de su posible aplicación a la luz de las normas internacionales en materia de agresión y las competencias de los órganos del SSD al respecto. En relación a esto último, el artículo evalúa las alternativas a las que se podría enfrentar un grupo especial ante una invocación del artículo XXI por un Estado agresor y, rechazando la posibilidad de que se realice una interpretación y aplicación de la disposición aislada de las normas en materia de agresión, se exploran eventuales soluciones a las que el grupo especial puede arribar, manteniendo un equilibrio entre la eficacia del sistema y la unidad del orden jurídico.

Palabras clave: Artículo XXI del GATT, sistema de solución de diferencias de la OMC, agresión, *ius cogens*

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I. INTRODUCTION

The current crisis in the dispute settlement system (DSS) of the World Trade Organization (WTO) has not prevented, for the first time in the history of the organization, two panels from analyzing and interpreting in recent pronouncements, the so-called "security exceptions" established in Article XXI of the General Agreement on Tariffs and Trade (GATT) and other WTO agreements (Arredondo & Godio, 2019; Baena Rojas, 2019).

The content and scope of the regulation and, in particular, the jurisdiction of the DSS bodies in respect thereof have been the subject

of much discussion in the doctrine, renewed by the panel reports in the following disputes: *Russia - Measures Concerning Traffic in Transit* (hereinafter, *Russia - Traffic in Transit*), 2019, and *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights* (hereinafter, *Saudi Arabia - Intellectual Property*), 2020. However, we do not intend to provide a comprehensive analysis of the rule or its interpretation in such cases. Our aim is more precise, but no less ambitious, as we intend to analyze Article XXI in relation to the prohibition of aggression in international law.

We believe that aggression is so serious that it shakes the very foundations of the international community; hence, its prohibition has become one of the fundamental rules of contemporary international law and the consequences of its violation are found throughout the entire legal system. These are not limited to the sphere of international responsibility (at two levels: state—for the act of aggression—and individual—for the crime of aggression—) and to the collective security system, but are also found in other branches of international law, such as in the rules governing international trade, which is our purpose here.

Indeed, we will argue here that WTO rules are not oblivious to the seriousness of aggression nor the consequences of its prohibition in international law. The purpose of this paper is to demonstrate this "expansive force" of the prohibition of aggression through its effects on the DSS. In that sense, we believe that GATT Article XXI must be interpreted in the light of the general provisions on aggression, since it allows the adoption of action that is necessary for the protection of the essential interests of the security of a State "in time of war." This objective will necessarily lead us to consider whether the DSS bodies are competent to deal with a situation in which an act of aggression has been committed, and in general terms, what implications the violation of *jus cogens* has for a dispute before the DSS.

To this end, we will begin by exploring GATT Article XXI and its interpretation, and then move on to consider the implications of its possible application in the light of international rules on aggression and the competencies of the DSS bodies.

In this regard, it should be noted that most of the authors who have addressed this issue focus on the contentious question of the WTO dispute settlement bodies' jurisdiction to interpret Article XXI, but have not previously addressed the precise subject matter that we propose. On the other hand, the authors who have most reflected on aggression in international law have not asked themselves about its implications for international trade rules in general nor for GATT Article XXI in particular. In other words, the thesis developed in this article, although firmly based both on the rules applicable to aggression and on the

rules and practice of the DSS, has no precedent in the academic literature and may constitute an interesting contribution to bring both areas of international law closer together and, thus, promote an interpretation compatible with the unity of the legal order.

II. GATT ARTICLE XXI

GATT[1] Article XXI of 1947, which was not modified by the GATT 1994, is titled "Security Exceptions" and states the following:

> 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.

Historically, the rule had not been invoked in the dispute settlement system but on a few occasions (Mitchell, 2017, p. 286). However, we have seen in recent years a large number of invocations of Article XXI[2],

1 Article XIV bis of the General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contain provisions similar to Article XXI. In its report of 16 June 2020, the Panel in *Saudi Arabia - Intellectual Property Rights* considered the findings of the Panel in *Russia - Traffic in Transit* applicable to TRIPS Article 73: "the wording of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994, which was first interpreted by the Panel in *Russia - Traffic in Transit*. The Panel's interpretation of Article XXI(b)(iii) in that dispute gave rise to an analytical framework that can guide the assessment of whether a respondent has properly invoked Article XXI(b)(iii) of the GATT 1994 or, for the purposes of this dispute, Article 73(b)(iii) of the TRIPS Agreement" (*Saudi Arabia - Intellectual Property Rights*, 2020, § 7.241). For their part, the Agreement on Technical Barriers to Trade and the Revised Agreement on Government Procurement contain provisions relating to the protection of the "essential security interests" of States (Vidigal, 2019, footnote 2), although they do not expressly mention "war."

2 Vidigal (2019) mentions that at least 23 disputes submitted to the WTO dispute settlement system involve the security exceptions—although not necessarily involving invocation of Article XXI:—four of them linked to the situation between Russia and Ukraine, four to Qatar's conflict with its Gulf neighbors, and 15 motivated by restrictive measures adopted by the United States (pp. 3-4). Of these

one of which led to the first WTO panel ruling on the matter in April 2019, in the aforementioned *Russia - Traffic in Transit* dispute.

However, its meaning and scope were and continue to be discussed by the doctrine, especially because the GATT does not define critical terms such as "considers necessary," "its essential security interests," "time of war," and "emergency in international relations" (Lindsay, 2003, p. 1278), all of which are contained in paragraph b, which calls our attention as it refers to "war."

II. 1. Interpretation of Subparagraph b

II.1.1. Competent body for Interpretation

Article XXI(b) allows a party "to take any action which it considers necessary for the protection of its essential security interests." That wording raises the problem of interpretation as to who determines what are the "essential interests" for the State's security (WTO, 2012, pp. 600-601). Thus, historically, two different positions were suggested regarding this interpretation: on the one hand, those who consider that the sole judge of such measures is the State that adopts them; on the other, those who consider that measures taken under the article can also be considered by the DSS bodies. In support of the first position, the literal interpretation of the terms "which it considers" suggests that only the Member invoking the rule can determine what its essential security interests are[3], which is aligned with the purpose of addressing any fears or doubts on the GATT's impact on a Member's ability to defend its nation (Federer, 2018, p. 229) and, therefore, no other WTO Member or body would have the right to determine whether a measure taken by a Member satisfies the regulation's requirements (Bhala, 1998, pp. 268-269).

In support of the second position, two arguments have been established. Under the first, a Member State may determine by itself whether a security exception applies, but a good faith standard is imposed on it which is subject to review by WTO bodies. Under the second argument, the State may itself consider what measures are "necessary for the protection of its essential security interests," but the compliance of the conditions listed in (b) is subject to scrutiny by WTO bodies (Alford, 2011, p. 704).

We agree with the latter argument. While the first part of the paragraph may be considered 'self-judging', in the sense that the State

cases, only the two cited above have resulted in panel reports—one adopted and one appealed,—four have been terminated by agreement between the parties, and the remainder are still pending.

3 It is argued that Article XXI is an expression of the intention to keep national security matters as far away from multilateral scrutiny as possible (Ravikumar, 2016, p. 322).

itself determines what are its "essential security interests," the fulfillment of the requirements for action under subparagraphs (i) - (iii) can be assessed by the WTO dispute settlement bodies (Akande & Williams, 2003, p. 399), since these are objective circumstances and legal concepts to be interpreted in the light of the applicable law.

This argument was shared by the Panel in the *Russia - Traffic in Transit* case:

> the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision (*Russia - Traffic in Transit*, 2019, § 7.82).

On this basis, it rejected the objection of lack of jurisdiction raised by Russia and declared itself competent to interpret Article XXI (*Russia - Traffic in Transit*, 2019, § 7.102).

To that end, the Panel designed objective tests that a Member must meet in order to validly invoke Article XXI (Vidigal, 2019, p. 13), which the Panel in *Saudi Arabia - Intellectual Property Rights* summarized as follows:

> determine whether the invoking Member's actions were "taken in time of war or other emergency in international relations" […] and whether the invoking Member's actions are ones "which it considers necessary for the protection of its essential security interests," […] requires an assessment of whether the invoking Member has articulated the "essential security interests" that it considers the measures at issue are necessary to protect, along with a further assessment of whether the measures are so remote from, or unrelated to, the "emergency in international relations" (*Saudi Arabia - Intellectual Property Law*, 2020, § 7.230).

The DSS bodies are therefore competent to interpret and apply Article XXI, as well as to assess the measures taken by the invoking Member in relation to the regulation. It might even be considered that the approach taken[4] by the panels went beyond what was proposed by the affirmative thesis by limiting the scope of the State's discretion to judge whether the measures are "necessary" to protect its essential security interests.

4 It should be noted that the report in *Russia - Traffic in Transit* was adopted by the Dispute Settlement Body (DSB) (WTO, 2019), while the report in *Saudi Arabia - Intellectual Property Rights* was appealed (WTO, 2020), although the current paralysis of the Appellate Body prevents us from considering a ruling in the short term.

II.1.2. The Alleged Political Nature of the Issue

In its third-party intervention in *Russia - Traffic in Transit*, the United States had argued that Russia's invocation of Article XXI was a "political issue" that was not "justiciable." In asserting jurisdiction, the Panel held:

> The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is "non-justiciable," to the extent that this argument also relies on the alleged totally "self-judging" nature of the provision (*Russia - Traffic in Transit*, 2019, § 7.103).

In a footnote, the Panel expanded its reasoning by arguing that another way to formulate the argument that a Member's invocation of Article XXI(b)(iii) is not actionable is to characterize the problem as a "political issue." It recalled that the ICJ has rejected the "political issue" argument and has concluded that, as long as the case presented before it or the request for an advisory opinion are founded on a legal question susceptible of a legal answer, it is bound to assume jurisdiction over it, regardless of the political background or other political aspects of the question. The Panel added:

> in *Mexico –Taxes on Soft Drinks*, the Appellate Body expressed the view that a panel's decision to decline to exercise validly established jurisdiction would not be consistent with its obligations under Articles 3.2 and 19.2 of the DSU […]. The Panel therefore considers that this way of characterizing the problem as a basis for the Panel to decline to review Russia's invocation of Article XXI(b)(iii) is also untenable (*Russia - Traffic in Transit*, 2019, footnote 183).

Thus, the Panel rejected that it was a "political issue" that prevented it from exercising its powers under the Dispute Settlement Understanding (DSU) (Vidigal, 2019, pp. 5-7). The express invocation of the Appellate Body (AB) ruling in *Mexico - Tax Measures on Soft Drinks and Other Beverages* (hereinafter, *Mexico - Soft Drinks*) will require us to return to this issue later in our analysis of a panel's jurisdiction regarding measures taken as a consequence of an act of aggression.

II.1.3. The Meaning of "war" in Paragraph (b), Subparagraph iii)

The word "war" is not defined in Article XXI or any other GATT provision, nor does it appear in other WTO agreements. It has been argued that its meaning is not entirely clear, yet—although it may be difficult at times to determine whether there is a war in a given situation—this determination is based on a well-established concept of international law and is, *prima facie*, a justiciable question (Schloemann & Ohloff, 1999, p. 445). It has, therefore, an objective content and legal meaning, which includes not only declared war, but also any other situation involving armed conflict (Matsushita *et al.*, 2015, p. 560).

The same meaning was adopted by the Panel in *Russia - Traffic in Transit*: "War refers to armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict)" (*Russia - Traffic in Transit*, 2019, § 7.72). As its analysis was developed mainly under the assumption of "emergency in international relations," the Panel did not elaborate much further on the meaning and scope of the term "war."

This does not prevent us from providing a terminological clarification. We share the opinion that the word "war" no longer has any legal meaning in contemporary international law (O'Connell & Niyazmatov, 2012, p. 196) and that if the legal system assigns it any content, it is to qualify it as a crime, in view of the prohibition of the use of force contained in the Charter of the United Nations[5]. Accordingly, we consider that the reference to "war" in the rule being examined must be understood in accordance with the legally acceptable notions of "use of force"[6] or "armed conflict,"[7] in the sense of resorting to armed force between States or between armed groups in the territory of a State. Although the Panel appears to limit itself to the latter, in another passage of its report it also refers to the use of force with express citation to Article 2.4 of the Charter (*Russia - Traffic in Transit*, 2019, footnote 151).

The preparatory works of GATT and the Havana Charter do not give any explanation about the concept of "war," but it has been argued that "The drafters included Article XXI, the national security exception, to avoid the absurd result of penalizing a member state for placing tariffs against another member state who is at war with them" (Davis, 2020, p. 368). If we interpret that as the object and purpose of the regulation, it may be considered that it would be equally absurd for a state to initiate a war with an act of aggression, apply trade restrictive measures against the other party, and then pretend to invoke Article XXI in its favor.

III. INVOCATION OF ARTICLE XXI (B) (III) IN CASE OF AGGRESSION

The latter approach brings us to the main object of our analysis, which will be developed in two parts. On the one hand, the substantial dimension of the problem: Can an aggressor invoke Article XXI in its favor? On the other hand, from the procedural point of view: Are the DSS bodies competent in case of aggression?

5 See the declaration of Mexico's representative in the Special Committee for the Meaning of Aggression (General Assembly, 1974b, p. 43).
6 Used in the field of *jus ad bellum*.
7 Used in the field of *jus in bello*, particularly in the Geneva Conventions of 1949 and their Additional Protocols of 1977.

III.1. The Substantial Dimension: Can an Aggressor Benefit from Article XXI?

According to the Definition of Aggression (adopted by United Nations General Assembly resolution 3314 [XXXIX] and article 8 bis of the Rome Statute of the International Criminal Court), "aggression" is the serious use of armed force by a State against the sovereignty, territorial integrity, and political independence of another State, or in any other manner inconsistent with the UN Charter. It is peacefully accepted that its prohibition is considered as the paradigmatic example of a peremptory rule of general international law or *jus cogens* (ILC, 2019, p. 224), and that it constitutes what the International Law Commission (ILC) called "the supreme international crime" (ILC, 1977, p. 109), which in the current language of the regulations on international responsibility, and in the light of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter, the 2001 Draft), may be considered as a "serious breach of an obligation under a peremptory rule," as stated in article 40.

This being so, and given that article XXI makes no distinction, could an aggressor validly invoke the exception to the rule and rely on the protection of its security interests in the event of a "war" that it itself initiated? We think that the answer is negative: the trade-restrictive measures that the aggressor could adopt would only contribute to consolidate its aggression, and the application of the *ex iniuria jus non oritur* principle does not allow it to invoke the rule to justify its actions. Otherwise, the consequences of its aggression would appear to be covered by the GATT itself, and this is inadmissible because of its manifest opposition to elementary rules of general international law[8].

One of the few opportunities in which Article XXI was discussed in the GATT 1947 dispute settlement system was in the situation generated by the United States' embargo against Nicaragua, brought by this State to the system in 1985 (Mavroidis, 2007, p. 323). The panel report, which was not finally adopted, includes certain references that may be useful for our analysis. Thus, Nicaragua argued that a country could not be allowed to rely on the existence of an "emergency" that it itself had created. In this regard, it considered that Article XXI is analogous to the right of self-defense in international law. This provision could be invoked only by a party subject to direct aggression or armed attack, and not by the aggressor or by parties indirectly at risk. Nicaragua added that it should be considered that the GATT did not exist in a vacuum, but was an essential part of a broader structure of international law, and

8 It should be highlighted that article 5.1 of the Definition of Aggression provides that "No consideration of whatever nature, whether political, economic, military, or otherwise, may serve as a justification for aggression" (General Assembly, 1974a).

that the General Agreement should not be interpreted in a manner inconsistent with international law[9]. Nevertheless, as the Panel's terms of reference prevented it from assessing the validity or motivation of the United States' invocation of Article XXI (*United States - Trade Measures Affecting Nicaragua*, 1986, § 1.4), no determination was made on the issue.

We believe this does not prevent us from noticing that Nicaragua's arguments are analogous to ours: the provision of Article XXI(b)(iii) is intended not to keep the victim of an aggression bound by GATT obligations vis-à-vis its aggressor, and not to give the aggressor new tools to consolidate its aggression.

The doctrine has paid little attention to this issue. Only Hahn (1991), in an outdated but very complete study, has formulated a question similar to ours, but he does not answer it[10], because he considers that such an interpretation would give GATT a role that this technical instrument does not have: when inter-state relations descend to the level of the law of the jungle, the niceties of GATT have no role of their own. In other words, he argues, GATT was not even intended to have force in an armed conflict, thus recognizing the limited role of international economic law once states have decided to go to war (p. 587). We cannot agree with this view: formulated from a realist viewpoint, it is not compatible with the defense of the legal order, the validity of which cannot be jeopardized by its own violation. On the contrary, Article XXI implies the response of the particular GATT/WTO order to deal with conflict situations: GATT obligations are not suspended in case of "war," but the agreement itself allows states to take action to protect their security interests, which, we insist, cannot protect an aggressor without violating the most fundamental rules of international law.

The same principle inspires Article 15 of the ILC Draft Articles on Effects of Armed Conflict on Treaties, entitled "Prohibition of benefit to an aggressor State," which states the following:

> A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly

9 "A country could not be allowed to base itself on the existence of an "emergency" which it had itself created. In that respect, Article XXI was analogous to the right of self-defense in international law. This provision could be invoked only by a party subjected to direct aggression or armed attack and not by the aggressor or by parties indirectly at risk. Nicaragua added that it must be borne in mind that GATT did not exist in a vacuum but was an integral part of the wider structure of international law, and that the General Agreement must not be interpreted in a way inconsistent with international law" (*United States - Trade Measures Affecting Nicaragua*, 1986, § 4.5).

10 Later in the same work he seems to give answers, but in ambiguous and somewhat contradictory terms. Thus, he argues that even if an aggressor can escape the GATT under Article XXI, then the state acting in self-defense should be relieved from having to grant trade benefits to its attacker (Hahn, 1991, p. 589); but then, commenting on possible conflicts between the rule and general international law, he mentions that in a situation of war and any armed attack that permits the lawful use of force it is clear that "war" or the (even potential) use of force poses no barrier (p. 603).

> of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

This rule is itself an application of the *ex iniuria jus non oritur* principle (ILC, 2016, p. 130) and confirms our considerations regarding the fact that the existence of conflict not only does not imply *per se* the suspension of States' obligations under the GATT, but prevents the aggressor from benefiting from its own aggression.

Likewise, we believe that an interpretation that would allow the aggressor to use the exception of Article XXI to justify measures taken in defense of its own aggression would imply recognizing that it can obtain a benefit from this serious violation of a rule of *jus cogens*, which is inadmissible.

In *Russia - Traffic in Transit*, the Panel claimed:

> It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member (2019, § 7.79).

If it was considered contrary to the system to interpret Article XXI as an unqualified optional condition, *a fortiori* it must be considered contrary to the system for a Member to initiate a war by means of aggression and then seek to use the system to its advantage.

In short, an interpretation of GATT Article XXI(b)(iii) in line with general international law and, in particular, with the rules of *jus cogens*, leads us to conclude that an aggressor State cannot validly invoke the exception in the case of a "war" that it has itself initiated by an act of aggression.

III.2. The Procedural Dimension: DSS Bodies' Jurisdiction to Determine the Existence and Effects of Aggression

While essentially the question seems to have a clear answer, at least from a theoretical point of view, procedurally there are more questions than answers, given the limited jurisdiction of the DSS bodies. Should a body such as a Panel, the AB or the DSB rule on the legal effects of aggression in the covered agreements if this is necessary to make a decision on a dispute brought before it? And, closely related to this, can such bodies determine the existence of an act of aggression, even if they are not expressly competent to do so under the DSU?

With regard to the first question, we must distinguish between two basic assumptions: that a determination of the existence of an act of aggression has been made by a competent body of the United Nations; or that such determination has not been made.

In the first case, if the determination was made by the Security Council, we are faced with the least problematic case: an aggression has occurred and has been determined by the body whose power of determination has been expressly recognized by Article 39 of the UN Charter[11]. In such a case, we see nothing to prevent the DSS bodies from considering the responsibility of the party regarded as the aggressor by the Security Council for the existence of the "war" within the meaning of GATT Article XXI(b)(iii) for the purposes of their analysis of the measures taken in relation thereto[12].

We believe that the same conclusion applies to the case where the General Assembly, meeting under the procedure set out in resolution 377 (V) "Uniting for Peace," has determined the existence of an act of aggression in the absence of unanimity of the permanent members of the Security Council (Kenny, 2016, pp. 27-28), nor do we see any obstacle to proceeding in this way in the DSS if there is a sentence of the International Court of Justice (ICJ) determining the existence of an act of aggression, although we do note that there could be an obstacle of a practical nature, considering that, in general, dispute processing before the ICJ takes much longer than disputes submitted to the DSS and it would be difficult to imagine a scenario in which the Court's judgment would precede a Panel's report.

The second scenario is much more complex and leads immediately to the second question: could DSS bodies determine, for the purpose of interpreting and applying GATT Article XXI, the existence of an act of aggression?

A priori, it would seem that the answer should be negative, since the consequences of the determination of an act of aggression go far beyond commercial matters and it does not seem, however broad an interpretation of the rules of the DSU may be, that the system bodies have such power.

11 Here, we again resort to analogy with the ILC draft articles on effects of armed conflicts on treaties. The ILC (2016) indicates, in its commentary to article 15: "The characterization of a State as an aggressor will depend […], in terms of procedure, on the Security Council. If the Council determines that a State wishing to terminate or withdraw from a treaty or suspend its operation—which presupposes that the case has been referred to the Council—is an aggressor, that State may not take those measures or, in any case, may do so only insofar as it does not benefit from them; this latter point may be assessed either by the Security Council or by a judge or arbitrator" (p. 130).

12 It should be borne in mind that, if the Security Council determines the existence of an act of aggression, it is likely to take measures against the aggressor under Chapter VII of the Charter of the United Nations, and the measures taken by States pursuant to these provisions would no longer be governed by Article XXI(b), but by Article XXI(c).

At the same time, the consequences of aggression operate as a matter of law, irrespective of the determination of its existence. This means that a DSS body could not ignore the issue in resolving a dispute, especially since it is the paradigmatic example of a serious breach of an obligation under a peremptory rule of international law.

These considerations lead us to explore three alternatives that a DSS body (a Panel, in particular) may face in case of invocation of GATT Article XXI by an aggressor: (a) omit any pronouncement on aggression and resolve the issue solely on the basis of the covered agreements; (b) consider that the determination of the existence of the act of aggression is indispensable for the purpose of interpreting and applying Article XXI; or (c) refuse to exercise its jurisdiction in the case. We will now analyze each of them.

III.2.1. The Body May not Deviate from its Ratione Materiae Jurisdiction

The jurisdiction of the bodies is defined by the DSU, Article 1 of which limits it to the so-called "covered agreements," which are those listed in Appendix 1 of the DSU and which we shall refer to generically as "the WTO agreements." Article 3.2 makes explicit that the system "serves to preserve the rights and obligations of Members under the covered agreements" and that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Article 3.5 states that "All solutions to matters formally raised […] shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements." On the other hand, Article 11 specifies that the function of panels "is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements".

In other words, the DSU is clear in limiting the jurisdiction of the system bodies on the covered agreements. Does this limitation also imply the impossibility of ruling on the existence of an act of aggression when such an act affects the interpretation and application of a rule of the covered agreements, such as GATT Article XXI?

An excerpt from the panel report on *Russia - Traffic in Transit* could provide an affirmative answer to this question:

> the Panel must determine whether this situation between Ukraine and Russia that has existed since 2014 constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b). The Panel notes that it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general (2019, §§ 7.120-7.121).

What does this passage mean in relation to aggression? We can point to at least two possible interpretations. According to the first, in the determination of none of the situations in subparagraph (iii) it would be relevant to know which actor or actors are internationally responsible for the existence of those situations. In such a case, the Panel should only focus on finding whether or not a "war" exists as an objective circumstance and proceed with its test for the application of Article XXI. As Heath (2019) argues:

> by using the phrase "international responsibility", appears to be stating that the panel will not decide whether Russia breached any of its obligations under general international law (such as Article 2(4) of the UN Charter on the use of force). [...] by using the phrase "characterize the situation", seems to be saying that the panel is not going to make any authoritative statement about whether the Russia-Ukraine situation amounts to an "armed conflict" [...] Two legal results flow from this decision [...]. The explicit result is that the panel is refusing to make the invocation of GATT Article XXI(b)(iii) contingent on the invoking state's legal responsibility—a party can invoke the "war" exception even if it started the war.

However, Heath (2019) neglects to mention[13] that, if it were a violation of the prohibition on the use of force, *jus cogens* would be involved and that circumstance cannot be innocuous, as we shall see.

But, for the second interpretation, the analysis of responsibility for the existence of the situation could not be omitted in the case of "war," in the sense of subparagraph (iii). Steve Charnovitz argued that it cannot be irrelevant which state is responsible for the creation of international tension; otherwise, the freedom of action to act in a situation of emergency stipulated in Article XXI would allow states to create that tension in order to justify any commercial action they want (Lester, 2019)[14]. However, he posed the question in general terms and did not specifically refer to the concept of "war" or the existence of peremptory rules in such a context[15]. For our part, we argue that there are four arguments that support this second interpretation.

13 Other authors, in a similar position to Heath, also omit this circumstance, even celebrating the fact that the Panel defends the system's authority (Ioachimescu-Voinea, 2019, p. 23), as if it were a closed system completely alien to the peremptory norms of international law.

14 "It's[sic] just can't be irrelevant what state is responsible for the emergency. Otherwise, the leeway in Article XXI to act in an emergency would allow states to create an emergency in order to justify any trade action they want" (Lester, 2019). The quote comes from a comment by Steve Charnovitz to a post by Simon Lester on the Panel's report.

15 Lapa (2020) argues that this position would imply the possibility of using the "clean hands" doctrine in WTO law. Given that such a doctrine has been scarcely used in practice, the author argues that "transposing it into the WTO might have brought additional arguments for a backlash against the WTO system" (p. 23). While we agree that the "clean hands" doctrine does not have much recognition in jurisdictional practice, notwithstanding—as the author points out—having been proposed in the context of the Russia-Ukraine dispute (Rice, 2015), we do not see how the determination of liability for the creation of "war" within the meaning of Article XXI could be considered as an application of such

First, the report clearly states that for "this" determination it is not relevant to know which actor is responsible, and such determination is none other than the one referred to at the beginning of the quoted passage; i.e., whether the situation between Russia and Ukraine is "an emergency in international relations within the meaning of subparagraph (iii)." There is nothing in the report that indicates that the Panel's view on the irrelevance of responsibility for the existence of the situation also applies to the case of "war."

Second, the Panel itself proposes a distinction between war and "emergency in international relations," even while acknowledging that the former is "a characteristic example" of the latter, which it describes as "a broader category," whose boundaries "are less clear than those [...] of war" (*Russia - Traffic in Transit*, 2019, § 7.71). In other words, it considers war to have a more precise meaning than "emergency in international relations." When defining "war," as we saw, the Panel equates it with the notion of "armed conflict," a legal concept with a concrete meaning in international law; whereas to define "emergency in international relations" it had to resort to the dictionary meaning (§ 7.72). We believe that this distinction cannot be innocuous for our interpretation. On the other hand, we do not consider that resorting to a notion proper to IHL—where the lawfulness of the conflict is not taken into account—is relevant to this discussion, since it also resorted to *jus ad bellum* when citing Article 2.4 of the Charter when referring to "international relations" (note 151).

Since they are different concepts, one susceptible of having legal significance[16] and the other not, the determination of liability for the latter may be validly considered as not relevant, but the same consideration could not be applicable for the former.

This relates to our third argument, in that the very characteristics of the prohibition of the use of force in contemporary international law mean that, in the case of aggression, belligerents cannot be considered on equal terms. In contemporary international law, the aggressor is not in the same position as the victim of aggression[17], since it has committed a serious violation of a *jus cogens rule*—which Heath (2019) does not seem to take into account in his analysis—and, for the purpose of determining

a doctrine, which has a rather procedural nature relating to *jus standi* (ILC, 2012, p. 2). This is why we think that Charnovitz's critique is closer to our position than to that doctrine, but neither he nor the other authors seem to consider the role of *jus cogens* in the question, which is a central issue in our argumentation.

16 We stand by this despite considering, as we said, that "war" as such is not a legal concept in contemporary international law; however, as we have also mentioned, the terms "use of force" and "armed conflict," associated with the notion of "war," do have a precise legal meaning in international law.

17 In this regard, the views expressed at the ILC (1967, pp. 66-67) during the discussion of the draft of what would later become Article 75 of the Vienna Convention on the Law of Treaties are very illustrative.

the legal consequences of the situation created by the aggression—such as the "war" in (iii)—it needs to be determined who bears responsibility for that aggression.

The fourth argument is procedural in nature and has been highlighted by Hill-Cawthorne (2019, pp. 797-798)[18], although significantly omitted by Heath: Ukraine did not raise the issue of alleged Russian responsibility for the creation of the emergency situation in international relations, hence the Panel was able to evade the pronouncement without further consequences.

In conclusion, we believe that it is not possible to extrapolate the considerations made by the Panel on the determination of responsibility for the existence of "emergency in international relations" to the possible determination of responsibility for "war," particularly in cases of aggression. This does not necessarily mean that we consider that the DSS bodies have the jurisdiction to determine the existence of an act of aggression; we are simply stating that we do not see a negative argument in that passage of the Panel's report.

In fact, this would not prevent a panel (conducting a restrictive interpretation of its powers under the DSU and considering the ruling of the AB in *Mexico - Soft Drinks*, a case we will discuss below) from considering that it can make a determination of the "objective circumstance" of "war" in Article XXI, without ruling on responsibility for the initiation of such a war and determining that actions taken by an aggressor to protect its essential security interests—that is, to maintain the aggression—do not violate the provisions of the GATT.

However, we understand that this alternative cannot be considered valid. Article 42.2 of the ILC Draft Articles on Responsibility of International Organizations provides: "No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation." It is true that article 41 of the draft refers to "a serious breach by an international organization of an obligation arising under a peremptory rule of general international law," and not to a serious breach by a State—article 40 of the 2001 Draft—as would be the case in the scenario under discussion; however, in its commentary to article 42, the ILC (2016) stated:

> While practice does not offer examples of cases in which the obligations stated in the present article were asserted in respect of a serious breach committed by an international organization, it is not insignificant that

18 However, he believes that the DSS organs could follow the *Mexico - Soft Drinks* case approach and that the annotated passage could be an indication of that position (Hill-Cawthorne, 2019, pp. 797-798).

> these obligations were considered to apply to international organizations when a breach was allegedly committed by a State. (p. 83).

In fact, one of the examples of the practice it provides relates to an act of aggression:

> with regard to the annexation of Kuwait by Iraq, the Security Council, in paragraph 2 of its resolution 662 (1990) of 9 August 1990, called upon "all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation (ILC, 2016, p. 83).

The duty of Article 42.2, therefore, is applicable to any type of serious breach of an obligation arising from a peremptory norm and is the most reasonable solution according to the nature of this type of breach.

But the question is: does a panel ruling on the application of measures for which the Article XXI exception was invoked by an aggressor imply "recognition"? We believe it does. In doing so, it should be borne in mind that what the rule mandates international organizations to do is not to recognize "the situation created" as lawful, and not the serious breach itself. In our case, "the situation created" would be the "war" within the meaning of GATT Article XXI; whereas the serious breach is the act of aggression that created it. If a panel[19] makes the "objective determination" of the existence of a "war" without inquiring into its causes, and thereafter finds the measures taken by the aggressor justified, it would be recognizing as lawful a situation created by a serious violation of a peremptory norm in flagrant violation of its obligation of non-recognition.

Consequently, we believe that a DSS body could not, in the event of aggression, interpret and apply the provisions of GATT Article XXI in isolation without having the risk of validating actions taken by the aggressor to consolidate its aggression, which would go against the WTO's obligations in cases of serious violation of obligations under peremptory norms. The first alternative is therefore unacceptable to us.

III.2.2. The Determination of the Existence of the Act of Aggression by the DSS Bodies is Indispensable for the Purpose of Interpreting and Applying Article XXI

The conclusion above would seem to definitely lead us to, and in line with our substantial considerations, state that the seriousness of the

19 To the extent that panels are created within the scope of the WTO DSS at the expense of the WTO budget (DSU Article 8.11), and that their function is to assist the DSB (Article 11), we may consider that they are WTO bodies. Even if this were not the case, the adoption of their reports by the DSB (DSU Article 16) is, beyond any doubt, an act attributable to the WTO and, therefore, susceptible of giving rise to its international responsibility.

aggression, which prevents the aggressor from benefiting from the unlawful situation created by its act, would allow a Panel—or, as the case may be, the AB and the DSB—to rule on responsibility for the initiation of the "war," for the purpose of interpreting and applying GATT Article XXI.

It is important to remember that, according to DSU Article 3.2, the DSU serves "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." By stating that the interpretation of the covered agreements shall be in accordance with the rules of public international law, the DSU implies—in our view—that the WTO system is not a closed regime, but allows for the penetration of other rules of international law[20]. The GATT does not operate in a factual or legal vacuum; it is part of the general system of legal rules governing relations between states (Hahn, 1991, p. 560). As the Appellate Body itself has made it clear, "the General Agreement should not be read in clinical isolation from public international law" (*United States - Gasoline*, 1996, p. 20). Therefore, GATT Article XXI, by resorting to the concept of "war," must be interpreted in the light of the rules governing the use of force in international law, including the mandatory nature of the prohibition of aggression.

However, we cannot deny that resorting to other rules for the purpose of interpreting a provision of one of the covered agreements and determining the responsibility of a party to the dispute for violation of non-WTO rules are two very different issues (Pauwelyn, 2003, p. 444). It is clear, even to those of us who recognize that the DSU bodies can and should resort to international rules outside the covered agreements in order to obtain a harmonious interpretation of the latter with international law, that the determination of responsibility for the commission of an act of aggression exceeds the limits of the *ratione materiae* jurisdiction of those bodies under the DSU. As the AB held in the *Mexico - Soft Drinks* case, the interpretation proposed by Mexico in its appeal:

> would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations. We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. […] Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements (*Mexico - Soft Drinks*, 2006, § 56).

20 Thus, we share the position put forward by the Study Group of the International Law Commission on the fragmentation of international law: "there seems, thus, little reason of principle to depart from the view that general international law supplements WTO law" (ILC, 2006, p. 190).

But, at the same time, we cannot lose sight of the fact that this is not just any non-WTO obligation, but a serious violation of an obligation arising from a peremptory norm, and a panel determination that did not take this circumstance into account would go against what *jus cogens* implies.

It is clear that the case we are considering does not involve the incompatibility between a WTO rule (in this case, GATT Article XXI) and a *jus cogens* rule. In such a case—which has no precedent in international practice or case law[21]—the mere application of the hierarchy of *jus cogens* would result in the invalidity of the conflicting rule (ILC, 2006, p. 184). Our case, rather, deals with an action taken by an aggressor—i.e., a State that has committed a serious violation of a *jus cogens* rule—which, in order to validate it, invokes the exception of GATT Article XXI.

Marceau (2002) has taken this possibility into account when considering the case of a WTO provision being implemented by a member in such a way as to violate *jus cogens*, and wonders whether a Panel or AB could conclude that a national measure implementing a WTO right or obligation is in violation of *jus cogens*. Possibly, the author considers that they could determine only whether a measure violates a WTO provision, not *jus cogens*; but it would also be possible for a body to determine that any violation of *jus cogens* is inconsistent with the true interpretation/application of the WTO provision (p. 800)[22].

Then, how could a DSS body determine that an aggression—a violation of a peremptory norm—would be inconsistent with the interpretation and application of Article XXI? A possible alternative would be the principle of good faith.

In this regard, the Panel on *Russia - Traffic in Transit* stated:

> the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. […] The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994 (2019, §§ 7.132-7.133).

Committing an act of aggression and then intending to use the Article XXI exception to justify measures aimed at consolidating the aggression

21 On precedents regarding security exceptions, see Vásquez Arango (2011).

22 "Can a WTO panel or the Appellate Body reach a conclusion that a national measure implementing a WTO right or obligation is in violation of *jus cogens*? Arguably, a panel or the Appellate Body can only determine whether a national measure violates a WTO provision, not *jus cogens*. But it may be possible for a panel or the Appellate Body to determine that any violation of *jus cogens* would be inconsistent with the true interpretation/application of the WTO provision. The panel would then be reading the WTO provisions so as to avoid conflicts with *jus cogens*" (Marceau, 2002, p. 800).

is clearly bad faith behavior, and the Panel could thus find that the invocation of the provision could not have been validly made.

It is true that in the case under review the Panel did not question Russia's good faith, but this would have been possible if Ukraine had raised that the invocation of Article XXI represented an abuse of law, given the occupation of Crimea and activities in eastern Ukraine, which, as we said, did not happen (Hill-Cawthorne, 2019, p. 789).

We should point out that the DSS bodies could draw on the distinction—artificial and criticized—that the ICJ made in its sentence in the *Jurisdictional Immunities of States* case by claiming that there was no conflict between *jus cogens* rules and those relating to State immunity because they deal with different matters, and because of the procedural nature of the latter (*Jurisdictional Immunities of States,* 2012, § 93). Thus, the DSS bodies could argue that the *jus cogens* nature of the prohibition of aggression does not modify their jurisdiction under the DSU, since these are rules of a procedural and not substantial nature. However, the analogy only applies to that because, if by appealing to that distinction, the Panel were to interpret and apply GATT Article XXI without considering *jus cogens*[23], it would fall back into the situation described in the previous point and the ICJ's reasoning would no longer be applicable.

In other words, such a distinction could serve, in any case, to "decline" the body's jurisdiction, which leads us to the third alternative.

III.2.3. In a Case that Requires the Determination of the Existence of an Act of Aggression, DSS Bodies Must Decline to Exercise their Jurisdiction

Can DSS bodies refuse to exercise their jurisdiction? In the aforementioned *Mexico - Soft Drinks* case, Mexico had appealed the Panel's report which, inter alia, had rejected its request to refuse to exercise jurisdiction in favor of an arbitral panel established under the North American Free Trade Agreement (NAFTA). By analyzing the DSU provisions, the AB concluded that a panel has no discretion to decline to exercise its jurisdiction in the matter before it (*Mexico - Soft Drinks*, 2006, §§ 47-54).

23 It is also worth recalling what the arbitral tribunal held in the dispute between Ireland and the United Kingdom under Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR): "It should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless to the extent that the Parties have created a *lex specialis*. Even then, it must defer to a relevant jus cogens with which the Parties' *lex specialis* may be inconsistent" (*Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, 2003, § 84). In our case, a panel is limited under the DSU to apply the WTO agreements, which constitute the *lex specialis* in the case, but that *lex specialis* must be consistent with *jus cogens*, especially when the inconsistency is not manifest, but can be avoided by interpreting the special rule in the manner we propose here.

However, we do not believe that the same analysis is directly transferable to the case under study. The AB itself circumscribed the scope of its pronouncement as follows:

> Mindful of the precise scope of Mexico's appeal, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it (*Mexico - Soft Drinks*, 2006, § 54).

In a case where an act of aggression had been committed, i.e., a *jus cogens* rule was at stake, we believe that there could be "other circumstances" involving "legal impediments" that would make it impossible for a panel to resolve it[24], given the situation we have described above.

In such a case, could a panel decline jurisdiction in the absence of any express rule on the matter? Pauwelyn & Salles (2009) are inclined towards an affirmative answer, considering that the panel may have jurisdiction to hear the case and, equally, decline to exercise that jurisdiction on the grounds that it is "inadmissible" in the presence of circumstances constituting "legal impediments" (pp. 94 *et seq.*). If a panel were to conclude that it cannot interpret and apply Article XXI, without necessarily ruling on responsibility for the commission of an act of aggression, because it is not competent for the latter determination, it could validly consider that this constitutes a "legal impediment" to its ruling and thus decline to exercise its jurisdiction in the case.

What can we consider about the rejection of the alleged "political nature" of the issue in the *Russia - Measures in Transit* dispute? As explained above, the Panel rejected the argument by linking it to the alleged "discretionary" nature of Article XXI, and not to the need to determine responsibility of a party for the violation of a peremptory norm, as in the scenario we raised. In a case of this nature, a panel would be faced with a situation in which the violation of a peremptory norm —hierarchically superior to the GATT and all WTO agreements—is decisive in the interpretation and application of the provision, so that it may constitute a "legal impediment," in the sense expressed by the AB; and, simultaneously, it creates a high-level political issue involving the maintenance of international peace and security. Therefore, the argument that the Panel presented would not be directly applicable to our case and it could well, for such reasons, decline to exercise its jurisdiction.

In this regard, we must recall that Article 86.3 of the Havana Charter provided information for this possible scenario:

24 In its report, in *India - Certain Measures on Imports of Iron and Steel Products*, the Panel held that, "no issue has arisen that would indicate a legal impediment precluding the Panel from ruling on the merits of the matter before us" (*India - Certain Measures on Imports of Iron and Steel Products*, 2018, § 7.19).

> The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter (United Nations Conference on Trade and Employment, 1948).

It is true, as the doctrine points out (Pinchis-Paulsen, 2020, p. 187, note 537), that neither the GATT nor the WTO agreements have a provision similar to the one noted; and that, unlike the ITO, the WTO was not conceived as a specialized agency of the United Nations, nor was it sought to establish a formal institutional relation with the UN. It should also be noted that the GATT Preamble contains no provisions relating to international peace. Some authors consider the absence of a reference to peace to be notable, given its mention in Article 1 of the Havana Charter and Article 55 of the UN Charter, as well as the importance of the nexus between international economic stability and international peace in the advances that led to the establishment of GATT (Wolfrum *et al.*, 2010, p. 50).

During the Uruguay Round, Argentina (Uruguay Round, 1988a) and Nicaragua (Uruguay Round, 1988b)—two States to whose detriment measures had been adopted under Article XXI—each submitted a proposal to adopt interpretations of Article XXI that would not lead to abuse of the rule by States. The Argentinean proposal mentioned the relationship that the Havana Charter established between Article 86 and Article 99—which contained the security exceptions in a text similar to Article XXI—and the Nicaraguan proposal made express reference to the competent organs of the United Nations. Likewise, in the discussion in the Negotiating Group on the GATT, it was insisted that political issues should not be brought into the GATT that were not relevant (Uruguay Round, 1988, § 6) and it was maintained that "it would be useful to continue to observe the initial clause of the third paragraph of Article 86" (Uruguay Round, 1988c, § 7). As we know, Article XXI was not amended and no interpretative notes were adopted, but it is interesting to note that the spirit of Article 86 seemed to have remained with the States regarding the inappropriateness of bringing political issues into the GATT.

In this regard, we believe that attention has not been drawn to the agreement between the WTO and the United Nations, concluded by

exchange of notes between the Director General and the Secretary General in 1995. In this document, they agreed:

> that the arrangements and practices described in the attached United Nations General Assembly document of 9 March 1976 (A/AC.179/5) in respect of the United Nations/GATT relationship provide a suitable basis to continue to guide relations between the United Nations and the World Trade Organization (General Council, 1995, p. 2).

The aforementioned document, attached to the notes, contains this significant passage:

> On essentially political matters the CONTRACTING PARTIES follow the policy expressed in article 86 of the Havana Charter, namely, to avoid passing judgement in any way on such matters and to follow decisions of the United Nations on such questions (General Council, 1995, p. 7).

Although some doubt may remain as to the validity of the criterion, it is undoubtedly inspired by the same principles that led to the drafting of the Havana Charter, and we believe that it could be used by a panel to decline jurisdiction in a case of application of Article XXI in which the existence of an act of aggression must be determined, since this is primarily a matter for the organs of the United Nations and not for the WTO.

In short, although it is a solution that is far from ideal, it is clearly preferable to an isolated analysis of GATT Article XXI, which would lead to the validation of an act of aggression in clear opposition to the rules of *jus cogens*.

IV. FINAL CONSIDERATIONS

We do not believe it is possible to interpret GATT Article XXI along with international law in a sense that would provide an aggressor with the possibility of using the exceptions to the rule to consolidate its own aggression. Such an interpretation would undermine one of the most fundamental rules on which the international community is based and thus the unity of the legal order.

Although we are convinced of the above conclusion, we cannot state the same with regard to how the DSS bodies might act when facing an actual dispute in which a State invokes the exception and the other party accuses it of being an aggressor. Although, for the sake of preserving the unity of the international legal order and the central role of *jus cogens* rules—in particular, the prohibition of aggression—in that order, we would like the bodies to interpret Article XXI in the light

of such rules and, in accordance with the principle of good faith, to reject the invocation of the exception, both the limited *ratione materiae* jurisdiction of the bodies and their own background create an unlikely scenario, especially in the midst of a crisis in the system, where a position such as the one we are proposing could be detrimental to the confidence of States in WTO dispute settlement.

Thus, if this situation of *fiat justitia pereat mundus* is to be avoided, we believe that there are reasonable grounds for arguing that, in the event of aggression, a panel would not be in a position to analyze whether the conditions of GATT Article XXI—or its analogous rules, GATS and the TRIPS Agreement—are met without determining responsibility for the initiation of the "war" to which the rule refers and, since such a power exceeds the limits of its jurisdiction, it should decline to exercise its jurisdiction and report thereon to the DSB. The latter, in any case, may decide whether to inform the competent UN bodies for appropriate action.

Although many might consider this is an unsatisfactory solution, we believe that it is the one that best balances the interests at stake. Thus, from a strictly legal point of view, DSS bodies do not run the risk of validating a serious violation of a peremptory norm—with the consequences that this could have, not only for the rights of the victim and for the international community as a whole, but also for the international responsibility of the WTO itself—by seeking a biased analysis of international rules. From a political point of view, the DSU is safe from possible accusations of *ultra vires* actions that could jeopardize (even more) the trust placed in it by the States.

We will not cease to repeat, as we have done from the beginning, that the DSU bodies cannot validate an interpretation of GATT Article XXI that allows an aggressor to benefit from its own aggression. Such an interpretation, for the sake of an extreme autonomy of the DSU and its applicable rules, in complete isolation from *jus cogens*, is repugnant to the most fundamental rules of international law and undermines the unity of the legal order. The seriousness of the aggression, with its effects even on the rules of international trade, is a demonstration of this unity.

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