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Collective Retaliation and the WTO Dispute Settlement System

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Article 22 of the Dispute Settlement Understanding (DSU) of the WTO offers, as last resort countermeasures, withdrawal of the concessions the state parties had agreed to in their schedules of commitments. The problem is that such a withdrawal of concessions would have very little impact on the economy and consequently on the behaviour of the respondent state if that party happened to be a developed state vis-à-vis a small, developing country. To deal with this situation a remedy of “collective countermeasures”, contained in Article 54 of the Draft Articles on State Responsibility of the International Law Commission (ILC), has been proposed; it has been argued that this remedy should apply, as a general principle of public international law, as a last resort in WTO disputes. The counter-arguments are, first, that the WTO regime is a self-contained regime and therefore the general principles of international law do not apply in this case, and, second, that the WTO legal system is based on a distinct idea of “compliance” with WTO rules as a primary remedy, as opposed to reparative and punitive justice. The concept of “compliance” with WTO rules is akin to the concept of “liberalization”, which is a linchpin of the WTO multilateral system. Therefore the idea of “collective countermeasures” or, in other words, “collective punishment” is repugnant to the principles of WTO law, and it is argued that the present remedies under Article 22 of the DSU are adequate.

Keywords: collective, retaliation, WTO, dispute, settlement, system

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Introduction

In the face of non-compliance, when all else fails, retaliations under Article 22 of the Dispute Settlement Understanding (DSU) of the WTO represent the countermeasures of last resort. These measures take the form of withdrawal of the negotiated commitments vis-à-vis the respondent. Since the birth of the WTO, such a withdrawal has occurred in a number of cases.¹ In cases where both the parties are developed member states or where one of the developing member states is an important trading partner, e.g., China, India or Brazil, retaliations are likely to represent adequate sanctions because both parties stand to lose or gain more or less equally. The risk of loss in such cases will induce compliance. The situation is quite different when the complainant is a developing country or one of the least-developed countries (LDCs), and a very small economy is pitted against a developed state. In this scenario the retaliations, that is to say the withdrawal of commitments by a smaller state, probably will not have much impact on the economy of the developed state, while the situation could have a devastating impact on the economy of the developing state or LDC. The *US-Gambling*² case, for example, represents one such scenario.

To deal with a situation like this, an idea of “collective retaliation” has been floated. In the face of non-compliance it is generally argued that the Article 22 DSU retaliatory measures “are not coercive enough to induce compliance”³; in order to be more satisfactorily coercive, it has been argued, the retaliations should be applied collectively by member states against the respondent on an “all for one” basis. The problem is that the WTO rules under the DSU do not allow collective retaliations, and the general principles of international law regarding collective measures embedded in the International Law Commission (ILC) Article 54 of the Draft Articles on State Responsibility [hereinafter Article 54 ILC] do not apply in the case of the WTO because the WTO is thought to be a self-contained regime. Neither the dispute settlement panels nor the Appellate Body (AB) have ever considered, and rightly so, issues to do with the principles of state responsibility in their rulings and recommendations. Thus it is argued in this article that the unavailability of collective retaliatory sanctions under Article 22 DSU and the article’s less coercive nature are actually key to the success of the WTO as a multilateral institution. The next section assesses whether the WTO is a self-contained regime, and section three deals with the application of customary international law in the WTO regime. Section four assesses the status of the principle of collective retaliation in international law and WTO law.

The WTO as a Self-contained Regime

The idea of a “self-contained regime” is not a new idea; rather, it may have the status of a customary law. Nevertheless, its first clear definition and acceptance as a feature of public international law occurred in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*,⁴ when the International Court of Justice (ICJ) held clearly that diplomatic law was a self-contained regime:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving states’ 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 abuses....⁵

The court went on to clarify, suggesting that in the event of a breach of a diplomatic law an injured party was not permitted to pursue a remedy other than the one available in the diplomatic law. The ICJ said that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.”⁶ From this it transpires that self-contained regimes constitute exclusive areas of law where general principles of international law do not apply unless they are permitted directly or indirectly by that very regime. According to this notion, a self-contained regime exists as an exclusive subsystem. The idea of the WTO as a self-contained regime can be supported on the basis that it is centered on the idea of trade liberalization, which means market access and trade between individual commercial entities across international borders.⁷

Exceptions to Self-contained Regime

This makes it look as if WTO law and international law are two separate systems underpinned by altogether different underlying principles, but this does not seem to be the case. The WTO is not the only self-contained regime within international law; there are also other self-contained regimes, for example diplomatic law, the law of the sea and so on. As with these other specific areas of international law, WTO law, as a part of international economic law, is also in turn part of international law, albeit, like many other specialised areas of international law, it specifically regulates one sphere, namely economic relations relating to international trade.⁸ By regulating international trade, WTO law can also implicate other specialised areas of international law,⁹ for example, environmental law, human rights law and so on. It would be inconceivable that such areas of international law would not impact upon WTO law.

It is unimaginable that all these specialized areas of international law could be completely separate from general public international law. Actually, they have

developed under the customary law or treaties, and they exist as separate fields of international law. Therefore, the application of the general principles of international law in these separate areas is limited but not absolutely prohibited. For example, Article 3(2) of the DSU allows the application of customary rules of interpretation of public international law for the interpretation of the WTO treaty. In the *US–Gasoline* case the Appellate Body held that in the light of Article 3(2) of the DSU the WTO agreements are “not to be read in clinical isolation from public international law”.¹⁰ Furthermore, beyond this there are principles of international law that cannot be prohibited by the self-contained regimes, first, because of their unique character as these are regarded as *jus cogens*, and second, because the parties in those regimes have explicitly agreed to be obliged to another treaty.

The WTO as a System of Lex Specialis (Special Rules)

In customary international law, special rules allow state parties to contract out of certain areas of international law in order to regulate relationships among them. The International Law Commission has codified the principle of *lex specialis* in Article 55 of the Draft Articles on State Responsibility as follows:

These articles do not apply 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.

The justification for special rules is that with them in place states are better able to conduct their relations in a specific area of international law. The presumption is that “a specific set of rules has priority over a general set of rules because the specific set is supposed to be an elaboration of the more general set.”¹¹ This means special rules prevail over the general rules. However, there are some exceptions to the concept of *lex specialis* in that they cannot exclude or modify *jus cogens* and cannot harm the position of the third parties.¹²

Thus Article 55, quoted above, provides that the general principles of international law can be excluded and modified by special rules. This also means that the special rules will only modify the general rules “to the extent” provided for in the special rules. This connotes that situations that are not within the reach of special rules are still governed by the general principles of international law.

The DSU rules, including the rules relating to the consequences of breaches of the WTO rules, are a special set of rules and therefore constitute a system of *lex specialis*;¹³ they exclude the application of the general principles of international law to the extent provided for by the special, self-contained regime of the DSU. In this context, if there is a conflict between the general rules of international law and the

treaty rules, it is the treaty rules that prevail. Thus *lex specialis* or a self-contained regime, being the latter, will prevail. In the absence of a treaty provision that prohibits the application of a general principle of international law, or where the existing remedies are insufficient, the general principles of international law would apply.¹⁴ According to the ILC, the difference between *lex specialis* and a self-contained regime is merely one of degree, as ILC Article 55 on *lex specialis* is meant to cover both these notions.¹⁵

The Application of Customary International Law Rules in the WTO Regime

Article 3(2) of the DSU permits the interpretation of “the existing provisions of [the covered] agreements in accordance with international rules of interpretation of public international law”. This refers not only to articles 30 and 31 of the Vienna Convention on the Law of Treaties, but also to the other rules of customary law that have not been codified, for example, the notion of evaluative interpretation, which was applied by the panel and the Appellate Body in *US–Shrimp Products*,¹⁶ and the concept of *lex specialis*, which is not contained in the Vienna Convention.

In turn, Article 32(3)(c) of the Vienna Convention paves the way, apart from the rules of interpretation, for the application of the general principles of international law. It says that that in interpreting the treaty, apart from the treaty itself “any relevant rules of international law applicable in the relations between the parties” must be taken into account. The Appellate Body echoed this view when it said that the covered agreements must not be interpreted in clinical isolation from public international law.¹⁷ This view was further reiterated in *Korea–Measures Affecting Government Procurement*. The panel in this case made reference to the rules of customary international law as follows:

We do not see any basis for arguing that the terms of reference [in DSU Article 7.1] are meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel.¹⁸

This means that dispute settlement panels and the Appellate Body will seek to apply rules that are not contained in the covered agreements of the WTO but rather are found in the realm of general public international law.

Furthermore, the rules of international law also apply to procedural matters within the dispute settlement system. In *European Communities–Regime for the Importation, Sale and Distribution of Bananas*,¹⁹ the panel applied the rules relating to *locus standi*. This practice can be seen in a number of other cases, for example, relating to burden of proof,²⁰ representation by private council,²¹ the admissibility of *amicus curiae*

brief,²² judicial economy,²³ drawing of an adverse inference,²⁴ the concept of substantial interest,²⁵ the rights of defence,²⁶ abuse of rights,²⁷ estoppel and acquiescence²⁸ and notion of precaution.²⁹

The above practice by the panel and the Appellate Body implies that there is no prohibition on the application of the general principles of international law within the WTO dispute settlement system. Furthermore, the absence of an explicit provision in the DSU excluding the application of international law within the WTO dispute settlement mechanism is an implicit acceptance of the application of international law to the WTO dispute settlement process.³⁰ Unlike the Convention on the Law of the Sea and the statute of the ICJ, the DSU does not explicitly contain a provision on applicable law; therefore, it is not possible to interpret that the DSU excludes the application of all other rules.³¹ The Appellate Body seems to have followed this reasoning,³² and this view was reflected clearly in *Korea–Measures Affecting Government Procurement* as follows:

We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreement in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.³³

This case creates an important precedent, and it suggests that the WTO is not an isolated area of law; rather, it is very much part of general international law.

Article 3(2) of the DSU also contains a provision that the dispute settlement organs “cannot add to or diminish the rights and obligations provided in the covered agreements”.³⁴ This might apparently seem to go against the application of general principles of international law in the WTO dispute settlement system, but this is not how this provision should be interpreted. The application of the general principles of international law would apply to interpretation of the existing rights and obligations of the parties or to filling the gaps in the WTO rules without adding to or diminishing the rights and obligations of the parties. The primary function of the general principles of international law in this case is to explain or clarify the given scenario in a WTO dispute either way but certainly not to disturb the rights and obligations of the parties contained in the provisions of the covered agreements of the WTO.

Collective Countermeasures (Retaliations) in International Law

Judicial View and Recent Practice

The notion of collective countermeasures seems to be a concept alien to international law. The state practice suggests that countermeasures are available only to the injured parties in international law, and this is on the basis of an important concept of *locus standi* in international law. This principle was firmly applied in the *South West Africa case*,³⁵ where the ICJ held that Liberia and Ethiopia had no legal interest in South Africa's treatment of the inhabitants of Namibia. Although both Liberia and Ethiopia were original members of the League of Nations, and as a consequence had certain rights and obligations under the mandate agreement between the League of Nations and South Africa, the ICJ held that the enforcement of the agreement was a matter for the league alone. The reasoning of the court for such a decision was based on the concept of *locus standi*, meaning that the individual member states, in this case Liberia and Ethiopia, had suffered no injury to themselves; therefore, they did not have the independent or inherent right to bring claims for breaches of the mandate agreement. This point of view was further reiterated in the case of *Military and Paramilitary in and against Nicaragua*,³⁶ where the ICJ was asked to consider whether the United States had the unilateral right to use force in response to Nicaragua's action against other Central American States. Although the court in this case ruled that third states could contribute in countermeasures, it categorically rejected the United States' claim to have unilateral rights against Nicaragua.³⁷ This reasoning suggests that unilateral countermeasures by third states are prohibited in international law. However, it does not rule out collective action under a treaty arrangement or under the auspices of the UN.

The contrary view is that the legitimacy of collective countermeasures in international law is based on the assumption that the multilateral agreements "from a broader perspective have a multilateral effect in the event of their violation".³⁸ Thus, a breach of a provision of a multilateral agreement by a member state impairs the interest of all other members, and therefore collective measures are required as a last resort remedy. The purpose of these collective measures is to induce compliance. Such a rule of international law will give equal protection particularly to smaller states within a treaty arrangement.

The recent state practice differs somewhat from the traditional view, described in preceding paragraphs, held by the ICJ. During the Persian Gulf War between Iraq and Iran, navigation of neutral vessels was endangered in the Persian Gulf. Some neutral states deployed forces to protect their flags and other neutral-flag vessels from the two

warring nations. The UN did not oppose the actions of the neutral states in deploying their forces. Although this deployment of forces was collective in nature, it is difficult to measure its legal significance without any treaty arrangement behind such actions.

ILC Article 54: Codification of International Law Regarding Collective Countermeasures

Article 54 of the ILC contains a general principle about “*Measures taken by States other than an injured State*”; it states,

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Article 48 is about “*Invocation of responsibility by a State other than an injured State*”.³⁹

An important argument against the application of the general principle of collective retaliation contained in Article 54, and in favour of the *lex specialis* (or self-contained regime), is that it is the will of the parties to a treaty that they want to be bound by its regime, whereas the application of the general principle may be interpreted as contrary to the will of the parties.

The general principle of international law would apply in the case of *lex specialis* (or self-contained regime) when this regime fails to provide a remedy, but this is an unlikely scenario in the case of the WTO. Like most self-contained regimes, the WTO dispute settlement mechanism is capable of providing a remedy in every conceivable scenario, and to date it has done so successfully. Its last resort remedy, the withdrawal of concessions, is an adequate remedy here. In cases where compliance with the dispute settlement reports has been contested, the DSU provides recourse to the dispute settlement system under DSU Article 21(5). So, in circumstances of contested compliance and non-compliance the DSU provides adequate remedies, to which the parties have agreed a priori.

WTO Countermeasures: Illusory in Some Circumstances

The primary purpose of retaliations is to induce compliance with WTO obligations. This purpose can only be achieved if there are substantial trade relations between the winning and the losing states. In a scenario where the opposing parties are a small developing state and a developed state, trade relations between them are likely to be minimal. In such circumstances, retaliatory measures by a developing country are likely to be ineffective in inducing the desired compliance with WTO rules from a developed state. The case *US–Gambling* is an example of this. This lack of efficacy of

the retaliatory measures and the consequent dissatisfaction of the winning party are the main complaints.

Nevertheless, this inadequacy cannot be attributed to the failure of the WTO dispute settlement mechanism; it should be attributed rather to the nature of the WTO Agreement itself. Here, the issue of whether the treaty arrangements should be renegotiated to achieve different results is up to the member states; it is a debatable issue whether present treaty arrangements should be changed merely to benefit the developing states disproportionately. This would be an arbitrary and unacceptable change for the developed states.

This failure to induce compliance does not mean that the WTO dispute settlement system cannot function properly. Rather, quite the opposite is true; it shows the system's ability to deal with cases where compliance has become impossible and the withdrawal of concessions is the only practical and meaningful way out. Thus, there is an air of predictability to the whole WTO enforcement process. The withdrawal of concessions works as a valve in extreme situations. This enforcement process displays the success of the WTO rules and the WTO as an institution – they are capable of providing solutions for trade disputes between member states in all circumstances.

In the above scenario of a dispute between developed and developing states, the fact that as countermeasures the retaliatory sanctions are illusory in nature – meaning that the winning state does not benefit from this situation in any way – is not material in the context of the overall success of the WTO as an institution. The issue here is not to seek benefit for the prevailing state but simply to stop the nullification and impairment of the benefits of the winning state. The withdrawal of concessions achieves this aim, and it allows the member states to reorganise their trade relations afresh. This represents a desirable solution for a very difficult situation where two parties have reached a dead end. Any other solution that is coercive in nature or has an element of punishment in it would be counterproductive in terms of facilitation of trade and the fundamental principles of the WTO.

If collective measures are used against the respondent state, the only way out left to that state is to withdraw all its commitments under the relevant schedules. For example, this result was achieved by the United States in the *US–Gambling case* when it withdrew its commitments under GATS Article XXI. The idea of collective retaliations is repugnant to the idea of liberalisation of global trade that underpins the WTO. Collective retaliation does more harm than good; it represents a non-tariff barrier to international trade.

The problem is that proponents of the collective retaliation theory would like to see the WTO remedies from the perspective of reparative and punitive theories of

justice,⁴⁰ whereas WTO remedies are distinct, because primarily they seek compliance with WTO rules. Therefore, in any case, once a violation has been identified the parties are left to negotiate a settlement. The purpose is not to compensate the injury or punish the wrongdoer; rather, it is to create a legal situation where the chances of the same wrong happening again are minimized. Thus, the WTO remedies are similar to the declarative relief traditionally granted in public international law. This is a new approach to wrongful acts by one member state against another within a treaty arrangement. In a way, this innovative theorisation of remedies in international law presents a challenge to a developing international legal system that also leans towards reparative and punitive justice. The problem with the collective retaliation theory is that it is retrogressive in nature, and its proponents fail to see this. WTO remedies are associated with the ethos of a new, developing international legal system.

Conclusion

WTO law is *lex specialis*, a self-contained law; it has its own enforcement mechanism. Article 22 of the DSU provides for last resort countermeasures, that is to say the withdrawal of the negotiated schedules of concessions. Critics of Article 22 countermeasures say these measures are not coercive enough, and in the face of their ineffectiveness the general principle contained in Article 54 of the Draft Articles on State Responsibility (ILC), which allows the application of collective countermeasures, should apply. But the reality is that Article 54 ILC does not apply to DSU rules, because the DSU is a self-contained system regarded as *lex specialis*. Article 55 ILC permits this self-contained legal system. The DSU is able to deal with all kinds of circumstances relating to the enforcement of member states' obligations. The idea of collective retaliations is repugnant to the ideals of the WTO, that is to say to liberalization and market access. The idea of collective retaliations is a step backward and inherently amounts to a non-tariff barrier to international trade.

Endnotes

1. E.g., EC–Bananas (US), EC–Hormones (US, Canada), Brazil–Aircraft and Byrd Amendment.
2. United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS 285; short title, US–Gambling.
3. Yen Kong Ngangjoh H., “Collective Countermeasures and the WTO Dispute Settlement: ‘Solidarity Measures Revisited’,” *Nordic Journal of Commercial Law* 2004/2: p.2. See generally Perez-Aznar, *Countermeasures in the WTO Dispute Settlement System* (Geneva: Graduate Institute of International Studies).
4. I.C.J. Reports, 1980: p.3.
5. *Ibid.*, p.40.
6. *Ibid.*, p.39.
7. McRae, D. M., “The Contribution of International Trade Law to the Development of International Law,” *RCADI v.260* (1996): pp.99-238; see p.117.
8. Voitovich, S. A., *International Economic Organizations in the International Legal Process* (Dordrecht; Boston: Martinus Nijhoff, 1995), p.8.
9. Garcia, R. M., *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs* (Geneva: Studies and Working Papers, HEI, 2001), p.45.
10. United States–Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, p.16, para.17; see Marceau, G., “A Call for Coherence in International Law. Praises for the Prohibition Against ‘Clinical Isolation’ in the WTO Dispute Settlement,” *JWT* vol.33, n.5 (1999): pp.87-152, p.107.
11. Mus, J. B., “Conflicts between Treaties in International Law,” *Netherlands International Law Review* vol. XLV (1998): pp. 208-232, p.218.
12. Thirlway, H. W. A., “The Law and Procedure of the International Court of Justice,” *BYIL* 1989: p.103.
13. Crawford, J., *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge-New York: Cambridge University Press, 2001), p.307; see also Garcia, R. M., *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs* (Geneva: Studies and Working Papers, HEI, 2001), p.3.
14. Garcia, R. M., *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs* (Geneva: Studies and Working Papers, HEI, 2001), p.3.
15. Crawford, J., *op. cit.*, p.308.
16. Panel report, WT/DS58/R, DSR 1998, VII: p.2821, para.7.8; Appellate Body Report, WT/DS58/AB/R, para.129.
17. United States–Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, p.16, para.17.
18. Panel report, WT/DS163/R, DSR 2000, VIII: pp.3757-3758, para.7.101.
19. WT/DS27/R, paras.133 and 136.

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20. United States–Measures Affecting Imports of Woven Wool Shirts and Blouses, WT/DS33/AB/R, para.14.
 21. European Communities–Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R, para.10
 22. United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, DSR 1998, VII: p.2821, para.7.8; WT/DS58/AB/R, para.107.
 23. United States–Measures Affecting Imports of Woven Wool Shirts and Blouses, WT/DS33/AB/R, para.19; Australia–Measures Affecting the Importation of Salmon, WT/DS18/AB/R, para.223.
 24. Canada–Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, para.202.
 25. European Communities–Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R, para.132.
 26. European Communities–Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R, para.154.
 27. United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, para.122.
 28. Guatemala–Definitive Anti-Dumping Measures on Gray Portland Cement from Mexico, WTDS156/R, para.8.24
 29. EC–Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R, para.120.
 30. Pauwelyn, J., “The Role of Public International Law in the WTO: How far can we go?” *AJIL* vol. 95: pp.535-578, p.540
 31. *Ibid.*, p.561.
 32. Bartels, L., “Applicable Law in WTO Dispute Settlement Proceedings,” *JWT* vol. 35, n.3 (2001): pp.499-519, p.516.
 33. WT/DS163/R, DSR 2000, VII: p.3756, para.7.96.
 34. See articles 3.2, 19.2 of the DSU.
 35. *I.C.J. Reports* 6
 36. (*Nicaragua v. United States*) 1986, *I.C.J. Reports* 14, paras.106-11.
 37. *Ibid.*, paras.146-49.
 38. Yenkong Ngangjoh H., “Collective Countermeasures and the WTO Dispute Settlement: ‘Solidarity Measures Revisited’,” *Nordic Journal of Commercial Law* 2004/2: p.3.
 39. 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. 3. The requirements for the invocation of

responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.
40. Chorzow Factories case (1927).

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