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THE USE OF CUSTOMARY INTERNATIONAL LAW AND GENERAL PRINCIPLES BY THE APPELLATE BODY AND THE CRISIS IN WTO DISPUTE SETTLEMENT

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Abstract

This research studies the use of customary international law and general principles in the Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO). Its objective is two-fold. First, from the viewpoint of the sources of international law, it aims at understanding how this international jurisdiction identifies and applies these sources of law, which for long have been the object of doctrinal debate due to their unclear content and scope. By providing an overview of the methodology employed by the WTO Appellate Body (AB) when resorting to these sources, this study offers the practice of WTO adjudicators and its contribution to the debate of customary international law and general principles. The second aim is to understand the influence that the resort to customary international law and general principles, which are non-WTO sources of law, has on the jurisdiction of the WTO DSM and on the claims expressed by some Members that the AB has indulged in judicial overreach.

Chapter 1 sets the definitional and theoretical framework for the development of the research. It provides a terminological clarification of the meaning of 'general principles' and 'customary international law' for the purposes of this research. Moreover, it also revisits the debate of the meaning of jurisdiction and applicable law in the WTO DSM. Finally, it describes the criticisms against the AB's interpretative practices in order to identify possible benchmarks for the assessment of what can be considered 'judicial overreach'.

Analysing all AB reports issued to date, it is possible to categorize four fields in which these sources of general international law are used: treaty law, rules on state responsibility, procedural principles and substantive principles. The thesis is divided into corresponding chapters (Chapters 2-5).

Chapters 2 to 5 are each divided into two parts. The first part of each chapter describes the methodology employed by the AB when resorting to these sources. It aims to describe and examine: the legal basis indicated for resorting to them within the WTO legal system, the method of identification of general principles and customary international law in the reports, the functions of these concepts in WTO legal system, and whether there is agreement or disagreement between the disputants with regard to the content of these sources. The second part of each chapter studies the Members' reactions upon circulation of relevant AB reports in Dispute Settlement Body meetings and examines how the use of these sources impacts the mandate of the AB. The potential impact of customary international law and general principles on the jurisdiction of the AB varies according to the fields of these sources of law.

Finally, from the foregoing chapters, Chapter 6 draws general conclusions on the use of general principles and customary international law by the AB. First, it systemically examines the findings of the previous chapters to draw conclusions regarding the methodology the Appellate Body follows, and the origin, nature and scope of these sources. Second, Chapter 6 proposes possible parameters to guide the use of general principles and customary international law in WTO adjudication to avoid claims of judicial overreach.

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Short name	Full name, date of circulation and WTO document number
US — Gasoline	*United States — Standards for Reformulated and Conventional Gasoline*
	Panel Report (29 January 1996) WT/DS2/R
	Appellate Body Report (29 April 1996) WT/DS2/AB/R
Japan — Alcoholic Beverages II	*Japan — Taxes on Alcoholic Beverages*
	Appellate Body Report (4 October 1996) WT/DS8/AB/R
Australia — Salmon	*Australia — Measures Affecting Importation of Salmon*
	Appellate Body Report (20 October 1998) WT/DS18/AB/R
Brazil – Desiccated Coconut	*Brazil — Measures Affecting Desiccated Coconut*
	Panel Report (17 October 1996) WT/DS22/R
	Appellate Body report (21 February 1997) WT/DS22/AB/R
EC – Hormones	*European Communities — Measures Concerning Meat and Meat Products (Hormones)*
	Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R
EC — Bananas III	*European Communities — Regime for the Importation, Sale and Distribution of Bananas*
	Appellate Body Report (9 September 1997) WT/DS27/AB/R
	Article 22.6 Arbitration Report (9 April 1999) WT/DS27/ARB
US — Shirts and Blouses	*United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*
	Panel report (6 January 1997) WT/DS33/R
	Appellate Body report (25 April 1997) WT/DS33/AB/R
India – Patents	*India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*
	Panel Report (5 September 1997) WT/DS50/R
	Appellate Body Report (19 December 1997) WT/DS50/AB/R
US – Shrimp	*United States — Import Prohibition of Certain Shrimp and Shrimp Products*
	Appellate Body report (12 October 1998) WT/DS58/AB/R

EC – Computer Equipment	*European Communities — Customs Classification of Certain Computer Equipment* Panel Report (5 February 1998) WT/DS62/R; WT/DS67/R; WT/DS68/R Appellate Body Report (5 June 1998) WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R
Japan – Agricultural products II	*Japan — Measures Affecting Agricultural Products* Appellate Body Report (22 February 1999) WT/DS76/AB/R
Chile — Alcoholic Beverages	*Chile — Taxes on Alcoholic Beverages* Appellate Body Report (13 December 1999) WT/DS87/AB/R
Canada – Dairy	*Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products* Appellate Body Report (13 October 1999) WT/DS103/AB/R
US — FSC	*United States — Tax Treatment for "Foreign Sales Corporations"* Appellate Body Report (24 February 2000) WT/DS108/AB/R Article 21.5 Appellate Body Report (14 January 2002) WT/DS108/AB/RW Article 22.6 Arbitration Report (30 August 2002) WT/DS108/ARB
Mexico — Corn Syrup	*Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW
US — 1916 Act (EC)	*United States — Anti-Dumping Act of 1916* Appellate Body Report (28 August 2000) WT/DS136/AB/R; WT/DS162/AB/R
US — Line Pipe	*United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* Appellate Body Report (15 February 2002) WT/DS202/AB/R
Chile — Price Band System	*Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products* Appellate Body Report (23 September 2002) WT/DS207/AB/R

US — Carbon Steel	*United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* Appellate Body Report (28 November 2002) WT/DS213/AB/R
US — Offset Act (Byrd Amendment)	*United States — Continued Dumping and Subsidy Offset Act of 2000* Panel Report (16 September 2002) WT/DS217/R; WT/DS234/R Appellate Body Report (16 January 2003) WT/DS217/AB/R; WT/DS234/AB/R
EC – Sardines	*European Communities — Trade Description of Sardines* Appellate Body report (26 September 2002) WT/DS231/AB/R
US — Corrosion-Resistant Steel Sunset Review	*United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* Appellate Body Report (15 December 2003) WT/DS244/AB/R
US — Upland Cotton	*United States — Subsidies on Upland Cotton* Recourse to Article 22.6 Arbitration Report (31 August 2009) WT/DS267/ARB/267
EC — Chicken Cuts	*European Communities — Customs Classification of Frozen Boneless Chicken Cuts* Appellate Body report (12 September 2005) WT/DS269/AB/R; WT/DS286/AB/R
Canada — Wheat Exports and Grain Imports	*Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain* Appellate Body Report (30 August 2004) WT/DS276/AB/R
EC — Export Subsidies on Sugar	*European Communities — Export Subsidies on Sugar* Panel Report (15 October 2004) WT/DS283/R Appellate Body Report (15 October 2004) WT/DS283/AB/R
US — Gambling	*United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* Appellate Body Report (7 April 2005) WT/DS285/AB/R
EC - Biotech	*European Communities — Measures Affecting the Approval and Marketing of Biotech Products* Panel Report (29 September 2006) WT/DS291/R

US — Countervailing Duty Investigation on DRAMs	*United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*
	Appellate Body Report (27 June 2005) WT/DS296/AB/R
Mexico – Soft Drinks	*Mexico — Tax Measures on Soft Drinks and Other Beverages*
	Appellate Body Report (6 March 2006) WT/DS308/AB/R
EC and certain member States — Large Civil Aircraft	*European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft*
	Appellate Body Report (18 May 2011) WT/DS316/AB/R
US — Continued Suspension	*US — Continued Suspension of Obligations in the EC — Hormones Dispute*
	Appellate Body report (16 October 2008) WT/DS320/AB/R
Canada — Continued Suspension	*Canada — Continued Suspension of Obligations in the EC — Hormones Dispute*
	Appellate Body report (16 October 2008) WT/DS321/AB/R
US — Zeroing (Japan)	*United States — Measures Relating to Zeroing and Sunset Reviews*
	Article 21.5 Appellate Body Report (18 August 2009) WT/DS322/AB/RW
Brazil — Retreaded Tyres	*Brazil — Measures Affecting Imports of Retreaded Tyres*
	Panel report (12 June 2007) WT/DS332/R
	Appellate Body Report (3 December 2007) WT/DS332/AB/R
China — Publications and Audiovisual Products	*China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*
	Appellate Body Report (21 December 2009) WT/DS363/AB/R
Thailand — Cigarettes (Philippines)	*Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*
	Appellate Body Report (17 June 2011) WT/DS371/AB/R
US — AD & CVD (China)	*United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*
	Panel Report (22 October 2010) WT/DS379/R
	Appellate Body Report (11 March 2011) WT/DS379/AB/R
US — Shrimp II (Viet Nam)	*United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam*

	Appellate Body Report (7 April 2015) WT/DS429/AB/R
US – Carbon Steel (India)	*United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*
	Appellate Body Report (8 December 2014) WT/DS436/AB/R
Argentina – Import Measures	*Argentina — Measures Affecting the Importation of Goods*
	Appellate Body Report (15 January 2015) WT/DS438/AB/R
India — Solar Cells	*India — Certain Measures Relating to Solar Cells and Solar Modules*
	Panel Report (24 February 2016) WT/DS456/R
	Appellate Body Report (16 September 2016) WT/DS456/AB/R
Peru — Agricultural Products	*Peru — Additional Duty on Imports of Certain Agricultural Products*
	Appellate Body Report (20 July 2015) WT/DS457/AB/R
EU — PET (Pakistan)	*European Union — Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*
	Appellate Body Report (16 May 2018) WT/DS486/AB/R
Korea — Radionuclides (Japan)	*Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*
	Panel Report (22 February 2018) WT/DS495/R
	Appellate Body Report (11 April 2019) WT/DS495/AB/R

Table of general abbreviations

AB	*Appellate Body* (of the World Trade Organization)
ADA	*Anti-Dumping Agreement*
ASCM	*Agreement on Subsidies and Countervailing Measures*
ATC	*Agreement on Textiles and Clothing*
DASR	*Draft articles on Responsibility of States for Internationally Wrongful Acts*
DSM	*Dispute Settlement Mechanism* (of the World Trade Organization)
DSU	*Understanding on rules and procedures governing the settlement of disputes*
FTA	*Free Trade Agreement*
GATT	*General Agreement on Tariffs and Trade*
ICJ	*International Court of Justice*
ILC	*International Law Commission*
ITLOS	*International Tribunal for the Law of the Sea*
NAFTA	*North American Free Trade Agreement*
PCIJ	*Permanent Court of International Justice*
PTA	*Preferential Trade Agreement*
SPS	*Agreement on the Application of Sanitary and Phytosanitary Measures*
TBT	*Agreement on Technical Barriers to Trade*
VCLT	*Vienna Convention on the Law of Treaties*
WTO	*World Trade Organization*
WTO Agreements	*The Marrakesh Agreement and the documents contained in its four annexes*

Relevant WTO provisions

The General Agreement on Tariffs and Trade (GATT)

Article XX: General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
…
(b) necessary to protect human, animal or plant life or health;
…
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Understanding on rules and procedures governing the settlement of disputes (DSU)

Article 3.2
The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 11. Function of Panels
The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

INTRODUCTION

1 The background: the sources of international law revisited in times of change

More than 70 years have passed since the adoption of the Statute of the International Court of Justice (ICJ), and almost 100 years since of the drafting of the Statute of the Permanent Court of International Justice (PCIJ). These codified, under the PCIJ-ICJ's Statute, the 'sources of international law', among which international custom and general principles. Despite the centrality of these topics in international law scholarship over these decades, some aspects remain obscure. Among these controversies, the nature and scope of customary international law and general principles remain subject to debate by scholars and practitioners. The practice of international adjudicators when ascertaining and resorting to these sources has proven to be one valuable way to investigate questions connected to customary international law and general principles.

Since the establishment of the ICJ in 1945, many other international courts and tribunals have emerged in international adjudication. One of these is the World Trade Organization's (WTO) dispute settlement mechanism (DSM), many times described as the 'crown jewel' of the multilateral trading system.[1] This system is, however, now under crisis, with the incoming probable demise of the organisation's standing judicial body, the Appellate Body (AB), accused of judicial activism by some of its Members.[2]

According to Article 3.2 of the DSU, DSM reports cannot 'add to or diminish rights and obligations' agreed by the negotiators and contained in the WTO Agreements. Moreover, WTO dispute settlement has limited material jurisdiction, and can only ascertain violations of WTO obligations. In this sense, one may wonder to what extent resort to customary international law and general principles by the WTO DSM, sources which are extraneous to its jurisdictional mandate, may have contributed to this state of affairs.

These two elements – the debates surrounding customary international law and general principles and the crisis in the WTO dispute settlement mechanism – set the background for the present research.

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[1] Thus called, *inter alia*, by John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) at 135.

[2] See generally Robert McDougall, 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance' (2018) 52 Journal of World Trade 867.

2 Object and scope of the present work

This work reviews the practice of the WTO Appellate Body when resorting to customary international law and general principles. It explores two central questions.

First, how does the case law of this international jurisdiction contribute to clarify the understanding of general principles and customary international law as sources of international law? To answer this question, this work focuses its analysis on four points, which are examined throughout the next chapters:

i. the distinction (if there is one) between customary international law and general principles in the AB's case law;

ii. the method through which the AB identified the existence and content of general principles and customary international law (hereinafter generally referred to as 'method of identification');

iii. the legal justification indicated for resorting to sources of law which are extraneous to the WTO legal system ('legal basis');

iv. the function performed by these sources of law in WTO adjudication (interpretative or gap-filling).

Second, can the AB's approach in resorting to these extraneous sources of law amount, or indeed has amounted, to claims of judicial overreach? In particular, has it contributed to the AB's existential crisis culminating in 2019? Three elements are considered throughout this work to address this question:

i. the Members' perceptions and expressed concerns relating to resort to customary international law and general principles in WTO adjudication;

ii. whether the AB's methodology when resorting to these sources influences criticisms of judicial overreach by WTO Members;

iii. whether reliance on these sources affected (expanded or limited) the material jurisdiction of the AB.

Customary international law and general principles have recently been included in the working list and examined by the International Law Commission (ILC).[3] Among

[3] The topic 'Formation and evidence of customary international law' was included in the works of the ILC in 2012. In 2013, the Commission decided to change the title of the topic to 'Identification of customary international law'. The topic 'General principles of law' was officially included in the programme of work in 2018.

the elements which remain obscure after years of debate are the method of identification of these sources, their content and scope.

The ILC has adopted authoritative conclusions on the identification of customary international law.[4] Although the ILC's conclusions and accompanying commentaries provide clarifications on the theoretical underpinnings for the identification of a customary rule of international law, in practice the exercise of ascertaining the existence of such a rule still encounters difficulties. For example, there are claims that while in theory determining the existence of the two constitutive elements of customary international law, practice and *opinion juris*, is the accepted methodology for the identification of a customary rule, the practice of international tribunals does not follow such methodology.[5] This arguably undermines legal certainty in international adjudication.

With respect to general principles, the ILC has not yet adopted a final or conclusive document, but merely appointed the 'scope of the topic and legal questions to be addressed'.[6] The notion of general principles is arguably even more obscure than that of customary law, since there is no widely accepted definition on the meaning of general principles and their elements, their origin or their method of identification. More generally, the relationship and the dividing line between general principles and customary rules is also unclear.

The practice of international courts and tribunals can provide clarification on these questions. International decisions are more readily available and easily accessible than state practice. Thus, a systematisation of how international decisions refer to these sources of law may provide a significant contribution to better understanding the content and scope of these sources and how they are ascertained in practice.

Against this backdrop, the present study aims to provide a contribution to this debate by reviewing the practice of the WTO DSM,[7] and examining how the caselaw of

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[4] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 117 ff.

[5] See, most notably, Stefan Talmon, 'Determining Customary International Law: The ICJ's methodology between induction, deduction and assertion' (2015) 26(2) EJIL 417-443.

[6] See ILC, Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017) 234 ff.

[7] Nolte observes that the jurisprudence of the WTO dispute settlement mechanism 'makes an influential contribution to the methods of interpretation of international norms' (G Nolte, Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body, in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 140.

this international organisation, in particular through reports of its AB have identified and employed customary international law and general principles.

Studying the use of these sources of general international law in the practice of the AB has one particularity: the WTO DSM is not of general jurisdiction. It is well-acknowledged that the panels and the AB have jurisdiction to decide on claims based only on the so-called covered agreements of the WTO.[8] Still, the legal basis for invoking non-WTO sources of law within dispute settlement remains blurred.

The AB has stated on its first report that WTO Agreements are 'not to be read in clinical isolation from international law'.[9] This has meant that non-WTO law can be used as an interpretative tool for provisions and terms contained in covered agreements, while the same sources cannot be *enforced* by WTO dispute settlement. However, the difference between resorting to these sources as auxiliary interpretative tools and applying these sources in a way that oversteps the jurisdictional limitations of the dispute settlement organs could also benefit from further clarification. Thus, in addition to an examination on the methodological patterns followed by WTO adjudicators practices to identify and determine the existence of general principles and customary international law, the indication (or lack thereof) of the relevant legal basis for invoking theses sources within WTO DSM will also be scrutinized by this work.

The relationship between these norms and the organisation's jurisdiction raises a second question which cannot be left aside when studying the use of general international law in the context of WTO dispute settlement: the claims of judicial activism resulting AB interpretative practices. In the last years, the concern long expressed by certain WTO members that some of the Appellate Body practices indulged in undue judicial activism have escalated to a point that threats the very existence of WTO dispute settlement. Criticisms towards the Appellate Body include procedural discontents, but also interpretative practices in the reports.[10]

While such criticisms have not indicated that the use of general international law by WTO adjudicators would be a direct source of judicial activism, such references may

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[8] The most well-known opponent to this view is Pauwelyn. See Joost Pauwelyn, *Conflict of Norms in Public International Law How WTO Law Relates to other Rules of International Law* (CUP 2003).

[9] *United States — Standards for Reformulated and Conventional Gasoline*, Appellate Body Report (29 April 1996) WT/DS8/AB/R at 17.

[10] See generally McDougall (n 2); Jennifer Hillman, *Three approaches to fixing the World Trade Organization's Appellate Body: the good, the bad and the ugly?*, available at https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf, accessed 22 January 2019.

nonetheless contribute to Member's perceptions of judicial activism. In particular, due to their unwritten character, customary international law and general principles are singled out and identified in authoritative form primarily by judicial activity.

For the same reason, the possibility of judicial discretion in the identification and application of these sources is very broad. The WTO adjudicator must not only resort to these sources within the limits of its jurisdictional mandate, but should also identify the existence and indicate the legal basis for recurring to these sources within the same limits in order to validate its choice to refer to these sources.

It is of great relevance to couple the analysis of the methodology employed by WTO adjudicators in resorting to customary international law and general principles with an assessment of how these sources can contribute to claims of judicial overreach. The two scopes are interconnected, as the lack of clear methodology may be a factor impacting criticisms of activism.

3 Methodology

3.1 Material and selection of reports

The present study is based primarily on the analysis of Appellate Body reports. This choice is explained by two factors: first, the AB has stated that panels are 'expected' to follow Appellate Body's conclusions in earlier disputes.[11] Albeit there is no formal hierarchy between panel and AB reports in WTO dispute settlement, the latter create legitimate expectations and legal certainty inside WTO dispute settlement.[12] Therefore, one can claim that there exists a higher degree of authoritativeness in AB reports in relation to panel reports.[13] Second, it is primarily the practice of the AB that has been

[11] See *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Appellate Body Report (29 November 2004) WT/DS268/AB/R, para 188.

[12] Moreover, panels are composed similarly to arbitration, in an *ad hoc* basis. In this sense, it is submitted here that, to some extent, parallel shortcomings apply with respect to case law examinations. In the words of Guillaume, '[arbitral] tribunals are normally constituted for each different arbitration, and thus lack the permanence that is characteristic of a jurisdiction. Furthermore, their decisions are of variable quality. What is more, not all of their decisions are rendered public, and hence the tribunals do not have knowledge of all decisions previously rendered. Thus, for arbitrators, precedent plays a much lesser role than for judges. Legal coherence sometimes suffers as a consequence' (G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2(1) Journal of International Dispute Settlement 5–23, at 14, footnotes omitted).

[13] This view is however criticised by the United States. In criticising this finding, the United States claimed that 'There is a significant difference between stating that one would expect panels to reach similar conclusions where the issues are similar (i.e., conducting their own objective examination, they may reach a similar outcome), on the one hand, and saying that one would expect a panel to simply follow a prior

criticised with claims of judicial activism, for which reason focusing on its case law is of interest.

This work also makes occasional reference to panel reports and other dispute settlement proceedings, when relevant. In these cases, the reason for examining such reports is explained. Other materials that have been used for the development of this research include Dispute Settlement Body (DSB) minutes of meetings, where members express their views towards DSM organs prior to their adoption[14] and official documents issued by governmental agencies of WTO Members as well as relevant scholarship.

The reports studied in this research were pinpointed in two stages, according to the following methodology. Initially, all reports issued by the AB were analysed and systematized in order to identify general patterns on the references to customary international law and general principles through the identification of key words in the text of the reports.[15] Second, through an examination of the relevance of the references to customary rules and general principles to the reasoning and outcome of the report, some of the reports pinpointed in the previous stage were selected for more thorough analysis. This stage also added AB reports which had not been covered in the first stage due to limitations in the key words, but which were identified by cross-references in other reports or mentioned in relevant scholarship.

The first stage served to draw a general overview of the use of customary international law and general principles by the WTO AB, without reaching specific scientific conclusions. The focus of the analysis provided in this research is based on the second stage of selection of reports. The reports described in the following chapters were pinpointed according to the relevance of the legal reasoning developed by the Appellate

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decision without conducting an objective examination of its own, on the other'. See 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, December 18, 2018, available at geneva.usmission.gov/2018/12/19/statements-by-the-united-states-at-the-december-18-2018-dsb-meeting/, accessed 20 December 2018, 27 para 84..

[14] AB reports are adopted virtually automatically by the WTO Dispute Settlement Body (adoption (comprised by the membership of the organisation), since the WTO dispute settlement mechanism follows the practice of reversed consensus in its decision-making process. This means that, unless there is consensus not to adopt, the report will be adopted. As it is almost impossible to achieve reversed consensus, since at least the 'winning' party will favour adoption, this system amounts to the quasi-automaticity of the adoption of the reports. Therefore, even though in theory the reports issued are not binding *per se*, in practice there is not much to be done to prevent adoption even if a large majority of WTO membership opposes to the reasoning and findings in the report.

[15] The reports were selected and systematized according to references to the following terms: 'customary', 'international law', 'principle', 'draft articles', 'state responsibility'. Some references to these terms were only made in passing or superficial manner (without an immediate context related to the use of customary international law or general principles); in these cases, the reports were not taken into account for the initial systematization phase. This research included reports issued until 16 June 2019.

Body with respect to findings regarding the identification and use of customary international law and general principles.

3.2 Structure

This work is divided into six chapters. Chapter 1 sets the terminological and methodological background for the development of this research. It first advances terminological clarifications for the main concepts used in this work, in particular the notions of general international law, customary international law and general principles. These definitions also require a brief explanation on the theoretical underpinnings of customary international law and general principles. Moreover, Chapter 1 also reviews some elements of WTO dispute settlement mechanism, in particular its jurisdictional limitations. Finally, it explains the benchmarks against which the notion of 'judicial activism' is considered. For the purposes of the present research, judicial activism by the Appellate Body will be generally considered in relation to two elements for which AB reports have been criticised: unnecessary findings to resolve a dispute and conclusions which amount to adding to or diminishing rights of WTO Members.

Chapters 2 through 5 describe and analyse the AB's references to general principles and customary international law according to four different categories: treaty law and treaty interpretation (Chapter 2); rules on state responsibility (Chapter 3); procedural principles (Chapter 4) and substantive principles (Chapter 5). This structure was determined following the first stage review of AB reports described above. By systematising all AB reports which refer to general principles and customary international law, it was possible to conclude that the AB refers to customary rules and general principles related to these 'fields' and categorises the pinpointed references accordingly.

The methodological choice of dividing the present research according to the 'field' of sources invoked in the AB's case law is due to three reasons. First, a division according to the nature of the customary international law and general principles under scrutiny allows for a clear organisation of this work. Second, the nature of these sources may also bear differences in the methodology employed for their identification and application, as will be further developed in Chapter 1. Third, their different content and scope also entail different interpretative implications for the adjudicator. For this reason, they may entail different legal consequences which may contribute to claims of judicial activism.

Each of these chapters describes the methodology employed by the AB for the use of customary rules and general principles. Then, they analyse how reference to general principles and customary international law in each of these contexts can potentially contribute to the perception of judicial activism.

Chapter 6 assembles the conclusions reached in the preceding chapters into an overview of the problems addressed in this work. By systematically assessing the results found in the preceding chapters, the research then provides an overview of the questions described above.

4 Relevance

The aim of this study is two-fold: first, from the viewpoint of the sources of international law, to understand how the WTO AB identifies and applies these sources of law, that for long have been object of doctrinal debate due to their unclear content and scope. By providing an overview on the methodology employed by the Appellate Body in doing so, this study contributes to the broader debate under general international law on the identification, differentiation between and application of general principles and customary international law. The second aim is to understand how the use of these sources of law may be an element contributing to claims of judicial activism by WTO adjudicators.

Although at the time of writing the functioning of the AB (and arguably of WTO dispute settlement) is under menace due to the blocking of the election of new members, this research remains relevant. WTO dispute settlement constitutes an international jurisdictional system, and the case law of the AB contributes to the study of interpretation and application of the sources of international law. Indeed, the ILC, in the works relating to both customary international law and general principles, has acknowledged the importance of including international jurisprudence on the material to be studied.[16] The research also advances a study on the methodology through which this international jurisdiction identifies these sources of law.

[16] See the ‘Range of materials to be consulted’ for the works on customary international law in Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10 98; and the proposed method of work for the study of general principles in ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 234.

In this vein, the topics here examined also touch upon other incidental questions, such as the line between applicable law, jurisdiction, interpretation and application, which are also subject to scholarly debate.[17] This research also contributes to these debates inasmuch as it analyses the practice of a well-established international forum with particular jurisdiction.

Finally, as the crisis in the WTO dispute settlement system has shown, there is a need to rethink and reshape some of the interpretative practices advanced by WTO adjudicators. This is not a matter of stating whether the criticisms which led to the system's crisis are right or wrong; it is a matter of strengthening internal legitimacy for the benefit of the trade system as a whole. In the words of Lauterpacht, '[t]he very existence of an international judiciary might be imperilled if […] the conviction gained ground among Governments that circumspection and restraint are absent in the conflict between what has been called judicial idealism and the claims of State sovereignty'.[18]

The methodology through which the WTO's permanent dispute settlement body identifies and applies customary international law can provide a better grasp on the limits on the use of these sources of law in the organisation's caselaw. By its turn, understanding such limits is a focal point to evaluate whether the use of these sources has been an element contributing (or which may potentially contribute) to judicial activism by the Appellate Body.

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[17] A known example is International Court of Justice's decision in the *Oil Platforms (Islamic Republic of Iran v. United States of America)* dispute and the ensuing doctrinal debate on the use of sources by means of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

[18] Hersch Lauterpacht, *The function of law in the international community* (first published 1933, OUP 2011) 112, footnotes omitted.

CHAPTER 1

CUSTOMARY INTERNATIONAL LAW, GENERAL PRINCIPLES AND THEIR APPLICABILITY IN WTO DISPUTE SETTLEMENT

1.1 PRELIMINARY REMARKS

International courts and tribunals are bound to decide disputes within the limits of their jurisdiction, respecting among other elements their material jurisdiction scope. As put by Judge Buergenthal in the International Court of Justice's (ICJ) case *Oil Platforms (Islamic Republic of Iran v. United States of America)*, '[s]ince this Court's jurisdiction in a particular case is strictly limited to the consent given by the parties to a case, the function of the *non ultra petita rule* is to ensure that the Court does not exceed the jurisdictional confines spelled out by the parties in their final submissions'.[1] At the same time, as argued by Judge Higgins in the same dispute, 'it is well established that the *ultra petita rule*, while limiting what may be ruled upon in its *dispositif*, does not operate to preclude the Court from dealing with certain other matters "in the reasoning of its Judgment, should it deem this necessary or desirable"'.[2]

The dispute settlement mechanism of the WTO is no exception to this. Although its jurisdiction is limited to the law contained in the multilateral trading system, non-WTO law can be invoked by parties and adjudicators. General principles and customary international law, sources which form part of the broader context of international law, can and have been used in this sense. But the balance between 'dealing with other matters when necessary' and producing a judgement that goes beyond the jurisdictional limits of a Court and indulging in judicial overreach is not always self-evident, as the Oil Platforms case well proves.[3]

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[1] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) [2003] ICJ Rep 2003, Separate Opinion of Judge Buergenthal at 273.

[2] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) [2003] ICJ Rep 2003, Separate Opinion of Judge Higgins at 228, citing *Arrest Warrant of Il April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002.

[3] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) [2003] ICJ Rep 2003. For a position about the merits of each of the separate opinions, see Campbell McLachlan 'The Principle of Systemic Integration and Article 313c of the Vienna Convention' (2005) 54(2) International & Comparative Law Quarterly 279-320. See in particular Judge Buergenthal's Separate opinion. On the significance of this dispute to the debate on jurisdiction of the ICJ and the applicable law of a dispute, see M Bothe, 'Oil Platforms Case (Iran v United States of America)', Max Planck Encyclopedia of Public International Law (2011); James A Green, 'The Oil Platforms Case: An Error in Judgment?' (2004) 9(3) Journal of Conflict and Security Law 357–386; DA Small 'The Oil Platforms case: jurisdiction through the–closed–eye of the needle' (2004) 3 Law & Practice of International Courts and Tribunals 113–24; Enzo Cannizzaro and

This research is interested in the intersection between the use of general principles and customary international in WTO dispute settlement, the jurisdictional limitations of WTO adjudication and claims of judicial overreach against the practice of the WTO Appellate Body. For this reason, this chapter is dedicated to elucidating these concepts. Therefore, Section 1.2 briefly addresses notions related to general principles and customary international and which will be used throughout this work. In this sense, an important disclaimer must be advanced: the intention is not to exhaust the theoretical and practical discussions with respect to these concepts, but merely to offer the general overview which will be followed in this work.

Section 1.3 outlines the jurisdictional limitations of WTO dispute settlement, in particular with respect its scope *ratione materiae.* Finally, Section 1.4 describes some of the criticisms by WTO Members which led to the crisis in the WTO Appellate Body. In this last section, focus will be given to the criticisms which may be related the use of customary international law and general principles in WTO adjudication.

1.2 TERMINOLOGY MATTERS: THE MEANING OF GENERAL INTERNATIONAL LAW, GENERAL PRINCIPLES AND CUSTOMARY INTERNATIONAL LAW

General principles and customary international law have long been the object of doctrinal debate, and it is far from the intention of this work to put an end to such controversies. However, for methodological purposes it is necessary to lay out the premises and to clarify the meaning intended by this work when it refers to these concepts.

Relatedly, it is also necessary to delimit what is here understood by ‘general international law’. This expression can have different connotations according to the meaning attributed to *general*: it can either refer to the subjects to which the norm is aimed at (i.e., *general* as in applicable to the whole of the international community, as opposed to one State or a group of States) or to the content of such norm (i.e., *general* rules as opposed to specific rules, such as human rights law, trade law, environmental law, etc.). For instance, ‘general international law’ is constantly used by the International Law Commission’s (ILC) report on the Fragmentation of International Law in relation to

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Beatrice Bonafé, ‘Fragmenting International Law through compromissory clauses? Some remarks on the decision of the ICJ in the *Oil Platforms* case’ (2005) 16(3) EJIL 481-497.

the *lex generalis* of 'general international law'[4] as opposed to the *lex specialis* provided by the 'self-contained regimes'.[5] Yet, the same term is used other scholars as a synonym for international law that has a universal character – that is, rules that have an application towards the ensemble of States in the international community.[6]

In this work, 'general international law' refers to the universal character of sources of international law. As put by Judge Bennouna, '*le droit international général, de par son universalité, est ce dénominateur commun auquel on se réfère, en l'absence de normes spéciales applicables, pour comprendre, interpréter et compléter, s'il y a lieu, celles-ci'*.[7] In this approach, 'general international law' comprises substantially the following sources of law: customary international law, general principles and *jus cogens*.[8] Crucially, rules of *jus cogens* are reflections of general principles and customary rules.[9] This being said, the concepts of general principles and customary international law also need clarification. To this end, Article 38(1) of the ICJ Statute is used as a departure point in light of its well-established relevance for the understanding of the sources of international law.[10]

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[4] ILC, 'Report of the Study Group of the International Law Commission on the Work of its 58th Session' (Fragmentation of International Law, 1 May-9 June and 3 July-11 August 2006) A/CN.4/L.682 ('Fragmentation').

[5] The Study Group understands self-contained regimes as sets of *lex specialis* rules that can be distinguished in three categories, which are not clearly separated: '[First,] In a narrow sense, the term is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation. [Second,] In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as 'systems" or 'subsystems" of rules that cover some particular problem differently from the way it would be covered under general law. [...] [Third], Sometimes whole fields of functional specialization, of diplomatic and academic expertise, are described as self-contained (whether or not that word is used) in the sense that special rules and techniques of interpretation and administration are thought to apply. For instance, fields such as 'human rights law", 'WTO law", 'European law/EU law", 'humanitarian law", 'space law", among others, are often identified as 'special" in the sense that rules of general international law are assumed to be modified or even excluded in their administration" (ibid 68)

[6] See Hans Kelsen, *Principles of international law* (1952) 188; Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Collected Courses of the Hague Academy of International Law, at 34; Grigory Tunkin, 'Is General International Law Customary Law Only?' (1993) EJIL537.

[7] Mohamed Bennouna, '*Le droit international entre la lettre et l'esprit* : *Cours général de droit international public'* (2017) 383 Collected Courses of the Hague Academy of International Law, at 90.

[8] Indeed, in the ongoing studies of the International Law Commission, one of the proposed criteria for the identification of *jus cogens* is that it is a 'norm of general international law", as provided for in Article 53 of the VCLT. See Conclusion 4 of the work on 'Peremptory norms of general international law (jus cogens)', ILC, 'Report of the International Law Commission on the Work of its 71st Session (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10 at 142 ('71st session'). Judge Bennouna also includes certain multilateral treaty provisions in his account of 'general international law', such as the Charter of the United Nations (Bennouna (n 7) 103).

[9] ILC, '71st session' (ibid) Conclusion 5.

[10] Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alain Pellet, *Droit international public* (8th ed, LGDJ 2009) at 126. Crucially, also the Appellate Body has recognised the importance of this provision

1.2.1 Customary international law

1.2.1.1 Definition

The traditional definition of customary law follows the wording of Article 38 of the Statute of the ICJ, which states 'international custom, as evidence of a general practice accepted as law' as a source of international law.[11] This formulation has been understood to reflect two elements which would constitute customary law: i. a general practice (objective element) which is ii. accepted as law, the so-called *opinio juris* requirement (subjective element).

While much has been written on this matter, two documents are of particular weight in the definition of customary international law: the International Law Association's 'Statement of principles applicable to the formation of general customary international law' (ILA report, 2000)[12] and the International Law Commission's 'Draft conclusions on identification of customary international law' (ILC Draft Conclusions, adopted in 2018).[13] The ILA's report focuses on the *formation* of a customary rule, while the ILC's draft conclusions focuses on its process of *identification*.

The objective element can be described as a general State practice that is 'uniform, extensive and representative' (in the words of Paragraph 12 of the ILA report), or 'general' (in the words of Conclusion 8 of the ILC draft conclusions). This means that there must be a representative endorsement of the international community (that is, it is not necessary that the practice is universal, but *general*). This endorsement is to be ascertained by the existence of a uniform, consistent practice (a practice that is the same 'on virtually all of the occasions in which [the State] engaged in the practice in question').[14] The subjective element represents the belief that this general practice is binding. This aspect is relevant to differentiate general practices that come into being and develop not due to comity or mere habit between States, but because it has a legal effect.

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from the viewpoint of sources of international law. *See US — Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R para 308.

[11] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

[12] International Law Association (ILA), 'Statement of principles applicable to the formation of general customary international law', Final report of the Committee, London Conference (2000) ('Statement').

[13] ILC, 'Report of the International Law Commission on the Work of its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 at 117 ff ('Draft Conclusions').

[14] ILA, 'Statement' (n 12) 21.

The ILA and the ILC dissent as to the importance of the two elements in ascertaining the existence of a customary rule. Albeit both these elements have been recognized by the ILC as necessary,[15] the ILA report on the formation of customary international law understands otherwise. The ILA report departs from a working definition which does not give the same weight to the subjective element.[16]

Beyond the works of the ILA and the ILC, scholars offer other legal accounts of customary international law.[17] However, they mostly represent variations of the two-element approach. This work adopts the view that the existence of a rule of customary international law is to be determined through the ascertainment of the two elements, state practice and *opinio juris*. This view, in any case, has been shared by States towards the definition and approach of customary international law.[18]

1.2.1.2 The identification of customary international law

In its Draft Conclusions on the identification of customary international law, the ILC stated that '[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.[19] The requirement of practice 'refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law' (Draft Conclusion 4). The requirement of *opinio juris* determines that

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[15] Draft Conclusion 2 of the ILC report states: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)" (ILC, 'Draft conclusions' (n 13) at 76)

[16] Paragraph iii of the Working Definition of the ILA project states that 'Where a rule of general customary international law exists, for any particular State to be bound by that rule it is not necessary to prove either that State's consent to it or its belief in the rule's obligatory or (as the case may be) permissive character'. (ILA (n 12)).

[17] See for instance, Roberts, who distinguishes between 'modern' and 'traditional' custom (A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757). Another example is the one taken by Lepard, who suggests taking into consideration the relationship between ethics and customary law (Brian D Lepard, *Customary International Law: a new theory with practical applications* (CUP 2010)). See also Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017).

[18] Fernando L Bordin, 'A Glass Half Full? The Character, Function and Value of the Two-Element approach to identifying customary international law' (2019) 21 International Community Law Review 283-306 at 292.

[19] These include a survey on diplomatic acts and correspondence; public statements made on behalf of States; official publications; government legal opinions; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; treaty provisions; conduct in connection with treaties; executive conduct; legislative and administrative acts; and decisions of national courts. Some forms of evidence may serve for the determination of both elements. ILC, 'Draft Conclusions' Conclusion 2 (n 13).

the general practice must be accepted as law, meaning that that 'the practice in question must be undertaken with a sense of legal right or obligation' (Draft Conclusion 9.1).

Both requirements must be verified against, primarily, acts of states, and evidence for their verification 'may take a wide range of forms'. The ILC Draft Conclusions lays out a detailed list of the forms of evidence which may serve as evidence for both elements when verifying the existence and content of a rule of customary international law (Draft Conclusions 6 and 10).[20] The Commission also stressed that 'a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly'.[21]

However, some authors argue that, in practice, the survey on the existence of the two elements is too demanding and sometimes even not possible to perform.[22] Talmon, for instance, enumerates four situations in which difficulties may be present in this assessment: state practice may not exist because it is too new; state practice can also be inconclusive; *opinio juris* cannot be established; there is discrepancy between state practice and *opinio juris*.[23] More broadly, Lusa Bordin indicates two practical shortcomings to this approach: first, an evidentiary challenge (it is difficult if not impossible to gather the data necessary to satisfactory conclude that there is state practice and opinio juris giving rise to a customary rule); second, what he calls an

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[20] ILC, 'Draft conclusions' (n 13), Commentary (3) to Draft Conclusion 10 at 140-141.
[21] ILC, 'Draft conclusions' (n 13) at 122.
[22] Beatrice Bonafé and Paolo Palchetti, 'Relying on general principles in international law', in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edwards Elgar Publishing 2016) 168. Petersen considers that the politics of decision-making do not require a court to develop a coherent methodology of identification of customary international law, even if this coherence may support its international legitimacy. He identifies several other 'identification devices" of customary rules rather than the assessment of its two constituting elements (Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying customary international law' (2017) 28 EJIL 366, 368 ff). He considers that '[s]tate practice is often difficult to observe and rarely homogenous' (ibid 377). Benvenisti, by its turn, argues that, when negotiations fail it is within the power of the ICJ to abuse of customary law and, without even finding practice or *opinio juris* that supports a rule, based on a logic of efficiency, it can be allowed to legislate (Eyal Benvenisti, Customary international law as a judicial tool for promoting efficiency, in E Benvenisti and M Hirsch (eds) in *The Impact of International Law on International Cooperation: Theoretical Perspectives* (CUP 2004)).
[23] Stefan Talmon, 'Determining Customary International Law: The ICJ's methodology between induction, deduction and assertion' (2015) 26(2) EJIL 417–443, at 422. Choi and Gulatti, in an empirical assessment of the methodology used by international courts for the assessment of customary international law, also reach the conclusion that '[…] international courts do not come anywhere close to engaging in the type of analysis the officially stated two-art rule for the evolution of customary international law sets up" (Stephen J Choi and Mitu Gulati, 'Customary International Law: how courts do it?', in Curtis A Bradly (ed) *Custom's future: international law in a changing world* (CUP 2016)).

'epistemological' challenge (the threshold necessary to demonstrate that the evidence is proof of *enough* practice and *opinio juris* to configure a rule of customary international law).[24]

In this sense, it has been contended that the actual application of customary international law by international courts, including the ICJ, disregards the identification of such elements as a requisite for its application as a source of law.[25] Nolte points out that 'some courts, while paying lip-service to the two-element approach, have sometimes collapsed the two elements, for example by assuming that a generally accepted text would imply that there also existed a general practice which followed the rule which is contained in the text'.[26] Gaja remarks that even the ICJ

> […] also in view of the great difficulty, bordering on the impossibility, of ascertaining the *opinio juris* and the relevant practice of a large number of States, the Court never attempted to give a full demonstration of the existence of what the same Court defines as necessary requirements for the existence of a customary rule of international law. The Court's reluctance to explain on which basis it asserts the existence of a customary rule does not affect only the statement of reasons in the Court's decisions. It goes deeper, and shows that the method used for ascertaining whether a customary rule exists does not tally with the theoretical definition.[27]

In any case, the two-element approach has been the accepted methodology for the identification of customary international law.[28] The idea an international court should

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[24] Lusa Bordin (n 18).
[25] Talmon (n 23); Petersen (n 22). For a thorough discussion on Talmon's study, See EJIL's debate on the topic: Omri Sender and Michael Wood, 'The International Court of Justice and Customary International Law: A Reply to Stefan Talmon' (30 November 2015) <https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/> accessed 09 March 2018; Harlan G Cohen, 'Methodology and Misdirection: Custom and the ICJ' (1 December 1 2015) <https://www.ejiltalk.org/methodology-and-misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj/> accessed 09 March 2018 ; Fernando L Bordin, 'Induction, Assertion and the Limits of the Existing Methodologies to Identify Customary International Law' (2 December 2015) <https://www.ejiltalk.org/induction-assertion-and-the-limits-of-the-existing-methodologies-to-identify-customary-international-law/> accessed 09 March 2018 ; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology and the Idyllic World of the ILC' (3 December 2015) <https://www.ejiltalk.org/determining-customary-international-law-the-icjs-methodology-and-the-idyllic-world-of-the-ilc/> accessed 09 March 2018.
[26] Georg Nolte, 'How to Identify Customary International Law? – On the Final Outcome of the Work of the International Law Commission (2018)', KFG Working Paper Series, n 37, June 2019 at 10.
[27] Gaja (n 6) at 37.
[28] For a thorough examination of the evolution of the two-element doctrine with respect to customary international, from the conception of Article 38(1)(b) to current days, see Jean d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 International Community Law Review 229–256, arguing that in 1920, the method to ascertain the existence of customary international law was monolithic, thereby conflating the elements of state practice and *opinio juris.* The present work, however, disagrees with the author's theory that the conflation of evidence for state practice and *opinio juris* in the same acts also

demonstrate the existence of state practice and *opinio juris* when ascertaining the existence of a customary rule has been generally accepted by scholars.[29] The combination of these two elements demonstrates the recognition of the international community of states and reinforces state consent in determining the existence of an unwritten source of obligations.[30]

1.2.2 General Principles[31]

1.2.2.1 Definition and function

Article 38(1)(c) of the Statute of the ICJ establishes 'the general principles of law recognized by civilized nations' as a source of law. The content, scope and method of identification of this source of law is perhaps even more controversial than that of customary international law. Moreover, also its role in international law is subject to debate.[32]

The role of general principles in international law can be better grasped when one takes into consideration that, originally, their insertion as a source in Article 38(1)(c) was designed to provide a gap-filling function.[33] It is worth recalling that the current paragraph (c) was actually inherited without further discussion from the analogous provision in the Statute of the Permanent Court of International Justice (PCIJ).[34] In the occasion of the drafting of the latter, there was an intense debate on whether this provision

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conflates the enquiry for the two elements, and considers that ILC Conclusions 6 and 10 do not contradict Conclusion 3, as advanced by d'Aspremont (ibid).

[29] On the other hand, some authors have argued that this two-element approach was a development of judicial practice, and in fact was not originally intended by the drafters of the Statute of the Permanent Court of International Justice. See Bordin, (n 18); J d'Aspremont (n 28) Bordin goes as far as to suggest that States are not keen on a too strict approach for the identification of customary international law (ibid, at 299-301).

[30] Bordin (n 18) 297.

[31] The term here preferred is 'general principles', instead of 'general principles of law', as to encompass both general principles deriving from national law and those derived within the international legal system.

[32] Max Sørensen, 'Principes de droit international public : cours général' (1960) 101 Collected Courses of the Hague Academy of International Law, ch 1.

[33] Many descriptions of the discussions of the Committee of Jurists in 1920 and the different approaches on the nature and scope of general principles have been written in legal scholarship. Cf, *inter alia*, Bin Cheng, *General Principles of Law as applied by international courts and tribunals* (CUP 1993) 1-22; Béla Vitanyi, 'Les positions doctrinales concernant le sens de la notion de « principles généraux de droit reconnus par les nations civiliées »' (1982) Revue générale de droit international public 48-116. For the original records of the discussion, See PCIJ, 'Advisory Committee of Jurists - Procès-Verbaux of the Proceedings of the Committee' (June 16th – July 24th 1920) (The Hague 1920) 310ff ('Procès-Verbaux').

[34] The only change to Article 38 was on its *caput*, which originally stated merely 'The Court shall apply:". The current versions states 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: […]".

should be inserted or not, mainly due to the differing views among the Advisory Committee of Jurists responsible for the drafting of the Statute of the PCIJ towards the role of the Court.

The topic was object of lengthy discussion, which revolved around what should be done in cases where the Court could not decide based on the existing rules of treaty and customary law. The debate centred on the views espoused by Mr. Root, who considered that States would not accept the jurisdiction of a Court that did not decide according solely on positive, consent-based rules, and those defended by Baron Descamps (the president of the Committee), who believed that general principles would in fact represent the 'concerns of fundamental law of justice and injustice deeply engraved on the heart of every human being',[35] and that '[t]hat was the law which could not be disregarded by a judge'.[36]

Of course, the underlying nature of this controversy touched upon other issues such as what the actual task of the World Court would be (to 'merely' settle disputes or to also develop jurisprudence?) and the limits of its jurisdiction (applying only recognized and accepted rules or also principles subject to different interpretations)[37]. Another incidental question was whether the judges should or should not declare *non liquet* when confronted with a controversy which would not be regulated by customary and conventional law.

The current wording of Article 38(1)(c) of the ICJ Statute reflects the final agreement reached by the Committee on the opposing views of Root and Descamps.[38] In sum, they translate the understanding that general principles are a way to avoid *non liquet*. The discussion that took place during these meetings did not explore with detail the content of this source of law. The main question revolved around the fact that they would give room for the judges to decide in case of insufficiency of treaties and customs – and whether this power should or should not be granted, especially when taking into consideration the fact that by that time the jurisdiction of the Court was to be mandatory

[35] PCIJ, 'Procès-Verbaux' (n 33) 310.
[36] ibid.
[37] For the discussions on the various views regarding the provision, see PCIJ, 'Procès-Verbaux' (n 33) 307 ff.
[38] According to Cheng, the final version of Article 38(1)(c) of the Statute of the PCIJ was a joint work of Elihu Root and Lord Phillimore, the latter whose views were in substance quite close to those of Baron Descamps. Cheng understands that '[r]eviewing the discussion in the Advisory Committee, it is quite plain that the Root-Phillimore amendment marked a reversal of Mr. Root's original attitude and his conversion to the views of Lord Phillimore, to whose pen it seems safe to attribute the amended draft" (Cheng (n 33) 14-15).

to all members of the League of Nations. Some principles were brought to the discussion as examples (e.g., *res judicata* and the principle 'by which the plaintiff must prove his contention under penalty of having his case refused'[39]), but not much more than this was developed. In any case, the underlying idea was that they would reflect the 'legal conscience of civilized nations'[40].

The fact that an in-depth definition of what was to be understood as 'general principles of law' was not attempted by the Advisory Committee explains part of the confusion towards this source, which persists more to this date.[41] They were conceived to fill gaps, following the discretionary of the judge regarding their assessment and whether they reflected such 'legal conscience'. Lord Phillimore himself, one of the drafters of the final version of the provision together with Elihu Rood, admitted that his understanding of general principles resembled natural law.[42] This understanding was doomed to implicate practical doubts. 'General principles' as a source of law were meant to have an abstract and open meaning – that is how they would fill the *lacunae*. By their very nature they are undetermined.[43] As a consequence, it is hard to determine their content.

Despite having been originally conceived to fill possible gaps left by the insufficiency of applicable treaty law and international customary law, another function of general principles is that of providing interpretative tools.[44] This function can actually be partially seen as an unfolding of the idea that principles should avoid the *non liquet*: by providing interpretative aid, existing rules can cover situations which are not directly covered by conventional and customary rules. However, it may be hard to distinguish when a principle is performing a gap filling function, or when it is serving as an interpretative asset.

Another issue to be further studied by the Commission,[45] and that has been extensively debated by the doctrine,[46] is the distinction between customary law and

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[39] PCIJ, 'Procès-Verbaux' (n 33) 317.
[40] In the words of the initial draft proposed by Baron Descamps (ibid 306).
[41] ILC, 'First report on general principles of law by Marcelo Vázquez-Bermúdez', Special Rapporteur (5 April 2019) A/CN.4/732 ('First Report on general principles').
[42] PCIJ, 'Procès-Verbaux' (n 33) 318.
[43] Mads Andenas and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' in M Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019) at 23.
[44] ILC, 'First Report on general principles' (n 41) at 7.
[45] See ILC, '71st session' (n 8) para 233.
[46] This topic was object of extensive debate in the ILC in its 71st Session in 2019. See ILC, '71st session' (n 8). See also Michael Wood, 'Customary International Law and the General Principles of Law Recognized by the Civilized Nations' (2019) 21 International Community Review 307-324.

general principles. While the theoretical definition of these concepts (principles as gap-filling, general guidelines coming from municipal law or inferred from the ensemble of rules; customary law as practice + *opinion juris*) does not seem to give much room for confusion, their practical application raises the debate. These and other issues are to be addressed by the ILC in its long-term programme of work 'general principles of law', whose first report circulated in 2019.[47] It recognized that many of the problems described above need clarification.[48]

It has been stated that general principles and customary law present a difference in terms of formulation of content: while the former is more general, the latter tends to present a more clearly defined rule.[49] Although customary international law and general principles may overlap in content, they have also a fundamental formal difference: while the former has as one of its constituting elements the requisite of state practice, the latter lacks such requisite.[50] In this sense, the difference between the two sources of law can arguably be grasped through their method of identification.

1.2.2.2 Classification and the identification of general principles

General principles can be systematised in two different categories: according to the legal system from where they are inferred (1.2.2.2.1) and according to their content (1.2.2.2.2). This differentiation is relevant because, at least in theory, their origin influences their method of identification, while the nature of their content has distinct impact on the role they play as sources of international law.

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[47] ILC, 'First Report on general principles' (n 41).

[48] ibid 5-9.

[49] ibid para 146 ff.

[50] It must be noted that the ILA report on the formation of general customary law defends the position that, if there is enough *opinio juris* to support the existence of a rule, demonstration of the existence of state practice is dispensed: '[…] it has already been stated (in Section 18) that, if an individual State does consent to a rule, that State will normally be bound by it. It follows that, if the generality of States consent, they will all be bound. Consequently, this assertion in this Section appear to be correct as a matter of theory' (ILA, 'Statement' (n 12) at 41). In this case, the theoretical difference between general principles and customary international law seems even more blurred. Although, in practice, and international adjudicator would claim the existence of one source or the other according to their argumentative logic (and therefore the differentiation would be a matter of invoking one rather than the other), the element that could resolve the theoretical dilemma as to their difference could be their content: in the case of a general enouncement supported by the belief of its legal obligatoriness, one would be talking about a principle; in case of a specific rule, one would be talking about a customary rule.

1.2.2.2.1 General principles of domestic law and general principles of international law

The drafting history of Article 38(1)(c) of the ICJ Statute leaves little room for doubts that general principles as a source of law may have their origins in domestic legal systems.[51] On the other hand, there is substantial debate as to whether general principles may also originate from the international legal system.[52]

The First Report on General principles of law by the ILC describes the first category – those deriving from national legal systems – as those 'principles common to a majority of those legal systems can be identified'.[53] Moreover, it is accepted that these general principles must also be transposable to the international level. are those common national legal systems and that would be applicable to international relations when they could be 'transposed' to the international level. Otherwise put, the general principle must not only be common to different legal systems, but its nature and content must also fit the particularities of international law.[54]

The second category of general principles, namely 'principles of international law', or 'general principles of law formed within the international legal system' as put by the First Report,[55] would be those inherent to the international legal order. One of the classical examples of general principles of international law are those identified in the reasoning of the ICJ in the *Corfu Channel* case, in which the ICJ stated the existence of

> certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[56]

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[51] See Wood (n 46).

[52] In opposition to the existence of general principles deriving from international legal system, e.g., Humphrey Waldock, 'General course on public international law' (1962) 106 Collected Courses of the Hague Academy of International Law at 57; 68-69.

[53] ILC, 'First Report on general principles' (n 41) para 230.

[54] ibid, para 169. See also Hugh Thirlway, 'The Law and Procedure of the International Court of Justice, 1960–1989: Part Two' (1990) 61 British Yearbook of International Law at 112.

[55] ILC, 'First Report on general principles' (n 41) at 67.

[56] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Merits) [1949] ICJ Rep 4 [22].

These are principles of international law since they would not be applicable to domestic law.[57] While the methodology for determining the existence and content of these principles is not undisputed,[58] it can be said that they somehow reflect the legal logic underlying the international law system.

While 'principles of international law' are specific of the international legal order for some particularity, 'general principles of law' deriving from national systems (that is, that find reflection in national systems) can or cannot be transposed to the international legal order.[59] In Gaja's words, international law principles are principles which 'do not find a parallel in municipal laws'.[60] This particularity is linked to the nature of the international relations, such as States being their main subjects (for instance, the principle of State sovereignty could be said to be a general principle from which many rules of international law stem), the content of these relations (for example the principles of the right to self-determination of peoples and that of territorial integrity of States).

The common element between the two categories would be that general principles as a source of law must be *recognised* by the international community. The method for ascertaining recognition is to be explored by the ILC in the next reports. This process of identification is possibly one of the main elements that differentiate the two categories.[61]

General principles of law find reflection in national legal orders, which is why they could be identified by a comparative exercise employed by the judge when confronted to the necessity of applying a give principle. However, this comparative

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[57] Some authors have argued that this and other references to general principles of international law in fact reflect customary international law and treaty law, and not general principles in the sense of Article 38(1)(c). See, e.g., Waldock (n 52) at 68 ff.
[58] Giorgio Gaja, 'General principles in the jurisprudence of the ICJ', in M Adenas *and others*, *General principles and the coherence of international* law (Brill 2019) 41 ('General principles in the ICJ').
[59] In the famous expression by Lord McNair, 'The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules' Separate Opinion by Sir Arnold McNair, Advisory Opinion of 11 July 1950, ICJ Reports 1950, at 148). For the idea of principles which are 'transposable', Daillier, Forteau, Quoc Dinh, and Pellet (n 10) 384.
[60] Giorgio Gaja, 'General Principles of Law', in *Max Planck Encyclopedia of Public International Law* (OUP 2013) para 17.
[61] There was an expressive word of caution from ILC Members upon the circulation of the First Report on General principles of Law in the 71st session (2019) regarding the existence of the category of general principles as deriving from international law. Members expressed concern in particular with respect to the relationship between this category and customary international law. As Wood summarises, one of the main concerns was that '[…] such an approach might make it all too easy for a general principle of law to be invoked, which would affect the credibility of this source of international law. Such an approach would also risk undermining customary international law, since some may wish to argue that whenever there is insufficient State practice or *opinio juris*, there is nonetheless 'recognition' in the sense of Article 38, paragraph 1(c) of the Statute' (Wood (n 46) 321).

exercise is seldom observed in practice.[62] This may be because general principles which find parallel in a number of national systems would not need further justification from the international adjudicator in justifying their applicability. Another possibility is of practical nature: given the impossibility (and arguably the unnecessity) of surveying all different legal systems in the world, courts and tribunals may refrain from performing such exercise and resort to assertion. This comparative exercise, in order to be methodologically sound, would have to clearly set out the reasons motivating its specific choice.[63] In any case, it is undeniable that '[t]he strength of the claim for a particular general principle will turn, as in all cases of inductive reasoning, upon the strength of the supporting data'.[64]

Conversely, principles of international law are those present in the underpinnings of international rules, and can be inferred from those rules.[65] They can be stated by these rules explicitly or implicitly.

Finally, it must be noted that some general principles find reflection in – and are applicable to – both national and international orders. An example of such are principles of treaty interpretation, many of which were codified in the VCLT. As the ILC explained in its commentaries to the draft project, '[t]hey are, for the most part, principles of logic and good sense […]'.[66]

1.2.2.2.2 General substantive principles and general procedural principles

This classification can be useful in understanding the practical applications of general principles, since it regards the content of such principles. A strict definition of the

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[62] See, for instance, the ICJ's practice in resorting to principles deriving from national legal systems: Gaja, 'General principles in the ICJ' (n 62) at 39. By means of example, Kotuby and Sobota explain that that reference to civil and common law of Germany, France, England and the United States are referenced most often because they are more readily available and accessible to international adjudicators that references from other domestic jurisdictions (Charles T Kotuby, Jr., Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) at 25).
[63] On the exercise of a comparative study and the identification of general principles, see Jaye Ellis, 'General principles and comparative law' (2011) 22(4) EJIL 949–971, at 949.
[64] Kotuby and Sobota (n 62) 25.
[65] Bonafé and Palchetti (n 22). The authors understand that '[…] it is now generally accepted that this notion covers both general principles which are recognized by states in their domestic legal orders and principles of international law, which can be identified by a process of deduction from other existing rules, the only controversial issue being perhaps whether the definition set forth in article 38(1)(c) of the ICJ Statute refers to both kinds of principles or, as suggested by some authors, only to the principles existing in *foro domestico*" (ibid 173).
[66] ILC, 'Report of the International Law Commission on the work of its Sixteenth Session', 11 July 1964, Yearbook of the International Law Commission, 1964, vol II at 200.

two categories is difficult, if not impossible, to establish.[67] Without attempting to exhaust the dichotomy, for methodological purposes this work defines these two categories as followed.

General principles of procedure are those relating to procedure before international jurisdictions, that is those governing the acts of the judges (*res judicata*,[68] judicial impartiality), the acts of the parties (good faith), and the proceedings of the jurisdiction (burden of proof, due process).[69] General substantive principles are here defined as prescribing rights, obligations, or standards of conduct.[70] Accordingly, general principles with a substantive content can be inferred from the logic underlying the rules of a particular system (domestic law, international law, criminal law, environmental law, trade law, etc.) and those guiding the application of the rules of a system. Examples of the first group are the precautionary principle (typical from environmental law) and *nulla poena sine lege* (criminal law). Instances of the second group are the principles of necessity and proportionality.

Some general principles may have a double function regarding the classification procedural versus substantial. One example is the principle of good faith: the obligation to negotiate in good faith can be regarded as a substantive principle in it prescribes a rule of conduct; yet, it can also be regarded as a procedural principle when taken as, for instance, a directive for the parties within the context of dispute settlement.

One of the scopes of this research is to understand the uses and limitations of general principles and customary international law in the WTO dispute settlement system. The categorisation of general principles according to their content may have little practical implication, since in resolving a given case a dispute settlement organ will not take into consideration whether a principle is either substantive or procedural, for instance. Nevertheless, not only these categories may aid in understanding the functions of general principles in international law, but they also may help understanding in which

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[67] For a thorough analysis of the problem, see Claire EM Jervis, 'Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law' (2019) 30(1) EJIL 105–128, at 105.
[68] The concept of *res judicata* can be considered to be a principle from a methodological perspective, since it is generally a source of law that originates in national legal systems. See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans, Green and co. 1927) at 206 ff.
[69] This definition is largely inspired by Robert Kolb, 'General principles of procedural law', in A Zimmermann, C Tomuschat and K Oellers-Frahm, *The statute of the International Court of Justice: a commentary* (OUP 2006) 871. For a comprehensive study on procedural principles of law, see Kolb (ibid).
[70] Following the definition of norms of 'substantive' conduct put forward by Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden Journal of International Law at 981.

cases a panel or the Appellate Body can (or may be more inclined to) make use of them to interpret WTO provisions. Indeed, another question is to what extent the DS organs and the parties to a dispute can resort to sources which are not formally part of the WTO legal system. This issue is addressed in the following section.

1.3 METHODOLOGY MATTERS: THE LEGAL BASIS (OR LACK THEREOF) TO INVOKING GENERAL INTERNATIONAL LAW WITHIN THE WTO DSM

The origins of the World Trade Organization date back to the 1947 General Agreement on Tariffs and Trade (GATT). The GATT consisted of an arrangement of tariff concessions; its aspirations were not originally as complex as the institutional framework regulating international trade that would come to be with the WTO. Its complexity, however, was sought by many to be limited to the niche of the multilateral trading system, without influencing or being influenced by external international law.[71] In James Bacchus' (former and one of the original members of the AB) words, to many trade negotiators 'international law was something vague and messy and applicable somewhere else. By contrast, "GATT law" was practical and workable and self-contained'.[72]

The (arguably limited) extent to which WTO legal system communicates with general international law is due to its high specialization and/or to its negotiators and practitioners involved in its application can be object of an interesting, yet probably unending discussion. The fact is that international trade law is so all-encompassing, and accordingly affects so many other 'subfields' of international law, that it would be difficult to ignore the interaction of WTO rules with other rules of international law. And indeed, such interaction was not ignored – and so demonstrates the very first ruling of the Appellate Body, the *US – Gasoline* case.

However, as Bacchus puts it,

> it is one thing not to read WTO law in clinical isolation from the rest of international law. It is quite another to define the lines where WTO law and the rest of international law overlap and where they do not. As we often asked ourselves during our deliberations around the round table

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[71] In this respect, see the interesting personal testimonial of James Bacchus, 'Not in clinical isolation' in G Marceau (ed), *A history of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015).
[72] ibid 508.

> of the Appellate Body: where is the line? Where is the line the members of the WTO have drawn between WTO law and the rest of international law in the WTO treaty?[73]

This section briefly revisits the debate of the relationship between the WTO legal system and general international law. The objective is to set the background according to which the resort to and incorporation of general principles and customary international law can take place in WTO dispute settlement. To this end, it is relevant to examine the distinction between the jurisdiction of WTO adjudication and the law applicable before WTO adjudicative bodies (1.3.1). The most 'evident' gateway linking general international law and WTO law is Article 3.2 of the DSU (1.3.2). This provision, however, does not exhaust the matter. The jurisdictional limitations of WTO adjudication limit the use of general principles and customary international law in this international forum: while resort to these sources of law is permitted, there are limitations to such use (1.3.3).

1.3.1 The Dispute Settlement Mechanism of the WTO and its jurisdiction *versus* its applicable law

1.3.1.1 The relevant DSU provisions

The difference between the applicable law (understood as the sources which can be made use of in the WTO DSM) available to the WTO adjudicators and parties and its jurisdiction (understood as the sources which can actually be enforced)[74] has been intensively worked on by the scholarship. It seems well settled that the WTO DSM only has jurisdiction over matters involving the so-called WTO covered agreements (the WTO

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[73] ibid 510.

[74] Marceau observes that part of the controversy on the limits of applicable law is semantic (Gabrielle Marceau, 'Fragmentation in International Law: The Relationship between WTO Law and General International Law - A Few Comments from a WTO Perspective' (2006) 7 Finnish Yearbook of International Law 6). Indeed, Papadaki divides the concept of 'applicable law' as *latu sensu* and *strictu sensu:* '*Lato sensu* application would necessarily include what we call "use of law" and would thus encompass both application and interpretation. On the other hand, *stricto sensu* "application" with the meaning ascribed to it above, ie 'determining the consequences which the rule attaches to the occurrence of a given fact', refers to a limited pool of norms in the cases under examination' (Matina Papadaki, Compromissory Clauses as the Gatekeepers of the Law to be 'Used' in the ICJ and the PCIJ (2014) 5 Journal of International Dispute Settlement 576). This work aligns with a broader sense of applicable law: it is here to be understood as the sources of law that can be used by the DS panels and AB to settle a dispute and interpret the law that they have actually hold jurisdiction to enforce. See also the distinction between the concepts of interpretation *versus* application, in Section 1.3.1.3.

Agreement, the Multilateral Trade Agreements of Annexes 1A, 1B, 1C and 2, and Plurilateral Trade Agreements in Annex 4), while its applicable law can range further than that. The crucial difference would be that panels and Appellate Body reports are not able to enforce obligations deriving from external sources. Still, the borderline between using such sources as applicable law or enforcing them is not clear.[75]

WTO dispute settlement is guided by the Dispute Settlement Understanding (DSU). Four provisions in this agreement are relevant to this matter: Articles 1.2 (on the coverage of the Understanding), 3.2 (on the function of the dispute settlement system), 7.1 (the terms of reference of panels, that is, the limits of the panel's competence), 11 (establishing the function of panels) of the Agreement. Most relevantly, Articles 3.2 and 7 set out as follows:

> **Article 3**
> **General provisions**
> 2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it **serves to** preserve the rights and obligations of Members under the covered agreements, and to **clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law**. Recommendations and rulings of the DSB **cannot add to or diminish the rights and obligations provided in the covered agreements**.
>
> **Article 7**
> **Terms of Reference of Panels**
> 1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
> 'To examine, **in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)**, the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).'

These provisions indicate that the disputes brought before the WTO DSM are limited to the covered agreements and the claims that trigger their jurisdiction shall be made in the terms of reference also based on covered agreements (Article 7). Such claims and the provisions of the covered agreements must be 'clarified' (or interpreted) in

[75] Giovanna Adinolfi, 'Il diritto non scritto nel sistema OMC' in P Palchetti (a cura di), L'incidenza del diritto non scritto nel diritto internazionale ed europeo, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016) at 98.

accordance with customary rules of international of public international law, but may not add to or diminish rights of the WTO members (Article 3.2).

Arguably, none of these provisions expressly limits the DSM to the covered agreements as the only source of law.[76] In the DSU, there is no equivalent of Article 38 of the ICJ, enlisting the sources of law to be made use of. Even Article 7.1, which seems to provide the most stringent provision in this sense ('shall have the following terms of reference'), is at the same time of dispositive nature ('unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel'). On the other hand, the same provisions can be interpreted in a restrictive manner: by not determining the possibility of making use of other sources of law, the competence of the DSM is limited to the covered agreements, so no other source could be invoked.

1.3.1.2 Scholarly debates

Would there be an intermediate solution to the question described above? It is true that, in the origins of the GATT, the dispute settlement mechanism and the controversies brought before it were very much GATT-oriented. But practice, and the development of international law, changed this scenario. Not only did the GATT legal framework grow to much more complex dimensions, but with the institution of the WTO-package, the claims that were once based on GATT provisions started to be based on multiple provisions from multiple agreements. In addition to that, the second half of the 20th century was marked by a strong development of international rules on many sectors (environmental law, human rights law and other regional trade agreements).

In this scenario, it seems unlikely that claims of WTO-inconsistent measures would come completely unaccompanied by other international instruments. Does the fact that Article 7 limits the terms of reference of panels completely discard the possibility of invoking other sources of international law? This question, as seen, has been partially answered by the very first AB report. But what is the limit of this invocation? Many authors have written on the matter.[77] Marceau, Pauwelyn and Bartels have extensively

[76] See generally Louis Balmond, 'Les sources du droit de l'OMC' in V Tomkiewicz (dir), *Les sources et les normes dans le droit de l'OMC* (Pedone 2012) at 19-25; Enzo Cannizzaro, 'Il rilievo di accordi esterni nell'interpretazione degli accordi OMC' in A Ligustro and G Sacerdoti (a cura di), Problemi e tendenze del diritto internazionale dell'economia, *Liber amicorum* in onore di Paolo Picone (Editoriale Scientifica 2011) 513.

[77] Perez-Aznar divides scholarly views on the possibility of application of customary international law in four degrees: use of customary rules of interpretation by means of Article 3.2 of the DSU; use of customary rules for interpreting WTO provisions; use of customary rules for procedural aspects; application of

disserted on the topic, and for this reason (and also because they advocate for slightly distinct approaches), the work of these three scholars is of particular interest. In addition, the work of the ILC on fragmentation has also addressed the question of resort to extraneous sources of law in WTO dispute settlement. Each view is described in turn.

Marceau calls the applicable law *versus* jurisdiction distinction a 'normative and jurisdictional' one, or relating to the 'substantive and procedural aspects'.[78] She contends that

> in most cases the proper interpretation of the relevant WTO provisions will be such as to avoid conflicts with the other international obligations of the WTO Members. [...] In case of irreconcilable conflicts, WTO adjudicating bodies are prohibited, through the dispute settlement mechanism and while making recommendations to the Dispute Settlement Body (DSB), from adding to or diminishing the rights and obligations of WTO.[79]

She defends the idea that the WTO Panels and AB have a mandate limited by Articles 7 and 11 of the DSU. She advances an interpretation of the WTO rules that is consistent with public international law – but one that, at the same time, does not promote the enforcement of external obligations in detriment of WTO law.[80] The only way this could be done would be through WTO provisions.[81] One example would be the use of the general exceptions of Article XX when justified by external treaties and obligations. She thus acknowledges the importance of Articles 3.2 of the DSU and 31 of the VCLT, which, 'in certain cases requires panels and the Appellate Body to use or to take into account

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customary international law by the DSB (Facundo Perez-Aznar, *Countermeasures in the WTO Dispute Settlement System: an analysis of their characteristics and procedure in the light of general international law* (Studies and Working Papers, Graduate Institute of International Studies 2006) 30-33). Furthermore, see, *inter alia* and in addition to the authors that will be discussed here: Ilona Cheyne, 'Gateways to the Precautionary Principle in WTO Law' (2007) 19(2) Journal of Environmental Law 155; David Palmeter and Petros C Mavroidis, 'The WTO legal system: sources of law' (1998) 92 AJIL 398; David Palmeter, 'The WTO as a legal system' (2000) 24(1) Fordham International Law Journal; RY Simo, 'The law of international responsibility: the case of the WTO as a '*lex specialis'* or the fallacy of a 'self-contained' regime (2014) 22 African Journal of International and Comparative Law 184; Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harvard International Law Journal 333.

[78] Gabrielle Marceau, 'Conflicts of norms and conflicts of jurisdictions : the relationship between the WTO agreement and MEAs and other treaties' (2001) 35(6) Journal of World Trade 1081 ('Conflicts').

[79] Marceau (ibid) at 1083.

[80] For a similar view, see A Mitchell, *Legal Principles in WTO Disputes* (CUP 2008) ch 3.

[81] She advances: 'The use of outside law (non-WTO) will depend on the terms of the WTO provisions at issue. Numerous references to outside rules and standards can be found in the WTO agreements. ln some cases, the WTO provision should be interpreted as requiring the outside obligation to be enforced within the WTO system; in others, the outside provision will merely provide interpretive material that must be used by WTO adjudicating bodies when enforcing another WTO obligation" (Gabrielle Marceau, 'A call for coherence in international law : praises for the prohibition against "Clinical Isolation" in WTO dispute settlement' (1999) 33(5) Journal of World Trade 87-152, at 112, footnotes suppressed).

various other treaties, custom and general principles of law when interpreting WTO obligations'.[82]

Pauwelyn takes a further step: he claims that Marceau's approach '[i]gnores th[e] distinction between *interpreting* a norm *with reference to another norm*, and *applying* a norm together with another norm'.[83] Moreover, he understands that Article 11 of the DSU in fact *allows* a panel to apply non-WTO rules, should these rules be necessary for such assessment when stating that panels should 'make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'. He goes as far as to say that

> [i]f the relevant conflict rule [that is, the non-WTO rule invoked by the party] indicates that the WTO rule in question prevails over the conflicting norm of international law, the WTO rule must be applied (and the complainant wins). If, in contrast, the relevant conflict rule demonstrates that the other rule of international law overrides or even invalidates the WTO rule, the WTO rule then cannot be applied (and the defendant wins). [...] The latter case does not result in requiring the WTO panel to enforce judicially claims under the other rule of international law (say, breach of the contradictory environmental norm). A WTO panel can only enforce claims under WTO covered agreements. To be able to enforce claims under these other rules, a WTO panel would need expanded jurisdiction.[84]

The main difference between Pauwelyn and Marceau's arguments is that, while the latter recognizes the possibility of using external WTO rules to interpret WTO law – ultimately relying on the provisions of the covered agreements to make findings –, the former believes that non-WTO rules can be applied, and indeed override WTO obligations, even if a panel cannot enforce such obligations.

While Pauwelyn's point of view can be legally justified, it seems artificial to infer that, despite the fact that the WTO rule will be applied in light of the non-WTO rule that overrides or invalidates the former, there will be no enforcement of the latter. It is true that even if it is found that an external obligation overrides a WTO obligation, it does not mean that compliance procedures within the WTO framework will be followed in order to enforce this extraneous obligation. Still, the WTO panel or Appellate Body will

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[82] Marceau, 'Conflicts' (n 78) 1103.

[83] Joost Pauwelyn*, Conflict of Norms in Public International Law: how WTO law relates to other rules of international law* (CUP 2003) 204.

[84] ibid 473.

be deciding on the basis of this extraneous source, and not on the basis of a WTO provision.

Furthermore, another issue that the author himself recognizes is the effect that the same provision would possibly apply differently for different members after being 'overridden' by non-WTO law.[85] While Marceau's perspective does not eliminate this danger, it certainly alleviates the possibility – or lessens the tone in which this would happen. Instead of stating that WTO obligation X does not apply because of non-WTO law Y, a panel or the AB would state that given non-WTO Y, WTO obligation Y is interpreted in this manner. This is important from a legitimacy perspective. For this reason, a more realistic way of looking at the matter from a WTO-adjudicator perspective seems to be Marceau's, since members are probably not expecting approaches that deal with a broad view of international law.

Bartels' perspective is somewhat in-between those of Pauwelyn and Marceau: distinctly from Marceau, he defends that panels and the AB can apply rules other than covered agreements, and distinctly from Pauwelyn he believes these rules can be applied as long as they do not add to or diminish the rights and obligations provided in the covered agreements. The author believes that 'disapplying a valid WTO norm because of a contrary non-WTO right does diminish those rights and obligations, seen both singly and together'[86]. He thus gives a very strong weight to Article 19.2 of the DSU, which reinforces the final sentence in Article 3.2,[87] acknowledging it as a 'conflicts rule'.[88]

The problem with this approach is that it establishes a supremacy of WTO law over any kind of international law (except from *jus cogens*, which cannot be derogated), disregarding the interpretative criteria of *lex specialis* or *lex posteriori*. It is no longer a problem of jurisdiction, as the author states himself, but a problem of hierarchy. This

[85] ibid 474.

[86] Lorand Bartels, 'Jurisdiction and Applicable Law in the WTO' (2016) SIEL Online Proceedings Working Paper No. 2016/18 <https://ssrn.com/link/SIEL-2016-Johannesburg-Conference.html> accessed 28 November 2015.

[87] DSU Art 19.2 states: '2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements"

[88] Lorand Bartels, 'Applicable law in WTO Dispute Settlement Proceedings' (2001) 35(3) *Journal of World Trade* 500. He defends the idea that 'the most appropriate way of reconciling these various approaches is to interpret the rule in Articles 3.2 and 19.2 prohibiting the DSB, Panel and the Appellate Body from 'add[ing] to or diminish[ing] the rights and obligations contained in the covered agreements' as a conflicts rule, similar to that in Article 293(1) of UNCLOS, which ensures that, in the event of any conflict between the covered agreements and 'other' applicable law, the covered agreements will prevail" (ibid 509).

seems, at least, controversial and susceptible of augmenting fragmentation in international law.

Indeed, the ILC report on fragmentation criticized such an approach:

> […] interpretation does not 'add' anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment. […] All instruments receive meaning through interpretation - even the conclusion that a meaning is 'ordinary' is an effect of interpretation that cannot have *a priori* precedence over other interpretations.[89]

The Study Group on fragmentation defends that the VCLT provides a 'toolbox' for the problem of fragmentation. In particular, the interpretation rules contained in Articles 30 and 31 of the Convention, and the principles of systemic integration contained in Article 31(3)(c) could deal with problems of hierarchy and specialty. Interpretation should be realized in a way of harmonizing (apparently) conflictive norms.[90] As regards the applicable law of the WTO DSM, the Study Group considered that, while there is no provision stating what the applicable law is, 'WTO covered treaties are creations of and constantly interact with other norms of international law'.[91]

1.3.1.3 Interpretation versus *application of sources of law*

The distinction between 'interpretation' and 'application' of norms entails the debate of whether these are two different processes which are necessarily interconnected, not necessarily interconnected, or if in fact one cannot draw such a distinction.[92] For the present purposes, this distinction is relevant for it may contribute to understanding to what

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[89] ILC, 'Fragmentation' (4) at 226.
[90] ibid 227.
[91] Commenting on the work of the ILC, Marceau observes that part of the controversy on the limits of applicable law is semantic. Her definition of 'applicable law' is the 'law for which a breach can lead to actual remedies', while the conception of the ILC Study Group 'includes all legal rules that are necessary to provide an effective answer to legal issues raised, and it would include procedural-type obligations (like the burden of proof)'. This work aligns with a broader sense of applicable law – thus, closer to the ILC Study Group's: applicable law here is to be understood as the sources of law that can be used by the DS panels and AB to settle a dispute and interpret the law that they have actually hold jurisdiction to enforce. (Marceau, 'Fragmentation (n 74) at 6).
[92] It is arguable that the difference between the two concepts ensues little practical relevance. It is normally theorised in the context of issues related to intertemporal law, since it may play a role in determining whether the law should be interpreted according to the. See, for instance, Jan Klabbers, 'Reluctant "*Grundnormen*": Articles 31(3)(C) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in M Craven, M Fitzmaurice and M Vogiatzi (eds), *Time, History and International Law* (Nijhoff 2007) 141-161.

extent non-WTO law can be used in WTO dispute settlement without overstepping its jurisdictional line.

As Bonafé and Canizzaro argue, disputes which call into question the use of sources of law outside the jurisdictional limits of a court is controversial because '[t]hey do not fall plainly within the scope of the jurisdictional clause, nor clearly outside it; they straddle the dividing line'.[93] To address this problem, the distinction between 'interpretation' and 'application' of law is useful. The distinction was discussed during the works of the ILC on the codification of the law of the treaties, as well as commented upon by the document preceding the works of the Commission, the Harvard Draft Convention on the Law of Treaties.[94] Gardiner sustains a 'natural sequence that is inherent to the process of reading a treaty: first ascribing meaning to its terms and then applying the outcome to a particular situation'.[95] The following distinction was drawn in the commentaries to the Harvard Draft Convention:

> Interpretation is closely connected with the carrying out of treaties, for before a treaty can be applied in a given set of circumstances it must be determined whether or not it was meant to apply in those circumstances. […] There is, however, a recognized distinction between the two processes. Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation.[96]

The question relevant to this work is of a slightly different nature. The use of this distinction is intended to clarify the limits of the use of an international source of law for the interpretation of *another* source of law. The question relates to the limits between the use of other international law that is not under the jurisdiction of a Court (in the case of the WTO, that is not one of the covered agreements) as interpretative guidance and the actual overriding application of this external law.

The definition of interpretation and application provided by the Harvard Draft Convention commentaries can be adapted in the following manner:

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[93] Cannizzaro and Bonafé (n 3) at 484.

[94] 'Harvard Draft Convention on the Law of Treaties' (1935) 29 AJIL, Supplement: Research in International Law 657. See further Richard Gardiner, *Treaty Interpretation* (OUP 2008) 27-29; Jan Klabbers, 'Reluctant "*Grundnormen*": Articles 31(3)(C) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in M Craven, M Fitzmaurice and M Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 141-161.

[95] Gardiner (ibid) 28.

[96] 'Article 19. Interpretation of Treaties' (1935) 29 AJIL, Supplement: Research in International Law (1935) at 938.

> The use of a norm for *interpretative purposes* is the process of resorting to an auxiliary source for the purpose of determining the meaning of an original norm; *application* of a norm is the process of determining the consequences which, according to its content, should follow in a given situation.

Interpretation is a cognitive process, while application is a practical one. This does not mean the two phases cannot overlap. Overlap may happen when different sources of law are used to interpret an obligation under dispute by an international adjudicator. The end conclusion will thus be intertwined with the use of sources different than the one originally being 'interpreted' (i.e., a WTO covered agreement term, provision or obligation) – and its final application may be an indirect application of these other sources. Thus, it is of interest whether this final application of the WTO provision entails the incidental application of a non-WTO rule.

As seen in Section 1.3.1.2, Article 3.2 of the DSU states that the WTO dispute settlement system 'serves to […] to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law', but also that 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. This is the express limitation of WTO adjudication.

Against this background, the distinction between application of non-WTO rules and the use of these rules for interpretative purposes is reflected in this dichotomy. Applying non-WTO sources of law within the multilateral trading system would arguably amount to 'adding to or diminishing the rights and obligations' of the covered agreements; using these norms for purposes of interpretation would thus be merely a 'clarification of the existing provisions'. Thus, in the specific context of WTO law, the distinction between the two processes can also be assessed according to whether the use of that source adds to or diminishes rights and obligations provided by the multilateral trading system.[97]

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[97] See Section 1.4.2.

1.3.2 The gateway to general international law in the Dispute Settlement Mechanism: Article 3.2 of the DSU

Article 3.2 is 'commonly understood as an invocation of the Vienna Convention'.[98] Based on this provision, panels and the AB recurrently make recourse to the rules on interpretation provided by the VCLT, laid out under its Articles 31, 32 and 33. This includes Article 31(3)(c) VCLT, which establishes that, when interpreting a treaty, 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account. Ultimately, this amounts to the textual recognition, within the DSU, of the possibility for the WTO adjudicator to take into consideration non-WTO rules (be them other treaties, customary law or general principles).

Having in mind the possible legal and political caveats of the jurisdiction of the WTO DSM, it is of interest to understand the drafting history involving this provision, which is particularly noteworthy since it can be viewed as the 'gateway' of general international law to the dispute settlement mechanism. It is the only direct reference to 'external' international law (non-WTO law) in the DSU.

Considering the legal framework of the WTO legal system, it is interest to dig into the reasons why this provision was inserted in the drafting of the DSU, especially considering that it was not present in the earlier decisions and understandings concerning the dispute settlement procedures under GATT.

The exact origins of the current wording of Article 3.2 are not entirely accessible.[99] However, relevant documents on the Uruguay Round negotiations (when the DSU was effectively drafted and this provision was inserted) indicate that the rudimentary form that would later become the aforementioned provision was drafted by the Chairman of the Negotiating Group on Dispute Settlement, Mr. Julio Lacarte-Muró, on a document dated 19 October 1990[100] in the following form under provision A (General Provisions):

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[98] Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO' (2006) 16(5) EJIL 857–877 at 865.

[99] This may be due to the fact that a significant part of the GATT negotiations from the 1950s onwards were not documented. According to John H. Jackson, '[a] curious feature of the various GATT trade rounds after the mid-1950s Is the absence of an official 'preparatory' document set similar to the UN Document Series EPCT, for 1946-1948. It appears from informal statements and interviews that the contracting parties at the time of these later rounds made a conscious but undocumented informal decision that there would be no 'official preparatory records.' Perhaps this reflects the sensitivity which negotiators felt about revealing some of the compromise decisions by various delegations. […]" (John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) 101.

[100] According to Stewart and Callahan, the Chairman's Text was the result of meetings and consultations held throughout the latter half of 1990: 'As a result of the informal meetings and consultations, by September 1990, the Negotiating Group had refined a number of the contentious issues, permitting the

> 1. Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system.[101]

No reference to 'customary rules of interpretation of public international law' or even international law in general was made in this moment. By 26 November 1990, on the 'first approximation to the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations',[102] a bracketed suggestion that would later give room to the reference to such customary rules of interpretation was inserted, as well as some other alterations were made, resulting in a formula very close to the current version:

> 2. The dispute settlement system of GATT is a central element in providing security and predictability to the multilateral trading system. Contracting parties recognize that it serves to preserve the rights and obligations of contracting parties under the General Agreement, and to clarify the existing provisions of the General Agreement [in accordance with the rules and practice of international law]. Contracting parties agree that recommendations and rulings under Article XXIII cannot add to or diminish the rights and obligations provided in the General Agreement.[103]

This draft final act was intended to be object of debate during the Brussels Ministerial Meeting on December 1990. It was revised during the meeting,[104] but no alterations were made on the provision A.2 above. The minutes of the meetings of Brussels Ministerial relevant to the discussion of the dispute settlement understanding are not publicly available. The only available source indicating the reasons for the inclusion of the bracketed excerpt is dated from almost a year later, at the meeting of 26 September

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Secretariat to draft textual language on a dispute settlement agreement. The Secretariat's draft text served as the basis for informal negotiations during September and October 1990, ultimately result in a text drafted by the Chairman of the Negotiating Group that was submitted to the TNC in mid-October" (Terence B Stewart and Christopher J Callahan, 'Dispute Settlement Mechanisms', in *The GATT Uruguay Round: A negotiating history (1986-1992)*, Volume IIb: Commentary (Kluwer Law and Taxation Publishers 1993) 2779, footnotes omitted). Since there was no provision which reflected an earlier version of current DSU Article 3.2 in the Secretariat's Draft Text (*Draft Text on Dispute Settlement* (21 September 1990) GATT Doc MTN.GNG/NG13/W/45), it is assumed that provision A.1 found in the Chairman's Text was the result of undocumented informal negotiations that took place in this interim.

[101] *Chairman's Text on Dispute Settlement* (19 October 1990) GATT Doc CGT/807-14 (NG13).

[102] 'Draft Final Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations' (26 November 1990) GATT Doc MTN.TNC/W/35.

[103] ibid 289, original brackets.

[104] 'Draft Final Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations – Revision' (03 December 1990) GATT Doc MTN.TNC/W/35/Rev.1.

1991 of the Negotiating Group on Institutions (the replacement for the former Negotiating Group on Dispute Settlement). By then, the contracting parties to the GATT still had not agreed on a formula for paragraph A.2, and there was still controversy on the possibility of accepting non-GATT rules:[105]

> Concerning paragraph A.2 of the draft Understanding, some participants noted that the text had been modified in response to the concerns expressed by a participant who was not a party to the Vienna Convention on the Law of Treaties. However, it would appear that a broad reference to the principles of public international law might subject the multilateral trading system to the risk of having to accept emerging peremptory rules or obligations not negotiated within GATT. A number of participants recalled that the dispute settlement mechanisms could not add or diminish the rights and obligations provided in the General Agreement. These participants stressed, therefore, that the CONTRACTING PARTIES should continue to have exclusive competence on all issues concerning the General Agreement including the essential question of the establishment of rights and obligations. Non-GATT law should have no rôle in the interpretation of the General Agreement as this was the exclusive prerogative of the contracting parties.[106]

It seems, from the transcription above, that the parties intended this provision to provide guidance in terms of interpretation. However, if on the one hand it was not possible to make explicit reference to the use of the VCLT because of the contracting parties who might not be parties to the Convention, on the other hand the door could not be open too widely precisely due to the hesitancy of some members towards the influence other sources of international law could have on GATT rights and obligations.

As mentioned, the wording of provision A.2 was not exactly the same as current Article 3.2 of the DSU. The current formula ‘in accordance with customary rules of interpretation of public international law’, instead of the slightly broader ‘in accordance with the rules and practice of international law’, seems have been the agreement reached in order to settle these concerns.

By December 1991, when of the release of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations[107] under Chairman Arthur Dunkel’s supervision, the parties had agreed on what is now current wording of

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[105] ‘Meeting of 26 September 1991 - Note by the Secretariat’ (18 October 1991) GATT Doc MTN.GNG/IN/1, p. 1.
[106] ‘Meeting of 26 September 1991 - Note by the Secretariat’ (18 October 1991) GATT Doc MTN.GNG/IN/1, para 3.
[107] ‘Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations’ (20 December 1991) GATT Doc MTN.TNC/W/FA (‘Draft Final Act’).

Article 3.2 of the DSU (then Article 1.2), with minor contextual differences regarding its applicability to the interpretation of the GATT rather than to the WTO.[108]

Therefore, as early as 1991, the contracting parties of the GATT were sceptical on the role 'non-GATT law' could have in interpreting GATT provisions. This is a question that, although to a much lesser extent, still permeates scholarly discussion. This leads to the further inference that, originally, it was not the intent of the parties (or at least some of the parties, which is particularly relevant in a system that would later be guided by the consensus rule of decision-making) that non-GATT treaties and sources of law would play a substantial role in the interpretation of obligations. Still, practice may have changed this position: such logic does not seem to be compatible with reports such as the AB's *US – Shrimp* bold use of external conventions.

DSU Article 3.2 thus speaks of 'customary rules of interpretation', not limited to the rules of interpretation codified by the VCLT. Consequently, this provision encompasses also principles and maxims of treaty interpretation other than Articles 31-33 of the VCLT.[109] Moreover, this provision grew to perform a central role not as a gateway to customary interpretation rules, but also to other sources of international law to the WTO DSM. In line with the above, Article 31(3)(c) of the VCLT is one of the customary rules of interpretation of public international law comprised in DSU Article 3.2. Through this VCLT provision, non-WTO law can be invoked as a 'relevant rule of international law applicable in the relations between the parties' for the interpretation of WTO provisions. However, as discussed in Section 1.3.1.4, the line between the use of other sources of law for the interpretative purposes and the application of these sources is not clear cut, and should be carefully considered in light of the jurisdictional limitations of WTO adjudication.

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[108] Article 1.2 of the Draft Final Act stated: '1.3 The dispute settlement system of GATT is a central element in providing security and predictability to the multilateral trading system. Contracting parties recognize that it serves to preserve the rights and obligations of contracting parties under the General Agreement, and to clarify the existing provisions of the General Agreement in accordance with customary rules of interpretation of public international law. Recommendations and rulings under Article XXIII cannot add to or diminish the rights and obligations provided in the General Agreement" (ibid S.2)
[109] Adinolfi (n 75) at 81.

1.3.3 The jurisdictional limitations of the WTO and the use of customary international law and general principles

The jurisdictional limitations of WTO dispute settlement can be compared to those of compromissory clauses in courts of general jurisdiction. As Bonafé and Canizzaro explain,

> Questions of jurisdiction must certainly be considered with great caution by a judicial body whose jurisdiction depends on the consent of the parties. […] Moreover, a too liberal attitude could produce an adverse impact on judicial settlement of disputes, as states would be much more reluctant to include jurisdictional clauses in a treaty.[110]

In WTO adjudication, such 'adverse impacts' could translate into the reluctance of States towards submitting disputes when considering a possible undue expansion of the jurisdiction conferred to this dispute settlement mechanism. On the other hand, if the panels and the Appellate Body start to disregard general international law and return to GATT-like practice, in which limited regard was given to non-trade rules, its legitimacy might also be undermined with accusations of promoting fragmentation. It is useful to refer again to Bonafé and Canizzaro's words, when they say that in cases in which a plurality of rules enables the settlement of the dispute, '[…] the enlargement of the scope of its jurisdiction and the taking into consideration of this wider set of rules applicable to the dispute, constitute the only way to set aside the incumbent danger of fragmentation of the law'.[111] WTO adjudicators must thus find the right balance between these two scenarios.

It is a point of convergence among the authors mentioned in Section 1.3.1.3 (and sustained by WTO DSM practice) that non-WTO law can be used to interpret WTO law. However, as seen in the previous section, the line between the use of these sources as interpretative tools and the application of these non-WTO sources of law might not always be straightforward, and the application of these sources might give rise to claims that the dispute settlement organs are incurring in judicial overreach. Moreover, customary international law and general principles may pose an extra hurdle: insofar as they can be *unwritten* sources of law, they also must be distilled by the adjudicator before being used.

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[110] Cannizzaro and Bonafé (n 3) at 496.
[111] ibid.

Moreover, it may be the case that the WTO adjudicator will have to assess whether a customary rule (such as general rules on state responsibility) or general principle (such as procedural principles such as burden of proof and treaty interpretation) has been contracted out by a WTO rule. An extraneous source that has been contracted out does not apply to the WTO legal system. However, it can still be used to interpret WTO provisions – as is the case, for instance, of the use of countermeasures.

Therefore, general international law can, *a priori*, always be used for purposes of interpretation of WTO provision – and, in this sense, it can always be applicable law (in an ILC understanding of the term *applicable law*). Another issue is to what extent general principles and customary law can be used to *fill gaps* in WTO obligations. This can be more complicated, since *filling gaps* could potentially add or diminish rights and obligations of the WTO members. In the case of the WTO, unlike the practice of the ICJ, for instance, the legal basis of a claim will always be conditioned to the terms of reference of the complainant. If a measure is not found incompatible with the provisions indicated by the complainant, there will be no case of *non liquet*: the measure will be deemed permissible.

All of these questions and how they are addressed by adjudicators can bear an impact on the legitimacy of the DSM in the perception of WTO Members. If the jurisdictional mandate of WTO adjudication is strained, this may give rise to criticisms of judicial activism by WTO Members.

1.4 LEGITIMACY MATTERS: THE CRITICISMS OF JUDICIAL OVERREACH FROM THE PRACTICE OF THE WTO APPELLATE BODY

'Judicial overreach', or 'judicial activism',[112] are open-ended concepts.[113] They cannot be defined in an objective manner, mostly because '[w]hether something is identified as judicial activism […] is often a matter of perspective'.[114] Different actors may not only perceive activism according to the positive or negative outcome of the

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[112] These are here used interchangeably.
[113] For a suggestion of elements which can be considered in order to ascertain judicial activism in international jurisdictions, see Fuad Zarbiyev, 'Judicial Activism in International Law: A Conceptual Framework for Analysis' (2012) 3(2) Journal of International Dispute Settlement 247–278.
[114] Zarbiyev (ibid) 252.

dispute with regards to their own interest, but may also hold different values of what adjudicators may and should legitimate do in the exercise of their function.[115]

Filling gaps existing in a system of law is an example which potentially gives rise to claims of activism. It is largely accepted in international law that international adjudicators cannot decline jurisdiction on the basis of *non liquet*[116] and, as Lauterpacht argued, the 'rejection of the admissibility implies the necessity for creative activity on the part of international judges'.[117] However, following the same author's line of reasoning, creative activity does not imply *per se* judicial overreach – filling gaps is part of the judicial function. The example of judicial activity to fill gaps in a system of law serves to illustrate that judicial activism is not easy to determine.

In the present research, judicial overreach is examined according to the criticisms addressed by WTO members to the practices of the WTO Appellate Body. These criticisms are publicly available mainly in two different types of documents: minutes of the Dispute Settlement Body meetings, in which members discuss issues related to dispute settlement functioning and comment on the reports issued by its organs (Panels, AB and arbitrators), and, in some cases, official government statements.

Different unaddressed criticisms by certain WTO Members explain the crisis leading to the deadlock of AB members appointments and reappointments. [118] For the present purposes, focus is given to the objections related to the AB's interpretative practices. They can be grouped in two categories: the claim that the AB has engaged in the practice of issuing findings on questions unnecessary to resolve a dispute (1.4.1) and the perception that the reasoning or finding in a report is adding to or diminishing rights and obligations of WTO (1.4.2).[119]

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[115] Cosette D Creamer and Zuzzanna Godzimirska, 'The Rhetoric of Legitimacy: Mapping Members' Expressed Views on the WTO Dispute Settlement Mechanism' (2015) iCourts Working Paper Series, 16 <https://ssrn.com/abstract=2560780> accessed 14 February 2019.

[116] This was one of the reasons leading to the inclusion of general principles as source of law in the list of Article 38 of the ICJ Statute. See 1.2.3.

[117] Hersch Lauterpacht, *The function of law in the international community* (first published 1933, OUP 2011) 108 (*The function*).

[118] For a detailed account of the reasons leading to the WTO AB crisis, see in particular Robert McDougall, The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance (2018) 52(6) *Journal of World Trade* 867–896; Jennifer Hillman, 'Three approaches to fixing the World Trade Organization's Appellate Body: the good, the bad and the ugly?', available at https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf, accessed 22 January 2019.

[119] See above Section 1.3.

1.4.1 Unnecessary findings to resolve a dispute

The crisis in WTO dispute settlement can partially be explained by the divergence of views on the function that its adjudicators should perform.[120] On one side of the spectrum, there is the view that WTO adjudicators should address questions only to the extent necessary to resolve a dispute.[121] On the other side, there is the view that they should contribute to the clarification of WTO rules[122] and even, in some cases, compensate for the fact that there is a deadlock in the negotiation of new agreements at the multilateral trading system and that amendment is difficult under WTO procedural rules.[123]

'Resolving the dispute' was the approach traditionally taken in GATT dispute settlement, which was strongly influenced by diplomatic considerations.[124] To some extent, this tradition has been kept by the WTO.[125] Conversely, WTO dispute settlement undertook a more 'judicial' approach to the detriment of a 'diplomatic' one.[126] Focusing on adjudication with the view of settling disputes would give less margin for findings that are unnecessary to solve the specific dispute or that result in judicial law-making.

'Clarifying the law' as part of the judicial function is a double-edged sword. On the one hand, clarifying the meaning of terms and provisions by means of judicial decisions can provide legal certainty for future disputes. On the other hand, according to the Appellate Body's critics, unnecessary interpretative elements exceed the mandate of WTO adjudicators. According to this view,

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[120] See McDougall (n 118) 883. For an overview of the concurring views on the judicial functions in international law in general, see Chester Brown, 'Inherent Powers in International Adjudication', in CPR Romano, K Alter, Y Shany, The Oxford Handbook of International Adjudication (OUP 2013) 842-843. For general considerations on judicial activism and the function of adjudicators, see Zarbiyev (n 113).

[121] This is the view taken by the United States. See USTR, '2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program', available at https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF, accessed 12 August 2019.

[122] See eg Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: the Early Years of WTO Jurisprudence' in JHH Weiler (ed), *The EU, the WTO, and the NAFTA: towards a common law of International trade?* (OUP 2000) 51 ff.

[123] See eg Shin-yi Peng, 'Regulating New Services through Litigation? Electronic Commerce as a Case Study on the Evaluation of 'Judicial Activism' in the WTO' (2014) 48(6) Journal of World Trade 1189-1222.

[124] Jennifer Hillman, 'Moving towards an international rule of law? The role of the GATT and the WTO in its development' in G Marceau (ed), *A history of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015) 66.

[125] For instance, Article 3.7 of the DSU indicates that 'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'.

[126] JH Jackson describes this transition in detail. See Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (CUP 2006) ch 5.

> The purpose of the dispute settlement system is not to produce reports or to 'make law,' but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the Appellate Body the power to give 'advisory opinions' as some national or international tribunals have.[127]

These have also been called 'unnecessary *obiter dicta*'.[128] Because previous *obiter dicta* have been frequently used by the WTO adjudicators in the resolution of subsequent disputes, this has become a strong point of critique towards the Appellate Body's practice.[129] These criticisms are of relative subjective nature: what is perceived to be 'unnecessary' varies according not only to the two views described, but also on what the expectations of the litigants (and WTO members in general) are regarding the outcome of the dispute.

From the viewpoint of these criticisms, there is one main problem with the so-called 'unnecessary *obiter dicta'*. Because adjudicators indulge in making findings which are not 'necessary to resolve the dispute' and subsequently rely on these findings to settle other disputes, it has been argued that they are thus 'making law', rather than relying on the text of covered agreements.[130] In this view, the WTO dispute settlement mechanism has no legal right to provide 'authoritative interpretations' of WTO provisions.[131] By ignoring these limitations, WTO adjudicators would 'add to or diminish rights and obligations' of WTO Members.

1.4.2 The prohibition of adding to or diminishing rights and obligations of WTO members

International adjudicators are vested with the task of interpreting treaties. It is generally accepted that they should not make law – that is, modify or amend treaty

[127] USTR (n 121) 26.
[128] This terminology is used by the United States in its statements (ibid). For a discussion on *obiter dicta* by the WTO Appellate Body, see eg Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' (2018) 17(3) World Trade Review 509–533 and Giorgio Sacerdoti, 'A Comment on Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes'' (2018) 17(3) World Trade Review 535–540.
[129] USTR (n 121) 26.
[130] This criticism is related another criticism addressed at the AB practices, that the organ claims its reports have 'precedential value'. See 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, December 18, 2018, Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, December 18, 2018', available at geneva.usmission.gov/2018/12/19/statements-by-the-united-states-at-the-december-18-2018-dsb-meeting/, accessed 20 December 2018.
[131] USTR (n 121) 26.

provisions and obligations. This would exceed their role. However, determining whether the reasoning in a decision oversteps interpretation and amounts to judicial law-making is not always straightforward. As Lauterpacht has argued, '[…] it is futile to assume that the process of "discovery" [as opposed to the process of "making law" of the pre-existing law is a mechanical function of human automata. The process of "discovering" a thing is, as the very word implies, a not less creative function than the "making" of it'.[132]

That is the case also in WTO adjudication, but in this system, it translates into the limitation that Appellate Body is not allowed to 'add to or diminish the rights and obligations' in the covered agreements.[133] As discussed above, this is codified in Article 3.2 of the DSU.[134] The idea of avoiding an unnecessary interpretative exercise is related to the belief that the Appellate Body should not engage in findings that are not needed to solve the dispute, and which, in particular, may amount to adding to or diminishing rights and obligations of WTO Members.

Creamer and Godzimirska examined all DSB meetings and the WTO Members' comments to AB reports from 1995 to 2013, and found that

> One recurring issue, with adverse effects on its perceived legitimacy, arises from governments' views that the DSM engaged in expansive interpretations of WTO rules, thus adding to, instead of clarifying Members' existing rights and obligations. Such expansive lawmaking, in the view of many governments, contributes to an 'unsettling' of the balance established within the WTO agreements between the Organization's judicial and political bodies.[135]

The obligation of not adding or diminishing rights and obligations has been considered by the AB as complied with if the conclusions reached by the adjudicator reflect 'a correct interpretation and application of provisions of the covered agreements'.[136] This is not very enlightening, as the meaning of a 'correct interpretation and application' is still subjective.

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[132] Lauterpacht, *The function* (n 117) at 111, footnotes omitted.
[133] Article 3.2 of the DSU states that '[…] The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'.
[134] See Section 1.3.1.1.
[135] Creamer and Godzimirska (n 116).
[136] *Chile — Taxes on Alcoholic Beverages*, Appellate Body Report (13 December 1999) WT/DS87/AB/R para. 79.

In this research, this issue will be addressed through the perspective of the use of non-WTO law (specifically customary international law and general principles) within WTO dispute settlement. Thus, the question to be considered is whether the use of these sources contributes to a broadening or restricting the scope of WTO rights and obligations (substantive and procedural). That may be so if the use of these sources promotes an extensive or restrictive interpretation to a provision, if it creates new substantive obligations, if customary international law or general principles are being *applied* rather than used for as interpretative tools,[137] or if their utilization endorses the modification of the content of a rule. In particular, general principles may be viewed as adding to or diminishing rights and obligations insofar as the serve to fill gaps in WTO law (thus creating unforeseen law), rather than merely to interpret WTO provisions.

[137] See Section 1.3.1.3.

CHAPTER 2

THE APPELLATE BODY'S RESORT TO GENERAL PRINCIPLES AND CUSTOMARY LAW GOVERNING THE LAW OF TREATIES

2.1 PRELIMINARY REMARKS

From its early days, the Appellate Body has followed a particular methodology for the interpretation of its treaties, relying religiously on Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) as a mantra for the interpretation of WTO provisions.[1] This chapter focuses on principles and customary rules of international law that govern the law of treaties – i.e., principles and customary rules related to the interpretation, and application of WTO covered agreements. Many of the concepts described in the following subsections are principles of treaty interpretation. However, since the AB's case law contains references to other principles which are not strictly related to the interpretation of textual provisions (such as non-retroactivity and *pacta sunt servanda*), this chapter was entitled under the wider umbrella of concepts 'governing the law of treaties'.

This chapter is divided in two parts. The first part focuses on the methodological aspects of the invocation of general principles and customary rules related to the interpretation and application of the covered agreements of the WTO. It describes the context in which general principles and customary rules are invoked, the method of identification of these sources of law in AB reports, and whether parties agree to their applicability and content of in WTO adjudication. Moreover, given the limited material jurisdiction of WTO dispute settlement described in the previous Chapter, the first section also examines how the AB justifies the legal basis general principles and customary rules on the law of treaties are relevant and applicable to WTO law.

The second part examines whether the way the AB resorts to these sources of international law influences the material jurisdiction of the organisation's dispute settlement mechanism.

[1] Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21(3) EJIL at 605 ('Treaty'). One particularity is the AB's reliance on dictionaries to determine the 'ordinary meaning' of the terms – something Abi-Saab called a dictionary 'obsession'. Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation' in M Fitzmaurice, O Elias and P Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010) at 106.

2.2 THE AB'S APPROACH TO GENERAL PRINCIPLES AND CUSTOMARY RULES ON THE LAW OF TREATIES

The AB's references to customary rules and general principles guiding the law of treaties is the most numerous among the four broad categories of general international law.[2] One of the possible reasons for this is that DSU Article 3.2 explicitly determines that the function of WTO dispute settlement is to 'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.

While this provision only refers to rules on treaty interpretation, the AB's practice is not restricted to rules under this category. This section explores four broad categories of references to rules and principles guiding the law of the treaties in the organ's case law.

First, the AB constantly refers to Articles 31-33 of the VCLT, and these provisions have been very early on labelled as 'customary rules'. Second, the AB has also employed many concepts on the law of treaties which are codified in the VCLT. Two examples are the principles of good faith and non-retroactivity. Third, the AB also makes recourse to interpretative principles find expression in the VCLT, but not explicitly so. That is the case of the interpretative principles of effectiveness and systemic integration, which can be inferred from Article 31(1) and 31(3)(c) of the Convention. Fourth, in more restricted instances, the AB refers to principles which are not codified nor find expression in the VCLT. One example is interpretative principle of *in dubio mitius*.

2.2.1 VCLT Articles 31 to 33: 'customary rules of interpretation of public international law'

Articles 31-33 of the VCLT are the only norms of general international law on the law of treaties that the AB has qualified as customary rules. A possible explanation for this approach is that, in fact, the DSU Article 3.2 reference to 'customary rules of interpretation' was originally intended to refer to the VCLT provisions codifying these customary interpretative guidelines. However, because not all members of the GATT/WTO were parties to the VCLT, the drafters chose to refer to 'customary rules of

[2] Following the general systematisation described in the Introduction, around 51% of the relevant references in the pinpointed reports are categorised under the law of treaties.

interpretation of public international law' instead.[3] This shows that from the outset the intention was to refer to the VCLT rules, and that the very early reference by the AB to these rules as those reflected under Article 3.2 of the DSU was but a matter of rhetoric.

The rules on treaty interpretation of the VCLT were invoked on the first WTO controversy to reach the panel stage, the *US – Gasoline* dispute.[4] In that case, the Appellate Body coined Article 31 of the VCLT as 'having attained the status of customary or general international law' and stated that, 'As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply' when clarifying the provisions of the WTO covered agreements.[5]

Despite the fact that this practice dates back to GATT years, this statement is relevant in the WTO context because it was through such recognition that the AB clearly expressed that Article 3.2 of the DSU was the legal basis for invoking these customary rules in the context of the WTO DSM. Together with this statement the AB inserted a footnote with reference to decisions of the International Court of Justice (ICJ), European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights, in addition to a few handbooks of international law.[6]

The AB followed a similar method when referring to VCLT Article 32[7] but, interestingly, did not the same approach in relation to Article 33. Instead, it merely invoked its applicability to the cases in which it was relevant, stating it reflected customary international law.[8] Perhaps because it was already a tautological statement after granting this recognition to Articles 31 and 32, but the AB was no longer preoccupied in establishing the connection between the status of customary rule of international law, and neither to Article 3.2 of the DSU.[9]

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[3] See 'Meeting of 26 September 1991 – Note by the Secretariat', Negotiating Group on Institutions (18 October 1991) GATT Doc MTN.GNG/IN/1, para 3 and Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (20 December 1991) GATT Doc MTN.TNC/W/FA (Draft Final Act).
[4] See *US — Gasoline*, Panel Report (29 January 1996) WT/DS2/R at 33, para 6.7
[5] *US — Gasoline*, Appellate Body Report (29 April 1996) WT/DS2/AB/R at 17.
[6] ibid fn 34.
[7] In its second report, the AB stated that 'There can be no doubt that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status' as VCLT Article 31 (*Japan — Alcoholic Beverages II*, Appellate Body Report (4 October 1996) WT/DS8/AB/R 10). This sentence was equally accompanied by a footnote with reference to ICJ decisions and International Law handbooks.
[8] See *Chile — Price Band System*, Appellate Body Report (23 September 2002) WT/DS207/AB/R 22.
[9] As Van Damme has noted, the AB has stopped worrying about justifying 'every step' in its reasoning on the VCLT (Van Damme, 'Treaty' (n 1) at 635).

2.2.2 General principles codified by the VCLT

This section analyses two principles of treaty law codified by the VCLT and invoked by parties to disputes and the AB: the principle of non-retroactivity and the principle of good faith. The latter concept is subdivided into different concretisations, as it can guide not only the interpretation of treaty provisions, but also their application.

2.2.2.1 Principle of non-retroactivity

The principle of non-retroactivity was codified in the VCLT under Article 28.[10] Five AB reports deal with the notion of non-retroactivity,[11] and all five refer to VCLT Article 28. It was invoked for the first time by Brazil, the defendant in *Brazil – Desiccated Coconut*, an early dispute submitted to the DSM. The European Communities, a third-party to the dispute, submitted that Article 28 contained 'principles of customary international law regarding the temporal application of treaty obligations', thereby submitting that non-retroactivity reflected customary law.[12]

In the first two reports in which there is reference to the principle, which in fact circulated in close dates (21 February 1997 and 9 September 1997), the AB did not make a lengthy assessment on the merits of the claims regarding the principle of non-retroactivity as such.[13] In the last three, however, the organ engaged in a more detailed analysis on the content of non-retroactivity and its applicability to the WTO disputes under scrutiny.

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[10] VCLT Article 28 states: '*Non-retroactivity of treaties*. Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.

[11] The reports are: WT/DS22/AB/R (*Brazil — Desiccated Coconut*), WT/DS27/AB/R (*EC — Bananas III*), WT/DS170/AB/R (*Canada — Patent Term*), WT/DS231/AB/R (*EC – Sardines*), WT/DS316/AB/R *(EC and certain member States — Large Civil Aircraft*). These reports were pinpointed by searching the term 'retroactivity' (*Full text search*) in the WTO 'Find dispute documents' database among the category of 'Appellate Body reports' (*Document*). As of 26.06.2018, seven reports resulted from the search, out of which 2 (WT/DS165/AB/R and WT/DS449/AB/R) were sorted out either because the matter was not properly assessed by the AB (WT/DS449/AB/R) or because it did not deal with the principle of non-retroactivity as such (WT/DS165/AB/R).

[12] *Brazil – Desiccated Coconut*, Appellate Body report (21 February 1997), WT/DS22/AB/R at 9.

[13] In *Brazil – Desiccated Coconuts*, the AB resolved the issue through the wording of Article 32.3 of the Agreement on Subsidies and Countervailing Measures, and its object and purpose in the context of the WTO Agreement. Therefore, it did address the question of retroactivity, but it did not address the principle as such; instead, it focused on the wording of the relevant provisions which addressed the problem (*Brazil – Desiccated Coconut*, Appellate Body report (21 February 1997), WT/DS22/AB/R at 15). In *EC – Bananas III*, the AB dismissed the claim on non-retroactivity by stating that it was a matter of factual analysis which had been addressed by the Panel, and thus it could not revisit it.

In no occasion the parties or the AB advanced a different meaning for non-retroactivity than that codified in Article 28 of the VCLT. On the other hand, albeit endorsing the applicability of the principle in the WTO, the adjudicators often analyse its applicability through the explicit provisions relating the temporal scope of obligations in the various covered agreements, such as the Agreement on Subsidies and Countervailing Measures (ASCM), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT). What was at stake in these disputes is the contention regarding the temporal scope of the obligation under scrutiny and its relation to the measure in question. In other words, the emphasis of the claims under adjudication was the observance of non-retroactivity under WTO provisions, not under VCLT Article 28. The latter served only as auxiliary to the ascertainment of the former.

In the early reports where the AB referred to the principle of non-retroactivity, the organ did not clearly lay out the legal basis for invoking this concept in WTO law. The adjudicators advanced a legal justification only in *EC and certain member States — Large Civil Aircraft* (2011). In this report, the AB states that 'the principle of non-retroactivity under Article 28 of the Vienna Convention is a general principle of law, which is relevant to the interpretation of the WTO covered agreements'.[14] In so stating, the adjudicators hint that the applicability of the principle within the WTO DS is justified because it is a principle of interpretation (therefore falling in the scope of Article 3.2 of the DSU).[15]

The principle of non-retroactivity was usually invoked through the assertion that is it a 'general principle of international law'. The AB also refrained from determining that this concept would reflect customary international. While in *Brazil – Desiccated coconut* the Panel had referred to Article 28 as 'an accepted principle of customary international law',[16] this terminology was not followed by the AB.

[14] *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R 285, para 672.

[15] Similarly, in *EC – Sardines* the AB referred to the principle as an 'interpretation principle codified in Article 28 [of the VCLT]' and stated that it was 'relevant to the interpretation of the covered agreements'. The non-retroactivity of the obligations at stake were analysed through most prominently provisions of a WTO covered agreement – in that case, Articles 2.4-2.6 and 12.4 of the TBT Agreement (*EC – Sardines*, Appellate Body report (26 September 2002) WT/DS231/AB/R at 58, para 214).

[16] *Brazil — Desiccated Coconut*, Panel Report (17 October 1996) WT/DS22/R at 75, para 279.

2.2.2.2 The principle of good faith

There are five categories of 'good faith' that have been invoked in WTO reports: i. good faith in interpreting treaties; ii. good faith in performing treaties and the principle of *pacta sunt servanda*; iii. Article XX as an expression of good faith; iv. procedural good faith to be followed by the Panel and v. procedural good faith to be followed by the party to the dispute. The first three categories are examined in this section since they are related to the context of treaty law and treaty interpretation.[17]

Early on in its practice, the AB coined the principle of good faith as a 'pervasive principle'[18] which was 'at once a general principle of law and a general principle of international law'.[19] Covered agreements make only scarce reference to good faith, but nonetheless parties and the AB recurrently invoked this principle in disputes.[20]

As a principle guiding treaty interpretation and treaty relations, good faith has been used in three different contexts in the WTO AB caselaw: the interpreter of a treaty must perform interpretation in good faith (2.2.2.3.1); the WTO members must perform their obligations in good faith (2.2.2.3.2); and provisions of the WTO which are considered 'expressions' of the principle of good faith (namely, GATT Article XX) (2.2.2.3.3). In all three cases, the AB has relied on provisions of the VCLT to refer to the principle of good faith.

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[17] This research tracked down all references to the principle of good faith in AB reports and systematised results into categories. The steps followed for this procedure were as follows: in the WTO online database for dispute documents (https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm), the term 'good faith' was input in the Full text search slot for a search in Appellate Body reports. 71 documents, which corresponded to 69 dispute reports, resulted from this query as of 02.07.2018. The AB report in the case *EC – Hormones* was manually added to the query, since its file on the WTO online database is not on a searchable version – therefore does not come up in the results even if the term is contained in the report. The following step was to individualize the mentions to good faith in each report, excluding mere references to the principle which do not 1. Advance a detailed argument OR 2. Provide the basis for the reasoning of the AB. In addition to that, 'bad faith' was also inserted as a term for the query and one extra report which did not overlap with the previous list came up, resulting in 71 reports which mentioned either 'good faith' or 'bad faith' or both. By reading the relevant extracts of these mentions, it was possible to divide the references to good faith into six different categories: i. good faith in interpreting treaties; ii. good faith in performing treaties and the principle of pacta sunt servanda; iii. Article XX as an expression of good faith; iv. procedural good faith to be followed by the Panel and v. procedural good faith to be followed by the party to the dispute; vi. other. This section will deal with categories (i), (ii) and (iii). Chapter 4 will assess categories (iv) and (v).

[18] *US — FSC*, Appellate Body Report (24 February 2000) WT/DS108/AB/R at 56, para 166.

[19] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R at 61.

[20] Panizzon argues, in the same sense, that 'All legal concepts of good faith emanate from the WTO Panels and AB jurisprudence, with two exceptions. Two WTO treaty provisions, both in the DSU, expressly mention good faith. These are Article 3.10 DSU regarding the duty to resolve disputes in good faith and Article 4.3 DSU regarding the duty to conduct consultations in good faith' (Marion Panizzon, *Good faith in the jurisprudence of the WTO* (Hart Publishing 2006) at 109).

2.2.2.2.1 Good faith in interpreting treaties and the principle of legitimate expectations

Article 31(1) of the VCLT codified good faith in interpreting treaties. This provision was invoked as an interpretative guideline by the AB since its first report. It states that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. In most cases references to the principle of good faith, the AB just referred to it in passing. It did not explain how the concept would be relevant for the interpretation of the provision or term under scrutiny.[21] In *US — Anti-Dumping and Countervailing Duties (China)*, the AB invoked the principle of interpretative good faith under VCLT Article 31: 'we recall, first, that according to Article 31 of the Vienna Convention, a treaty is to be interpreted in good faith'[22]. The adjudicators, however, did not develop what this guideline entailed in practical terms.

Although to 'interpret treaties in good faith' is not a straightforward parameter, this guideline has not generally been object of contention in WTO disputes. The exception was its relationship with the principle of legitimate expectations. In *India — Patents (US)*, the Panel considered that, following VCLT Article 31(1), '[…] good faith interpretation requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the Agreement'.[23] Similarly, in *EC – Computer Equipment* the Panel also relied on the protection of the legitimate expectations of and based the reliance on this doctrine with the 'principle of good faith under Article 31 of the Vienna Convention'.[24] In both cases, however, the AB rebutted the use of legitimate expectations as an interpretative principle.

Albeit in different contexts, the AB privileged the interpretation of WTO obligations according to the terms of the treaty over an interpretation which took into consideration the 'legitimate expectations' of the parties. This would imply, as the AB noted in *EC – Computer Equipment,* for the interpretation of a right or obligation 'in the light of […] their *subjective* views as to what the agreement reached […]' meant.[25] According to the AB, instead, the 'legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself' and the protection of their legitimate

[21] Such is the case, for instance, in the AB report in *US — Line Pipe* (WT/DS202/AB/R) 78, para 244.
[22] *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R 135, para 326.
[23] *India – Patents*, Panel Report (5 September 1997) WT/DS50/R at 47 para 7.18.
[24] *EC – Computer Equipment*, Panel Report (5 February 1998) WT/DS62/R 64 para 8.25-8.26.
[25] *EC – Computer Equipment*, Appellate Body Report (5 June 1998) WT/DS62-67-68/AB/R 31 para 82.

expectations should be guided by the rules of treaty interpretation set out by Article 31 of the VCLT, whose interpretation 'must not add to or diminish rights and obligations provided in the WTO Agreement'.[26] Finally, in *EC – Computer Equipment,* the AB also stated that

> we do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the 'legitimate expectations' of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the Vienna Convention.[...] The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of one of the parties to a treaty.[27]

The AB, thus, did not dismiss the applicability of the concept of legitimate expectations in the WTO legal system. However, the AB did dismiss the idea that this notion would ensue from the principle of interpretation in good faith according to VCLT Article 31(1).

2.2.2.2.2 Performance of WTO obligations in good faith

Good faith can also guide the performance of treaty obligations. Performance of a treaty in good faith means that 'treaty obligations should be carried out according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning'.[28] This concretisation of the principle is codified in Article 26 of the VCLT, named *pacta sunt servanda*, which states that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[29]

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[26] *India – Patents*, Appellate Body Report (19 December 1997) WT/DS50/AB/R at 17-18, paras 45-46.
[27] *EC – Computer Equipment*, Appellate Body Report (5 June 1998) WT/DS62-67-68/AB/R 31 para 83-84.
[28] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1993) 114.
[29] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. As of 30.06.2018, 8 Appellate Body reports deal explicitly with the principle of *pacta sunt servanda* (PSS) (WT/DS50/AB/R (*India — Patents (US)*), WT/DS58/AB/R *(US – Shrimp*), WT/DS231/AB/R (*EC – Sardines*), WT/DS217-234/AB/R (*US — Offset Act (Byrd Amendment)*), WT/DS363/AB/R (*China — Publications and Audiovisual Products*), WT/DS379/AB/R (*US — AD & CVD (China)*), WT/DS456/AB/R, (*India — Solar Cells*), WT/DS457/AB/R/Add.1 (*Peru — Agricultural Products*). These reports were pinpointed by searching the term '*pacta sunt servanda*' (Full text search) in the WTO 'Find dispute documents' database among the category of 'Appellate Body reports' (Document). However, in only three of them (WT/DS58/AB/R, WT/DS231/AB/R, WT/DS217-234/AB/R) the reference is to some extent relevant to the reasoning of the decision. The other 5 reports (WT/DS50/AB/R,

In the caselaw of the AB, the principle of good faith in the performance of treaty obligations takes the form of a *presumption* of good faith compliance. Interestingly, the AB reference to this presumption was phrased in a negative form. In *Chile — Alcoholic Beverages*, the AB stated that 'Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith'.[30]

The first references to the principle of good faith in the performance of WTO obligations were reflected in the 'presumption of performance in good faith' of such obligations by the members. Only in *US – Line Pipe,* two years after the *Chile — Alcoholic Beverages* report, the AB linked the presumption to Article 26 of the VCLT on a footnote.[31] In *EC – Sardines,* the AB stated that '[m]embers of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda*'.[32]

The AB did not seem preoccupied in indicating the legal basis for applying the principle in the WTO legal system and dispute settlement. This may be so since *pacta sunt servanda* is in fact a rule of such centrality and importance in the international legal order that any justification for 'importing' it into the WTO legal system would be superfluous.[33]

The *pacta sunt servanda* principle was never qualified as a customary rule by the AB, except perhaps indirectly, in passing and in a footnote, when the organ remarked that the United States 'said, in response to questioning at the oral hearing, that it has no difficulty with the notion that Article 26 of the Vienna Convention expresses a customary international law principle'.[34] However, the report is unclear on whether this was an indirect determination that, in the view of the AB, VCLT Article 26 would reflect a customary rule or whether this footnote was inserted just to provide more grounds to the

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WT/DS363/AB/R, WT/DS379/AB/R, WT/DS457/AB/R and WT/DS457/AB/R/Add.1) were excluded because the matter was not relevantly invoked or assessed. 'To some extent' because, as will be explained, these references are usually made obiter dictum, not relevant to the core of the reasoning. Furthermore, such references to the PSS principle are often related to the principle of good faith, which has been more relevant to the interpretation of the obligations at stake. It should be added that, in the reports in which PSS is relevantly invoked, Article 26 of the VCLT (the codified form of the principle) is always referenced.

[30] *Chile — Alcoholic Beverages*, Appellate Body Report (13 December 1999) WT/DS87/AB/R at 21-22, para 74, footnotes suppressed.

[31] *US – Line Pipe*, Appellate Body Report (15 February 2002) WT/DS202/AB/R 38, fn 117.

[32] *EC – Sardines*, Appellate Body Report (26 September 2002) WT/DS231/AB/R 80, para 278.

[33] See Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017) at 33.

[34] *US — Offset Act (Byrd Amendment),* Appellate Body Report (16 January 2003) WT/DS217-234/AB/R at 98, fn 247.

relevance of good faith in the WTO legal system. On the other hand, stating the customary status of Article 26 of the VCLT could give the impression that the principle of good faith in performing obligations has its own legal value and is an autonomous obligation in WTO law. This is possibly why the AB left the extract ambiguous, hinting only that one of the disputants in that report acknowledged its relevance. Good faith in the context of the performance of treaty obligations has accordingly always been labelled as a principle.

Finally, it should be noted that the AB sometimes conflates the notion of performance in good faith and interpretation in good faith. One illustrative instance of this conflation can be found in the *US — Anti-Dumping and Countervailing Duties (China)* report:

> In this respect, we recall, first, that according to Article 31 of the Vienna Convention, a treaty is to be interpreted in good faith. That means, *inter alia*, that terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party.[35]

This is an interesting take on the meaning of interpretative good faith, because it in fact places the focus of good faith in the performance by the party. In other words, it states that interpreting a treaty in good faith means, '*inter alia*', a presumption of the performance of the treaty in good faith by the party. Granted, it is not easy to draw the line between performance of treaty obligations and the interpretation of such. Still, interpreting a treaty in good faith does not amount necessarily to the assumption that it has been performed in good faith, as this extract suggests.

2.2.2.2.3 Article XX as an 'expression of good faith'

The third distinctive use of the principle of good faith found in the AB caselaw is specific to one provision of the WTO covered agreements: Article XX of the GATT. Article XX, named 'General Exceptions', enumerates and regulates specific hypotheses, liked to the protection of societal values such as human health, environment and public moral concerns, in which the GATT obligations can be exempted. They constitute, in the words of the AB, a 'legal right' that may be invoked by the parties.[36] This legal right,

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[35] *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R at 125-126, para 326.

[36] *US – Gasoline*, Appellate Body Report (29 April 1996) WT/DS2/AB/R at 22.

nonetheless, must be applied without abuse, 'reasonably'.[37] In the *US – Shrimp* dispute, the AB stated that

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.' An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.[38]

The AB concludes that paragraph stating that their task is 'is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law', and adds a footnote making reference to Article 31(3)(c) of the VCLT (the provision that includes the possibility of referring to 'any relevant rules of international law applicable in the relations between the parties'. This footnote therefore indicates that general principles can be considered 'relevant rules' for interpretation under the wording VCLT Article 31(3)(c).[39]

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[37] ibid 23.

[38] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R at 61-62, para 128, footnotes suppressed. The reference to *abus de droit* is a quote to Bin Cheng's classical oeuvre, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons Ltd 1953) 125. See the *US – Shrimp* report (ibid), fn 156.

[39] *General principles* could arguably be excluded from the understanding of 'rules of international law', since, to some extent, they do not really reflect rules. McLachlan, for instance, states that Article 31(3)(c) 'refers to 'rules of international law' - thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules' (Campbell McLachlan 'The Principle of Systemic Integration and Article 313c of the Vienna Convention' (2005) 54(2) International & Comparative Law Quarterly at 290). However, we here share the view of Merkouris in that 'the term 'rules' of Article 31(3)(c) refers to binding rules of international law, emanating from an accepted source of international law, i.e. treaties, custom and/or general principles of law. This all-inclusive approach to the term 'rules' finds also support in doctrine. There are very few authors who have deviated from this position'. (Panos Merkouris, *Article 31(3)(c) and the Principle of Systemic Integration*: *Normative Shadows in Plato's Cave* (Brill Nijhoff 2015) 19. As far as the WTO dispute settlement organs goes, the closest clarification in this sense was given by the Panel in *EC – Biotech products,* which stated that 'Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. [...] Regarding the recognized general principles of law which are applicable in international law, it may not appear self-evident that they can be considered as 'rules of international law' within the meaning of Article 31(3)(c). However, the Appellate Body in *US – Shrimp* made it clear that pursuant to Article 31(3)(c) general principles of international law are to be taken into account in the interpretation of WTO provisions.

Moreover, this footnote could be regarded as the legal basis indicated by the AB to invoke the principle of good faith and the *abus de droit* doctrine in the *US – Shrimp*. However, this reference is to some extent rhetorical, since the AB does not really delve into a more concrete demonstration of how these canons fit the definition of the provision. It can thus be said that the actual legal basis for the use of these concepts in this case is their reflection on the 'spirit' of the *chapeau*.[40] The connection between good faith, *abus de droit* and the *chapeau* of Article XX was also revisited by the AB in the *Brazil – Retreaded tyres* report.[41]

Good faith is thus directly linked with the prohibition of *abus de droit*, which to some extent relates to the obligation of performance in good faith. However, there are a few conceptual and methodological differences between the AB's reference to good faith in the performance of treaty obligations, as described Section 2.2.2.2.2, and good faith in the context of Article XX. The principle of good faith and *abus de droit* in GATT Article XX is expressed in a negative perspective (a State cannot abuse of its rights, as opposed to a State must perform their obligations in good faith). Moreover, in the AB's approach, good faith in performing treaty obligations is derived from the general rule of *pacta sunt servanda*, while the chapeau of Article XX is an *expression* of good faith. In other words, methodologically speaking, in the context of Article XX, the legal basis for the use of good faith and *abus de droit* is the GATT treaty itself. Conversely, good faith in the performance of treaties flows from the rule of *pacta sunt servanda*, which is not contained in WTO texts.

2.2.3 Principles of treaty interpretation derived from VCLT Article 31: the cases of effectiveness and systemic integration

In addition to referring to general principles codified in the VCLT, WTO adjudicators have also derived principles of treaty interpretation from provisions in that

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As we mention further below, the European Communities considers that the principle of precaution is a 'general principle of international law'. In *EC – Hormones,* the AB stated that if the precautionary principle is a general principle of international law, it could be considered a 'rule of international law' within the meaning of Article 31(3)(c)' (*EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS46/AB/R, para 7.67). Moreover, in *US — AD & CVD (China)*, the AB, in assessing the relevance of the ILC Draft Articles on State Responsibility, stated that while are not binding as written rules, but 'insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties' (*US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R, para 308).

[40] Section 2.3 argues that good faith has little role to play in the assessment of a trade measure when confronted with this provision.

[41] *Brazil — Retreaded Tyres*, Appellate Body Report (3 December 2007) WT/DS332/AB/R para 224.

Convention. Two examples found in the AB case law are the principle of effectiveness (or effective interpretation) (2.2.3.1) and systemic integration (2.2.3.2).[42]

2.2.3.1 The principle of effectiveness

The principle of effectiveness, *effet utile*, or effective interpretation, guides the interpreter in the sense that

> treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.[43]

In the preparatory works for the VCLT, the International Law Commission (ILC) decided not to expressly refer to this principle in that convention.[44] After discussing the issue, the Commission considered the principle 'is embodied' in the general rule of interpretation contained in Article 31(1) of the VCLT.[45] Nonetheless, reference to this interpretative canon is found with relative frequency in AB reports.

The AB first resorted to the rationale behind the principle of effectiveness in the case *US – Gasoline* (again, the first case under its appreciation), considering that 'interpretation must give meaning and effect to all the terms of a treaty'.[46] The

[42] Another possible example is the evolutionary approach, insofar as one considers it to be a principle of treaty interpretation. For a detailed assessment of the WTO adjudicators' resort to this interpretative approach, see Gabrielle Marceau, 'Evolutive interpretation by the WTO adjudicator: sophism or necessity?' (2018) 21 Journal of International Economic Law 791-813.

[43] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume I (Grotius Publications Limited 1986) at 345.

[44] Sir Arthur Watts, *The International Law Commission 1949–1998*, Volume II: The Treaties (OUP 1999) at 684.

[45] Yearbook of the International Law Commission, 1966, Vol. II, at 219. Special Rapporteur Waldock, inspired by Fitzmaurice's definition of the principle, had considered the codification of the principle in the following form: 'In the application of articles 70 and 71 a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent (a) with its natural and ordinary meaning and that of the other terms of the treaty; and (b) with the objects and purposes of the treaty'. Ultimately, the Commission decided not to adopt this provision. For a detailed description of the preparatory works and the discussion on the inclusion or lack thereof of the codified version of this principle, See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) at 276 ff (*Treaty)*.

[46] The full quote reads: 'One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility' (*US – Gasoline,* Appellate Body Report (29 April 1996) WT/DS2/AB/R at 23, footnotes suppressed).

adjudicators did not expressly name the principle, but they added a footnote with reference to ICJ caselaw and International Law handbooks.

The subsequent AB report to circulate, *Japan – Alcoholic Beverages II,* explicitly cited the principle ('principle of effectiveness or *ut res magis valeat quam pereat*'). This time, it supported the principle on the VCLT by stating that it was a 'fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31',[47] and added a reference to *US – Gasoline* in the relevant part.

Subsequent references to the principle were mostly accompanied by reference to past reports in which the principle had been invoked, in particular *US – Gasoline* and *Japan – Alcoholic Beverages II.*[48] This hints that, even though the AB has indicated that the legal basis for the principle of effectiveness is found in VCLT Article 31(1), which is a customary rule of interpretation for the purposes of DSU Article 3.2, adjudicators generally opt to base their assertion in previous AB reports. The legal basis for its use within the WTO dispute settlement was therefore coined in those two early reports: it was a 'fundamental tenet of treaty interpretation' flowing VCLT from Article 31, a provision which had attained the status of customary rule.

2.2.3.2 The principle of systemic integration

Similarly, the principle of systemic integration is codified in VCT Article 31(3)(c),[49] a provision that has also been recognized as customary law.[50] This provision states that 'There shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties'.

The principle of systemic integration thereby guides a process of 'interpretation that takes into consideration the system in which the rule being interpreted functions',[51] in which 'obligations are interpreted by reference to their normative environment (system)'.[52] By determining that 'any relevant rules of international law applicable between the parties' shall be taken into account in the process of treaty interpretation (and

[47] *Japan — Alcoholic Beverages II,* Appellate Body Report (4 October 1996) WT/DS8/AB/R at 12.
[48] Among some examples are WT/DS24/AB/R; WT/DS58/AB/R; WT/DS98/AB/R; WT/DS121/AB/R; WT/DS217-234/AB/R; WT/DS412/AB/R; WT/DS430/AB/R.
[49] On the topic, See Merkouris (n 39); McLachlan (n 39); ILC, 'Report of the Study Group of the International Law Commission on the Work of its 58th Session' (Fragmentation of International Law, 1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682 ('Fragmentation').
[50] Merkouris (n 39) at 4.
[51] ibid 6.
[52] ILC, 'Fragmentation' (n 49) at 208 para 413.

as part of the general rule of interpretation), the drafters of the VCLT codified the idea that treaties, including those part of the WTO umbrella, must be interpreted taking into consideration other rules of international law, there comprised other treaties and customary rules.[53]

Panels and AB have applied Article 31(3)(c) of the VCLT in some disputes. However, the AB made explicit reference to the principle of systemic integration only once, in the case *EC and certain member States — Large Civil Aircraft*. Still, also in this case the AB referred to the VCLT provision. In this report, the AB ultimately did not take the argument of systemic integration into consideration, because the non-WTO agreement being invoked was deemed as not 'relevant' within the meaning of Article 31(3)(c). Nonetheless, the organ drew considerations on the meaning of the principle, and stated that systemic integration, 'in the words of the ILC, seeks to ensure that "international obligations are interpreted by reference to their normative environment" in a manner that gives "coherence and meaningfulness" to the process of legal interpretation'.[54]

It should be noted that the AB cited the works of the ILC for the purpose of stating the importance of the principle and for ascertaining the meaning of the term 'the parties' in Article 31(3)(c).[55] In this case, the report on fragmentation by the ILC had been

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[53] *General principles* could arguably be excluded from the understanding of 'rules of international law', since, to some extent, they do not really reflect rules. McLachlan, for instance, states that Article 31(3)(c) 'refers to 'rules of international law' - thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules' (McLachlan n (39) 290). The Appellate Body in *US – Shrimp* made it clear that pursuant to Article 31(3)(c) general principles of international law are to be taken into account in the interpretation of WTO provisions. As we mention further below, the European Communities considers that the principle of precaution is a 'general principle of international law'. In *US – Shrimp,* the AB stated that if the precautionary principle is a general principle of international law, it could be considered a 'rule of international law' within the meaning of Article 31(3)(c)' (*US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R, para 7.67). Moreover, in *US — AD & CVD (China)*, the AB, in assessing the relevance of the ILC Draft Articles on State Responsibility, stated that while are not binding as written rules, but 'insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties' (*US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R para 308).

[54] *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R, para 845, footnotes suppressed. Interestingly, the ILC report on fragmentation quoted by the AB also severely criticized the interpretation of the same term of the provision in the *EC – Biotech* panel report. In other words, the AB made reference to the works of an institution of general international law *par excellence* which criticized a previous WTO panel report in order to ground its considerations on the provision. One could wonder that it was precisely in order to send the message that it was overruling the *EC – Biotech* panel report that these considerations were drawn, especially considering that in fact the agreement invoked under Article 31(3)(c), as mentioned, was dismissed for not being 'relevant', an assessment that typically comes before the meaning of 'applicable in the relation between the parties'.

[55] The AB report in *EC and certain member States — Large Civil Aircraft* shed light to the meaning of 'the parties' in Article 31(3)(c), by stating that 'n a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of

invoked by the European Union in its submissions.[56] Nonetheless, the very fact that the AB ultimately referred to this report corroborates the inclination of the organ to refer to authoritative works of general international law when drawing conclusions on questions relating to that field. This inclination can be also seen in footnotes referring to caselaw of the ICJ and other works of the ILC.

When the AB explicitly refers to the principle of 'systemic integration', it does so through reference to its codified version in Article 31(3)(c) of the VCLT, as part of the 'steps' indicated by the VCLT principles on treaty interpretation. This renders reliance on the principle very restrictive, since in the methodology for doing so employed by the AB (and arguably by panels) is that of first fulfilling the 'criteria' to check whether a rule can be regarded within the scope of Article 31(3)(c) or not. Following a strict reading of its wording, three requirements can be identified for the determination that a rule that is not the text being interpreted falls within the scope of this provision: they must be 'rules of international law'; the rules must be 'relevant'; and such rules must be 'applicable in the relations between the parties'.[57] Consequently, resorting to this provision through a strict application of its requirements limits the applicability of the principle of systemic integration as such.

Yet, one can also argue that the AB resorts more to the principle of systemic integration than it explicitly acknowledges. For instance, in *US – Shrimp* the AB referred to the United Nations Convention on the Law of the Sea, Agenda 21, the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals for the interpretation of Article XX(g),[58] without delving into the

WTO law among all WTO Members'. This report represented an indirect overruling of the Panel report in *EC – Biotech*. In this report, the Panel addressed elements of the provision such as the sources of public international law comprised by its wording and the meaning of 'applicable in the relations between the parties', concluding that 'the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members' (*EC - Biotech*, Panel Report (29 September 2006) WT/DS291/R at 333, para 7.68). The ILC report on Fragmentation severely criticized the conclusions of the Panel in this assessment (ILC, 'Fragmentation' (n 50) 227-228, para 450) and, arguably, this criticism served as inspiration to the AB when drafting the report on *Large Civil Aircraft*, since it directly quoted the ILC report and its understanding of the principle of systemic integration. The Panel's approach had also been criticized by scholarship works, such as Robert Howse and Henrik Horn, 'European Communities – Measures Affecting the Approval and Marketing of Biotech Products' (2009) 8(1) World Trade Review at 49.

[56] See *EC and certain member States — Large Civil Aircraft,* Appellate Body Report (18 May 2011) WT/DS316/AB/R, para 81 and footnotes.

[57] For a description of the AB's assessment of this provision, see Chapter 3.2.1.2.

[58] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R, para 129 ff.

technicalities of Article 31(3)(c). One could say that the principle of systemic integration has been applied (even if not explicitly).[59]

There are two similarities in the use of the principles of effective interpretation and systemic integration. The first is that, as said, in both cases the AB relies on the VCLT provisions as a starting point to refer to these tenets of interpretation. Consequently, the legal basis for invoking both principles under WTO adjudication can be inferred to be DSU Article 3.2.

The second similarity is that parties and third-parties do not contest their applicability to WTO dispute settlement or their content. Instead, what is disputed is the outcome of the legal reasoning following from the interpretation in accordance with these principles. In the case of the principle of effectiveness, whether a certain interpretation would or not render a provision *inutile*. In the case of the principle of systemic integration, given the attachment of the AB to Article 31(3)(c) of the VCLT, it is rather the extent to which a rule may be 'relevant'[60] or 'applicable in the relation between the parties' that has been the object of controversy.[61]

2.2.4 The exception that confirms the rule: the principle of *in dubio mitius*

It can be concluded from the foregoing sections that most canons and general principles on the law of treaties used by the AB find reflection, directly or indirectly, in the text of the VCLT. One could argue that codification in the Convention is the most important element for their applicability. The principle of *in dubio mitius* is one isolated case: it does not find reflection neither directly nor indirectly in the VCLT, and yet it has been invoked by the Appellate Body. This principle translates the notion that 'if an obligation is not clearly expressed its less onerous extent is to be preferred'.[62] It is a concept typical of the logic of international law.

The Appellate Body invoked the concept of *in dubio mitius* on a footnote in the *EC – Hormones* case. The adjudicators stated that it cannot be 'lightly assume[d] that

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[59] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R, 48-49.

[60] See *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R 360 ff and *Peru — Agricultural Products,* Appellate Body Report (20 July 2015) WT/DS457/AB/R 41 para 5.99.

[61] Abi-Saab makes interesting remarks on whether rules other than customary rules on interpretation may be applied by the WTO DSM. See Abi-Saab (n 1) at 99, in particular at 107 ff.

[62] R Gardiner, *Treaty Interpretation* (OUP 2008) 61. This principle is also referred to as rule or principle of restrictive interpretation. See Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Yearbook of International Law 48.

sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations'.[63] On that footnote, the AB cited the 'interpretative principle of *in dubio mitius*, widely recognized in international law as a "supplementary means of interpretation"', and added a quote from an International Law handbook with a definition of the principle, in addition to reference to relevant caselaw (including ICJ, PCIJ and arbitral decisions) as well as other doctrinal works.[64]

The AB's method of identification of *in dubio mitius* was reference to relevant caselaw and scholarship. The AB indicated VCLT Article 32 (one of the customary rules falling within the scope of DSU Article 3.2) as the legal basis for the applicability of this interpretative principle, as a 'supplementary means of interpretation' of WTO provisions.

This report could have constituted an *obiter dictum* not only for the subsequent use of the principle of *in dubio mitius* as an interpretative tool for WTO obligations, but also as a gateway for other interpretative principles which could serve as 'supplementary means of interpretation' under VCLT Article 32. It could be expected that, following this report, the principle of *in dubio mitius* would be subsequently invoked by defendants in WTO disputes. And indeed it was: after the *EC – Hormones* report, disputants invoked the principle in five other disputes.[65]

However, albeit having been invoked, after *EC – Hormones* the AB did not rely on this principle or assessed its relevance to the disputes.[66] Only in *China — Publications and Audiovisual Products* did the AB revisit the concept, in particular because its relevance to the case was object of contention among the parties.[67] In that case, China claimed that following the interpretation of the relevant provisions applicable to the

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[63]*EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R at 64, para 165.
[64] ibid fn 154.
[65] Four times out of which by the defendant and the remaining one by a third party. The reports are: WT/DS75/AB/R; WT/DS202/AB/R; WT/DS207/AB/R; WT/DS342/AB/R; WT/DS363/AB/R. Interestingly, in the last three reports the party invoking the principle referred to the principle through reference to the *EC – Hormones* AB report in order to support its argument. The references to '*in dubio mitius*' were singled out according to the following procedure: in the WTO online database for dispute documents (https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm), the term '*in dubio mitius*' was inputted in the *Full text search* slot for a search in Appellate Body reports. 5 documents, which resulted from this query as of 12.07.2018. In addition to that, the AB report of *EC – Hormones* was searched, since the version available on the WTO online database is not searchable and thus does not result in the queries.
[66] See Giovanna Adinolfi, 'Il diritto non scritto nel sistema OMC' in P Palchetti (a cura di), L'incidenza del diritto non scritto nel diritto internazionale ed europeo, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016) at 83.
[67] Nevertheless, it is worth remarking that the applicability of *in dubio mitius* had also object of contention in *Korea — Alcoholic Beverages*, but not assessed in detail by the AB. See WT/DS75/AB/R, paras 5 and 47.

dispute according to VCLT Articles 31 and 32 was inconclusive, and thus the Panel should have applied the principle of *in dubio mitius*. The AB rebutted the claim and stated that 'even if the principle of *in dubio mitius* were relevant in WTO dispute settlement, there is no scope for its application in this dispute'.[68]

This report is interesting because it is in contradiction with that of *EC – Hormones*. In *China – Audiovisual*, the AB either ignored or forgot it had previously relied on the principle on its own initiative.[69] Given the lapse of time between the two reports (*EC – Hormones* circulated in 1998, while *China — Publications and Audiovisual Products* circulated in 2009), it is possible that this is so because in the context of the latter, the AB was less inclined to make reference to principles outside of the WTO legal framework or that have been codified by the VCLT.[70]

In any case, although *in dubio mitius* is not expressly codified in the VCLT, its legal basis in *EC – Hormones* was not entirely detached from the Convention. This 'exception' confirms the rule not only for this reason, but also because the very fact that the AB adopted contradictory positions towards its relevance hints that it feels more 'comfortable' when referring to principles which finds a codified expression in a widely accepted agreement such as the VCLT.

2.2.5 Overview of the AB's approach to customary international law and principles of the law of treaties

When it comes to principles and customary rules related to the interpretation and application of treaties, the caselaw of the Appellate Body indicates an inclination for staying within the limits of rules codified under the Vienna Convention on the Law of the Treaties. In this sense, the first element to be noted is that, strictly speaking, the AB makes

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[68] *China — Publications and Audiovisual Products*, Appellate Body Report (21 December 2009) WT/DS363/AB/R at 166, para 144.

[69] Indeed, prior to the AB report in *EC – Hormones*, no other Panel or AB report had made express mention to the principle.

[70] Tancredi argues that there is scepticism as to whether this principle is still valid in international law, or that its utilization is possible in WTO law, and submits that '*le fait que les organs de Genève, après l'affaire Hormones, n'aient plus fait expressément reference à ce principle confirme le bien-fondé de ce scepticisme'* (Antonello Tancredi, 'OMC et coutume(s)' in V Tomkiewicz (dir), *Les sources et les normes dans le droit de l'OMC*, Colloque de Nice des 24 et 25 juin 2010 (Pedone 2012) at 92). See also Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5(1) Journal of International Economic Law 17-89.

very limited use of *unwritten* general principles and customary rules.[71] For instance, the principle of good faith and non-retroactivity have both been codified by the VCLT. On the other hand, systemic integration and effective interpretation can be said to find reflection in VCLT provisions. In the case of the former, the AB also prefers to rely on its codified version – Article 31(3)(c) – than on the unwritten version of the general principle underlying the provision.

Reference to *in dubio mitius* in the AB's case law is interesting important exception. However, it should be noted that this concept was used in the context of the *EC – Hormones* dispute, a case that involved other concepts of general international law (most notably the precautionary principle).[72] For this reason, the AB may have been 'inspired' to resort to other non-conventional sources of interpretation. This sets the tone for the limits of the use of general principles by the WTO adjudicators.

The second remark, mentioned in the beginning of this section but which should not be understated, is that VCLT Articles 31-33 are the only instance in which the AB has determined the customary status of principles of treaty law and treaty interpretation. To some extent, this can be explained by the fact that these VCLT provisions indeed find wide acceptance as reflecting customary rules of treaty interpretation.[73]

On the other hand, the principle of good faith in itself could also be considered as having attained this status.[74] However, the AB has declared only Article 31(1) as a whole to reflect customary law, rather than the concept of good faith as an 'independent' principle. There are also grounds to consider non-retroactivity as a customary rule.[75] In the *EC and certain member States — Large Civil Aircraft*, the customary status of and

[71] Other non-codified principles of interpretation have been employed in the caselaw of the WTO DS, but their use was rather limited and inconclusive, which is why it was chosen not to deal with them in detail. Among other elements, many of them are not referred to as 'principles' or other keywords that indicate their method of identification or legal basis for employment under the WTO DSM, they See Repertory of 'Appellate Body Reports – Interpretation', available at https://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm#I.3.9B (accessed 30 September 2018).
[72] See Chapter 5.
[73] Oliver Dörr, 'Article 31. General rule of interpretation' in O Dörr and K Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed, Springer 2018) at 561-562.
[74] See fn 12 and accompanying text.
[75] K von der Decken, 'Article 28. Non-retroactivity of treaties' in O Dörr and K Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed, Springer 2018) at 509. The authors recall that in 2012, in the Obligation to Prosecute or Extradite (Belgium v Senegal) case, the ICJ declared the customary status of VCLT Article 18 (ibid).

indeed has been invoked as such by disputants,[76] but the AB has refrained to refer to that principle or VCLT Article 28 as customary.[77]

The reasons for this approach can only be speculated, but two are here suggested. The first is that the AB has only referred to VCLT Articles 31-33 as customary because these provisions are implied in the text of DSU Article 3.2 as the 'customary rules of interpretation of public international law'.[78]

The second reason may be that declaring other canons of treaty law and treaty interpretation as 'customary' may give the impression that they would entail legal implications. The general reluctance of the AB to refer to non-WTO rules as customary, even when there is some ground for doing so, can be regarded as a cautious approach by the organ in not overemphasising the role of these sources in the WTO legal system. For instance, if good faith was to be declared a customary rule, and not 'just' a general principle of treaty interpretation and treaty performance, it could be understood that there are normative grounds to bring claims based on violations of good faith. This could raise criticisms from the Membership and amount to accusations that the AB is 'adding to or diminishing rights and obligations of Members'.

The method of identification of general principles and customary rules guiding the law of treaties consists of either a simple importation from the VCLT or assertion combined with reference to scholarship and the caselaw of major international tribunals, in particular the ICJ. This methodology shows that the AB has not taken any bold steps in using principles which may be more controversial. It has also not engaged in a full-blown process of identification of these principles. Although these canons are recognized as principles and customary rules, it is in fact their codified version that has been employed by the AB.

In this vein, another point worth remarking are the AB's trends on the identification of extraneous principles and concepts of general international law. At first, the AB relied on assertion combined with reference to the scholarship and ICJ caselaw. However, subsequent mentions to the same concepts tended to revert back to its own case law rather than reaffirming a given principle or going at length in demonstrating its origins. Similarly, parties follow the *obiter dicta* by the WTO adjudicators in order to

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[76] *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R at 290, para 685-686.
[77] See fn 16 and accompanying text.
[78] See fn 3 and accompanying text.

invoke general principles and customary international law on treaty interpretation, rather than the legal justification provided by the AB for the applicability of these sources in the WTO DSM.

The AB has generally justified the applicability of general principles and customary rules of treaty interpretation in WTO dispute settlement through VCLT Articles 31 and 32. These rules were recognized early on as 'customary rules of interpretation of public international law', thus falling in the scope of DSU Article 3.2. This was valid also for principles not codified under those provisions, such as effectiveness and systemic integration. However, other concepts of treaty law invoked by the AB, such as non-retroactivity and *in dubio mitius*, did not present a clear-cut indication as to how they would be applicable to WTO dispute settlement.

Through the development of its caselaw, the AB seemed gradually less open to the use of these principles. As an illustration, the principle *in dubio mitius*, which in *EC – Hormones* (1998) was characterized as 'widely recognized in international law as a 'supplementary means of interpretation', was dismissed in *China – Publications and audiovisual products* (2009) 'even if [it] were relevant in WTO dispute settlement'.[79] Another example was the principle of systemic integration – or better yet, the preference the AB has given to sticking to the requirements of VCLT Article 31(3)(c) rather than to the principle of itself. This can be seen in the contrast between the *US – Shrimp* report (2001), in which it made extensive reference to outside sources of conventional law, and the *Peru – Agricultural Products* report (2015).

2.3 GENERAL PRINCIPLES ON THE LAW OF TREATIES AND WTO DISPUTE SETTLEMENT: OVERLAP OR EXPANSION?

Departing from the analysis of AB practice in Section 2.2, this section aims at addressing whether the use of the canons above can promote judicial overreach in WTO adjudication. First, it offers an examination of Members' reactions to the AB's resort to principles and customary rules on the treaty law of treaties in DSB meetings (2.3.1). This study investigates whether Members oppose to resort to these sources in WTO adjudication and, if so, what the expressed reasons for concern are.

[79] See Section 2.2.4 **The exception that confirms the rule: the principle of *in dubio mitius***.

This section then studies the possibility of (and whether the AB has indulged in) judicial overreach through resort to non-WTO principles and customary rules on the law of treaties. It first considers whether the broadening the material jurisdiction of WTO adjudication can be attained/realized/carried out through the AB's use of the principle of systemic integration (2.3.2). Second, it examines the possibility of creation of an autonomous obligation of good faith that would otherwise not exist in the WTO agreements (2.3.3).

In the two scenarios, by expanding its jurisdictional mandate based on these general principles, the AB would be 'adding to or diminishing rights and obligations' of WTO Members. As discussed in Chapter 1.3.1, Members in some occasions accused the AB of not observing this limitation, thereby indulging in judicial overreach.

2.3.1 Members' reactions to the AB's resort to general principles and customary rules guiding the law of treaties

One useful way to ascertain whether reference to extraneous sources of law can amount to the perception of judicial overreach in WTO adjudication is to analyse Dispute Settlement Body (DSB) minutes of meetings. In these meetings, interested Members may comment on panel and AB reports before their adoption. Accordingly, this subsection provides an overview of the Members' reactions to the reports described in Section 2.2. This examination allows to single out in which instances the AB's approach was deemed sensitive or controversial to WTO Members.

Most cases of resort to customary rules and general principles on the law of treaties in AB reports were received without controversy. That is the case with the AB's reference to VCLT Articles 31-33. Indeed, Members have extensively relied on these provisions in their own submissions. When criticising the AB's interpretation in a given report, Members also claimed that the outcome did not follow the customary rules of interpretation reflected in Articles 31-32 of the VCLT.[80] The reliance on these provisions and the lack of controversy regarding their applicability in WTO adjudication can be explained, as described in Section 2.2.1, by the fact that Article 3.2 of the DSU refers to these provisions when setting out that covered agreements should be interpreted 'in

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[80] See, for instance, the statement by the United States upon the circulation of the *US – Continued Zeroing* AB report (DSB, Minutes of Meeting (29 April 2009) WT/DSB/M/265 para 78); statement by China in *US — AD & CVD (China)* (DSB, Minutes of Meeting (9 June 2011) WT/DSB/M/294 para 94); statement by India in *India – Patents (US)*, Minutes of Meeting (18 February 1998) WT/DSB/M/40).

accordance with customary rules of interpretation of public international law'.[81] One can conclude that members do not oppose to, and indeed endorse reference to these sources of law in WTO dispute settlement, as well as their qualification as 'customary' rules.

Some Members occasionally referred to general principles in their DSB statements. Norway, a third party in the *US – Continued Zeroing* dispute, commented the AB report in that case, advancing that the adjudicators' interpretation of Article 17.6(ii) of the Antidumping Agreement was 'not necessarily different from the result reached through the principle of *in dubio mitius*, that would apply as the last resort to settle an interpretative question under public international law in any case'.[82] The Philippines on two occasions invoked the 'basic customary rule of *pacta sunt servanda*' (commenting the *Brazil – Desiccated* and *Coconut US – Shrimp* reports), and argued that the AB had not taken this principle into account.[83] However, the occasions in which WTO Members referred to general principles in DSB meetings were sparse and isolated, and not shared (at least explicitly) by a significant number of Members. It is therefore difficult to infer any patterns relating to Members' reliance on general principles in their statements.

Overall, Members have not expressed concerns or criticisms towards the AB's resort to general principles and customary rules on the law of treaties. This may be so because the organ has adopted a cautious approach in resorting to these concepts. Except for the principle of effectiveness and VCLT Articles 31 and 32, other canons guiding the law of treaties, such as non-retroactivity and *in dubio mitius,* are rarely central to the reasoning. Moreover, as said, Members have not criticised the adjudicators' resort to the principle of effectiveness and VCLT Articles 31-33, especially because the latter are accepted without controversy as the 'customary rules of interpretation of public international law' to which DSU Article 3.2 refers.

Only in few occasions did Members explicitly comment on or contest the approach taken by the AB with respect to the application of general principles and customary rules on the law of treaties. Two concerns raised by some delegations were with respect to resort to other sources of law under Article 31(3)(c), and to the role of the principle of good faith in the interpretation of agreements and settlement of disputes. In the DSB meeting upon circulation of the *US – Shrimp* AB report, the Philippines

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[81] See fn 3 and accompanying text.
[82] DSB, Minutes of Meeting (20 March 1997) WT/DSB/M/265.
[83] DSB, Minutes of Meeting (19 February 2009) WT/DSB/M/30 and DSB, Minutes of Meeting (6 November 1998) WT/DSB/M/50.

delegation criticised the AB's reference to non-WTO international conventions, and argued that 'Members might have obligations under those treaties and declarations in other international forums but not in the WTO'.[84] Upon the circulation of the *US — Anti-Dumping and Countervailing Duties (China)* AB report, Japan questioned the use of the ILC Draft Articles on State Responsibility as a 'relevant rule of international law applicable between the parties' under VCLT Article 31(3)(c).[85]

Some Members have also cautioned against an expansive reliance on the principle of good faith. While there seems to be no disagreement that treaties must be interpreted in good faith, some Members have cautioned against the adjudication of violations of good faith in WTO dispute settlement. Commenting the *US — Offset Act (Byrd Amendment)* AB report, the United States held that it was 'troubled' by the 'Appellate Body's suggestion […] that a panel might, "in an appropriate case", find that a Member had not acted in good faith'.[86] They stressed that 'A finding that a Member had not acted in "good faith" would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body', because no obligation to act in good faith was set forth in WTO law.[87]

Both instances of concerns – expansive resort to extraneous sources of international law and the principle of good faith – stem from the fact that WTO adjudicators have limited material jurisdiction. Overstepping this limitation would amount to judicial overreach. The next two subsections address whether the AB's resort to the principles of systemic integration and good faith can amount to judicial overreach by the organ.

2.3.2 Systemic integration and the (possibility of) broadening of the material jurisdiction of WTO adjudication

Through the logic of systemic integration, adjudicators can examine sources of law that are not within the immediate scope of their mandate for the assessment of the legal issues under dispute. In the case of WTO adjudication, systemic integration may thus entail reference to non-WTO treaties and rules for the interpretation of WTO

[84] DSB, Minutes of meeting (WT/DSB/M/50) 14 December 1998, at 14.
[85] This report and the AB's reliance to the ILC Draft Articles in that case are assessed in detail in Chapter 3.
[86] DSB, Minutes of meeting (WT/DSB/M/142) 19 February 2003, para 57.
[87] ibid.

provisions and terms. This can be problematic due to the already mentioned blurred line between jurisdiction and applicable law.[88] By invoking this interpretative principle, WTO adjudicators could overstep its material jurisdictional and deciding on questions which are outside its mandate.

The AB, however, has not been very liberal with the use of sources of international law other than the covered agreements in its caselaw. In *EC and certain member States — Large Civil Aircraft*, the AB dismissed the agreement called into question as non-relevant because, although it 'relate[d] closely to issues germane to this dispute',[89] it did not inform the meaning of the specific term 'benefit' in Article 1.1(b) of the SCM Agreement. By restricting the relevance of a non-WTO rule to the interpretation of one specific word of a provision in a covered agreement, the AB adopted a very narrow approach to the meaning of relevant in this case.

The AB maintained this restrictive approach in the *Peru – Agricultural Products* case. In this report, the AB considered that ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Articles 20 (*Consent*) and 45 (*Loss of the right to invoke responsibility*) and a Free Trade Agreement concluded between the disputants not to be 'relevant' because they did not concern the same subject matter as Article 4.2 of the Agreement on Agriculture and GATT Article II:1(b).[90]

Evidently, this is a very restrictive view of the scope of application of the principle of systemic integration. The WTO covered agreements are by their very nature very technical and specific regarding their subject-matter. Few other sources of law, especially deriving from general international law (such as customary rules on state responsibility and general principles) will concern the same subject-matter as WTO terms provisions. If one takes into consideration the relatively broad use of non-WTO law by the AB in the *US – Shrimp* report, one can notice a retraction in the range of application of this principle for interpretative purposes.

At the same time, both reports present elements hinting that the AB was not as constrained as it could have been. In *EC and certain member States — Large Civil Aircraft*, the AB clarified the meaning of 'the parties' in Article 31(3)(c). It recognised the possibility a non-WTO treaty whose parties do not coincide with WTO Membership

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[88] See Chapter 1.

[89] *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R para 847.

[90] *Peru — Agricultural Products,* Appellate Body report (20 July 2015) WT/DS457/AB/R at 41-42, para 5.101-5.104. See Chapter 3.3.2.2.

can be used within WTO dispute settlement for interpretative purposes under the following that VCLT provision. The adjudicators drew conclusions that clearly stated its disagreement with the conclusions regarding the same issue in the *EC – Biotech* panel report.[91] However, this analysis was unnecessary, since the adjudicators ultimately dismissed the applicability of the 1992 Agreement invoked into question for being 'not relevant'.

In *Peru – Agricultural products*, a Free Trade Agreement (FTA) between the parties had been invoked under VCLT Article 31(3)(c). The AB could have summarily dismissed the allegations regarding the relevance of the FTA on the basis that the treaty was not in force between the parties. Still, the adjudicators did not do so, and went on to analyse specific aspects of its applicability to the dispute.

These two cases show that the organ was inclined to use the opportunity to clarify issues relating to the relationship between non-WTO law in WTO dispute settlement. Therefore, while the AB was very restrictive in the application of VCLT Article 31(3)(c) and its criteria, its jurisdictional constraints may not be as narrow as they seem at first sight.

2.3.3 The principle of good faith: an autonomous obligation?

Adjudicators can resort to the principle of good faith when interpreting a given provision or ascertaining the violation of an obligation. At the same time, WTO adjudicators arguably do not have jurisdiction to determine that a Member has breach its obligations because it did not act in good faith. Put differently, the principle of good faith can only be accessory to the assessment of violation of a WTO covered agreement provision. However, depending on how adjudicators resort to this principle, it can indirectly entail the creation of an autonomous obligation. This subsection examines whether the AB's resort to this principle has amounted to such a result on two levels. First, as described in Section 2.2.2.2.2 Performance of WTO obligations in good faith the AB has advanced the existence of a presumption of performance of WTO obligations in good faith. The question arises of whether such a presumption can be rebutted – i.e., if there is bad faith in breaching WTO obligations, and whether this would amount to a violation of WTO law. Second, as described in Section 2.2.2.2.3 Article XX as an

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[91] See fn 54.

'expression of good faith' the AB has held that the exceptions of GATT Article XX must be invoked in good faith. In this sense, similarly, the question arises of whether the prohibition of abuse in invoking these exceptions is a just a limitation to Article XX or is a self-standing obligation. These two questions are addressed in turn in the next subsections.

2.3.3.1 Performance in good faith

The *presumption* of the performance of treaties in good faith is, *per se*, not an autonomous obligation. It is a technical (and *a priori* rebuttable) *presumption*. A separate question is whether performing WTO treaties in good faith is an autonomous obligation and, if so, what the consequences are for the breach of an obligation in bad faith.

On the one hand, VCLT Article 26 indicates that there is such a general obligation to implement treaties in good faith (although the relevance of the compliance with the substantive obligation, whether in good faith or not, in itself is arguably the point that matters). On the other hand, the dispute settlement mechanism of the WTO is actionable in case of nullification or impairment of a Member's rights and benefits, which means that it does not matter whether the obligation has been performed at all or not.[92]

Unsurprisingly, the AB partially settled the issue by sustaining the Panel finding in *US – Carbon Steel (India)* that a claim based on compliance on good faith falls outside the terms of reference allowed by the DSU.[93] The AB considered that the principle of good faith would be relevant only to the extent that it could inform the *interpretation* of WTO obligations.[94]

This was confirmed soon after in *US – Offset Act (Byrd Amendment*). In this case, the question was whether the United States had violated Article 5.4 of the Antidumping Agreement (ADA) and 11.4 of the Agreement on Subsidies and Countervailing Measures (ASCM).[95] These provisions determine conditions for

[92] For instance, Article 26 of the DSU provides for dispute settlement procedures in the case of the so called 'non-violation complaints'. In this case, however, the withdrawal of the measures shall not be mandatory.
[93] *US – Carbon Steel (India*), Appellate Body Report (8 December 2014) WT/DS436/AB/R at 188-189, para 4.334).
[94] ibid.
[95] ADA Article 5.4 and ASCM Article 11.4 provide in equal terms: 'An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed(38) by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.(39) The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like

antidumping investigations in these two agreements. Complainants and third parties had argued that the United States that violated the principle of good faith in conducting such investigations.[96]

The Panel asked the complainants whether 'the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?'.[97] Generally, the complainants replied that the principle of good faith informed the WTO obligations, but did not create new obligations per se, and that such principle was not invoked as basis for an independent complaint. However, by failing to act in good faith the United States had violated the provisions at issue.[98]

The panel found that the United States had not acted in good faith in promoting the outcomes and values envisaged in ADA Article 5.4 and ASCM Article 11.4. The Panel considered that the principle of good faith was a 'well-established' 'general rule of conduct in international relations'.[99] It held that the United States was conducting the investigations for granting antidumping and countervailing measures in an unobjective manner by providing incentives to domestic producers to initiate petitions for dumping investigations. The Panel concluded that the terms of the United States legislation under dispute 'may be regarded as having undermined the value of AD Article 5.4/ SCM Article 11.4 to the countries with whom the United States trades, and the United States may be regarded as not having acted in good faith in promoting this outcome'.[100]

The AB was not convinced by this line of reasoning. The adjudicators considered that, although a Panel may have basis, 'in an appropriate case' to determine whether a Member has acted in good faith, the mere violation of a WTO obligation could not amount to the conclusion that it had not acted in good faith. In the dispute at issue, the evidence

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product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry*'*.

[96] *US — Offset Act (Byrd Amendment)*, Panel Report (16 September 2002) WT/DS217-234/R at 314 ff, para 7.59 ff.

[97] *US — Offset Act (Byrd Amendment)*, Panel Report (16 September 2002) WT/DS217-234/R Question 35 to the complainants, at 101 ff.

[98] See, *inter alia*, *US — Offset Act (Byrd Amendment*, Panel Report (16 September 2002) WT/DS217-234/R WT/DS217-234/R at 36, para 4.146; 93, para 4.440; 99, para 4.538. For the questions to the complainants, and their answers, see ibid 105, para 4.571; 115, para 4.619; 122, para 4.654; 127, para 4.675; 139, para 4.754; 144, para 4.770; 151, para 4.805. For the reply by the defendant United States, see ibid 154 para 4.824.

[99] ibid 316, para 7.64.

[100] ibid para 7.63.

in the Panel record did not support the conclusion that the United States had not acted in good faith. The AB held that

> nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.[101]

The AB thus overturned the Panel's conclusions, but at the same time it did not make concrete considerations on whether having acted in bad faith amounted to a violation of WTO obligations.[102]

The AB did not take a position on whether finding that a Member had acted in bad faith would amount to the findings of a violation of a WTO obligation. Therefore, it is not discarded that bad faith could amount to violation, even if a given measure is in accordance with the express terms of the treaty provisions. Nonetheless, if a Member acts in bad faith towards WTO obligations, such acts are probably aimed at *circumventing* such obligations, arguably for discriminatory or protectionist purposes. The WTO obligation being violated would thus be the WTO principle of non-discrimination and its corollaries, rather than the principle of good faith.

Arguably, determining whether a Member has acted in bad faith may provide a way of assessing whether discrimination exists. This procedure, however, would need to be realised through treaty wording – i.e., treaty provisions which contain words that allow for importing the principle of good faith as a guideline for performance of obligations.

2.3.3.2 The prohibition of abuse of rights: between a limitation and a self-standing obligation

In *US – Shrimp,* the AB interpreted the *chapeau* of GATT Article XX to be an 'expression of good faith'.[103] This provision allows trade measures to be exempted from GATT obligations as long as they 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

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[101] *US — Offset Act (Byrd Amendment)*, Appellate Body Report (16 January 2003) WT/DS217-234/AB/R WT/DS217-234/AB/R at 98, para 298.
[102] *US — Offset Act (Byrd Amendment)*, Appellate Body Report (16 January 2003) WT/DS217-234/AB/R WT/DS217-234/AB/R at 98, para 298-299.
[103] See fn 38 and accompanying text.

conditions prevail, or a disguised restriction on international trade'. The AB held that '[a]n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting'.[104]

The AB stated that these requirements are an 'expression of the principle of good faith': the rights enumerated by the paragraphs ensuing the *chapeau* should not be abused by the Member wishing to invoke such rights. The AB confirmed this approach in *Brazil – Retreaded Tyres,* in which the adjudicators assessed the balance between the rights granted by Article XX and the rights of the other members under the GATT. The AB stated in clear terms: 'the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX'.[105]

Put differently, this is how the *dicta* can be read: the violation of WTO obligations is in some specific cases permitted, but such violation must be performed in good faith. However, the following question remains: to what extent is the principle of good faith relevant for the point that the AB is trying to make?

The exemptions conferred to the WTO members by Article XX must be invoked in good faith. The 'abusive exercise' by a Member of its treaty rights would contrast with the principle of good faith in performing treaty obligations. In the AB's reasoning, such an abusive exercise would amount to a violation of the treaty obligation. Therefore, following the AB's reasoning in *US – Shrimp,* in the context of GATT Article XX, the principle of good faith arguably embodies an autonomous obligation. However, the adjudicators ultimately determined the violation of that provision on the basis of the existence of 'arbitrary or unjustifiable discrimination', rather than on the principle of good faith itself.

In the *US – Shrimp* AB report, these considerations preceded the 'issue of whether the *application* of the United States measure […] constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade"'.[106] Among other reasons, the AB found that the measure was inconsistent with the requirements of the *chapeau* because there were differences in treatment between different exporting countries. Moreover, the AB held that the lack of transparency in the application of the measure was arbitrary.

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[104] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R at 61, para 158.
[105] *Brazil – Retreaded Tyres*, Appellate Body report (3 December 2007) WT/DS332/AB/R at 88 para 224.
[106] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R 62, para 160, original emphasis.

The United States was not necessarily acting in bad faith in the application of the measure. One could argue that, such application lacked diligence, but was not necessarily bad faith. The focal point of analysis of the AB remained the existence of 'arbitrary or unjustifiable discrimination' – and indeed these are the names of the subtopics under which scrutiny is developed by the adjudicators. It follows, that while acting in good faith may be a requirement for qualifying the tests under Article XX, this is not necessarily the threshold to be observed. For the purposes of Article XX, the opposite of good faith is not bad faith, but 'arbitrary or unjustifiable discrimination'.

The final part of the requirements set by the *chapeau* focuses on something that can be more closely related to a requirement of good faith: the prohibition of invoking the exceptions as 'a disguised restriction on international trade'. *Disguised restriction* bears the same negative and subjective connotation as *bad faith*. However, in *US – Gasoline,* the AB stated that *disguised restriction* is a related concept to those of *arbitrary or unjustifiable discrimination*.[107] Thus, even when assessing a concept to which a broader meaning could be attributed, the AB chose to focus on the principle of non-discrimination as an interpretative guideline.[108]

The flipside of the coin is to ask whether discrimination in good faith would fall within the scope of permissible measures according to the *chapeau* of Article XX. In that case, the Appellate Body would arguably consider that there was discrimination, but such discrimination was not unjustifiable or arbitrary. This possibility was analysed by the AB in the *Brazil – Retreaded tyres* report. In that case, the AB addressed whether Brazil's discrimination between Mercosur and non-Mercosur countries in the imposition of a measure that allegedly was aimed at environmental and human health issues amounted to arbitrary or unjustifiable discrimination. This discrimination had followed a decision imposed by the Mercosur arbitral tribunal which determined that the members of the regional trade agreement should be exempted from the measures at stake. During panel

[107] It stated: '"Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX' (*US – Gasoline*, Appellate Body Report (29 April 1996) WT/DS2/AB/R at 236).
[108] In this sense, see Adinolfi (n 66) at 95.

procedures, part of the discussions revolved precisely around the role of the principle of good faith in invoking GATT Article XX.[109]

The AB agreed with the Panel that the compliance with the Mercosur ruling was not 'capricious' or 'random'. Indeed, Brazil was acting to comply with a judicial body.[110] Therefore, the discrimination was not performed in bad faith. The AB, yet, did not focus on this aspect. Instead, it considered that, since the discrimination resulting from the compliance to the Mercosur ruling had 'no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX',[111] the application of the measure amounted arbitrary or unjustifiable discrimination.[112]

Reverting to the question of whether the principle of good faith has a legal autonomy in WTO law, these considerations point to a negative conclusion. The AB's interpretation of how to apply the chapeau of Article XX is perhaps the closest instance of an autonomous obligation to observe the principle of good faith in WTO law. However, even in this case, this requirement was merely a reflection of a principle of *WTO law*: the principle of non-discrimination. The obligation of performance in good faith and prohibition of abuse does exist, but it is a corollary of the prohibition of discrimination.

2.3.4 Interim conclusions

Although references to general principles and customary rules on the law of treaties represent the largest portion of non-WTO sources of law in the AB case law,[113] WTO Members did not express substantial criticisms or raise concerns related the approach followed by the organ when resorting to these sources. This can be explained by two factors. First, because most of these references are to Article 31 and 32 of the VCLT, which were explicitly incorporated as 'customary rules of interpretation of public international law' into WTO law by DSU Article 3.2 DSU. In a way, because of DSU Article 3.2, these provisions, in addition to VCLT Article 33, could be regarded part of the WTO legal system, and not pertaining *only* to general international law. The drafting Members of the DSU *intended* that the DSU reflected reference to these provisions.

[109] See *Brazil - Retreaded Tyres*, Panel report (12 June 2007) WT/DS332/R Annex 1, in particular para. 538 ff.
[110] *Brazil – Retreaded Tyres*, Appellate Body report (3 December 2007) WT/DS332/AB/R 91, para 231 ff.
[111] ibid 92, para 232.
[112] ibid para 233.
[113] See fn 2.

Therefore, the absence of criticism for the AB's reliance to these rules in the development of its reasoning does not come as a surprise.

The second reason is that the AB arguably relied on these general principles of treaty interpretation and application in a very restrictive manner. As described in Section 2.2, one can observe a tendency that AB reports rely on codified, rather than unwritten, general principles and customary international law. Preference is also given to concepts codified in the VCLT. The fact that 116 States are party to this convention gives leeway for the adjudicators to refer to concepts of that are rather uncontroversial in general international law.[114]

The way in which such concepts are applied by WTO adjudicators could still lead to claims of judicial overreach. Section 2.2 of this chapter explored two examples, brought up by Members in their DSB statements, in which reference to general principles on the law of treaties could promote an undue 'expansion' of the material jurisdiction of WTO adjudication. In both cases, however, it was argued that the AB's reliance on these concepts was characterised by a restrictive approach.

The first example, detailed in Section 2.2.1, is the principle of systemic integration, according to which international norms should be read in accordance with the broader framework of international law. In this sense, resort to this principle could indirectly result in the interpretation and application of non-WTO law.

The AB resorted to the logic underlying this principle in some disputes, among which *US – Shrimp* and *EC and certain member States — Large Civil Aircraft*. However, one can infer from the AB's practice that it prefers to rely on VCLT Article 31(3)(c), i.e. the codification of the principle. In its early reports the AB seemed more inclined to take into consideration non-WTO law for the interpretation of WTO terms and provisions, as in *US – Shrimp*. However, in the more recent *EC and certain member States — Large Civil Aircraft* and *Peru – Agricultural Products*, the AB followed a stricter approach. It restricted its reliance on non-WTO conventions for the interpretation of WTO provisions to the fulfilment of the 'criteria' of VCLT Article 31(3)(c). Put differently, the AB only accepted the relevance of the invoked agreements insofar as these were 'relevant' 'rules of international law' 'applicable between the parties'.

The second example, detailed in Section 2.2.2, is the principle of good faith. Members are expected to perform their WTO obligations in good faith. Moreover, the

[114] As of 16 August 2019.

AB determined that the exceptions under GATT Article XX should be invoked in good faith. These two guidelines could be read to amount to self-standing obligations to observe the principle of good faith. Because they are not based on treaty wording, they could amount to claims of judicial overreach if adjudicators found violations based on this principle.

However, the AB has taken a restrictive approach also in this instance. The organ, while relying on the principle of good faith in its reasoning and emphasising the importance of observing good faith in performing WTO obligations, always attained its analysis to treaty words and provisions. The AB relied on the principle of good faith as a threshold for ascertaining the observance of WTO obligations, but not as a self-standing obligation in itself.

CHAPTER 3

BETWEEN FALL-BACK AND DEROGATION: GENERAL INTERNATIONAL LAW ON STATE RESPONSIBILITY AND WTO ADJUDICATION

3.1 PRELIMINARY REMARKS

The topic of State Responsibility was included in the codification efforts of the International Law Commission (ILC) as early as 1949.[1] The final product of these works, entitled 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (DASR),[2] was only adopted by the ILC in 2001, and it focused on the secondary rules of state responsibility (i.e., 'the consequences of failure to fulfil obligations established by the primary rules').[3]

Evidently, the adoption of the ILC DASR in 2001 does not mean that there were no (primary or secondary) principles or customary rules guiding the determination of state responsibility before the codification efforts came to be; equally, their codification does not supersede the existence of customary rules and general principles. Moreover, the extent to which the ILC DASR reflects codification or progressive development is, of course, not straightforward to ascertain.[4] Although the content of the Draft Articles is largely accepted regardless of its customary status, the practice of international courts

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[1] UN, Yearbook of the International Law Commission: Summary Records and Documents of the First Session including the report of the Commission to the General Assembly (United Nations 1949) 51.

[2] ILC, 'Report of the International Law Commission on the work of its 53rd session (23 April - 1 June and 2 July - 10 August 2001) UN Doc A/56/10 ('DASR').

[3] Yoshiro Matsui, 'The transformation of the Law of State Responsibility' in R Provost (ed), *State Responsibility in International Law* (The Library of Essays in International Law, Ashgate Publishing 2002) 5. For an account of the codification history on the topic by the ILC, see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 1 ff. This methodological decision was justified by Roberto Ago, the second Special Rapporteur of the topic in the ILC, as follows: 'Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require very extensive commentaries. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely.' ('Second report on State responsibility, by Roberto Ago, Special Rapporteur: The origin of international responsibility' (1970) *Yearbook of the International Law Commission*, vol II, UN Doc A/CN.4/233, 179).

[4] See Alain Pellet, 'Between Codification and Progressive Development of the Law: Some Reflections from the ILC' (2004) 6 International Law Forum du droit international 15-23; Crawford, *The ILC Articles* (ibid) at 59-60.

may shed light to the acceptance as customary rules of its provisions and the authoritativeness of their value.[5]

Additionally, such practice may also clarify to which extent the general rules on state responsibility apply in the presence of a system which has its own framework of secondary rules. It is the existence of a particular set of secondary rules in relation to the general rules that characterizes a 'self-contained' regime (which by its turn does not mean it is entirely disconnected from general international law).[6] Article 55 of the ILC DASR recognizes the dynamic between general and special regimes of secondary norms. It states that '[The Draft 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'.[7] According to this approach, the application of general rules of state responsibility is not discarded unless specifically contracted out by the *lex specialis* regime.[8]

The WTO Agreement establishes both primary and secondary rules for a multilateral trading system, and the secondary rules include rules on the determination of a breach of WTO obligations by a State and the consequences thereof. In many aspects, the WTO legal system is *lex specialis* with regard to general rules on state responsibility.[9]

Either due to what Koskenniemi called substantive 'failure' of the regime (the inexistence of material rules necessary to attain the purpose of the institution)[10] or merely seeking for clarifications from the broader background (after all, the WTO is 'not to be

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[5] In this sense, see ILC, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies', Report of the Secretary-General (30 April 2010) UN Doc A/65/76 ('Compilation').

[6] As Simma and Pulkowski put, self-contained regime is not to be understood as a legal subsystem in 'splendid isolation from their environment', but instead as a 'particular category of subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules' (Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) EJIL 492-492 ('Of Planets'). See also Chapter 1.2.

[7] DASR n (2) 140.

[8] Bruno Simma and Dirk Pulkowski, '*Leges specialis* and self-contained regimes' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010) 145 ('*Leges*'). See also for a description of the distinct approaches to the relationship between general secondary norms and self-contained regimes taken by Special Rapporteurs Riphagen, Arangio-Ruiz and Crawford.

[9] For a detailed review of the relationship between WTO law and general international law on state responsibility, see Mariano R Garcia, *On the application of customary rules of State responsibility by the WTO dispute settlement organs: a general international law perspective* (Studies and Working Papers, Graduate Institute of International Studies 2001) and Hubert Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale* (LGDJ 2007).

[10] ILC, 'Report of the Study Group of the International Law Commission on the Work of its 58th Session' (Fragmentation of International Law, 1 May-9 June and 3 July-11 August 2006) A/CN.4/L.682 ('Fragmentation') 97 ff.

read in clinical isolation from general international law'), it is possible to resort to customary rules and general principles of state responsibility which have not been incorporated by the WTO Agreements.[11] There is some overlap between the general international law framework on state responsibility and that of the WTO system, but there are also *lex specialis* rules derogating from these general guidelines.

As Simma and Pulkowski considered, 'to the extent that [secondary rules of the special regime] are inexistent or ineffective, the general rules on state responsibility will remain applicable'; however, 'it would be too simple […] to assert that a fall-back on general international law follows 'automatically' from a mechanical application of the *lex specialis* maxim'.[12] The authors also explain that tribunals established under a special legal subsystem are 'primary concerned with the content of "their" special law. Only in a second step, if this special regime proves insufficient to resolve a case, is resort had to general international law'.[13]

This fall-back to general international may, however, have shortcomings. One of them is a potential lack of clarity with respect to when such fall-back takes place. Another is the possibility that Members of the special regime are unsatisfied to see secondary rules which were not originally agreed upon being applied regardless of their consent. For example, general international law on state responsibility provides for rules on the consequences of a wrongful act, namely cessation and reparation, as well as the general guidelines to follow when reparation is due. Conversely, the WTO system does not foresee reparation as a consequence of the finding of a WTO-inconsistent measure, and it has been argued that this is not a consequence allowed in the multilateral trading system.[14]

Another example are circumstances precluding wrongfulness, codified in the ILC DASR. These hypotheses preclude the responsibility of a State, which would otherwise be found in violation of international law. Indeed, the ILC commentaries consider that '[u]nless otherwise provided, they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source'.[15] The WTO

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[11] Simma and Pulkowski, '*Leges*' (n 8) 155-158.
[12] Simma and Pulkowski, 'Of Planets' (n 6) 485.
[13] Simma and Pulkowski, '*Leges'* (n 8) 141.
[14] See Sherzod Shadikhojaev and Nohyoung Park, 'Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility' (2007) 41(6) Journal of World Trade 1237–1258.
[15] DASR n (2) 72.

Agreements do not ‘provide otherwise’. The invocation of these circumstances, however, would arguably ‘add to or diminish rights and obligations’ of WTO Members, as they would justify non-performance of WTO obligations. Reference to these sources by WTO adjudicators could entail criticisms of WTO Members.

This chapter examines the approach followed by WTO adjudicators in resorting to this field of international law and the implications of this recourse to the jurisdictional mandate of WTO dispute settlement system. Understanding how resort to these sources is justified by the AB and the general approach of the adjudicators in so doing is indispensable in order to understand how general international law on state responsibility relates to WTO law. It is useful to consider, for instance, whether the classification of a general secondary norm as ‘customary’ or as a ‘general principle’ entails a different treatment in such resort. Moreover, such examination allows for a better grasp of whether recourse to general secondary norms can amount to a judicial overreach.

The first part of the chapter (3.2) deals with these issues by studying what the AB considers to be customary international law and general principles of state responsibility, and what the legal basis for invoking these sources under WTO dispute settlement is. The second part (3.3) focuses on whether recourse to general international law on state responsibility could trigger claims of judicial overreach in WTO dispute settlement.

As this chapter demonstrates, not all concepts of state responsibility examined here have been declared to be customary law or general principle by the Appellate Body. However, an overview of the general resort that the AB makes to these norms is relevant in order to draw conclusions with respect to the patterns in this use. It is also relevant to assess the functions played by these norms in the WTO system.

3.2 THE USE OF GENERAL INTERNATIONAL LAW ON STATE RESPONSIBILITY BY THE WTO APPELLATE BODY

A first look at the DASR reveals similarities between the WTO system of secondary norms and the one set out by general international Law. Draft Article 3 states that ‘There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b)

Constitutes a breach of an international obligation of the State'.[16] Similarly, Article 3.3 of the DSU provides that the dispute settlement mechanism of the WTO is to be triggered when 'a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member'. There are three elements that are worth scrutiny in this formulation: first, the concept of 'measure' (which is comparable to the idea of 'conduct consisting of an action or omission'); second, 'taken by another Member' (a WTO-equivalent to the attribution requirement); third, the existence of impairment of benefits (which, as will be explained, represents a deviation of the requirement of a breach of an international obligation).[17]

These similarities hint that reference to general international law on state responsibility could potentially serve to complement interpretation of WTO provisions (interpretative aid), fill gaps in the multilateral trading system of responsibility (subsidiary role), or to be contrasted with (WTO law as *lex specialis* which derogates general international law). Having this in mind, this section is aimed at systematizing the references to general international law on state responsibility by the WTO Appellate Body. It is divided into four subsections: attribution of conduct (3.2.1), impairment of benefits (3.2.2), circumstances precluding wrongfulness as a defence in WTO dispute settlement (3.2.3) and general international law of countermeasures (3.2.4). This selection is based on the references made by the Appellate Body to general international law on state responsibility.[18]

3.2.1. Attribution of conduct

The State is a legal fiction. For the determination of state responsibility, 'attribution' is thus 'the process by which international law establishes whether the conduct of a natural person or other such intermediary can be considered an "act of state", and thus be capable of giving rise to state responsibility'.[19]

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[16] DASR (n 2).
[17] See Section 3.2.2.
[18] These four categories were the result of a systematising process according to the following method: in the WTO online database for dispute documents (https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm), the terms 'state responsibility' 'internationally wrongful acts' was inputted in the *Full text search* slot for a search in 'Appellate Body reports' and 'Recourse to Article 21.5 - AB reports'. 13 documents resulted from this query as of 24.10.2018.
[19] James Crawford, *State responsibility: the general part* (CUP 2013) ('*State responsibility*') at 113, footnotes omitted.

In *US — Corrosion-Resistant Steel Sunset Review*, the AB stated that '[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings'.[20] The central issue is to ascertain whether a certain conduct (or, specifically in the case of trade law, measure) can be attributed to a State (or, more accurately, WTO member).

The methodology of the legal basis will be addressed in two situations: Section 3.2.1.1 deals with the cases in which the AB invoked general rules on state responsibility without explaining the methodology for doing so, and Section 3.2.1.2 deals with the specific case in which these rules were invoked under Article 31(3)(c) of the VCLT.

3.2.1.1 References to general rules on attribution without clear legal basis

Explicit reference to general international law on attribution can be found in AB case law after the adoption publication of the ILC DASR in 2001. However, the first AB report, *US – Gasoline* (1996), made implicit considerations on the topic. In this report the AB held that '[…] the United States, of course, carries responsibility for actions of both the executive and legislative departments of government'.[21] This statement is not clearly associated to a general principle or customary rule of international law, but it does embody one of the basic rules of attribution. In *US – Shrimp* (1998), the AB advanced a similar declaration, stating that 'The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary'.[22]

While in *US – Gasoline* the attribution statement was not accompanied by any authoritative source of international law, in *US – Shrimp* it was followed by a footnote with a reference to *US – Gasoline* and two handbooks of general international law. The footnote in the *US – Shrimp* quote is telling regarding the tendency of the AB in prioritizing *dicta* of previous reports as source of law. Indeed, the *US – Shrimp* passage

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[20] *US — Corrosion-Resistant Steel Sunset Review*, Appellate Body Report (15 December 2003) WT/DS244/AB/R at 29, para 81.

[21] *US – Gasoline,* Appellate Body Report (29 April 1996) WT/DS2/AB/R at 28. Similarly, in *US — Corrosion-Resistant Steel Sunset Review*, the AB considered that Article 3.3 of the DSU 'identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'' and that acts of that are attributable to a Member for this purposes are '[…] in the usual case, the acts or omissions of the organs of the state, including those of the executive branch' (*US — Corrosion-Resistant Steel Sunset Review*, Appellate Body Report (15 December 2003) WT/DS244/AB/R 29, para 81).

[22] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R 71, para 163, footnote omitted.

is later referenced by the *US – Zeroing (Japan) (Article 21.5 – Japan)* AB report, issued in 2009.[23]

There is a slight shift in the approach followed by the AB and the disputants before and after the adoption of the DASR in 2001, which can be noted in particular with respect to the claims of violation of WTO law related to non-State entities. Before 2001, this assessment was made through resort to the dictionary approach. In *Canada — Dairy*, whose AB report circulated in 1999, the organ interpreted the meaning of 'governments or their agencies' in Article 9.1 of the Agreement on Agriculture (AgA).[24] The Appellate Body addressed the question by reverting to the dictionary definitions of 'government', and then adduced that 'government agency' is '[…] an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character […]' and that it enjoyed a 'degree of discretion in the exercise of its functions'.[25] There is no reference to sources of general international law for the conclusions reached in this report.

This approach can be contrasted with the analysis of Article 1.1(a)(1)[26] and subparagraphs of the Agreement on Subsidies and Countervailing Measures (ASCM) in *US — Countervailing Duty Investigation on DRAMs*, circulated in 2005. In that report, Korea, the complainant, had invoked Article 8 of the DASR[27] in order to support its

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[23] *US — Zeroing (Japan),* Article 21.5 Appellate Body Report (18 August 2009) WT/DS322/AB/RW at 81, fn 462. The AB was addressing United States' claims that judicial acts were part of independent judicial proceedings, thus not subject to the responsibility of administering authority. It stated that '[t]he judiciary is a state organ and even if an act or omission derives from a WTO Member's judiciary, it is nevertheless still attributable to that WTO Member' (ibid, para 182). To support this conclusion, it invoked two WTO provisions (Article 18.4 of the Antidumping Agreement and Article XVI:4 of the WTO Agreement) and Article 27 of the VCLT, which provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' (ibid).

[24] The provision states: '1. The following export subsidies are subject to reduction commitments under this Agreement: (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance'. Canada had appealed the Panel's conclusions that provincial milk marketing boards were government agencies based on the fact that there they 'receive[d] the authority from the governments to regulate certain areas themselves that their actions become governmental' (*Canada – Dairy*, Appellate Body Report (13 October 1999) WT/DS103/AB/R at 24, para. 94, citing panel report's conclusions).

[25] ibid 35, para 97.

[26] The relevant part of provision states: '1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e. where: [...] (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; […]'.

[27] DASR, Article 8: 'Conduct directed or controlled by a State. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

interpretation of Article 1.1(a)(1)(iv) of the ASCM. This provision considers that there is a financial contribution by a government or any public body when 'a government makes payments to a funding mechanism, or *entrusts* or *directs* a private body to carry out one or more of the type of functions [...] which would normally be vested in the government and the practice'.[28]

Korea argued that 'there must be a demonstrable link between the government and the conduct of the private body', and invoked DASR Article 8 to support its claims.[29] The United States, the other disputant, claimed that there was 'sufficient factual basis to conclude' that there was entrustment or direction of the private body from the Chinese government, but did not contest the applicability of the DASR.[30] The Appellate Body agreed Korea's interpretation and also referred to Article 8 to state that 'the conduct of private bodies is presumptively not attributable to the State'.[31] The interpretation, however, focused on the specific wording of Article 1.1(a)(1)(iv) of the ASCM, and reference to DASR was merely complementary to the determination of the meaning of 'entrusts' and 'directs'.

These reports show that the AB, even after 2001, focuses on the traditional interpretative tools such as dictionary approach, to assess questions of attribution. Reference to general international law is made only to supplement the general interpretative steps. Perhaps because of this 'secondary' role, there is a lack of preoccupation from the AB in specifying the legal basis for the invocation of the DASR (without any explanation or indication that they would qualify under DSU Article 3.3 or a specific provision of the VCLT). The mere invocation coupled with an authoritative reference (in early case law, international law handbooks; after 2001, the DASR) was the justification employed by disputants and the AB. Moreover, the Appellate Body seems to find it unnecessary to state whether these rules qualify as principles or customary international law.

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[28] *US — Countervailing Duty Investigation on DRAMs*, Appellate Body Report (27 June 2005) WT/DS296/AB/R at 41, para 112, emphasis added.

[29] ibid.

[30] 'United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, Appellee Submission of the United States Of America' (April 25, 2005), available at https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file724_5539.pdf, accessed 30 January 2019, at 6.

[31] *US — Countervailing Duty Investigation on DRAMs*, Appellate Body Report (27 June 2005) WT/DS296/AB/R 41, para 112, fn 179.

3.2.1.2 DASR under VCLT Article 31(3)(c): the US — AD and CVD (China) AB report

In *US — AD and CVD (China)*, whose AB report circulated in 2011, there was a clearer indication of a legal basis for invoking general international law on attribution. Interestingly, after this report, no mention to general international law on the topic was made on appeal level.[32]

In this dispute, China had invoked Articles 4, 5 and 8 of the DASR under Article 31(3)(c) of the VCLT for the interpretation of the term 'public body' in Article 1.1(a)(1) of the ASCM.[33] China contended that these provisions reflected customary international law and thus were relevant rules of international law 'necessarily' applicable in the relations between the parties.[34] The United States claimed that 'it remains an open and contested question' whether these provisions reflected customary international law and '[o]nly if these Articles were customary international law could they be said to be "applicable in the relations between the parties" […]'.[35]

The applicability of the DASR was rejected by the Panel on the basis that the Draft Articles could provide 'conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements'.[36] The panelists dismissed the DASR as 'relevant rules of international law' as invoked by China claiming that the WTO Agreement should be interpreted 'on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context […]', that the DASR are not binding and that the WTO rules are *lex specialis* vis-à-vis the general rules of international law on state responsibility.

The AB kept the approach of referring to the DASR as complementary means of interpretation: it first determined the meaning of 'public body' primarily by examining the ordinary meaning and dictionary approach,[37] and only then supported its conclusions

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[32] References to the requirement that a measure is attributable to a State can be found, as in *Argentina — Import Measures,* Appellate Body Report (15 January 2015) WT/DS438/AB/R and *US – Carbon Steel (India)*, Appellate Body Report (8 December 2014) WT/DS436/AB/R 121, para 4.31 ff. However, Section 3.2.1.2.3 details, these arguments findings are mostly related to matters of fact than to matters of law, and there is no reference to general international law on the subject.

[33] The considerations made in this section on the use of the ILC DASR by the AB in the *US — AD & CVD (China)* report can be found in more detail in Mariana C de Andrade, 'Path to judicial activism? The use of 'relevant rules of international law' by the WTO Appellate Body' in (2018) 15(3) *Brazilian Journal of International Law*.

[34] *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R at 16, para 36.

[35] ibid 57, para 142.

[36] *US — AD & CVD (China)*, Panel Report (22 October 2010) WT/DS379/R 47, para. 8.87.

[37] *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R 110, para 285 ff.

with provisions of the DASR.[38] Following the interpretative methodology of VCLT Article 31, the AB decided that determining whether an entity could be characterised as a 'public body' revolved around assessing 'whether the entity is vested with or exercises governmental authority'.[39] After considering the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' and motivated by China's arguments, it considered the ILC DASR.

In this dispute, the AB developed a more detailed analysis of the applicability of non-WTO rules invoked under Article 31(3)(c) to WTO dispute settlement. It stated that the provision 'contains three elements. First, it refers to "rules of international law"; second, the rules must be "relevant"; and third, such rules must be "applicable in the relations between the parties"'.

With respect to the 'rules of international law' criterion, the AB observed that 'Articles 4, 5, and 8 of the ILC Articles are not binding by virtue of being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties'.[40] Thus, to assess whether the provisions were 'rules of international law', the AB would have to consider whether they constituted customary law or general principles. This could have led to an authoritative declaration regarding the status of these rules.

However, the AB did not answer this question. Instead, the adjudicators held that in fact, their interpretation of 'public body' (based on the general rule in VCLT Article 31(1)) 'coincide[d] with the essence of Article 5 [of the ILC DASR]'.[41] In other words, the AB claimed that Article 5 of the ILC DASR lent support to their own analysis.[42]

The AB at first circumvented the question of whether the invoked ILC provisions constituted rules of general international law for the purposes of Article 31(3)(c). Interestingly, however, the organ went on to criticise the Panel for its findings that the

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[38] ibid 119, para 307 ff.

[39] ibid 132, para 345. For an assessment on the merits the AB's interpretation of the term 'public body', see Joost Pauwelyn, 'Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China' (2013) 12(2) World Trade Review 235–241 ('Activism?'); Thomas J Prusa and Edvin Vermulst, 'China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States: exporting US AD/CVD methodologies through WTO dispute settlement?' (2014) 13(2) World Trade Review 229-266.

[40] *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R 119, para 308. The AB also sustained that 'First, the reference to "rules of international law" corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice and thus includes customary rules of international law as well as general principles of law' (ibid).

[41] ibid 120, para 310.

[42] ibid, para 311.

ILC provided mere ‘conceptual guidance’ to WTO provisions and thus they did not constitute rules of international law in the sense of that provision. The AB reversed this finding and considered that if ILC Articles have been used to contrast or confirm the meaning of WTO Agreement provisions, ‘this evinces that these ILC Articles have been “taken into account” in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases’.[43]

There is a logical inconsistency in this reasoning. The AB had previously held that in order to be considered ‘rules of international law’ they need to have attained the status of customary law or general principles. If, subsequent to this statement, the AB is clearly claiming that these Articles have been considered under VCLT Article 31(3)(c), by consequence this means that the DASR provisions which have been considered under Article 31(3)(c) are incidentally considered to reflect either customary international law or general principles. Still, the AB was not clear in this sense. Instead, it refrained from positioning itself firmly regarding the status of these DASR provisions.

It is also interesting to remark that it was China who invoked Article 31(3)(c) as the legal basis for the interpretation of ‘public body’. One may wonder what the AB’s approach would have been if China had not justified it under Article 31(3)(c). The *US — Countervailing Duty Investigation on DRAMs* sheds some light to this question: in that dispute, Korea had invoked the same principles of attribution, in particular Article 8 of the ILC’s text on State Responsibility. In its report in that case, the AB resorted to DASR Article 8 but did not make any reference to VCLT Article 31(3)(c) and its requirements. From this approach, it can be inferred that there is in fact no need to justify resort to DASR provisions under VCLT Article 31(3)(c) for the provisions under the former to be taken into consideration.

Reference to general international law on attribution can be characterized by a shifting trend to rely on assertion and handbooks of international law (which characterized the AB’s early years of practice) to a reliance on the ILC DASR. Resort to the Draft Articles for rules on attribution, while now seemingly *dicta* (since subsequent Panel and AB reports have relied these references when justifying their own use of the DASR provisions), was not introduced into WTO case law by a detailed explanation of whether the draft provisions on attribution reflect customary international law or general principles. Rather, the AB circumvented giving an answer to this question.

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[43] ibid 121, para 340.

3.2.2 Impairment of benefits and assessment of damage and DASR Article 14

Following the ILC DASR, the second element for the establishment of an internationally wrongful act of a State is the existence of a breach of an obligation.[44] In the WTO legal system, Members' obligations are those provided for in the covered agreements. For instance, as seen in Chapter 2, lack of good faith does not amount to a *per se* breach of WTO law because it is not an autonomous obligation in the multilateral trading system.

There is a difference between this element in general international law and in the WTO legal system. In general international law the existence of a breach of an obligation (that is attributable to a State) is sufficient to entail the responsibility of that State. Moreover, damage is not required. By contrast, in WTO law the responsibility of a state is a consequence of the existence of a nullification or impairment of benefits accruing from WTO agreements (i.e., damage).

The WTO framework represents somewhat an inversion of the logic that breach of an obligation is one of the requirements of international responsibility and damage is not required. WTO law requires nullification or impairment (damage) of benefits as grounds for invoking the DSM, and such nullification or impairment is presumed in case of violation of obligation. According to DSU Article 3.8, 'there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement'. However, this formulation still indicates that the ultimate requirement is the damage, rather than the breach.

Generally, when ascertaining whether a measure amounts to impairment of benefits of a Member, WTO adjudicators do not refer to general international law. However, one instance raised the AB's interest in referring to extraneous norms: the retroactivity of acts for purposes of establishing responsibility.

Article 14 of the ILC DASR sets out the rules regarding the temporal scope of a conduct and the relationship with its wrongful character. Paragraph (1) states that 'The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue'.[45] While, on the one hand, according to general international law, '[a]n act does not have a continuing

[44] Draft Article 12 of the DASR (*Existence of a breach of an international obligation*): 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character' (DASR (n 2) 54).
[45] DASR (n 2) 59.

character merely because its effects or consequences extend in time', on the other hand the consequences of the wrongful act and of the prolongation of its effects over time '[…] are subject of the secondary obligations […]' applicable to the case.[46]

The WTO Agreement entered into force in 1995. Trade measures which were permissible prior to this date (and would have been contrary to WTO law but ceased to exist) may have had repercussions after 1995. Arguably, there is no wrongful act if the measure is no longer in place, even if the effects of this measure continue to take place.

It was in this context that the European Communities, in *EC and certain member States — Large Civil Aircraft*, invoked the principle of non-retroactivity present in Article 28 of the VCLT,[47] coupled with Article 14(1) of the ILC DASR as support to its interpretation of Article 5 of the ASCM,[48] which states that no member should cause adverse effects to the interests of other members through the use of subsidies.[49] It argued that financial aids that were given prior to 1995 should not be considered as contrary to Article 5 of the ASCM, even if its effects continued to subsist.[50]

The United States, on the other hand, contested the applicability of Article 14 to the dispute as 'irrelevant' to the interpretation of non-retroactivity of rules. It also stated that the ILC Articles are neither 'covered agreements' nor 'customary rules of interpretation of public international law' (thereby hinting their inapplicability not only in terms of substance, but in lack of legal basis).[51] These arguments were not countered by the European Union.[52]

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[46] ibid para (6).
[47] See Chapter 2.1.1.1.
[48] *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R at 21, para 41.
[49] Article 5 of the ASCM provides in its complete form: 'No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.: (a) injury to the domestic industry of another Member(11); (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994(12); (c) serious prejudice to the interests of another Member.(13) This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture'.
[50] In short, 'The European Union further argues that, by concluding that Article 5 refers to a "situation" comprising both the granting of a subsidy and its effects, regardless of when the subsidy was granted, the Panel effectively negated the principle of non-retroactivity. Yet, under general international law, the question of whether treaty obligations apply to certain government conduct depends on the nature of the government conduct and its timing' (*EC and certain member States — Large Civil Aircraft* Appellate Body Report (18 May 2011) WT/DS316/AB/R at 21, para 40).
[51] USTR, Appellee Submission of the United States (30 September 2010) available at https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/DS316.US_.Appellee.Sub_.(Posted).pdf (access 15 November 2018) at 09, para 25.
[52] The EU does not counterargue this position in its closing memorandum after the hearings before the AB (see closing memorandums of 26 November 2010 and 14 December 2010, available at

In its reasoning and findings, the AB completely overlooked the discussions on whether Article 14 of the DASR reflects customary international law in general, if it could be considered a customary rule for purposes of interpretation, and whether there is a legal basis for the invocation of this rule in the WTO legal system. Instead, the adjudicators went on to analyse whether DASR Article 14(1) and Article 5 of the ASCM have the same scope.[53] The AB did dismiss the EC's argument, but not based on the allegations that it was not a 'covered agreement' or did not reflect customary international law, but because its substance was not relevant to provide support to the interpretation advanced by the European Union.

3.2.3 Circumstances precluding wrongfulness

Circumstances precluding wrongfulness are hypotheses under general international law according to which the wrongful act of a State may be justified.[54] They have neither been incorporated nor explicitly derogated by the WTO Agreements. For this reason, it is debatable whether such circumstances may be invoked under the multilateral trading system.

In *Peru – Agricultural Products*, Guatemala initiated proceedings before the WTO DSM claiming that Peru had violated provisions under the GATT and the Agreement on Agriculture. These alleged violations were linked to the conclusion of a bilateral Free Trade Agreement (FTA) between the two disputants. The FTA had not entered into force, but it allowed for a mechanism of trade regulation known as the Price Range System (PRS), which was incompatible with WTO obligations.[55] One of the main questions before the WTO adjudicators was therefore the incompatibility between the obligations under the FTA and the WTO.

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http://trade.ec.europa.eu/wtodispute/show.cfm?id=268&code=2#_eu-submissions, accessed 15 November 2018).

[53] *EC and certain member States — Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R at 290, para 685-686.

[54] DASR (n 2) 71.

[55] G Shaffer and LA Winters, 'FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law' (2017) 16(2) *World Trade Review* 303–326

Peru, the defendant, invoked Articles 20 and 45 of the ILC DASR (respectively on 'Consent'[56] and 'Loss of the right to invoke responsibility')[57] as relevant rules under Article 31(3)(c) of the VCLT, and should be taken into account for the interpretation of Article 4.2 of the Agreement on Agriculture, the provision with which the PRS would be incompatible.[58] Peru claimed that the draft articles codified general principles of law and were 'directly relevant in this context', and that they provided additional support to the claim that WTO Members can waive their WTO rights through non-WTO treaties.[59] Guatemala, the complainant, argued that Peru did not demonstrate that Articles 20 and 45 of the DASR were neither 'relevant' nor 'rules of international' for the purposes of VCLT Article 31(3)(c).

The AB rejected the claims of Peru by stating that the ILC DASR were not '*relevant* rules' under Article 31(3)(c) for the interpretation of Article 4.2 of the AgA. In particular, the AB considered that they did not 'concern the same subject matter as the treaty terms being interpreted'.[60] The AB did not address whether these Articles 20 and 45 reflected principles of state responsibility or customary international law.

Similarly to *US — AD and CVD (China),*[61] one may wonder whether it would not have been more difficult for the AB to discard their applicability to the dispute had Peru not invoked the DASR provisions as 'relevant rules' for the interpretation of a WTO provision under Article 31(3)(c). Instead, Peru could have relied on a more general justification, such as a simple assertion that these provisions guide the relations between WTO Members. More boldly, Peru could have claimed the customary status of these rules. The restrictive approach of the AB towards the meaning of 'relevant' had already been established since *EC – Large Civil Aircraft,*[62] so it was not a surprise that the AB rejected Peru's arguments under this formal approach. In any case, it remains unsettled whether circumstances precluding wrongfulness apply in the WTO system.

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[56] Article 20 of the DASR ('Consent') states: 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent' (DASR (n 2) 72).

[57] Article 45 of the DASR states: 'Article 45. Loss of the right to invoke responsibility. The responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim' (ibid 121)

[58] Article 4.2 of the Agreement on Agriculture provides: '2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties (1), except as otherwise provided for in Article 5 and Annex 5'.

[59] *Peru - Agricultural Products*, Appellate Body Report Addendum, Annex B-1 Executive Summary of Peru's Appellant's Submission (20 July 2015) WT/DS457/AB/R/Add.1 B-11, para 13.

[60] ibid at 41-42, paras 5.100 and 5.103.

[61] See Section 3.2.1.2.

[62] See Chapter 2.2.3.2.

3.2.4 Countermeasures in the multilateral trading system: suspension of concessions

According to the ILC, countermeasures are acts which 'would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State […]'.[63] They are used to 'induce a State to comply with its obligations'.[64] At the same time, countermeasures represent one of the circumstances precluding wrongfulness.[65]

In WTO law, countermeasures have been incorporated by the WTO Agreements in the form of the so-called suspension of concessions – that is, the suspension of trade rights granted by the injured member to the other member found to be in violation of WTO law. In the multilateral trading system, these suspensions of concessions cannot be exactly qualified as circumstances precluding wrongfulness, as they must be authorised by the Dispute Settlement Body (DSB).[66] Once authorisation is granted, the measures taken within the scope of the authorisation are not incompatible with WTO law.

This section describes references to general rules on countermeasures in the context of the request for suspension of concessions (3.2.4.1) and in the imposition of safeguards (3.2.4.2). The imposition of safeguards in fact is different from the imposition of countermeasures;[67] however, the AB did refer to general rules on countermeasures in that context.

3.2.4.1 Reference to general rules on countermeasures in the context of request for suspension of concessions

In WTO law, suspension of concessions must by authorised by the DSB. However, if the member target of the countermeasures objects to the level of suspensions proposed, to the lawfulness of the countermeasures under the relevant covered agreement, or believes that principles and procedures for the application of countermeasures, provided for in Article 22.3 of the DSU, have not been followed, it can recur to arbitration under DSU Article 22.6, [68] with the decision of this arbitration not being subject to

[63] DASR (n 2) 128.
[64] ibid Article 49.
[65] ibid Article 22.
[66] Article 22.2 of the DSU.
[67] See Section 3.3.2.4 Proportionality
[68] Article 22.2 and 22.6 of the DSU. The latter provides: '6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has

appeal.[69] For this reason, this subsection describes to the case law of procedures under Article 22.6,[70] and to the AB report in *US* and *Canada – Continued Suspension* disputes.

In this context, three aspects of general law on countermeasures have been invoked under DSU Article 22.6 arbitration and in AB proceedings: proportionality in the imposition of countermeasures, its scope of inducing compliance, and the obligation to suspend countermeasures if the obligation is complied with or there is a pending dispute at a competent jurisdiction. Reference to general international law in DSU Article 22.6 arbitration mostly relates to the scope of countermeasures and to the relevance of the principle of proportionality, since one of the objectives of this procedure is to determine whether the level of the suspension of concessions is 'appropriate'.[71]

In these three instances of references to countermeasures, resort to these rules was based on the text of the DASR, both from the side of the adjudicators and from the side of the parties. For instance, in the *EC – Bananas III* Article 22.6 report, the arbitrators argued that the 'general international law principle of proportionality of countermeasures' should not be contradicted when calculating the amount of nullification or impairment caused by a Member that has failed to bring into compliance a trade measure.[72] The arbitrators referenced the DASR as adopted in first reading in 1997 and relevant scholarship to lend support to the claim.[73] The *EC – Bananas III* and its reasoning on the purpose of countermeasures and proportionality were subsequently referenced by many other Article 22.6 reports.[74] While the existence of a 'general principle of proportionality' relevant for the determination of suspension of concessions was recognized by arbitrators, the means of identification of this principle remains mainly reference to the DASR (even

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requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator (15) appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration'.

[69] Article 22.7 of the DSU.

[70] The reports pinpointed for the present section were selected through two queries on the WTO website 'Find disputes documents' (https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm). Refining the types of documents to 'Arbitration Report (Article 22.6)' (*Document)*, on *Full text search*, the first query term was 'state responsibility'. As of 30 November 2018, 4 reports resulted from this query (WTDS27ARB, WTDS46ARB, WTDS108ARB, WTDS267ARB). The second first query term was 'countermeasure'. As of 30 November 2018, 14 reports (22 documents) resulted from this query, of which all 4 from the previous query overlapped. The second query was refined taking into consideration which reports made recourse to non-WTO references on countermeasures.

[71] See Article 4.10 of the Agreement on Subsidies and Countervailing Measures.

[72] *EC — Bananas III*, Article 22.6 Arbitration Report (9 April 1999) WT/DS27/ARB 38, para 6.16.

[73] ibid fn 67.

[74] See for instance WT/DS26/ARB (12 July 1999); WT/DS46/ARB (28 August 2000); WT/DS108/ARB (30 August 2002)

when they had not been adopted in their final version) and subsequent cross-reference to this report by other subsequent arbitrators.

With respect to the legal basis and the role given to these rules, in the case of proportionality of countermeasures and scope of inducing compliance, they were invoked under an interpretative approach. In *US – Upland Cotton*, Brazil invoked the DASR as 'additional interpretative guidance' to its claim that countermeasures are aimed at inducing compliance.[75] The arbitrators agreed that '[…] this term, as understood in public international law, may usefully inform our understanding of the same term, as used in the ASCM'.[76] In *US — FSC* and in *Brazil — Aircraft*, the arbitrators used the DASR to ascertain the meaning of 'appropriate countermeasures' in Article 4.10 of the ASCM.[77]

Generally, arbitrators in DSU Article 22.6 proceedings refer to non-WTO sources relative to countermeasures when assessing the ordinary meaning of relevant terms. In particular, the concept of 'proportionality' has been used to address the term 'appropriate' in Article 4.10 of the ASCM, and the scope of inducing compliance has been used to ascertain the meaning of 'countermeasures' in the same provision. The use of these references is directly or indirectly done by means of Article 31(1) of the VCLT; Article 31(3)(c) does not seem to have been used as legal basis for that.

On the other hand, resort to the circumstances in which countermeasures must be terminated were not invoked under an interpretative justification. In *US* and *Canada – Continued Suspension*, the EC challenged the suspension of concessions that had been taken by the United States and Canada as countermeasures to the previous *EC – Hormones* dispute in order to induce compliance with the adopted report. The EC submitted that it had complied with the report, thus the countermeasures should be lifted, in light of Article 52.3 of the DASR. This provision states that 'Countermeasures may not be taken, and if already taken must be suspended without undue delay if: (a) the internationally wrongful act has ceased and (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties'.[78] The EC also argued that if there was disagreement regarding compliance, the existence of a dispute

[75] *US – Upland Cotton*, Article 22.6 Arbitration Report (31 August 2009) 26, para 4.39.
[76] ibid para 4.41.
[77] *Brazil - Aircraft,* Article 22.6 Arbitration Report (28 August 2000) WT/DS46/ARB, para 3.44; *US – FSC*, Article 22.6 Arbitration Report (30 August 2002) WT/DS108/ARB 13, para 5.26 and fn.
[78] DASR (n 2).

before an international tribunal as a limitation to the imposition of countermeasures was a customary rule that was to be observed in the absence of an explicit rule in the DSU.[79]

The AB completely circumvented the EC's allegation under Article 52.3(a) of the DASR, and merely stated that '[…] the Articles on State Responsibility do not lend support to the European Communities' position' and that '[…] relevant principles under international law, as reflected in the Articles on State Responsibility, support the proposition that countermeasures may continue until such time as the responsible State has ceased the wrongful act by fully complying with its obligations'.[80]

Adjudicators seem to be inclined to accept the resort to rules on countermeasures if they provide interpretative support to existing WTO provisions. On the other hand, they seem to be less inclined if they are invoked under a fall-back application, as was the case of the EC's allegation in *US* and *Canada – Continued Suspension*. In this dispute, general rules provided for in the DASR were invoked because no analogous rules concerning the suspension of countermeasures exist in WTO law. As a result, the AB did not fully address the EC's arguments with respect to the obligation to suspend countermeasures upon the existence of a dispute. Moreover, it also did not take a position with respect to the customary status of these norms.

3.2.4.2 Proportionality in attributing damage for the imposition of safeguards

The concept of proportionality can be said to reflect a principle inasmuch it guides the interpretation and application of rules.[81] It encompasses a broad range of possible applications: it 'is an umbrella concept',[82] a 'means-end test'[83] that 'requires the decision maker to reach two or more evaluative judgments and assess those judgments against each other'.[84] One of the instances in which the AB has explicitly resorted to the

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[79] The EC argued: 'But if the Appellate Body would hesitate whether there is a rule in the DSU as to whether suspension of concessions should continue during the adjudication of a disagreement concerning the consistency with the covered agreements of a measure taken to comply, the question would have to be guided by general international law' (*AB-2008-5 and AB-2008-6 United States, Canada – Continued Suspension of Obligations in the EC – Hormones Dispute Appellee's Submission by the European Communities* (26 June 2008) available at http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139905.pdf (accessed 03 December 2018)).

[80] *Canada — Continued Suspension*, Appellate Body Report (16 October 2008) WT/DS321/AB/R 160, para 382.

[81] Engle traces the history of proportionality and asserts that the concept can be called a 'general principle' whose origins date back to antiquity. Eric A Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 Dartmouth Law Journal 1-11.

[82] Michael Newton and Larry May, *Proportionality in International Law* (OUP 2014) at 33.

[83] Engle (n 81) 8.

[84] Newton and May (n 82) 16.

principle of proportionality has been to limit the amount of safeguard measures[85] that could be imposed against a member whose exports was causing damage to another member.

In *US – Cotton Yarn,* Pakistan had initiated proceedings against a safeguard measure imposed by the United States under the Agreement on Textiles and Clothing (ATC). Under Article 6.4 of the ATC, in order to impose safeguards to the imports of a certain category of products, the interested Member must determine what is the 'serious damage' being caused by the imports of a member.[86] The point at stake was whether the United States could attribute damage caused by the importation of a certain category of products to one Member only and imposing safeguards measures only against that particular country, disregarding proportionality.[87]

The AB report in this case was circulated in 2001, shortly after the adoption of the ILC DASR. It concluded that 'the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member' and that '[…] Article 6.4, second sentence, does not permit the attribution of

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[85] Safeguard measures are trade restrictions which 'may be adopted where a surge in import causes, or threatens to cause, serious injury to the domestic industry. […] Safeguard measures temporarily restrict import competition to allow the domestic industry to adjust to new economic reality. Their application does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures' (Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th ed, CUP 2017) 631).

[86] Article 6.4 of the ATC provides: 'Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement'.

[87] The Panel concluded that the United States had not examined the effect of imports from other WTO members individually, inconsistently with its obligations under Article 6.4 of the same agreement. The Panel concluded that 'attribution cannot be made only to some of the Members causing damage, it must be made to all such Members'. (*US – Cotton Yarn*, Panel Report (31 May 2001) WT/DS192/R 122, para 7.126) The United States appealed from this finding, arguing that 'Article 6.4 does not deal with 'causation'', and that the Panel had '[…] misunderstood the two distinct concepts of causation and attribution' (*US – Cotton Yarn*, Appellate Body Report (8 October 2001) WT/DS192/AB/R 25). It is interesting to note that the AB started its analysis by differentiating three different concepts at stake: 'first, causation of serious damage or actual threat thereof by increased imports; second, attribution of that serious damage to the Member(s) the imports from whom contributed to that damage; and third, application of transitional safeguard measures to such Member(s)' (ibid 34, para 109, footnotes omitted). To explain the difference between these concepts, the AB did not revert to general international law, even though it could have been helpful to clarify the issue. To advance the notion of attribution of damage to a Member in this report, the adjudicators remained attached to the wording of Article 6.4 of the ATC.

the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage'.[88]

The AB 'further supported' its conclusions by the 'rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered'.[89] This statement was accompanied by a footnote making reference to Article 51 of the DASR, a provision regulating the proportionality of countermeasures. The adjudicators argued that concluding otherwise would amount to an 'exorbitant derogation from the principle of proportionality' which 'could be justified only if the drafters of the ATC had expressly provided for it, which is not the case'.[90]

In this report, the AB invoked the principle of proportionality through its codified version in the DASR. The AB indicated no explicit legal basis for the use of this source, except that it provided 'support' for the interpretation of WTO obligations. However, the statement that concluding otherwise would imply a 'derogation' from the general principle indicates that the AB considers that this rule is applicable *by default* to the multilateral trading system. There was no reference to whether this rule was to be considered customary international law, but there was a clear assertion that it was a 'principle' of general international law.

Conversely, in the *US – Line pipe* report, adopted in 2002, the AB held the ILC DASR was not binding *per se*, but its Article 51 nevertheless 'sets out a recognized principle of customary international law'.[91] To support this statement, it added a footnote referencing the *Nicaragua* and the *Gabcikovo-Nagymaros Project* decisions of the ICJ. Interestingly, the adjudicators remarked that 'also the United States has acknowledged this principle elsewhere',[92] referencing comments made by the country in the commentaries to the works of the ILC in 1997 and remarks made by it also in the proceedings of an arbitral tribunal.

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[88] *US – Cotton Yarn*, Appellate Body Report (8 October 2001) WT/DS192/AB/R at 37, para 119, footnotes omitted.
[89] ibid para 120, footnotes omitted. The organ then proceeded to illustrate how the methodology for establishing the amount of serious damage caused by an exporting Member should be developed, and stated that this analysis was 'to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member' (ibid).
[90] ibid 38, para 120.
[91] *US – Line Pipe*, Appellate Body Report (15 February 2002) WT/DS202/AB/R 82, para 259.
[92] ibid.

The United States was the defendant in this case, and the AB makes no reference to the recognition of the customary status of proportionality by other Members. The conclusion that Article 51 ‘sets out a recognized principle of customary international law’ is not further explained. Therefore, the recognition of proportionality for the imposition of countermeasures as a customary rule by the AB was merely asserted. The indication of the United States’ converging view can be read as a way to legitimise this assertion.

3.2.5 Overview of the AB’s approach to customary international law and general principles on state responsibility

While very limited consideration to sources of general international law was given by the AB when assessing matters of attribution before 2001, after the adoption of the ILC DASR the organ and parties to the disputes tended to invoke these rules more frequently. Still, the Appellate Body has adopted a very cautious approach in referring to general rules on state responsibility.

First, the method of identification of these sources consists mainly in reference to the works of the ILC on state responsibility. Before the adoption of the draft articles of 2001, the AB also resorted to scholarship on the topic, as in the *US – Shrimp* report.[93] Later on, the codification of rules on State Responsibility by the ILC left little need for the AB to engage in other methods of identification. In fact, proceeding with a full-blown query of state practice, *opinio juris* for the determination of a customary rule seems not only unnecessary, but also a potential source of controversy.

Second, the AB is also very cautious in determining that a rule of state responsibility reflects customary international law. The only concept in the field which has been mentioned by the AB as having attained a ‘customary’ nature is the principle of proportionality. More interestingly, the AB asserted its customary status without any base on state practice or *opinion juris* or to authoritative sources of international law (e.g., ICJ decisions or ILC commentaries), but it did mention the fact that the United States had ‘acknowledged the principle elsewhere’.[94]

The ILC commentaries to Article 51 state that ‘[p]roportionality is a well-established requirement for taking countermeasures’, being widely recognized in State

[93] See Section 3.2.1.1 References to general rules on attribution
[94] See fn 92.

practice, doctrine and jurisprudence'.[95] The AB could have referred to these commentaries as authoritative source for asserting the customary status of the proportionality principle. Instead, it only referred to the practice of the interested country in that particular dispute (the United States, in the position of defendant). This hints that the organ was mostly concerned with ensuring the acceptance of the legal reasoning by the affected party, rather than determining the customary status of a fundamental principle as a matter of law.

It is hard to say why adjudicators were prompt to determine the proportionality principle as a customary rule. It is even hard to say if they meant anything in particular by it, although in principle the use of the terminology 'recognized principle of customary international law' to qualify it leads to an otherwise conclusion. The only inference that can be made with some firm basis is that the AB prefers not to take a position regarding the customary status of rules. Even when the customary status of a norm is a matter of dispute between the parties, the AB circumvents the question.

Recourse to the rules on attribution (more specifically, Article 5 of the DASR) and to Article 14 of the DASR are two instances of AB practice which corroborate the hesitation of the AB in determining the customary status of a norm. In both cases, the AB deliberately avoided taking a position on their status as a customary rule. In particular in *EC and certain member States — Large Civil Aircraft*, the AB did not address issue of whether Article 14 of the DASR would reflect a customary rule, despite the fact that there was open disagreement between the disputants regarding not only the status of the rule, but its relevance within the WTO legal system.

On the one hand, it is understandable that if the adjudicators are not even convinced of the argument, as in the EC's claim with respect to Draft Article 14 in *EC and certain member States — Large Civil Aircraft*, there is no need to take a position regarding the status of that rule as customary international law. Moreover, this approach also prevents the AB from focusing on the relevance of a non-WTO law source of law for assessment of the specific dispute, thus avoiding to issue what could be perceived as 'unnecessary advisory opinions'.[96] On the other hand, this general reticence of the adjudicators leaves open questions such as what the legal status of some rules of state

[95] DASR (n 2) 134. The ILC commentaries refer to the ICJ decisions in the '*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America'* and the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* (ibid).

[96] See Chapter 1.3.2.

responsibility is under WTO law, their relevance for WTO dispute settlement, and to what extent WTO law has contracted out from secondary norms set out by general international law.

Despite these points still open for debate, the WTO adjudicators have focused on resort to these sources only insofar as it lends support to the interpretation of WTO provisions. Resort to the DASR has been merely subsidiary: the legal basis of the AB's interpretative practice remains focused on the general rule of interpretation of the VCLT. Therefore, while reference to general secondary norms could be made to fill gaps of the *lex specialis* regime,[97] this role has not been recognised by WTO adjudicators. Additionally, the principle of proportionality is the only instance in which there is fall-back to general rules on state responsibility. In this scenario, the principle of proportionality seems to have a more overarching applicability – something that can be called 'application by default' – than other secondary norms. They AB hinted such value for the proportionality principle in *US – Cotton Yarn*, when it stated that an 'exorbitant derogation from the principle of proportionality could be justified only if the drafters of the ATC had expressly provided for it, which is not the case'.[98]

The role of VCLT Article 31(3)(c) as a legal basis for the invocation of general rules on state responsibility remains obscure. This provision was 'broken down' into a specific three-tier test throughout the development of the WTO case law, and the invocation of this provision as a legal basis for resorting to rules on attribution by China and circumstances precluding wrongfulness by Guatemala has contributed to the development of this test. The AB does not seem to, *proprio moto*, use this provision as legal basis for citing general rules on state responsibility; it only addresses the three requirements when the provision is invoked by the disputant. In this sense, from a strategic point of view for the litigant parties interested in invoking these sources, it seems to be an easier route if general rules on state responsibility are invoked as 'lending further support' to a given interpretation based on the ordinary meaning of the terms, context, object and purpose, without reference to VCLT Article 31(3)(c).

This subsidiary role granted to general rules leads to the conclusion that, in fact, at least from the perspective of the applicable law, there seems to be little practical relevance in determining whether a norm of state responsibility reflects a general principle or a customary rule. In theory, the relevance of the determination of this status

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[97] Simma and Pulkowski, '*Leges*' (n 8) 146.
[98] See fn 90.

would be in the scrutiny of whether the draft articles are 'applicable in the relations between the parties' under Article 31(3)(c).[99] However, the AB has also showed it can adopt a flexible approach to what it considers under this requirement, as seen in the previous chapter.[100] Therefore, the determination of their customary status seems limited to providing stronger legitimation for the invocation of these sources within WTO dispute settlement.

Generally speaking, the Appellate Body has taken general rules on state responsibility into account as interpretative aid to provisions contained in the covered agreements. In some cases, such as *Peru – Agricultural Products* and *US — AD and CVD (China),* adjudicators have limited their reasoning to stating whether a general secondary norm is relevant for the interpretation of a rule or whether it 'further supports' its own interpretation. This is a defensible methodology. Even if not entirely consistent in the way it is applied, it reflects a cautious, but not overly fragmentated, approach to general international law from the viewpoint of internal legitimacy.

3.3 THE JURISDICTION OF WTO DISPUTE SETTLEMENT AND GENERAL RULES ON STATE RESPONSIBILITY: ADDING TO THE SECONDARY RULES OF THE SYSTEM?

This section examines how the use of general international law on state responsibility can amount to claims of judicial overreach in WTO dispute settlement. As explained in the beginning of this Chapter, resort to secondary rules of international law in specialized regimes can bring into the WTO DSM secondary rules which were not agreed by the Membership. As a result, such reference or fall-back to these sources can raise criticisms of judicial overreach. Resort to general international law could, for instance, add to the existing rights and obligations of Members, through the importation of concepts such as circumstances precluding wrongfulness and consequences of the wrongful act. Another consequence could be that resort to concepts such as attribution or proportionality, which are not expressly provided for in WTO Agreements, as a means to ascertain violation, would be regarded as falling outside the scope of the DSM's material

[99] This can be corroborated by the AB's statement that 'insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties' in the *US — AD & CVD (China)* Appellate Body Report. See fn 40.

[100] Chapter 2.3.4.

jurisdiction. Both cases could be perceived as an 'expansion' of the jurisdictional mandate of WTO adjudicators.

Therefore, the aim of this section is to understand, according to the reasoning in AB reports, the extent to which these rules can be invoked in WTO adjudication. This is here addressed departing from an analysis of the Members' expressed perceptions towards the methodology and the substantial implications of the use of these sources by adjudicators. These perceptions can be assessed to some extent by the comments made by WTO members on DSB meetings upon the circulation of relevant reports (3.3.2).

Having WTO Members' concerns in mind, this section examines the implications that resort to general rules on state responsibility has on the jurisdictional mandate of the WTO through two elements. First, it is useful to understand how the use of these sources by the AB contributes to clarifying the question of to which extent the multilateral trading system derogates from general secondary rules. This is relevant because if the case law points to the derogation or incompatibility of *lex generalis*, general rules are by consequence not applicable to WTO dispute settlement (3.3.2).

Second, it is examined whether there is a distinction or conflation in the use of these sources for interpretative purposes or their actual application in WTO dispute settlement. This is of relevance because, to the extent that the concepts are used 'only' as interpretative aid to WTO provisions, the perception of judicial overreach may be lessened. Conversely, if they are 'applied' without clear textual basis, Members may perceive this as an expansion of the material jurisdiction and the mandate of WTO adjudicators (3.3.3).

3.3.1 Reception of the use of general international law by WTO members on DSB meetings

Three groups of comments regarding the use of concepts of general state responsibility can be identified when examining the reports described in the previous section, and will be detailed in turn. First, the use of the principle of proportionality in *US – Cotton Yarn* and *US – Line Pipe* brought about comments from parties in both sides of the dispute (3.3.2.1). Second, the methodology for the reference of general international law rules on attribution in *US – AD and CVD (China)* was commented in length by Japan (3.3.2.2). Finally, the report on *Peru – Agricultural*, in which the AB unceremoniously

dismissed the applicability of 'Consent' as an excuse for Peru, was very much welcomed by the United States by its conciseness (3.3.2.3).

3.3.1.1 The lack of clarity in the resort to the principle of proportionality

The use of the proportionality principle as a parameter for determining the safeguards that could be imposed under the ATC was criticised by both complainant and defendant in the *US – Cotton Yarn* dispute. While Pakistan (the disputant who was privileged by the finding) welcomed the outcome, it found that the AB had not clarified in concrete terms how proportionality should determine the level of safeguard that could be imposed.[101] Pakistan found, moreover, that there was no textual basis for the rationale used by the Appellate Body in its reasoning.[102]

The United States was of the same view, but additionally it did not appreciate the use of the principle of proportionality. It stated that 'the Appellate Body had relied on what it considered to be the principle of "proportionality," found in a draft article on state responsibility – a principle with no textual basis in a covered agreement', and that 'it was inappropriate for the Appellate Body to develop a new "principle" not based in the text of the ATC'.[103] In sum, both Pakistan and the United States were concerned that the AB did not strictly follow the text of the ATC; but the United States was more critical of the importation of an external principle with no basis on a covered agreement. A similar criticism by the United States was addressed to the reasoning of the AB in *US – Line pipe*. Even more vehemently, it submitted that its 'greatest concern' 'was the Appellate Body's growing habit of creating its own rules'.[104]

While the United States was the only Member who criticised the use of the proportionality principle by the AB as a standard of review for safeguard measures,[105] the main criticisms with respect to these reports seem to revolve around the substance of the findings, which was not consistent with a plain textual reading of the provisions under

[101] Minutes of Meeting Held in the Centre William Rappard on 5 November 2001, WTO Doc WT/DSB/M/112 (4 December 2001) 30 ('Minutes of 5 November 2001').
[102] ibid 8, para 30.
[103] ibid 9, para 34.
[104] Minutes of Meeting Held in the Centre William Rappard on 8 March 2002, WTO Doc WT/DSB/M/121 (3 April 2002) 8, para 35.
[105] In contrast, the EC 'welcomed the useful reminder of the link between the WTO Agreement and the general principles of international law, in particular the principle of proportionality' (DSB, 'Minutes of 5 November 2001' (n 101) 10, para 36).

issue. Therefore, the problem of the use of the proportionality principle could have been lessened had the AB been clearer, both methodologically and substantially.

3.3.1.2 Attribution in the US – AD and CVD (China) AB report

The use of general rules on attribution in the *US – AD and CVD (China)* AB report raised similar concerns to those related to the reference to the principle of proportionality. Criticisms mainly focused on the merits of the findings, as many WTO members felt that the conclusions of the AB did not find textual basis. Generally speaking, Members did not criticise the AB's approach to the relevance of Article 5 of the ILC DASR, with the exception of Japan. Japan, instead, raised multiple remarks regarding the implications of the methodology employed by the adjudicators. In particular, taking into consideration the finding that the DASR could be taken into account if qualified as 'relevant rules of international law applicable in the relations between the parties' in the terms of VCLT Article 31(3)(c), Japan questioned

> How could certain rules of international law (Article 5 of the ILC Article) be 'taken into account' within the meaning of Article 31(3)(c) of the Vienna Convention without first deciding on its status as customary international law? Or had the Appellate Body implicitly or otherwise decided that Article 5 of the ILC Articles reflected public international law somewhere in the Report? If so, where was such a finding? […] In any event, because the Appellate Body had not resolved the question of whether Article 5 reflected customary international law, that rule could not be and had not been 'taken into account' within the meaning of Article 31(3)(c) of the Vienna Convention.[106]

Indeed, as described in Section 3.2.1.2, none of these questions was tackled by the Appellate Body in its report – presumably because it found that the content of Draft Article 5 'coincided in essence' with the provision of the ASCM under dispute. Two remarks are due here. First, the Appellate Body, in earlier reports, had taken other rules 'into account' according to VCLT Article 31(3)(c) without ascertaining its customary status.[107] The requirement that an international law concept should reflect a customary rule or a general principle is a more recent development of WTO case law.

[106] Minutes of Meeting Held in the Centre William Rappard on 25 March 2011, WTO Doc WT/DSB/M/294 (9 June 2011) 27, para 122.
[107] Most notably, *US – Shrimp*. See Chapter 2.2.2.2.

Second, these comments by Japan reflect the systemic importance of the methodology expressed by the adjudicators in its reasoning for recurring to the ILC DASR – or general international law. Japan stressed the need to state whether a certain provision (or more broadly speaking, concept of international law) reflects customary international law to be applicable to the interpretation of WTO law in the terms of Article 31(3)(c). Even if it is not strictly necessary that a canon of law reflects customary law in order for it to be 'taken into account' by WTO adjudicators, the legal reasoning of an adjudicator should clarify these points.

These remarks in the DSB meeting reflect a general deficiency in the AB's methodology when resorting to customary international law and general principles. At the same time, these comments by Japan should not be overstated. None of the other members shared the same concerns – or at least did not position themselves in the same way. Therefore, while a sound methodology that replies enquiries made by Japan would certainly provide more legitimation of the report, such methodology does not seem to be the main concern by WTO members. Instead, it is the outcome of the dispute – and whether recourse to general principles and customary international law adds to or diminishes WTO rights and obligations – that was a matter of expressed disagreement by some members.

On the one hand, as seen in the case of the proportionality principle, more precision in resorting to general international law may lessen the perception of lack of textual basis for the conclusions reached by the AB.[108] On the other hand, more clarity could also have triggered criticisms that the adjudicators were issuing unnecessary advisory opinions. This is a conundrum that is difficult to solve. It seems, however, that at the current state of affairs, 'less is more'.

3.3.1.3 The Peru – Agricultural products *approach: less is more?*

The conundrum of how to address lack of clarity in resort to extraneous sources and claims of judicial overreach could be partially answered by the comments made by the United States in *Peru – Agricultural products*. The United States, a third party to the dispute, welcomed the conciseness of the AB report in that dispute and in rejecting the

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[108] Mitchell suggests that the 'vehement criticisms' made by the United States may be explained by the approach to the principle of proportionality, and argues that 'This provides an example of the dangers of using principles with insufficient precision'. (Andrew Mitchell, 'Proportionality and remedies in WTO disputes' (2006) 17 EJIL at 1006).

Guatemala's arguments based on the bilateral FTA, and submitted that in 'rejecting these arguments, the Appellate Body had refrained from addressing certain issues of interpretation and public international law raised by Peru that were not necessary to resolve the dispute'.[109] Put differently, recent comments by the United States in DSB meetings seem to defend an approach to the settlement of disputes which should focus on interpretations based on a strict reading of covered agreement provisions, dismissing arguments based on external sources of law.

3.3.2 Derogation vs. Fall-back

It is accepted that the WTO regime is not a completely 'self-contained regime'.[110] However, WTO law has contracted out from some general rules on State Responsibility.[111] In this case, resort to general secondary rules can be only had to the extent that WTO law is not *lex specialis* derogating general international law.[112] This being so, to what extent is the interaction between the multilateral trading system and general rules on state responsibility actually accepted by the WTO adjudicating bodies? The answer to this question can be found by examining the use that the WTO adjudicating bodies have made, in particular, to general rules on attribution (3.3.2.1), circumstances precluding wrongfulness (3.3.2.2), countermeasures (3.3.2.3) and proportionality (3.3.2.4).

It is worth noting that it is not the intent of the present section to provide an assessment of cases in which the multilateral trading system derogates or overlaps with general international law, but only to comment on the extent to which customary rules and general principles have been used to confirm or contrast the interpretation of WTO agreements.[113]

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[109] Minutes of Meeting Held in the Centre William Rappard on 31 July 2015, WTO Doc WT/DSB/M/466 (25 September 2015) 3, para 1.09.
[110] See Chapter 1.2.
[111] See, for instance, Lorenzo Gradoni, Regime failure *nel diritto internazionale* (CEDAM 2009).
[112] As an illustration, the situation is similar in the case of disputes before the ICJ whose jurisdiction is based on compromissory clauses. In the *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran*) (1980), general rules on countermeasureas had been derogated by the Treaty that granted jurisdiction to the Court. The Court thus did not feel '[…] unable to apply international customary law by virtue of its jurisdictional bounds, but rather because the Treaty itself provided the proper redress for the alleged breach' (Enzo Canizzaro and Beatrice Bonafé, 'Fragmenting International Law through compromissory clauses? Some remarks on the decision of the ICJ in the *Oil Platforms* case' (2005) 16(3) EJIL 492).
[113] For an extensive analysis of the relationship between general international law on State Responsibility and WTO law, see Lesaffre (n 9).

3.3.2.1 Recourse to general rules on 'attribution' of a conduct to a Member

As described in Section 3.2.1.2, in *US — AD and CVD (China),* the AB found that their interpretation of 'public body' in Article 1.1(a)(1) of the ASCM coincide[d] with the essence of Article 5 [of the ILC DASR]'.[114] It is useful to take a closer look at the reasoning of the AB in order to better grasp this statement. This will help clarify whether general rules of attribution of a conduct to a State indeed 'coincide with the essence' of WTO provisions, if they would have been derogated by other WTO agreements or if they would apply in case of lacunae.

The threshold created by the AB in *US — AD and CVD (China)* with respect to the meaning of 'public body' in Article 1.1(a)(1) of the ASCM is that the entity in question should exercise 'governmental authority'.[115] The AB considered that

> the determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense. That assessment must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority.[116]

What is interesting to note is that the requirement that the entity should be 'vested with or exercise governmental authority' parallels with the specific wording used by the DASR Article 5. That provision states that 'The conduct of a person or entity [...] which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law [...]'.[117]

Therefore, it seems that the conclusion not only 'coincides in essence', but was indeed drawn (even if inadvertently) from the ILC document. Also noteworthy was the fact that the exercise of 'governmental authority' by an entity as a threshold for 'public body' in the terms of the ILC text was subject to direct contention by the parties in the case,[118] but the Appellate Body did not expressly position itself regarding this contention.

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[114] See *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R 120, para 310.

[115] Prusa and Vermulst (n 39) 227.

[116] *US — AD & CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R 132, para 345. The AB reversed the Panel's conclusion that a 'public body' in the terms of Article 1.1(a)(1) of the ASCM would mean 'any entity controlled by a government'. ibid 124, para 322.

[117] DASR (n 2) 42.

[118] E.g., 'China adds that, had the Panel taken the ILC Articles into account, it would have had no choice but to accept that State-owned entities are presumptively private bodies, ordinarily covered by subparagraph

It did so only indirectly, by means of the abovementioned paragraph, and in a context disconnected to the remarks related to the relevance of the DASR for the interpretation of Article 1.1(a)(1). Moreover, it drew this criterion from general international law without specifying whether Draft Article 5 reflected customary law or not.[119]

Ultimately, the threshold the AB considered determining the violation of Article 1.1(a)(1) by the United States in the *US – AD* and *CVM* dispute was the fact that the United States authorities had not relied on sufficient elements to determine 'meaningful control of an entity by government'.[120] This finding *per se* does not entirely correspond to the benchmark established by ILC Draft Article 5, which also requires, for instance, that the entity is '*empowered by the law* of that State to exercise elements of the governmental authority'.[121] Even so, as opposed to derogation, it seems that, at least for the concept of 'public body' in the ASCM, the AB has directly borrowed the terms by ILC Draft Article 5, even if the benchmark applied was not entirely the same.

In any case, especially in more recent case law, the Appellate Body has only scarcely relied on references to general international law on attribution. It has developed its own benchmarks to ascertain, in each case and according to the wording of the specific provisions invoked by WTO members, whether a conduct can be attributable to a State.[122] This may be a reaction to the strong criticisms raised by Members in the DSB meeting upon circulation of the *US – AD* and *CVM* AB report.[123]

(iv), unless they are exercising elements of governmental authority, in which case they would be considered public bodies' (ibid 16, para 35). On the other hand, 'The United States contests China's understanding that the interpretation that a public body must be vested with governmental authority is confirmed by the various determinations in the DRAMS cases' (ibid 53, para 133) and 'The United States also argues [...] a reference to that commentary in a footnote in an Appellate Body report does not confirm that an entity cannot be a "public body" unless exercising elements of governmental authority' (ibid 58-59, para. 149).

[119] See Section 3.2.1.2 DASR under VCLT Article 31(3)(c): the US — AD and CVD (China) AB report

[120] *US — AD & CVD (China)* ABR (n 34)133, para 346.

[121] DASR (n 2) 42. The ILC Commentaries specify that 'The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category' (ibid 43). See also Djamchid Momtaz, 'Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority' regimes' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010) 244-245.

[122] For a detailed examination of different scenarios of attribution of a conduct to WTO Members and their relationship with the rules set out by the ILC DASR, see T Garcia, 'La responsabilité des entités non étatiques à l'OMC' in Vincent Tomkiewicz (org), *Organisation Mondiale du Commerce et responsabilité international*, Colloque Nice 23-24 juin 2011 (Pedone 2011) 199-208 ; Geraldo Vidigal, 'Attribution in the WTO: the limits of "sufficient government involvement"' (2017) 6 Journal of International Trade and Arbitration Law 138.

[123] See Section 3.3.1.

3.3.2.2 Circumstances precluding wrongfulness

The AB report in *Peru – Agricultural products* did not leave much room for the possibility of fall-back to general rules on circumstances precluding wrongfulness. The AB required that the provisions on the DASR (or other customary international law or general principles that were not codified by the ILC) are *relevant* for the interpretation of a WTO provision, on the terms of Article 31(3)(c) of the VCLT.

In practice, there are no WTO rules so closely related to the content of circumstances precluding wrongfulness which could satisfy the AB's threshold. In other words, following the AB's approach, no circumstances precluding wrongfulness would be *relevant* to the interpretation of a WTO provision. Thus, if WTO adjudicators follow the understanding that circumstances precluding wrongfulness are only applicable if they fit the three-element test of Article 31(3)(c), it does not seem likely that general law precluding wrongfulness can be taken into account in the WTO legal system at all. This can be seen as a restrictive approach to general international law, with little possibility of fall-back.

This conclusion bears a direct consequence on the discussion of jurisdiction and applicable law introduced in Chapter 1 of this work. If circumstances precluding wrongfulness can only be considered to the extent that they are 'relevant' for the interpretation of a covered agreement provision or term under the strict method set by the AB,[124] these defences have been derogated from the WTO system by implication.[125]

This being said, it must also be stressed that it is not clear whether VCLT Article 31(3)(c) is the only legal basis through to which circumstances precluding wrongfulness can be invoked. This benchmark was used in *Peru – Agricultural products* arguably because it was the legal basis invoked by Peru. The findings in this report did not exclude the possibility of invoking this set of secondary rules in accordance to other legal bases.

On the other hand, the same report can be read to have excluded the applicability of consent as a circumstance precluding wrongfulness, unless such consent is granted in the umbrella of the WTO. The AB argued that Peru's arguments regarding the applicability of the FTA went 'beyond the interpretation of these provisions in accordance with Article 3.3 of the DSU and Article 31 of the Vienna Convention, and amount[ed] to

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[124] See Section 3.2.3.

[125] Pauwelyn defended the idea that non-WTO law could be invoked and applied by WTO adjudicators as a matter of defence. See Joost Pauwelyn, *Conflict of Norms in Public International law: how WTO Law relates to other rules of international law* (CUP 2003), in particular ch 8.

arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves'.[126] The adjudicators then concluded that the WTO agreements contain 'contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements'[127] and that departure from WTO rules *can* be considered as consistent with the multilateral trading system if found in compliance with the relevant provisions on regional trade agreements.[128]

Therefore, one may conclude that departure from WTO obligations can be considered only under two circumstances. First, if agreed under the umbrella of the multilateral trading system.[129] Second, to the extent that they qualify under the criteria for falling into the scope of Article XXIV of the GATT, Article V of the GATS or the enabling clause. In neither case, seemingly, would these defences be considered as 'consent', as the legal basis would be through a WTO-specific provision, which would excuse the departure from its own obligations.

3.3.2.3 Countermeasures

The regime of countermeasures in the WTO legal system is perhaps the part of this regime which is most clearly *lex specialis vis-à-vis* general international law.[130] To some extent, it has contracted out of general international law, in particular because they can only be resorted to if authorized by the Dispute Settlement Body.[131] On the other

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[126] *Peru — Agricultural Products*, Appellate Body Report (20 July 2015) WT/DS457/AB/R at 43, para 5.107.
[127] ibid 44, para 5.111.
[128] ibid, para 5.112.
[129] Giovanna Adinolfi, 'Il diritto non scritto nel sistema OMC' in P Palchetti (a cura di), L'incidenza del diritto non scritto nel diritto internazionale ed europeo, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016) at 103.
[130] In the words of Garcia (n 9) 54 ff, stating that WTO law is *lex specialis* to general international law and unilateral decisions over countermeasures has been derogated by the Members of the multilateral trading system. He defends that it would be possible to resort to general international law measures '[…] to the extent that the remedies envisaged by the treaty-based regime are not available or ineffective' (ibid 57). However, he adds that it is 'difficult […] to identify situations where such a complete set of rules [the multilateral trading system] would not constitute an efficient substitute of traditional ways of dealing with cases of non-compliance as exists in general international law' (ibid 58). Similarly, Simma and Pulkowski (n 6) 519-523. For a detailed study of the relationship between the general regime of countermeasures and WTO law, see F Perez-Aznar, *Countermeasures in the WTO Dispute Settlement System: an analysis of their characteristics and procedure in the light of general international law* (Studies and Working Papers, Graduate Institute of International Studies 2006).
[131] See Beatrice Bonafé, 'L'autorizzazione ad adottare contromisure nel quadro dell'Organizzazione Mondiale del Commercio: il requisito delle "circostanze sufficientemente gravi"' in A Ligustro, G Sacerdoti (a cura di), *Problemi e tendenze del diritto internazionale dell'economia, Liber amicorum in onore di Paolo Picone* (Editoriale Scientifica 2011) at 497.

hand, it also overlaps with rules of international law to some degree: they are a response from the affected member in order to induce compliance by the member whose measure is found to be inconsistent with WTO law[132] and for this reason they are temporary.[133] With this in mind, the question remains as to what extent the WTO adjudicators have recurred to general international rules on state responsibility as a fall-back resort or have declared these rules not to apply to the multilateral trading system.[134]

The assessment of the overall objective of the WTO provisions on countermeasures by adjudicators has coincided with the general international law regime, even when no references to the DASR on countermeasures are made. The arbitrators in *EC – Bananas III* stated that '[…] the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned', that 'this temporary nature indicates that it is the purpose of countermeasures to *induce compliance*' and finally that 'there is nothing in Article 22.1 of the DSU […] that could be read as a justification for counter-measures of a punitive nature'.[135] The arbitrators also stressed that, as in the general regime of countermeasures, countermeasures in WTO had as 'only legitimate object' that of 'inducing compliance'.[136] In *US – Upland Cotton,* the arbitrators referred to the DASR and reached similar conclusions.[137]

On a related note, with respect to the termination of countermeasures, the AB in *Canada – Continued Suspension* considered that 'relevant principles under international law, as reflected in the Articles on State Responsibility, support the proposition that

[132] DSU Article 22.8.
[133] See Perez-Aznar (n 130) at 39 ff.
[134] The more complex question of to what extent WTO law has effectively contracted out from general international law on countermeasures has been examined in thorough detail by a number of scholars, and will not be discussed in length here. See, e.g., Gradoni (n 111); Perez-Aznar (n 130); Lesaffre (n 9).
[135] *EC — Bananas III*, Article 22.6 Arbitration Report (9 April 1999) WT/DS27/ARB 34, para 6.3, original emphasis.
[136] ibid 39, para 4.112.
[137] The arbitrators considered that 'countermeasures', as understood in general international law according to the ILC DASR, could 'usefully inform our understanding of the same term, as used in the ASCM', and found that 'the term "countermeasures", in the ASCM, describes measures that are in the nature of countermeasures as defined in the ILC's Draft Articles on State Responsibility'. This being so, they concluded that 'the term 'countermeasures' essentially characterizes the nature of the measures to be authorized, i.e. temporary measures that would otherwise be contrary to obligations under the WTO Agreement and that are taken in response to a breach of an obligation under the ASCM. This is also consistent with the meaning of this term in public international law as reflected in the ILC Articles on State Responsibility' (*United States — Subsidies on Upland Cotton*, Recourse to Article 22.6 Arbitration Report (31 August 2009) WT/DS267/ARB/267 26, para 4.42).

countermeasures may continue until such time as the responsible State has ceased the wrongful act by fully complying with its obligations'.[138]

The multilateral trading system has created a *lex specialis* regime that contracts out of some elements of countermeasures. Most notably, the procedural requirements for set out in Articles 22 of the DSU and 4 of the ASCM are a significant departure from the general international law in the imposition of countermeasures.[139] Aside from the procedural requirements for the suspension of concessions, no reference declaring instances in which WTO law deviates from general international law is found in AB or DSU Article 22.6 arbitration case law.[140] This means that, notwithstanding the important derogation by the multilateral trading system on the procedure for the imposition of countermeasures allowed in general international, the overall objective of this prerogative overlaps in the two regimes. As a consequence, other general rules on countermeasures which have not been derogated by WTO law, such as the temporal limitations, are also applicable in the multilateral trading system.

3.3.2.4 Proportionality

Both the *US – Cotton Yarn* and the *US – Line pipe* reports invoked the principle of proportionality for the determination of the limits of the imposition of a safeguard. Interestingly, the rule on proportionality on the DASR deals with the application of countermeasures, not with the question of determination of attributable damage *for the purposes of* safeguard measures. These are two connected concepts, but which are different in nature. The AB thus imported a concept related to one sphere of state responsibility (countermeasures must be proportionate) to a different one (attribution of damage). Moreover, countermeasures have a very different function than safeguard measures. While the former aims at inducing the cessation of a wrongful act by the wrongdoing State, the latter aims at protecting the domestic industry of a Member of the multilateral trading system whenever the importation of a certain product is causing or

[138] See fn 79.

[139] Maria Fogdestam Agius, *Interaction and Delimitation of International Legal Orders* (Queen Mary Studies in international law, v 16, Brill Nijhoff, 2014) at 96.

[140] Indeed, Bonafé considers that the WTO regime of countermeasures and the notion of gravity in this legal system is guided by a principle of equivalence which coincides with the general principle of proportionality (Bonafé (n 131) at 510).

threatening to cause serious injury to that industry.[141] There is no need for a wrongful act for the imposition of safeguard measures. The very basis of this institute of trade law is *lex specialis*.

Article 51 of the DASR does not mention that countermeasures must be commensurate with the injury suffered by the affected state. Instead, it determines that proportionality must be assessed against the 'gravity of the internationally wrongful act and the rights in question'.[142] The adjudicators considered that an 'exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the ATC had expressly provided for it, which is not the case'.[143] However, strictly speaking these are two different issues: on one hand, proportionality in the attribution of damage for the rebalancing of trade; on the other hand, proportionality in the imposition of countermeasures when considering the violation in question and the rights at stake.

This is relevant because the AB considered that an interpretation that did not take this principle into account would amount to a derogation. According to the adjudicators, this could only be so if the drafters of the ATC had so envisaged, which was not the case. However, unless it was referring to the principle of proportionality in its general sense (and not only as codified under Article 51 of the DASR), this reasoning does not find legal justification.

That safeguards measures as applied by the United States were inflicting a disproportionate effect on Pakistan was the argument of this party (sided by third-party India). There was no reference to general rules on state responsibility by the parties or the Panel. The AB considered the 'principle of proportionality' a 'rule of general international law', which should be taken into consideration not only as relevant support, but as a guiding principle which had not been derogated by the multilateral trading system.

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[141] One could argue that countermeasures may have also the aim of re-establishing the balance that was affected by the breach, rather than only to induce compliance. Canizzaro in fact identifies four functions for the imposition of countermeasures, among which, in distinct categories, that of re-establishing balance and that of inducing compliance (Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889-916). In this sense, safeguards could be said to have a similar objective as countermeasures as they are precisely aimed at counterbalancing the damage caused by the entry of products into the domestic market. However, not only countermeasures must be a reply to an unlawful act, but the WTO Agreements explicitly recognize the character of countermeasures as coercive. Article 22.2 of the DSU sets out: 'The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached'.

[142] DASR (n 2) 134.

[143] See fn 90.

Arguably, what was misplaced was reference to Article 51 of the DASR, rather than reference to the principle of proportionality – which encompasses a much broader scope.[144]

Tancredi has suggested that the contrast between the specific and the general rule does not exclude the application of the general rule so long as they have a 'common denominator'.[145] In this case, the idea of proportionality would be the common denominator. However, it thus remains unclear if the AB recognises the principle of proportionality applicable by default (i.e., unless there is explicit derogation) to the entire WTO system or only to the regime of safeguards (and presumably of countermeasures).[146]

3.3.3 Use of general international law on state responsibility for interpretative purposes *versus* its application

The approach followed when resorting to non-WTO law in the context of WTO dispute settlement can be used as to assess whether these sources have been used in an activist or restrained manner. The more based on textual elements resort to extraneous norms is made, the less activist it can be perceived. This is corroborated by the comments

[144] This point was also stressed by the United States in the DSB meeting upon the circulation of the report: 'The United States was further concerned that, while acknowledging that the referenced draft article on state responsibility purported to apply only in the context of countermeasures against breaches of state responsibility – a context not at issue here – the Appellate Body had relied on this provision to interpret the ATC' (Minutes of Meeting Held in the Centre William Rappard on 5 November 2001, WTO Doc WT/DSB/M/112 (4 December 2001) 9, para 34). Mitchell advances a parallel criticism, considering that the use of the principle of proportionality in this case was 'inappropriate'. Considering that safeguards are not aimed at counterbalancing an unfair commercial practice, the author states: 'Culpability plays an essential role in the principle of proportionality, where every instance involves culpability through an unlawful or undesirable act. In the absence of culpability, sanctions can have no retributive purpose or effect. The Appellate Body expressly recognized that safeguards are not responses to unfair or culpable conduct, but it applied the principle of proportionality anyway. It is not clear what meaning that principle can have when divorced from one of its core elements and rationales' (A Mitchell, 'Proportionality and remedies in WTO disputes' (2006) 17 EJIL 1006). In reality, the proportionality element in the regime of countermeasures, in particular as expressed in Article 51 of the DASR, do not necessarily involve a culpability element. Instead, DASR Article 51 considers that countermeasures should take into account 'the gravity of the internationally wrongful act and the rights in question'. Conversely, it is submitted here that the principle of proportionality is much more general than that which is recognized in the context of countermeasures in international law, and therefore can be invoked also in the context of the imposition of safeguards. However, the specific instance of proportionality that was invoked by the AB was that contained in the law of state responsibility and countermeasures – this instance is the one that involves the culpability element Mitchell refers to and it is the nature of this specific application of proportionality that makes the use of the proportionality inappropriate by the AB.

[145] A Tancredi, 'OMC et coutume(s)' in V Tomkiewicz (dir), *Les sources et les normes dans le droit de l'OMC* (Pedone 2012) at 89.

[146] Perez-Aznar enumerates three situations in which resort to the principle of proportionality in countermeasures could be taken into account by the WTO DSM: in the case of multiple complaints, in double-counting to determine nullification or impairment and in 'cases where the dispute is between countries with manifest differences in the size of their economies' (Perez-Aznar (n 130) 67-69).

made by Members' upon circulation of reports in DSB meetings, as described in Section 3.3.2. When expressing their concerns, Members were generally critical when the AB deviated from agreed texts.

Relatedly, one way of ascertaining judicial activism can be through the role adjudicators grant to these sources: do they serve only as interpretative aid of WTO provisions or are they in fact being applied through a 'broadened interpretation'? Does the Appellate Body engage in an 'improper' application of non-WTO rules while claiming it is merely interpreting WTO provisions? In the light of the distinction between application and interpretation presented in Chapter 1,[147] this section addresses this problem departing from the AB's methodology regarding resort to the rules of attribution (3.3.3.2) and circumstances precluding wrongfulness (3.3.3.3).

3.3.3.1 The meaning of 'public body'

In *US — AD and CVD (China)*, the Panel had considered that the ILC DASR could not supersede certain WTO provisions. In particular, the Panel considered that the '[…] taxonomy set forth in Article 1.1 of the ASCM at heart as an attribution rule [...]'.[148] It further stated that

> while in some cases the Draft Articles have been cited as containing similar provisions to those in certain areas of the WTO Agreement, in others they have been cited by way of contrast with the provisions of the WTO Agreement, as a way to better understand the possible meaning of the provisions of the WTO Agreement. In all cases, however, the exercise undertaken by these panels and the Appellate Body has been to interpret the WTO Agreement on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty.[149]

On appeal, the parties disagreed on whether there existed an inconsistency between the general rule (Article 5 of the DASR) and the *lex specialis* rule (Article 1.1(a)(1) of the ASCM). China claimed that there was no inconsistency; the United States claimed that there was. If the latter reading was accepted, the *lex specialis* contained in the WTO covered agreement was to prevail.

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[147] See Chapter 1.3.1.3.
[148] *US — AD & CVD (China)*, Panel Report (22 October 2010) WT/DS379/R 47, para 8.87.
[149] ibid 48-49, para 8.87.

The AB found that this problem would only be relevant if the question at stake was which law was to be *applied* – the general rule or Article 1.1(a)(1) of the ASCM. However, as the AB submitted, there was 'no doubt' that the provision to be applied was the WTO provision, and that the ILC Articles would only be relevant for the interpretation of that provision.[150] Therefore, it concluded that there is a line between taking these Draft Articles into account for purposes of *interpretation* of the ASCM and *applying* the Draft Articles. It stressed that the provisions being *applied* were those in the ASCM.

This statement by the AB stresses the importance of the use for interpretative purposes *versus* application debate. A WTO adjudicator can rhetorically *claim* it is not applying a non-WTO rule while nevertheless applying such rule (which would be beyond its jurisdiction). The line between the two situations is not always easy to draw. For example, some degree of overlap may happen when different sources of law are used to interpret an obligation under dispute by an international adjudicator. The end conclusion will thus be intertwined with the use of sources different than the one originally being 'interpreted' (i.e., a WTO covered agreement term, provision or obligation) – and its final application may be an indirect application of these other sources.

However, it is submitted here that the AB has been consistent with the distinction. The AB did indeed resort to general rules on attribution for the interpretation of a primary rule set out by the multilateral trading system,[151] but it did so only inasmuch the secondary rule clarified the determination of the attribution that was inherent to the categorisation of an entity as a 'public body'. In other words, the element of attribution was inherent to the primary rule.[152] Moreover, the AB has relied on general rules of attribution only as a complementary source by focusing on the terms of the treaty text for the attribution of a conduct.[153]

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[150] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report (11 March 2011) WT/DS379/AB/R, 122, para 316.

[151] It has been contended that secondary sources of law (in this case, general rules on attribution) cannot be used as interpretative tools with respect to primary sources of law, because the normative nature of each rule would be different. A Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22(4) EJIL 993-1026.

[152] Condorelli and Kress explain that '[…] a special rule of attribution may co-exist with a particular primary rule […]' (Luigi Condorelli and Clauss Kreiss, 'The Rules of Attribution: General Considerations' in J Crawford, A Pellet, S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010) at 227).

[153] Prusa and Vermulst (n 39) 232. The substance of the decision could nonetheless be criticized. For a position in this sense, see Pauwelyn, 'Activism' (n 39)).

3.3.3.2 Recourse to non-WTO law as defence

In *Peru – Agricultural products*, Peru argued that the conclusion and ratification of the FTA by Guatemala amounted to a consent precluding the wrongfulness of WTO obligations and also a waiver of rights in the sense of Article 45 of the DASR. Guatemala counterargued that Peru's submission invoking the ILC Articles and the FTA amounted not to an interpretation of Article 4.2 of the Agreement on Agriculture, but instead on a modification or amendment of that provision.[154] The AB summarily dismissed the applicability of a circumstance precluding wrongfulness (Consent) was by the AB in the *Peru – Agricultural products* case as non-relevant for the interpretation of the provision invoked under the terms of reference of the dispute.[155]

While the narrow reading of the term 'relevant' under Article 31(3)(c) is debatable, perhaps the AB, in providing this response to Peru's claims that Guatemala had consented to the breach of WTO obligations by means of an FTA, avoided taking a position with respect to a bigger question: are the rules on circumstances precluding wrongfulness invocable in the multilateral trading system? In other words, would resort to circumstances precluding wrongfulness beyond interpretative aid to a specific WTO term or provision amount to application of non-WTO law? What if a state invokes that it cannot comply with WTO obligations and invokes, *e.g.,* the state of necessity (which has in fact been recognized by as customary international law by the ICJ)?[156] These questions translate into a further problem: is there a legal distinction in resorting to general law for attribution of conduct or, instead, for defence purposes?

The customary status of a norm does not provide the answer. There seems to be no implications stemming from the fact that only certain canons of the law on state responsibility, such as proportionality, are considered customary, while others are not. A source for distinction therefore lies in the nature and content of the rule.

As mentioned in Chapter 1, 'application' is understood as 'the process of determining the consequences which […] should follow in a given situation'.[157] Resort to rules on attribution entails a factual assessment; the consequences of this assessment

[154] *Peru — Agricultural Products,* Appellate Body Report (20 July 2015) WT/DS457/AB/R at 39, para 591-592.
[155] See Section 3.2.3 **Circumstances precluding wrongfulness**
[156] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 1997, para 52.
[157] 'The use of a norm for interpretative purposes is the process of resorting to an auxiliary source for the purpose of determining the meaning of an original norm; application of a norm is the process of determining the consequences which, according to its content, should follow in a given situation' (Chapter 1.3.1.3).

will stem from the application of the primary rule (in *US – AD and CVD (China)*, Article 1.1(a)1 of the ASCM).[158] Moreover, elements of attribution are embedded in the primary rules of WTO law.[159]

Conversely, other rules of state responsibility such as the legal consequences of an internationally wrongful act (in particular cessation and reparation)[160] involve more than operative concepts: they entail consequences over the legal rights or obligations for the affected state.[161] Another example are the circumstances precluding wrongfulness: resort to these hypotheses would amount to a defence against WTO claims of violation, this would affect the rights and obligations of WTO members.[162] These categories of secondary norms have not been employed by the AB. Thus, not only the field of the rules is of importance when invoking customary international law in WTO dispute settlement, but also its legal implications.

The six circumstances precluding wrongfulness codified by the ILC constitute a means of defence which would exempt WTO obligations. Countermeasures have been incorporated into the multilateral trading system under the regime of suspension of concessions.[163] Other circumstances have not been explicitly recognized under WTO

[158] For an explanation on the debate between the 'normative' and 'factual' approaches to attribution, see Condorelli and Kress (n 152) at 225-227); Crawford, *State Responsibility* (n 19)113-115.
[159] As a factual consideration embedded in the assessment of the violation of the WTO provision, as in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures. Condorelli and Kress explain that '[…] a special rule of attribution may co-exist with a particular primary rule […]' (Condorelli and Kress (n 152) at 227).
[160] As Crawford explains, 'As the result of an internationally wrongful act, a new legal relation is established between the responsible state and the state or states to whom the obligation breached is owed' (Crawford, *State Responsibility* (n 19) 461).
[161] E David, 'Primary and Secondary rules' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010) 29. Indeed, there is disagreement as to what extent both of these categories related exclusively to secondary norms. On circumstances precluding wrongfulness, see Federica Paddeu, *Justification and Excuse in International Law: concept and theory of general defences* (CUP 2018) at 57 ff; on cessation as both a primary and secondary obligation, see Crawford (n 160) 464.
[162] On a discussion regarding the distinction between defences and excuses in the case of circumstances precluding wrongfulness, see Paddeu (n 161). See also the *Peru – Agricultural products* dispute, in which consent was invoked by the defendant.
[163] The question remains as to whether trade measures alleged to be countermeasures in order to induce compliance of other international law obligations (multilateral or unilateral economic sanctions) could be invoked as having wrongfulness excluded by the general regime of state responsibility. This question has been addressed to a limited extent by the AB under the specific wording of GATT Article XX(d) in the dispute *Mexico – Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R. See Martins Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law', in T Broude and Y Shany, (eds), *Multi-sourced Equivalent Norms in International Law* (Hart Publishing 2011) 259-288. Moreover, it is still under contention, for instance, in *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (DS526) and the disputes related to sanctions against Russia's annexation of Crimea. See RJ Neuwirth, A Svetlicinii, 'The Economic Sanctions over the Ukraine Conflict and the

law.[164] In the words of David, 'insofar as these rules aim at excluding the wrongfulness of the conduct and not the responsibility of the state for that conduct, […] they should be seen as forming an element of the primary rule in question'.[165] If there is an element of primary nature, there is a degree of regulation of conduct – and thus creation of rights and obligations. Therefore, resort to these hypotheses can more likely be viewed as a case of application of these rules, rather than a tool for interpretation of WTO obligations.

Exceptions to WTO violations are already provided by the WTO Agreements; it is not a light assumption that further excuses to wrongfulness can also be brought from general international law. That is not to say that this importation would be contrary to principles of interpretation or international law. However, it could be difficult to find acceptance from the side of the WTO Membership without triggering accusations that resort to non-WTO defences amount to adding to or diminishing rights and obligations of Members. In other words, it could be problematic from a legitimacy viewpoint.

In this sense, it is submitted here that in *Peru – Agricultural products*, by dismissing the general rules on 'consent' as not relevant under VCLT Article 31(3)(c) for the interpretation of Article 4.2 of the AgA, the Appellate Body found a way out to the conundrum on formal grounds. It was a straightforward way to resolve the claims, without resorting to 'unnecessary findings'. The alternative solution would have been to assert plainly that the WTO system had contracted out of the general regime of circumstances precluding wrongfulness, which is arguably a bold statement. The other possibility would have been to address the status and content of consent (or the relevant circumstance invoked) individually under the WTO regime, and the conditions under which it could be invoked. For instance, the WTO adjudicator could claim that consent is not accepted if given outside of the WTO umbrella, or that a Free Trade Agreement rule contrary to WTO obligations did not qualify as consent, given the multilateral nature of the WTO, in contrast with the bilateral or regional nature of an FTA.

Peru framed its recourse to consent in a narrow way by submitting it provided 'additional support' to the interpretation of WTO provisions, which allowed the AB to frame its findings in a restrictive manner. Should a State invoke these rules in a broader

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WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions' (2015) 49(5) Journal of World Trade 891–914.

[164] Moreover, consent is a particularly controversial defence, as it is granted before the performance of the conduct, there is no illegality (Paddeu (n 161) 156).

[165] David (n 161) 29. For the author, this is related to the fact that the distinction between primary and secondary rules on state responsibility is 'sometimes artificial' (ibid).

manner, then the adjudicator may be compelled to take a clear position regarding the status of these rules under WTO law.[166]

3.3.4 Interim conclusions: resort to general rules on state responsibility and the perception of judicial overreach

The criticisms by WTO Members towards the AB's resort to general international law on state responsibility can be summarized in a conundrum: on the one hand, some Members have demanded that reference to these norms is made in a clearer manner; one the other hand, there are demands that the Appellate Body should not engage in making unnecessary findings to resolve a dispute.

The balance between these two points is difficult to find. The Appellate Body should indeed have laid out in clearer terms when and how these rules can be invoked in WTO dispute settlement – for instance, if it necessary that they are considered customary international law, if they are taken into account under VCLT Article 31(3)(c) and if some of these rules, such as the precautionary principle, are applicable 'by default' to the system. However, taking clear positions on, for instance, the customary status of these rules, would require a detailed reasoning in order to be legitimised. This would likely reinforce claims of indulgence in unnecessary findings and judicial activism.

Moreover, the AB should be more attentive when bringing these references into the system. The case of the improper reference to the proportionality principle under DASR Article 51 as applicable to the regimes of safeguards in the WTO serves as an illustration of how the lack of preoccupation in adequately qualifying resort to these norms can entail justified criticism.

At the same time, this lack of clear-cut explanations on the legal basis for resorting to these sources has allowed the Appellate Body to find a balanced approach in using these sources for purposes of interpretation, rather than clearly applying them in the DSM. The AB has made sure its reasoning is always focused on the WTO provisions under contention. This was the case even for proportionality principle. Even though the organ found it to be applicable by default to the WTO regime (since a derogation should have been made for it not to be applicable), the principle was invoked as a tool to

[166] Regarding 'Error' as a circumstance precluding wrongfulness, Cook states that 'To date, no WTO adjudicator has accepted a defence of "harmless error"' (Graham Cook, *A digest of WTO jurisprudence on Public International Law concepts and principles* (CUP 2015) 55). For a thorough description of the instances in which it was invoked, see Cook (ibid) 55 ff.

determine the attribution of serious damage in the regime of safeguards, under a specific provision of the ATC Agreement.

Perhaps more borderline was the case of the rule of attribution with respect to the interpretation of 'public body' in ASCM Article 1.1(a)(1). Even though in in *US — AD and CVD (China)* the AB refrained from taking a position on the status of DASR Article 5, the AB used a very similar criterion to the one contained in this provision ('governmental authority') as a threshold for the assessment of what constitutes a 'public body' under the WTO Agreement. This arguably amounted to the indirect application of the DASR, even if the AB claimed to base its finding in the provision. Still, as mentioned, it can be argued that even if the AB did resort to an extraneous criterion for the determination of 'public body', this does not amount to the application of an extraneous rule because it was a factual assessment in the context of the primary rule provided for the WTO regime.

From the viewpoint of development of international law, these questions raised before the Appellate Body present a great opportunity for a judicial organ to contribute in the clarification of the status of these sources and the extent to which they are applicable to a *lex specialis* regime. However, from the viewpoint of legitimacy, the AB has taken a prudent approach and WTO adjudicators should continue to do so. Reference to general international law on state responsibility may be relevant, but Members seem to appreciate when the findings are based on WTO provisions to the largest and clearest extent possible.

CHAPTER 4

GENERAL PRINCIPLES OF PROCEDURE AND PROCEDURAL INNOVATIONS IN WTO ADJUDICATION

4.1 PRELIMINARY REMARKS

International adjudication is based on the principle of consent.[1] The consent of the parties not only grounds the *seisin* of an international tribunal and its jurisdiction *ratione materiae*,[2] but also binds its procedural powers.[3] In the words of Rosenne, 'In the same way that no arbitral or judicial settlement of a concrete dispute is possible without the consent of the parties, so, ultimately, does their consent establish the procedure by which that dispute is to be decided'.[4] In other words, adjudicators must settle the dispute according to the applicable law that has been indicated by the parties, as well as to the limits of the procedural powers granted by the constitutive agreement of the relevant adjudicative forum.

In the WTO, the rules of procedure for its dispute settlement mechanism are set by the *Understanding on rules and procedures governing the settlement of disputes* (DSU), the *Working procedures for appellate review (*'Working Procedures') and the *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes* ('Rules of conduct'). For brevity, the ensemble of these rules will be here referred as the 'procedural rules' or 'procedural rulebook' of WTO dispute settlement.

Nevertheless, as is the case in other international jurisdictions, the DSU, the 'statute' of WTO dispute settlement, is not exhaustive with respect to rules of procedure in the organisation.[5] Constituent agreements and status of international courts and

[1] The PCIJ in the *Eastern Carelia* Advisory Opinion stated that consent '[…] only accepts and applies a principle which is a fundamental principle of international-law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement' (*Status of Eastern Carelia* (Advisory Opinion) 1923 PCIJ Rep Series B No 05 at 27).

[2] See Chapter 1.

[3] Angelo P Sereni, *Principi generali di diritto e processo internazionale* (Quaderno della Rivista di Diritto Internazionale, Giuffrè 1955) 61.

[4] Shabtai Rosenne, *The law and practice of the International Court, 1920-2005,* vol. III (Procedure) (4th ed, Martinus Nijhoff Publishers 2006) 1024.

[5] Chester Brown, *A common law of international adjudication* (OUP 2010) 40 ('*A common*'). In the same sense, Van Damme argues that 'The DSU is the starting point for defining the function of WTO panels and the Appellate Body. It is their first and primary source of powers. But other powers may exist and be sourced elsewhere. General international law is not merely limited to customary international law applicable to all States. Fundamental principles rooted in principles of due process and the rule of law are also part of general international law governing international adjudication' I Van Damme, 'Jurisdiction,

tribunals may contain gaps and ambiguities which can be filled and clarified through practice.[6] In these cases, international adjudicators may have recourse to extraneous sources of law, including general principles to fill procedural gaps.[7] As seen in Chapter 1, general principles may derive from international or national legal orders.[8] These principles can, moreover, help clarifying existing procedural provisions, thus performing not only a gap-filling, but also an interpretative role. In some cases, these derivations from general principles of procedural law may amount to the creation of procedural rules and standards not foreseen in the texts guiding the functioning which was agreed on and signed by the Members. However, when international adjudicators look for extraneous procedural sources of law, they cannot exceed the powers they have been conferred by the parties. Doing otherwise would amount to judicial overreach.

Against this backdrop, the aim of this chapter is twofold. First, it describes which six general principles of procedure referred to in Appellate Body proceedings: *kompetenz-kompetenz,* burden of proof, due process, procedural good faith, judicial economy, and estoppel. The first part of the chapter explores the method of identification employed, the legal basis indicated for their applicability under the WTO DSM (4.2.1), and the functions performed by these sources of law in WTO dispute settlement (4.2.2).[9] Second, it analyses whether resort to general principles of procedure and the ensuing creation of procedural

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Applicable Law, and Interpretation' in D Bethlehem *et al* (eds), *The Oxford Handbook of International Trade Law* (OUP 2018) at 305.

[6] For instance, with respect to the procedural rules of the PCIJ and the ICJ, has been argued that 'It sometimes appears that the Rules have been deliberately left incomplete — for example those relating to preliminary objections or advisory proceedings — presumably to avoid too much rigidity, although as judicial experience increases, more detailed codes of procedure are being introduced into the Rules of the Court'. […] The joint history of the two Courts demonstrates the wisdom of the caution displayed by each Court before adopting a given procedural code'. Malcolm Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, v. 3 (Brill Nijhoff 2016) 1057.

[7] Mario Scerni, 'La procédure de la cour permanente de justice international' (1938) 65 Collected Courses of the Hague Academy of International Law, at 588.

[8] Chapter 1.2.3.2.1. Some authors disagree with respect to the existence of general principles of procedure deriving from national legal systems. Sereni, for instance, argues that '*è chiaro che la procedura dei due gruppi* [common law and civil law] *di sistemi differisci notevolmente […] Una analisi concreta e minuziosa delle disposizioni di diritto positivo dei diversi sistemi di diritto interno porta necessariamente alla conclusione che non esistono "principi" in materia di procedura e di prove […]'* (Sereni (n 3) 40-41). It is submitted here, however, that to follow this justification would be to find that there are hardly any 'general principles of law recognized by civilized nations', as it would be nearly impossible to find principles common to all systems on the globe. See Chapter 1.

[9] The principles in this section have been pinpointed in accordance with the general systematization of references described in the Introduction. All references to the procedural canons enumerated in Section 4.2 were pinpointed under query for keyword 'principle' and/or through cross-reference by the Appellate Body to its own previous reports. In particular, following the general systematization, the principle of good faith was coded in a separate account in order to classify it to its content – related to treaty interpretation, treaty performance or governing procedural rules on dispute settlement.

standards not foreseen in the procedural texts (here generally referred to as 'procedural innovations') can be a means of judicial overreach (4.3).

Judicial overreach, as already discussed in the previous chapters, is a subjective concept. Therefore, as in Chapters 2 and 3, this Chapter addresses this issue firstly by examining the expressed concerns by WTO Members in DSB meetings upon the circulation of relevant reports. Additionally, this chapter examines the AB's patterns in making procedural findings based on general principles of procedure in order to understand how the perception of judicial activism prompted by the AB's procedural law-making can be mitigated.

Before proceeding, one terminological remark is due. When it comes to general rules of procedure,[10] it can be argued that it is more appropriate to refer to principles, rather than to customary law. That is so for three reasons, relating to origin, content, and method of identification. First, many of the principles of procedure that inspire international dispute settlement come from domestic law – that is the case for principles such as due process and burden of proof (origin).[11] Second, even if there are principles that emerge from the reality of international relations (and therefore do not find parallel in domestic legal systems), these unwritten rules normally dictate general guidelines, rather than defined conducts, which is arguably one of the differences between customary law and general principles (content). Third, the possibility of the existence *state* practice establishing the existence of a procedural rule is limited:[12] such practice would most significantly come from the practice of international adjudicators, and the acceptance of

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[10] When dealing with general principles of procedural law, a definition of 'procedure' must be advanced. In the present context, procedural rules will be understood as those which govern dispute settlement. As Kolb explains, a broad definition of 'procedure' 'include[s] rules governing the composition of the court, question of competence and admissibility, the objective and subjective conditions for bringing a claim, as well as the modalities according to which the case will be dealt with'. (Robert Kolb, 'General principles of procedural law' in A Zimmermann, C Tomuschat and K Oellers-Frahm, *The Statute of the International Court of Justice: a commentary* (OUP 2006) 795).

[11] As Bonafé and Palchetti explain, '[…] while, in the presence of such interaction, domestic law may certainly be regarded as a form of state practice, the fact that certain principles are applied domestically for the purposes of regulating relations between actors within the domestic legal order of the state can hardly be regarded as a manifestation of state practice which is relevant for the establishment of a customary rule'. (Beatrice Bonafé and Paolo Palchetti, 'Relying on general principles in international law', in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edwards Elgar Publishing 2016) at 167).

[12] Conclusion 4 of the ILC conclusions on the identification of customary international law states that '1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law. 2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'. ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May–10 June and 4 July-12 August 2016) UN Doc A/71/10.

this practice by States would arguably amount to *opinio juris*.[13] For this reason, this Chapter will generally refer to the concepts here examined as general principles.

4.2 RESORT TO PROCEDURAL PRINCIPLES IN APPELLATE BODY PROCEEDINGS

4.2.1 ***Kompetenz-kompetenz***

The principle of *kompetenz-kompetenz*, or *compétence de la compétence,* is well established in international jurisprudence.[14] It translates the 'power, or the jurisdiction, to decide whether that substantive jurisdiction exists'.[15] *Kompetenz-kompetenz* is an 'incidental and pre-preliminary' power of international courts.[16] The ICJ has stated that

> it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. […] This principle has been frequently applied and at times expressly stated.[17]

The question of whether a court has jurisdiction to rule over a case is not always under contention. Normally, it is assessed when the matter is raised.[18] This judicial prerogative has been codified in a number of statutes of international tribunals,[19] among which Article 36.6 of the Statute of the ICJ.[20] It, however, finds no reflection in the DSU.

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[13] Interestingly, the Appeals Chamber of the Special Tribunal for Lebanon declared the *kompetenz-kompetenz* power of international courts to be customary. See *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standin, Special Tribunal for Lebanon Appeals Chamber (10 November 2010), para 47.

[14] Hugh Thirlway, *The law and procedure of the International Court of Justice*: *Fifty Years of Jurisprudence*, vol I (OUP 2013) 755.

[15] Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction — Compétence de la Compétence* (Springer 1965) 7.

[16] Shihata (n 15) 8.

[17] *Nottebohm case (Liechtenstein v. Guatemala)* (Preliminary Objections) 1953 [119]. The ICJ also stated that 'This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations' (ibid).

[18] Chittharanjan F Amerasinghe, *Jurisdiction of Specific International Tribunals* (Brill 2009) 22.

[19] Stefania Negri, *I principi generali del processo internazionale nella giurisprudenza della Corte Internazionale di Giustizia* (Edizioni Scientifiche Italiane 2005) 26.

[20] Article 36.6 sets out: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

The WTO adjudicators must therefore refer to this general principle of law when they invoke the power to determine the existence and the limits of their own jurisdiction.

In *US – 1916 Act (EC)*, the Appellate Body was confronted with the question of whether objections to the jurisdiction of a Panel (or of WTO dispute settlement) could be raised at a later stage of the proceedings. The AB agreed with the Panel's finding that, while these objections must indeed be raised as early as possible, there are issues of jurisdiction which can be visited at any stage of the proceeding, because the 'vesting of jurisdiction in a panel is fundamental prerequisite for lawful panel proceedings'.[21] On a footnote, the AB added that 'it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it'.[22] It also cited a variety of judicial decisions from other international courts and a vast number of International Law handbooks, also published in a number of different languages.[23]

In *US – 1916 Act (EC)*, the matter which prompted the AB's reference to *kompetenz-kompetenz* was not one relating to the determination of its own competence, but one regarding the timeframe according to which the jurisdiction of a Panel can be contested. Perhaps for this reason the adjudicators did not explicitly cite the *kompetenz-kompetenz* concept. Nevertheless, they cited and described it on the accompanying footnote.

The principle was reaffirmed in WTO adjudication by the AB in the *Mexico – Soft Drinks*[24] report. In this dispute, Mexico had asked the Panel to decline its own jurisdiction in light of the existence of a dispute with the same legal facts before the North American Free Trade Agreement (NAFTA) system. Referencing its previous quote in *US – 1916 Act (EC)*, the AB held that 'it does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute'.[25] While in *US – 1916 Act (EC)* the AB made a rather improper reference to *kompetenz-kompetenz*, in *Mexico – Soft Drinks* the

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[21] *US — 1916 Act (EC)*, Appellate Body Report (28 August 2000) WT/DS136/AB/R; WT/DS162/AB/R at 17.
[22] ibid fn 30.
[23] ibid.
[24] *Mexico — Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R at 17, para 44 ff. See also *EU — PET (Pakistan),* Appellate Body Report (16 May 2018) WT/DS486/AB/R para 5.51 and *Mexico — Corn Syrup,* Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW para 36.
[25] *Mexico — Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R at 17, para 46.

adjudicators were indeed confronted with the question of the determination of their own jurisdiction.

These cross-references show that the AB followed the practice of relying on previous decisions when importing extraneous legal concepts once these concepts have already been invoked. It is interesting to point out that the AB referred to the principle as expressed in a previous decision even if the claims under scrutiny were of a different nature.

When invoking the *kompetenz-kompetenz* in its case law, the AB did not qualify it as a principle or a customary rule, and the methodology employed does not clarify its status according to the organ. In any case, as mentioned before, the existence of customary rules of procedure is difficult to demonstrate,[26] in particular due to the lack of state practice as one of their constitutive elements.

4.2.2 Principles governing the burden of proof

The allocation of the duty to provide evidence for the facts invoked by a party is '[…] governed by a large number of general principles of law recognised by States *in foro domestico*'.[27] Cheng argues that the activity of international tribunals, when ascertaining the 'truth of a case', is '[…] governed by certain general principles of law based on common sense and developed through human experience'.[28] The general rule on the burden of proof is translated in the maxim *onus probandi incubit actori*,[29] a concept that finds its origins in Roman Law.[30] Rules of evidence in international adjudication are generally absent in the instruments governing international courts and tribunals.[31] This justifies the international adjudicators' practice of relying on these general principles.

The DSU and other procedural texts in WTO adjudication also lack rules on the burden of proof. Consequently, the AB also relied, since its early case law, on general principles of law to regulate the matter. The methodology employed by the AB when invoking elements related to the burden of proof for the first time was reference to other

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[26] See fns 12-13 and accompanying text.

[27] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (CUP 1993) 334.

[28] ibid 335.

[29] Kolb (n 10) 819.

[30] ibid.

[31] See e.g., Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer Law International 1996) at 3; Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Brill 2005).

legal systems.[32] In *US – Shirts and Blouses* case, the Appellate Body invoked the concept by referring to its recognition in different national law systems:

> In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. **Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions**, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[33]

It is noteworthy that the adjudicators hint that basic rules on the burden of proof are inherent to 'any system of judicial settlement'. The principle that the burden of proof rests upon the party who asserts the claim or defence is a 'generally-accepted canon of evidence in […] most jurisdictions'.[34] This goes in line with Cheng's statement that these principles are in fact based on 'common sense'.[35]

The AB employed a 'dual' methodology to justify the existence and relevance of *onus probandi incubit actori*: it resorted both to international practice and to domestic practice. The approach was relatively well-grounded from a methodological perspective, as the adjudicators referenced a number of sources for asserting the relevance of the principle. Nevertheless, it was still limited. With respect to international practice, the authoritative source the AB referred to was restricted to one handbook on the burden of

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[32] James Bacchus, former Member of the Appellate Body, explained how the AB proceeded to determine its first reference to the burden of proof: 'The phrase 'burden of proof ' does not appear in the WTO treaty. When the issue of where to place the burden of proof first arose in an appeal, we compiled a copious collection of the municipal and international practices throughout the world and found a widespread consensus that the party asserting the affirmative of a proposition bears the initial burden of proving that proposition. This was the rule we adopted. In turn, this action of the Appellate Body was then welcomed by the members of the WTO sitting together as the WTO Dispute Settlement Body. WTO members realised that, in the absence of any rule in the WTO treaty, a practical rule was needed to help make dispute settlement work and thus help make a continuing success of the WTO treaty' (James Bacchus, 'Not in clinical isolation' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO*: *The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015) at 512.

[33] *US — Shirts and Blouses*, Appellate Body report (25 April 1997) WT/DS33/AB/R at 14, footnotes omitted, emphasis added.

[34] This approach was reaffirmed in the *Chile — Price Band System,* Article 21.5 Appellate Body Report (7 May 2007) WT/DS207/AB/RW at 48, para 134.

[35] See fn 27.

proof by international courts.[36] With respect to domestic practice, the AB cited to a number of handbooks from different national jurisdictions (among which United States, United Kingdom, France, Spain and Italy),[37] reflecting common law and civil law traditions. However, in light of the number of different legal traditions in the world,[38] this still is a limited comparative study on domestic jurisdictions to justify a sound methodology to the determination of the existence of a general principle.

Another general principle related to the burden of proof in adjudication is the notion of *jura novit curia*, according to which what the law is […] is not a matter of proof for the parties […]'.[39] This concept was invoked following a similar methodology with respect to the practice of international tribunals. In *EC – Tariff Preferences*, the AB invoked the principle of *jura novit curia* and, on a footnote, referenced an *obiter dictum* by the ICJ on the Military and Paramilitary Activities in and against Nicaragua decision in order to provide a definition of the concept.[40] This reference served both a definitional and an authoritative purpose.[41] However, in this case, the AB refrained from surveying also domestic legal systems to ascertain the existence of *jura novit curia.*

Therefore, with respect to principles related to the burden of proof, the AB has resorted more significantly to the practice of other international tribunals, in particular that of the ICJ, when identifying relevant rules applicable to questions related to the burden of proof. The WTO DSM bodies have also largely resorted to these practices in order to fill procedural gaps which are not provided for by the DSU.[42]

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[36] *US — Shirts and Blouses*, Appellate Body report (25 April 1997) WT/DS33/AB/R fn 15.

[37] ibid fn 16.

[38] Kotuby and Sobota explain that '[…] comparative scholars generally identify two legal "families" (Romano- Germanic civil law and the common law), and further divide those families into eight legal systems: common law, Romanistic civil law, Germanic civil law, Nordic law, Socialist law, Far Eastern law, Islamic law, and Hindu law' (Charles T Kotuby, Jr., Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) at 25, footnotes omitted).

[39] Rosenne (n 4) at 1592.

[40] *EC — Tariff preferences*, Appellate Body report (7 April 2004) WT/DS246/AB/R para 105 and fn 220.

[41] Similar methodological approaches to the importation of principles related to evidence and burden of proof have been followed by subsequent Panels and Appellate Body reports. See fn 34. Moreover, albeit not exactly resorting to a general principle but rather a procedural practice, in *Canada — Aircraft*, the AB considered that the practice of taking 'adverse inferences' from a party's refusal to provide information as 'supported by the general practice and usage of international tribunals', and referred to the case law of the ICJ in order to support its statement.

[42] See the detailed description that panels and the AB have had to the practice of the ICJ and other international tribunals in Graham Cook, *A digest of WTO jurisprudence on Public International Law concepts and principles* (CUP 2015) ch 7.

4.2.3 Due process

Due process is an overarching concept,[43] whose content is difficult to define – perhaps precisely because it is meant to be of broad nature.[44] Its relevance to the law of dispute settlement is undisputed. As Kotuby Jr. and Sobota explain, there are certain 'baseline procedural rules' which have been identified as the 'core of due process', such as the opportunity to present defence and to be heard at meaningful time and in meaningful manner, and the need for the judge to be impartial, unbiased and objective.[45] This concept finds its origins in domestic law, and is reflected in many different domestic law systems.[46]

The notion of due process does not explicitly appear in the documents governing dispute settlement in the WTO except for one mention with respect to third party rights in the Working Procedures.[47] Nevertheless, provisions which indirectly protect due process in dispute settlement proceedings can be found in these texts.[48] Moreover, this concept has been invoked several times in AB proceedings,[49] both by parties and by the AB.

Interestingly, due process seldom is categorized as a general principle in AB reports. The most frequent textual basis with respect to which notions of due process are invoked by parties and the AB is Article 11 of the DSU, which determines the function of panels and states, among other elements, that 'a panel should make an objective

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[43] For a detailed description on the development of various concepts related to due process throughout the centuries, see Kotuby and Sobota (n 38) 55.
[44] Andrew Mitchell, *Legal principles In WTO Disputes* (CUP 2008) 145 (*Legal principles*).
[45] Kotuby and Sobota (n 38) 64, footnotes omitted.
[46] ibid 55 ff. Moreover, different concretisations of due process are reflected in various national legal systems. As an illustration, principles relating to equality of the parties, due notice and right to be heard, and prompt rendition of justice have been codified in the American Law Institute and UNIDROIT project entitled 'Principles of Transational Civil Procedure', adopted and promulgated in April 2004.
[47] Article 27(3)(c) of the Working Procedures for Appellate Review sets out: '(c) Any third party that has made a request pursuant to Rule 24(4) may, at the discretion of the division hearing the appeal, taking into account the requirements of due process, make an oral statement at the hearing, and respond to questions posed by the division'.
[48] For a detailed assessment of WTO provisions which incorporate due process, see Andrew Mitchell, 'Due process in WTO Disputes' in R Yerxa and B Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005) 144—160 ('Due Process').
[49] As of 06.03.2019, the term 'due process' was found in 74 AB reports. In the WTO online database for dispute documents (https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm), the term 'due process' was input in the *Full text search* slot for a search in Appellate Body reports. 84 documents, which corresponded to 73 dispute reports, resulted from this query. The report of the case *EC — Hormones* was manually added to the query, since its file on the WTO online database is not on a searchable version — therefore does not come up in the results even if the term is contained in the report. It must be noted that in 5 of these reports, 'due process' was related to antidumping investigation procedures (therefore not relating to dispute settlement, but to primary rules of WTO law).

assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. The obligation to make an 'objective assessment of the matter before it' based most of the claims and findings related to due process in relation to this provision.

The first time the AB cited the concept of due process was in the *EC – Hormones* report. In that dispute, the organ had to address a claim by the European Communities that the Panel had violated Article 11 of the DSU in assessing the evidence brought by the parties. The AB posed the question: 'when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it?'. To answer it, it considered that

> A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[50]

Like the reference to *onus probandi incubit actori* in *US – Shirts and Blouses*, this passage asserts that the notion of due process is recognized in 'many jurisdictions'. However, unlike reference to the *onus probandi incubit actori* principle, the adjudicators resorted to a much more simplistic methodology: there was no process of induction from a number of domestic law handbooks, but a mere assertion.

Reference to process in *EC – Hormones* sets the tone for subsequent reports involving claims of violation of due process: subsequent references to due process are always subsidiary to a claim of violation of a dispute settlement obligation.[51] In other words, although violation based on due process rights are invoked by the disputants, the claims are always based on WTO provisions, in particular Article 11 of the DSU.

On the other hand, the assertion that 'due process' reflects 'natural justice' was not repeated by the AB. Instead, quite often the main legal basis the AB has invoked for justifying the applicability of due process in WTO dispute settlement is that this concept is in fact 'implicit' or 'underlies' the DSU and other written procedural documents

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[50] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R 49, para 133.
[51] With the exception of the claims of violation of due process in antidumping investigations and safeguard measures, as in *US — Underwear, US — Zeroing (EC), Mexico — Anti-Dumping Measures on Rice*, *inter alia*.

governing WTO dispute settlement.[52] According to the AB, the obligation of ensuring due process is not written in Article 11 of the DSU, but underlies its content. This legal basis also represents another method of identification for the principle of due process, namely induction from the WTO legal system. As opposed to the *EC – Hormones* report, deduction of a general principle from covered agreements entails a different process of identification.[53]

In these references, the principle of due process seems to be of such fundamental nature that legal justification for its origin and relevance appears self-evident. Due process is used by parties and the AB as a concept which transcends any need for indication legal basis, and in no instances the invocation of this principle is in fact contested by the parties. Instead, when one party invokes the violation of its due process rights, the other party tries to demonstrate that there was no such violation.[54]

The concept of due process is often used by the Appellate Body as an auxiliary tool for interpreting provisions of the DSU. Due process has been widely accepted under WTO law, but claims of violation of procedural rights are always in the form of claims under a covered agreement provision, in particular Article 11 of the DSU. [55] These claims of violation of procedural rights involve different aspects, among which treatment of evidence by the Panel (including the use of experts), allocation of burden of proof, right of defence, respect to deadlines and questions related to jurisdiction such as the limits of the terms of reference of adjudicators, among others.[56]

Despite grounding references to due process in DSU terms and provisions, sometimes the AB based its reasoning significantly on considerations of violation of due

[52] For instance, in *Brazil — Desiccated Coconut* (WT/DS22/AB/R) at 33; *India — Patents (US)* (WT/DS50/AB/R) at 34; *US* and *EC — Continued Suspension* (WT/DS320/AB/R and WT/DS321/AB/R at 180 ff).
[53] See Chapter 1.2.2.
[54] See for instance *Argentina — Textiles and Apparel* (WT/DS56/AB/R) at 10.
[55] Other provisions of the DSU have been invoked in the context of considerations of due process, among which Articles 6.2, 7.2, 12.7 of the DSU. In *EC — Chicken Cuts*, for example, the EC invoked due process to base its claim that some claims made in Panel proceedings were outside the Panel's terms of reference under Article 6.2 of the DSU *(EC — Chicken Cuts*, Appellate Body report (12 September 2005) WT/DS269/AB/R, WT/DS286/AB/R at 45 ff). See also *Mexico — Corn Syrup*, Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW at 16-17.
[56] The AB reports in which reference to 'due process' was made were categorized under eight broad topics: Treatment of evidence (including experts); Allocation of burden of proof; Right of defence and deadlines (Preclusion); Terms of reference indicated by the party / claims made and findings (Jurisdiction); Confidentiality (BCI) *versus* due process; Judicial economy and request to complete the analysis; Failure to make objective assessment (not specific); other. Each AB document could contain more than one reference to 'due process', thereby falling into different categories. Out of the 84 references to due process (see fn 49), 34 fell under two categories: Right of defence and deadlines (Preclusion); Terms of reference indicated by the party / claims made and findings (Jurisdiction).

process for the assessment of violation of DSU provisions. In *Thailand — Cigarettes (Philippines)*, the AB discussed at length (for no less than four paragraphs) that 'Panel working procedures should both embody and reinforce due process'.[57] In *Chile – Price Band System,* the AB stated that

> […] in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU.[58]

The findings in *Chile – Price Band System* are ultimately anchored in a WTO provision. This is not surprising, since the AB can only determine claims of violation of WTO provisions. Nevertheless, in this report due process informs the reasoning of the AB to a large extent.

4.2.4 Procedural good faith

As advanced in Chapter 2, WTO adjudicators have resorted to the principle of good faith under different concretisations.[59] One of these concretisations guides dispute settlement procedures, in particular the acts of the disputants.[60] As put by Kolb, 'the parties are bound by a general commitment of loyalty among themselves and towards the Court'.[61]

There are two instances in which parties and adjudicators invoke procedural good faith in WTO dispute settlement procedures: i. good faith is to be followed by the panel ('adjudicator good faith') and ii. good faith is to be followed by the parties to the dispute ('disputant good faith').[62] These two instances of good faith will be generally

[57] *Thailand — Cigarettes (Philippines)*, Appellate Body Report (17 June 2011) WT/DS371/AB/R at 58, para 148.
[58] *Chile — Price Band System*, Appellate Body Report (23 September 2002) WT/DS207/AB/R at para 176.
[59] See also Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: the Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Studies in International Trade Law, Hart Publishing 2006).
[60] See Cook (n 42) 153; Panizzon (n 59) ch 10.
[61] Kolb (n 10) at 830.
[62] This conclusion was reached according to the following procedure: in the WTO online database for dispute documents (https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm), the term

referred to as 'procedural good faith' (as opposed to good faith stemming from treaty interpretation and treaty obligations).[63]

Reference to procedural good faith normally stems from the assessment of two DSU provisions: Article 11 (invoked in cases where the acts of the adjudicator are under scrutiny) and Article 3.10 (invoked in cases where the acts of the parties are under scrutiny). In particular, Article 3.10 of the DSU sets forth an explicit reference to good faith: '[…] if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked'.

The principle of good faith was not formally 'identified' before being invoked by the AB. Moreover, only seldom is it referred to procedural good faith as a general principle.[64] Rather, adjudicators refer to procedural good faith as an auxiliary concept to ascertain violations of procedural obligations. Moreover, in some cases the principle was invoked by the disputant, but not used by the Appellate Body in ascertaining the violation. Nevertheless, in some other instances, good faith was used in a more active manner by the AB.

In *EC – Hormones* the AB stated that a disregard to the 'duty to make an objective assessment of the facts' established under Article 11 of the DSU 'imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel', in which it 'disregards' or

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'good faith' was input in the *Full text search* slot for a search in Appellate Body reports. 71 documents, which corresponded to 69 dispute reports, resulted from this query as of 02.07.2018. The report of the case *EC — Hormones* was manually added to the query, since its file on the WTO online database is not on a searchable version — therefore does not come up in the results even if the term is contained in the report. The following step was to individualize the mentions to good faith in each report, excluding mere references to the principle which do not 1. Advance a detailed argument OR 2. Provide the basis for the reasoning of the AB. In addition to that, 'bad faith' was also inserted as a query term and one extra report which did not overlap with the previous list came up, resulting in 71 reports which mentioned either 'good faith' or 'bad faith' or both. The references to good faith were then divided into six different categories: i. good faith in interpreting treaties; ii. good faith in performing treaties and the principle of pacta sunt servanda; iii. Article XX as an expression of good faith; iv. procedural good faith to be followed by the Panel and v. procedural good faith to be followed by the party to the dispute; vi. other. This section will deal with categories (iv) and (v).

[63] See Chapter 2.2.2.2.

[64] For instance, in the *US — FSC* report, the AB held that 'Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law (*US — FSC*, Appellate Body Report (24 February 2000) WT/DS108/AB/R at 56, para 166).

‘misrepresents’ evidence submitted upon it.[65] In *Australia — Salmon*, the AB used this threshold to analyse the claim under Article 11 of the DSU, and found no violation of the provision.[66] Therefore, good faith has been invoked as a yardstick to assess the conduct of a panel in claims of violation of Article 11 of the DSU.

Due to the explicit mention to good faith in its wording, claims of violation based on Article 3.10 of the DSU allow for a more straigthforward resort to the principle as threshold of violation. In *Peru – Agricultural products,* Peru invoked Articles 3.7 and 3.10 of the DSU and the principle of good faith to ground the claim that Guatemala had not initiated dispute settlement proceedings in good faith. The AB concluded that the judgement to initiate proceedings should be exercised in good faith, but there a ‘largely self-regulating discretion’ in doing so.[67]

The AB’s reasoning in *Peru – Agricultural Products* sets a high threshold to establish a violation of procedural good faith by the disputants: good faith is ascertained having regard to the disputants’ own discretion. However, good faith does serve as an element according to which certain conducts are expected from disputants. For instance, as stated by the AB,

> This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes.[68]

Therefore, procedural good faith implies not only that Members should comply with the reports when these are adopted by the membership, but also determines that disputants must act in order to promote the prompt and fair settlement of disputes.

The principle of procedural good faith is grounded on two legal bases in the AB’s case law. When invoked in the context of DSU Article 3.10, it is justified by the very wording of that provision. When invoked in the context of DSU Article 11, it is invoked

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[65] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R 49, para 133. Interestingly, these considerations were intertwined with considerations related to the principle of due process. See fn 50 and accompanying text.
[66] *Australia — Salmon*, Appellate Body Report (20 October 1998) WT/DS18/AB/R 78, at 265.
[67] *Peru — Agricultural Products,* Appellate Body report (20 July 2015) WT/DS457/AB/R 18, para 5.18.
[68] *US — FSC,* Appellate Body Report (24 February 2000) WT/DS108/AB/R 56, para 166.

to ascertain whether the panel has provided an 'objective assessment of the matter before it', without any explicit textual reference, but as a threshold to examine the 'objective assessment' requirement. The AB did not lay out a method of identification of this general principle, except cross-reference to mentions of good faith in previous reports, in particular *US – Shrimp*, even though in the latter good faith was invoked in a different context.[69]

4.2.5 Judicial economy

The notion of judicial economy allows adjudicators to optimize the results in the management of a dispute by making procedural decisions which entail a more efficient use of their powers. Adjudicators can, for instance, join disputes which involve the same facts in order to grant the same decision, or choose to address only some of the arguments and claims advanced by the parties. This concept is present both in domestic[70] and international adjudication.[71]

In the WTO, the first report to mention the principle of judicial economy was *US — Wool Shirts and Blouses*, circulated in 1997. In that case, the panel had held that there was a 'consistent GATT panel practice of judicial economy' and that a complaining party was 'entitled to have the dispute over the contested "measure" resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so'.[72]

This finding was then appealed by India, the complainant in the dispute. India claimed that the customary practice under GATT dispute settlement indicated that there was no space for judicial economy in WTO dispute settlement. The Appellate Body disagreed, and stated that both in GATT and WTO practice, panels had refrained from making findings which were unnecessary to the settlement of the dispute. In making this statement, the AB referred to a number of GATT and WTO reports.[73]

The principle of judicial economy is also present in domestic legal systems; yet, when the panel in *US — Wool Shirts and Blouses* invoked the principle, it did not refer to

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[69] *US — FSC,* Appellate Body Report (24 February 2000) WT/DS108/AB/R 56, para 166 and fn 172.
[70] See Luigi P Comoglio, *Il principio di economia processuale*, vol. 1 (CEDAM 1980) at 7ff for a historical description of the concept.
[71] Fulvio M Palombino, 'Judicial Economy and Limitation of the Scope of the Decision in International Adjudication' (2010) 23 Leiden Journal of International Law 909–932.
[72] *US — Wool Shirts and Blouses*, Panel report (6 January 1997) WT/DS33/R 61, para 6.6.
[73] *US — Wool Shirts and Blouses,* Appellate Body report (25 April 1997) WT/DS33/AB/R 18.

domestic law. The AB did refer to GATT and WTO practice to infer the existence of the principle, but that was only because India challenged the applicability of the concept to the WTO legal system in the light of GATT customary practices and the function of the DSM. In *Canada – Wheat Exports and Grain Imports,* the Appellate Body confirmed that this practice had been first employed by several GATT panels.[74] There was, therefore, no method of identification of the principle, only the reference to a 'consistent GATT panel practice'. After this dispute, 66 AB reports and 140 Panel reports have made reference to judicial economy.[75]

The methodology behind the invocation of judicial economy differs from the previously described principles because it is grounded in the practice of GATT dispute settlement. Instead, as described, other procedural principles were first invoked with support in domestic legal systems and/or the practice of other international tribunals.

4.2.6 Estoppel: the procedural principle *not* employed by the Appellate Body

The previous subsections described the procedural principles employed by the Appellate Body in its reasoning and findings. Conversely, this section analyses the principle of estoppel, which was invoked by parties but not applied by the AB. It is interesting to examine the contrast between this principle, whose applicability was 'denied' by the adjudicators, and the other principles previously described.

Estoppel is a general concept which flows from the broader principle of good faith. Lauterpacht argues that the principle underlying estoppel is common to all systems of private law.[76] It 'operates so as to preclude a party from denying before a tribunal of a statement of fact made previously by that party to another […]'.[77] As Bowett describes, 'its essential aim is to preclude a party from benefiting by his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party'.[78]

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[74] *Canada — Wheat Exports and Grain Imports*, Appellate Body Report (30 August 2004) WT/DS276/AB/R para 133.
[75] As of 04.04.2019.
[76] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans, Green and co. 1927). at 204.
[77] David W Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 British Yearbook of International Law 176.
[78] ibid 177.

Kolb explains that estoppel has two different applications in international law, one on a substantive and another on a procedural level. Substantive estoppel is a source of obligations and is related to the creation of legitimate expectations with respect to existing rights and obligations. Procedural estoppel is related to the creation of legitimate expectations in the course of proceedings.[79]

The concept of estoppel has been explicitly mentioned in 23 panel proceedings,[80] but only in one AB report, in the *EC — Export Subsidies on Sugar* dispute, when it was invoked by the European Communities. In this dispute, the EC invoked estoppel as a procedural defence, but based on factual arguments prior to the establishment of the dispute (it was thus a combination of procedural and substantive estoppel).

The EC alleged that the complainants (Australia, Brazil and Thailand) were estopped from bringing the claim before WTO adjudication because they did not react when the tariff schedules challenged in the dispute were brought to their attention. Since they did not react, they 'shared the understanding' that the regime at stake was not incompatible with WTO rules.[81] The EC claimed that bringing a dispute to the WTO would thereby be inconsistent with the principle of good faith and Article 3.10 of the DSU.[82] The EC also argued that 'estoppel is a procedural defence, which precludes one party from exercising a right vis-a-vis another party, but without modifying the substantive obligations of that party'.[83]

Unlike the principles addressed the previous sections, there was not only a contention on the merits of the claims based on estoppel,[84] but there was also disagreement among the parties on the nature and parameters of estoppel and on whether estoppel was applicable to WTO dispute settlement. Third parties also strongly manifested themselves with respect to the possibility of invoking estoppel in WTO dispute settlement.[85] In particular, the United States stressed that the WTO rules 'reflected a very conscious choice on the part of WTO Members to limit the use of international law in WTO dispute settlement proceedings to customary rules of interpretation' and that

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[79] Kolb (n 10) 833.
[80] As of 11.04.2019. In none of the reports the principle of estoppel bore substantive implications to the reasoning of the adjudicators.
[81] *EC — Export Subsidies on Sugar*, Appellate Body Report (15 October 2004) WT/DS283/AB/R 108, para 314.
[82] *EC — Export Subsidies on Sugar*, Panel Report (15 October 2004) WT/DS283/R 54, para 4.250.
[83] ibid 128, para 7.56.
[84] The complainants claimed that even if the principle of estoppel was found to be applicable in WTO dispute settlement, the conditions for its application were not present in the case at issue (ibid 56, para 4.256).
[85] ibid at 51 ff.

'"[e]stoppel" is not a defense that Members have agreed on, and it therefore should not be considered by the Appellate Body'.[86]

The Panel considered that estoppel had not been applied in WTO dispute settlement, and that even if applicable it should be read harmoniously with the WTO legal system.[87] The AB upheld this finding. In particular, the AB considered that the 'the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding'. The AB found that Article 3.10 of the DSU covers 'the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU'.[88]

While the AB did not challenge the argument that estoppel was a general principle, the organ decided not to take a position with respect to its applicability in WTO dispute settlement. The AB dismissed the EC claims on the grounds that the facts of the case did not support the EC's argument that the complaining parties would have been estopped from bringing the claim by their action.[89] On the other hand, the adjudicators, in reaffirming the relevance of Article 3.10 of the DSU 'from the point of initiation of a case through implementation', hinted that estoppel could not serve as a basis to prevent a party from bringing their claim before the WTO DSM.

In this reasoning, the AB found not only that there was no legal basis for the principle, but also it would contradict WTO law on dispute settlement. While the existence of the principle of estoppel was recognised as such by the AB (and also by the contesting parties), the question regarding its applicability to the WTO was left open.

4.2.7 Overview of the AB's approach to general principles of procedural law

The approach adopted by the AB when resorting to general principles of procedure indicates that these concepts apply 'by default' to WTO law. In other words,

[86] *EC — Export Subsidies on Sugar*, Appellate Body Report (15 October 2004) WT/DS283/AB/R 108, para 311.
[87] ibid 128 ff. In particular, the Panel stressed that 'If estoppel, as a general principle of law, were applicable to disputes between WTO Members, Members would still have to comply with the DSU and would thus have to find a way to comply in good faith with both the provisions of the DSU and those of estoppel' (ibid 129, para 7.64).
[88] ibid 108, para 313.
[89] ibid 108-109.

these concepts apply to WTO dispute settlement even if they are not codified by WTO covered agreements and procedural texts and without the need to be 'incorporated' into WTO law. This can be inferred from two elements in the AB's practice. The first is that the adjudicators usually did not specify a legal basis for invoking these concepts. Instead, they referred to DSU provisions and derived the applicability of given general principles almost as a logical inference that such principles are applicable and relevant to ascertain a violation of that procedural obligation. This is most notably the case for the principles of due process and procedural good faith.

The second, related, element is that in many cases the adjudicators indicated, by their choice of words, that those principles are somehow inherent to any legal and judicial system. This can be noted by phrases such as 'widely accepted rule of international law' (*kompetenz-kompetenz*), 'generally accepted canon of evidence' (burden of proof), 'natural justice' known in 'many jurisdictions' (due process), 'pervasive principle' (good faith).

The AB case law follows no consistent method of identification of general principles of procedure apart from this recurring abstract reference to their undisputed nature. To support these assertions, the AB quoted international and national law handbooks and the practice of other international courts, in particular the ICJ. The practice of citing other international jurisdictions is not uncommon in procedural findings made by WTO adjudicators.[90] In the cases of the principles of due process and procedural good faith, the AB did not seem to find it necessary to justify such references based on other authoritative sources. It seems that the adjudicators found the existence and applicability of these general principles to be self-evident.

Both the practice of treating the relevance and applicability of general principles of procedure to WTO adjudication as self-evident and of referring to decisions of other international courts and tribunals corroborate an argument, advanced by Brown, that there is a 'common law' of international adjudication.[91] The author considered that one reason for common procedural approaches by international courts is that '[…] they have

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[90] Adinolfi writes that 'On a number of occasions, those rulings were inspired by, or expressly aligned with, the disciplines and the practice followed by other international courts and tribunals' (Giovanna Adinolfi, 'Procedural rules in WTO dispute settlement in the face of the crisis of the Appellate Body' (2019) 61 QIL at 50).

[91] Brown, *A common* (n 5).

reference to customary rules developed in international judicial practice, and general principles of law, both of which are well established as sources of judicial procedure'.[92]

In many cases, the Appellate Body and parties to the dispute invoked general principles of procedure to ground claims and assess violations of certain DSU provisions, in particular its Articles 3.7, 3.10, 7 and 11. This is the case particularly in the references to good faith, due process and *kompetenz-kompetenz*. Conversely, principles governing the burden of proof were called upon as if they applied 'by default' to the system. Similarly, judicial economy was not invoked based on a WTO provision, but under the claim that it was a 'customary practice' from the GATT era.

A trend in the AB's case law worth noting is that more descriptive references to general principles of procedure grounding resort to these concepts on non-WTO law and case law occurred only in early reports. After the first reference to those principles, the AB's invocation of the same concepts tended to be based on a cross-reference to the previous reports as the legal justification for that new invocation. For example, after *US – 1916 Act (EC),* the AB invoked *kompetenz-kompetenz* in the *Mexico – Soft Drinks* report. However, in the latter report, the adjudicators did not refer to the practice of other international courts or handbooks of international law. Instead, they merely quoted the *US – 1916 Act (EC)* report.[93]

In some cases, the AB added not one, but a string of cross-references grounding its resort to procedural principles. For example, in *US — Shrimp II (Viet Nam)*, the AB stated that a complaining party may not allege facts without relating them to its legal arguments (a corollary of the *onus probandi incubit actori* maxim). The adjudicators then added a footnote quoting the 'Appellate Body Report, US – Gambling, para. 140 (referring to Appellate Body Report, Japan – Apples, para. 159, in turn quoting Appellate Body Report, US – Wool Shirts and Blouses, p. 14, DSR 1997:I, p. 335)'.[94] It is noteworthy that this practice has not been criticised by WTO Members, even though the AB's practice of relying on *obiter dicta* from adopted reports has been criticised in the ongoing crisis in WTO dispute settlement.[95] In fact, this approach is mirrored by the

[92] ibid at 229.
[93] *Mexico — Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R p. 17, para 44 ff. See also *EU — PET (Pakistan),* Appellate Body Report (16 May 2018) WT/DS486/AB/R para 5.51 and *Mexico — Corn Syrup,* Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW para 36.
[94] *US — Shrimp II (Viet Nam)*, Appellate Body Report (7 April 2015) WT/DS429/AB/R fn 165.
[95] See Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' (2018) 17(3) *World Trade Review* 509–533.

parties, who also refer to adopted reports when invoking general principles of procedure in their submissions.[96]

Consequently, although references to the same concepts can often be found in more recent case law, adjudicators did not engage in the same methodology of identification of principles in more recent reports. Instead, the AB cites its own reports rather than repeating its early case law practice of quoting decisions by other international tribunals and international and national law handbooks. These cross-references show that the AB prefers to rely on previous decisions when importing extraneous legal concepts once these concepts have already been invoked. The reason behind this may be connected to the organ's overall practice of relying in previous reports in its reasoning.[97] Moreover, one can infer that there is a 'preference' to resort to previous adopted reports as an authoritative source of law (thus staying 'within the system'), rather than general principles derived from national legal systems.

In most cases, the content or the applicability of these general principles to WTO dispute settlement has not been disputed by the parties. The only two exceptions have been judicial economy, whose applicability in the WTO context was disputed by India, and estoppel, whose applicability to the DSM was contested by not only the claimant but also third parties. In all the other cases, what was disputed, instead, was whether the principle had or not been violated (in particular with respect to the principles of due process and procedural good faith).

Therefore, both from the side of the AB and from the side of disputants, there seems to be an overwhelming acceptance that these principles are applicable to WTO dispute settlement, even if there is no explicit textual legal basis for invoking them. At the same time, the procedural innovations ensuing from resort to these principles may give rise to an overstepping of the AB's mandate. The next section examines whether this practice can contribute to claims of judicial overreach.

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[96] See e.g., the European Communities' reference to due process in *United States* and *Canada – Continued Suspension*, available at http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139903.pdf (accessed 03 August 2018), fn 75; Korea's reference to due process in *Korea — Radionuclides (Japan)* (WT/DS495/AB/R/Add.1 fns 12, 13, 14); Indonesia's reference to the burden of proof in *Indonesia — Import Licensing Regimes* (WT/DS477/AB/R/Add.1 ; WT/DS478/AB/R/Add.1, paras 8 ff).

[97] See Niccolò Ridi, 'The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 Journal of International Dispute Settlement 200–247; Krzyzstof Pelc, 'The Politics of Precedent in International Law: A Social Network Application' (2014) 108(3) American Political Science Review 547-564.

4.3 THE REFERENCE TO GENERAL PRINCIPLES OF PROCEDURE AND PROCEDURAL INNOVATIONS

Procedural rules shape the legal system and can have as much impact as substantive rules. Accordingly, procedural findings may also be a trigger for the perception of judicial overreach.[98] In this vein, this section departs from an examination of whether Members expressed criticisms towards AB findings based on procedural principles (4.3.1).

Moreover, this section analyses the instances in which procedural principles were invoked and applied by the AB, and what the procedural outcome of such application was. For the sake of clarity, when these outcomes reflected findings not provided for in the DSU and other procedural texts, they are here called 'procedural innovations'. This section then examines general patterns of the AB when relying in general principles of procedural law to make procedural findings (4.3.2).

From a combined assessment of the Members' reactions to AB reports which employ general principles of procedure and the procedural innovations stemming from this resort, this section draws conclusions on whether the patterns in AB reinforce or undercuts judicial overreach (4.3.3).[99]

4.3.1 Reactions from WTO Members

Overall, WTO Members did not criticise the AB's resort to procedural principles not set forth by the DSU. In fact, in some instances Members referred to general principles and the practice of other tribunals to argue that the decisions by the AB found no solid basis. This was the case, for instance, in the decision regarding the burden of proof in the *EC – Tariff Preferences* report, on which India submitted that '[t]he Appellate Body had not based its novel concept on WTO law or the jurisprudence of international tribunals or general principles of law, as none existed'.[100] In most instances, if Members were

[98] See Adinolfi (n 90).
[99] Other scholars have advanced other approaches to address the limits of WTO adjudication when resorting to procedural principles. In particular, Mitchell and Heaton have developed three criteria according to which resort to procedural principles is permitted under the inherent powers of WTO adjudication (Andrew Mitchell and David Heaton, 'The inherent jurisdiction of WTO Tribunals: the select application of public international law required by the judicial function' (2010) 313 Michigan Journal of International Law 559-618, at 828 ff). See also Brown, *A common* (n 5) at 72; 90.
[100] DSB, Minutes of Meeting Held in the Centre William Rappard on 6 November 1998, WTO Doc WT/DSB/M/167 (14 December 1998) at 12-13, para 50.

unsatisfied with the procedural findings made by the AB, they commented on the merits of the reasoning, rather than on the use of procedural principles behind the findings.[101]

It is more difficult to draw conclusions with respect to the extent to which the Members find it justifiable to resort to these principles in order to develop procedural rules which are not provided for in the DSU or in the Working Procedures. As a means of illustration, Members generally did not contest when the AB filled a gap in its procedural framework with respect to the burden of proof, even if some of them did contest the merits of the rule created.[102] However, in other cases, filling procedural gaps was severely criticised by the WTO membership.

One of the most known and controversial cases in this sense was the AB's determination that panels could accept non-requested *amicus curiae* briefs.[103] In the *EC – Asbestos* case, the AB decided, '[i]n the interests of fairness and orderly procedure',[104] to adopt additional procedures with respect to the submission of *amicus* briefs in that dispute. This prompted the Members to convene a meeting of the General Council in order to discuss the decision.[105] While the *amicus curiae* decision was not based in a procedural principle, the language adopted ('in the interests of fairness and orderly procedure') is very similar to the language adopted by the AB in other procedural decisions based on due process and good faith.[106] This language was criticised by several members in the General Council meeting addressing the issue.[107] Interestingly, following this meeting and the criticisms, the AB decided not to accept any of the proposed *amicus curiae* briefs in the *EC – Asbestos* case.[108]

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[101] For example, in the *US — Shirts and Blouses* report, in which India and other third parties made considerations with respect to the findings of the AB with respect to the allocation of the burden of proof.
[102] See, for instance, the discussions on the DSB meetings upon the adoption of the *US — Shirts and Blouses* (WT/DSB/M/33 at 6), *EC — Tariff preferences* (WT/DSB/M/167 at 12 ff), *US — Carbon Steel* (WT/DSB/M139 at 8) reports.
[103] AB findings with respect to the acceptance of *amicus curiae* briefs were criticised in the *US — Shrimp*, *EC — Asbestos, US — Lead and Bismuth II* and *EC — Sardines* reports. See also William J Davey, 'The Limits of Judicial Processes' in D Bethlehem *et al*, *The Oxford Handbook of International Trade Law* (OUP 2009) 474.
[104] Communication from the Appellate Body, WTO Doc WT/DS135/9 (8 November 2000).
[105] General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000, WTO Doc WT/GC/M/60 (23 January 2001) ('General Council meeting').
[106] It should be noted that the decision invoked Article 16(1) of the Working Procedures for Appellate Review, which states that ' In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. […]'. The choice of words was therefore copied from that provision.
[107] See, e.g., statements by Egypt ('General Council meeting' n (105) para 17) Hong Kong, China (ibid, para 26), Mexico (ibid, para 51).
[108] Davey (n 103) 474.

Creamer and Godzimirska have noted that the notions of 'procedural fairness and due process' were increasingly incorporated into AB reports.[109] However, the authors also point out that this has not been a source of concern for WTO Members. An illustration can be found in the DSB meeting in which the *US* and *Canada – Continued Suspension* AB report was discussed. In this dispute, the AB had reversed Panel findings based on consultations with experts because it found that 'manner in which the Panel used these experts does not ensure impartiality and cannot be said to ensure fairness in the consultations with the experts', that '[s]uch a result is not compatible with the due process obligations that are inherent in the WTO dispute settlement system'[110] and, consequently, that the Panel had not made an 'objective assessment of the matter' in accordance with Article 11 of the DSU.[111]

In the DSB meeting upon circulation of those reports, Japan drew lengthy statements regarding the relationship between the notion of due process and Article 11 of the DSU. Japan did not contest the AB's findings, and it 'did not disagree with the Appellate Body's general statements that due process requirement was "inherent in the WTO dispute settlement system" and was "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings"'.[112] However, according to Japan, because 'due process' was not treaty language, 'the ultimate question to be answered here was not whether the Panel had infringed due process rights inherent in the system, but whether and how the substantive provision of the DSU, in this case Article 11, had been breached by the Panel'.[113] Therefore, Japan argued that it remained unclear 'how the breach of inherent due process rights, which had been found by the Appellate Body, constituted the Panel's failure to "make an objective assessment of the matter", as required by Article 11 of the DSU'.[114] In other words, the delegation of Japan opposed to the idea that due process could *per se* form a violation of WTO procedural obligations, and argued that the relationship between this procedural principle and DSU Article 11 should be clarified.

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[109] Cosette D Creamer and Zuzzanna Godzimirska, 'The Rhetoric of Legitimacy: Mapping Members' Expressed Views on the WTO Dispute Settlement Mechanism' (2015) iCourts Working Paper Series, 16 <https://ssrn.com/abstract=2560780> accessed 14 February 2019.
[110] *Canada — Continued Suspension* (WT/DS320/AB/R) and *US — Continued Suspension* (WT/DS321/AB/R) para 469.
[111] ibid 481-482.
[112] DSB, Minutes of Meeting Held in the Centre William Rappard on 14 November 2008, WTO Doc WT/DSB/M/258 (4 February 2009) 7, para 21.
[113] ibid 8, para 21.
[114] ibid.

Similarly, in the DSB Meeting in which the *Thailand — Cigarettes (Philippines)* AB report was discussed, the United States advanced that 'Members would also benefit from a better explanation of how the discussion of, and focus on, "due process" in connection with Thailand's appeal under Article 11 of the DSU related to the text of Article 11, in particular the provision for an "objective assessment of the matter before it"'.[115]

The comments by the delegations in DSB meetings did not dispute the legal basis for resorting to these principles, or the methodology employed in identifying such principles. In appeals proceedings, WTO Members themselves invoked the same general principles of procedure in their submissions.[116] Moreover, they have generally not disputed the existence, the content and the applicability of general principles of procedure. The only exceptions were judicial economy, whose applicability in the WTO context was disputed by India,[117] and estoppel, whose applicability to the WTO adjudication was contested not only by the claimant but also by third parties.[118] Instead, in the other cases, parties disputed whether the principle had been violated or respected. This was the case in particular with respect to the principles of was due process and good faith. This, if anything, confirms the recognition of the principles described and their applicability to WTO dispute settlement.

Therefore, in general, WTO Members did not express a critical position towards the reliance on procedural principles on the AB's findings. Instead, in most instances, Members are critical on the merits of the findings, but not on the reliance to procedural principles. Where there have been criticisms with respect to resort to general principles of procedure, the concerns involved the lack of clarity in the AB's findings.

4.3.2 The use of principles as a basis for creating new procedural practices and standards

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[115] DSB, Minutes of Meeting Held in the Centre William Rappard on 15 July 2011, WTO Doc WT/DSB/M/299 (1 September 2011) at 12-13, paras 10 ff.

[116] See, e.g., reference to the principle *jura novit curia* by Indonesia in *Indonesia — Import Licensing Regimes* (WT/DS477/AB/R/Add.1 ; WT/DS478/AB/R/Add.1); principle of good faith and estoppel by Colombia (third-party) in *Peru - Agricultural Products* (WT/DS457/AB/R/Add.1); a 'general principle of evidence' on the burden of proof by *Panama in Argentina - Goods and Services* (WT/DS453/AB/R/Add.1); principle of due process by Thailand in *Thailand — Cigarettes (Philippines)* (WT/DS371/AB/R, para 147).

[117] *US — Wool Shirts and Blouses*, Appellate Body report (25 April 1997) WT/DS33/AB/R, p. 18.

[118] *EC — Export Subsidies on Sugar*, Appellate Body Report (15 October 2004) WT/DS283/AB/R, 51 ff; *Supra* note 56, para 4.256.

Appellate Body findings have given rise to some procedural standards which were not envisaged by the DSU or other procedural rules.[119] Considering that often DSM decisions rely on previous rulings with respect to aspects of procedure,[120] the impact that the procedural innovations may have on WTO dispute settlement goes beyond a single dispute. This section analyses the use of procedural principles in making findings related to the functioning of WTO adjudication mechanisms. These findings are here referred to 'procedural innovations'. To simplify visualisation, the table below provides examples of such procedural innovations based on resort to general principles of procedure and the legal basis, textual or implicit, on which these findings were founded.

[119] The power of the AB to develop new procedural rules with respect to a single dispute is in fact provided by Rule 16(1) of the Working Procedures for Appellate Review, which determines that '[i]n the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body'. As this Rule states, the adoption of a procedural in this scenario must be 'for the purposes of that appeal only' and such adoption must be notified to all of the participants to the dispute and Members of the AB. However, many procedural findings by the AB did not follow this procedure, and evolved into an established practice of the WTO DSM, such as the development was the adjudicators' practice of exercising judicial economy. This is so because Rule 16(1) is limited in scope: it only deals with the possibility. Findings of violation of procedural obligations by the AB do not entail the creation of rules for the proceedings of a given dispute. Instead, they address how a procedural standard was not observed by a given conduct performed by the Panels or the parties to the dispute. Nevertheless, these findings may contain procedural considerations that will develop into practices followed in subsequent DSM proceedings. In this section, focus is given to procedural findings not made on the basis of Rule 16(1) of the Working Procedures.

[120] See Niccolò Ridi, '"Mirages of an Intellectual Dreamland"? Ratio, Obiter, and the Textualization of International Precedent' (2019) 10(3) Journal of International Dispute Settlement 361.

GENERAL PRINCIPLE	LEGAL BASIS[121]	EXAMPLES OF PROCEDURAL INNOVATIONS[122]
Kompetenz-kompetenz	Fundamental question related to 'vesting of jurisdiction'	Jurisdictional issues can be visited at any stage in the proceeding (*US – 1916 Act (EC))* Panels have the authority to decide their own jurisdiction, but cannot 'decline to exercise validly established jurisdiction' (*Mexico – Soft Drinks)*
Burden of proof (general rule and *jura novit curia*)	General rule: applicable to any legal system (therefore default rule) *Jura novit curia:* no specific legal basis	General rule: party asserting the defence under WTO law must bear the burden of proof. *Jura novit curia:* party must provide 'sufficient evidence to substantiate its assertion' (*EC – Tariff Preferences)*
Due process	Not specified, but from statements in *EC – Hormones* and *Chile – Price Band System,* has implied that due process applies by default ('inherent' obligation) Generally, invoked under DSU Article 11 for interpretative purposes	Members should bring procedural deficiencies in a seasonably and promptly manner (*United States – FSC)* Right to fair response (*Chile – Price Band System*) Other innovations: Decisions related to treatment of evidence (including experts); allocation of burden of proof; right of defence and deadlines (preclusion); terms of reference indicated by the party / claims made and findings (claims related to jurisdiction); Confidentiality (BCI) *versus* due process; request to complete the analysis; Panel failure to make objective assessment.[123]

[121] Either the explicit or implicit textual reference to which the Appellate Body was referring to when referring to the procedural principle.
[122] 'Examples of procedural innovations' refers to the procedural outcome of the reasoning in which the procedural principle was employed. List illustrative not exhaustive; based on the cases pinpointed in Section 4.2.
[123] See fn 56.

Procedural good faith	DSU Article 3.7 (interpretative) DSU Articles 3.10 (explicit: 'if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute')	DSU Article 3.7: Members have a 'large self-regulating discretion on when to initiate proceedings', so WTO adjudicators must presume that this right has been exercised in good faith (*Mexico – Corn Syrup (Article 21.5)*); DSU Article 3.10: a party cannot act in a way during the proceedings and then make claims in an opposing direction (*US – FSC).*
Judicial economy	Broad interpretation of DSU Article 11; not precluded by the DSU	'A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute' (*US — Wool Shirts and Blouses)*
Estoppel	Assessed under DSU Article 3.10, but no findings as to whether it applies to WTO DSM.	Estoppel would amount to a limitation to the right to bring a claim before the DSM (*EC — Export Subsidies on Sugar*)

Table 1: Procedural principles, legal basis and procedural innovation

The creation of procedural standards on the basis of general principles is not a practice uncommon in international dispute settlement.[124] The findings described above can be divided into three categories with a view of examining the patterns specific to each of these categories.[125]

First, there are the findings related to the **determination of jurisdiction** of WTO adjudication. Findings based on *kompetenz-kompetenz* are the most evident examples. Second, there are the **findings on the proceedings**, or what can be called **procedural findings '*strictu sensu*'.** These determine rules of procedure which have not been set by the DSU or other procedural rules on WTO adjudication once jurisdiction has been established. Among these are findings based on considerations of due process, principles governing the burden of proof and judicial economy. Finally, there are the findings on the

[124] Paolo Palchetti, 'Making and enforcing procedural law at the International Court of Justice' (2019) 61 Questions of International Law 5-20, at 6.

[125] The typology here presented partially reflects the grouping of procedural principles used in the ICJ offered by Kolb (n 10) 798. There are, however, some variations, among which the fact that this work does not refer to the existence of what he calls 'structural and constitutional principles'. These would be contained in the umbrella of due process.

conduct of parties and adjudicators in the proceedings, or **substantive findings relating to the proceedings.** They ascertain the *conduct* of the players (disputants and adjudicators) in these proceedings. In WTO practice, these findings have mostly been based on the principle of procedural good faith as expressed in Article 3.10 of the DSU, as well as when it is referred to generally, not under its codified version (most notably under DSU Article 11).

4.3.2.1 Determination of jurisdiction

To be able to adjudicate over a dispute, an adjudicator must decide (explicitly or implicitly) whether it has been granted jurisdiction to do so, and what the limits of its jurisdiction is. This notion is supported by the practice of other international tribunals,[126] and WTO Members have not opposed to this understanding.

At the same time, the idea of consent to international jurisdiction also requires that this determination of its own jurisdiction must be carefully employed. In the words of Amerasinghe, 'interpretation of jurisdictional clauses must be formal and yet constructive (because interpretation must not lead to absurdity) while at the same time the judge must not turn legislator. [...] While interpretation is not restrictive, it is equally not excessively liberal'.[127]

Therefore, on one side, a tribunal's jurisdiction should not be read too broadly as to cover matters which could arguably fall beyond the powers granted by the parties to the adjudicator. For instance, deciding on substantive matters related to Preferential Trade Agreements, even if these matters are also related to WTO law, would fall outside the scope of DSM jurisdiction.[128] On the other side, this determination should not be read too narrowly as to limit or deprive the right of parties to resort to the DSM (for instance, by interpreting recourse to other international adjudicative *fora* as precluding WTO adjudication).[129] Doing otherwise would be against the prohibition to add and diminish rights and obligations of WTO members, and is also a source of legitimacy concern.

In *Mexico — Corn Syrup (Article 21.5)*, the AB had to address whether the lack of prior consultations between the disputants prior to the formation of a panel would

[126] See fn 14.
[127] Amerasinghe, *Jurisdiction* (n 18) 191.
[128] See, e.g., William J Davey and André Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8(1) World Trade Review 5–23.
[129] See, for instance, *Peru – Agricultural products*, described in Chapter 3.2.3 and 3.3.1.2.

amount to a defect that would deprive the panel of its authority to deal with the issue. The AB concluded that 'the Panel was not required to consider, on its own motion, whether the lack of consultations deprived it of its authority to assess the consistency of the redetermination with the Anti-Dumping Agreement'.[130] It found that 'the failure of the United States' communication to indicate whether consultations were held would not deprive a panel of its authority to deal with and dispose of the matter before it […]'.[131]

In *Mexico — Soft Drinks*, Mexico had required the panel to decline its jurisdiction, since another forum (a NAFTA panel) would be competent to address the issue. The AB found that, following their inherent adjudicative powers, 'panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction'.[132] The AB concluded that '[a] decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU'.[133]

The findings in these two reports fall into the broader category of the *kompetenz-kompetenz* principle: the first one refers to what Boisson de Chazournes calls the 'competence to act at all',[134] the second one 'competence to entertain the merits of a case'.[135] In both cases, the AB interpreted concepts of *kompetenz-kompetenz* by ensuring that the Panel could be validly formed and properly function. The AB was reluctant to make findings that would limit the rights of parties to the DSM on the basis of its *kompetenz-kompetenz* prerogatives. In this sense, the AB's approach to the notion of *kompetenz-kompetenz* has been applied restrictively.

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[130] *Mexico — Corn Syrup,* Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW para 65.
[131] ibid para 66.
[132] *Mexico — Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R para 45.
[133] ibid para 52.
[134] Although panel reports are not the object of the present work, the recent report on the *Russia — Traffic in Transit* dispute is noteworthy in this context. In its reasoning, the Panel resolved the very controversial issue of the justiciability of GATT Article XXI, an arguably self-judging exception, by first establishing that 'The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function. One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction' (*Russia — Traffic in Transit*, Panel Report (5 April 2019) WT/DS512/AB/R, para 7.53, footnotes suppressed). This Panel report has not been appealed.
[135] Laurence Boisson de Chazournes, 'The Principle of Compétence de la Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals', in M Arsanjani, J Cogan and S Weissner, *Looking to the Future: Essays in Honor of W. Michael Reisman* (Martinus Nijhoff 2010) 1027-1064 at 1041.

4.3.2.2 Procedural findings strictu sensu

Findings on the functioning of dispute settlement are a fundamental part of the adjudicative process, even if the merits of the findings which flow from recourse to these principles may be contested. An illustration of this are the findings on the burden of proof. WTO Members have disagreed with the conclusions on who should bear such burden.[136] Yet, regardless of the parties' view on the merits of these findings, adjudicators must decide issues such as who bears the burden of proof, when to engage in judicial economy, and must ensure that due process is being respected for a satisfactory settlement of disputes.

Under this category of procedural findings, resort to due process is the most prone to claims of judicial overreach. The principle of due process served as basis for the AB to make a number of procedural innovations when assessing violations of the DSU in the course of adjudicatory proceedings, in particular DSU Article 11.

In *US – Gambling,* the AB had to assess claims of violation of Article 11 of the DSU in panel proceedings. In that occasion, although the complainant based its claims on that DSU provision, the AB largely relied on considerations of due process to base its findings. The adjudicators considered that 'due process rights similarly serve to limit a responding party's right to set out its defence at any point during the panel proceedings'.[137] In doing so, the adjudicators hinted the existence of a temporal preclusion rule, and determined and that panels must regulate panel proceedings in order to accord due process guarantees to the parties to the dispute.[138]

Another example is *US* and *Canada – Continued Suspension,* in which the AB invoked due process to reverse the findings of the Panel based on expert evidence.[139] In this report, the claims and findings were significantly reliant on due process considerations, and to a large extent the AB reversed the findings based on this principle more than on Article 11 of the DSU.[140]

The AB's reliance on the principle of due process also led the organ to state that 'in the interests of due process, parties should bring alleged procedural deficiencies to the

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[136] For example, in the *US — Shirts and Blouses* report, in which India and other third parties made considerations with respect to the findings of the AB with respect to the allocation of the burden of proof.
[137] *US — Gambling*, Appellate Body Report (7 April 2005) WT/DS285/AB/R at 91, para 270.
[138] ibid at 91.
[139] See Section 4.2.3.
[140] In the same sense, Mitchell and Heaton (n 99).

attention of a panel at the earliest possible opportunity'[141] and that 'the principles of good faith and due process oblige a responding party to articulate its defence promptly and clearly'.[142] Again, these examples attest that the AB's reliance on this general principle served as legal justification for the creation of procedural standards not foreseen in the DSU, and which went beyond the ordinary meaning of the terms of DSU provisions.

As Mitchell submits, the inherent powers of WTO adjudicators allow them to 'protect due process interests of disputing parties'.[143] As a consequence, even though due process is not an express source of rights and obligations, this principle can (an d arguably should) be used by adjudicators without them necessarily incurring in judicial overreach.[144] At the same time, resort to this principle without explicit textual basis may lead to the perception of judicial overreach.

In this sense, the lack of clarity in resort to this principle may give rise to criticisms.[145] As can be read from Japan's comments in the DSB meeting debating the *US* and *Canada – Continued Suspension* report and the United States' comments in *Thailand — Cigarettes (Philippines)*, the concern is that these findings depart from the agreed procedural texts.[146] At the same time, due process considerations are necessary for the proper administration of DSM functions, and for this very reason it arguably require no explicit legal basis.[147] Instead, adjudicators should explain more clearly the relationship between due process and the provisions under scrutiny in the particular cases when creating procedural standards which are not foreseen in the DSU.

4.3.2.3 Substantive findings relating to the proceedings

In the words of Sir Gerald Fitzmaurice, 'There is always a natural reluctance to ascribe bad faith to States, in the sense of a deliberate intention knowingly to circumvent

[141] *US — Carbon Steel,* Appellate Body Report (28 November 2002) WT/DS213/AB/R*,* para. 123.
[142] *US — Gambling*, Appellate Body Report (7 April 2005) WT/DS285/AB/R, para 272. See also *Mexico — Corn Syrup*, Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW at 16-17, para 47 ff.
[143] Mitchell, 'Due process' (n 48) 158.
[144] Brown, *A common* (n 5) 72-78.
[145] See, for instance, comments made by Japan with respect to the *US* and *Canada – Continued Suspension* reports. DSB, Minutes of Meeting Held in the Centre William Rappard on 14 November 2008, WTO Doc WT/DSB/M/258 (4 February 2009) 7, para 21.
[146] See Section 4.3.1
[147] In the DSB meeting upon circulation of those reports, Japan drew lengthy statements regarding the relationship between the notion of due process and Article 11 of the DSU. See DSB, Minutes of Meeting Held in the Centre William Rappard on 14 November 2008, WTO Doc WT/DSB/M/258 (4 February 2009) 7, para 21.

an international obligation'.[148] Therefore, finding that a party has acted in bad faith (i.e., finding that a party did not act in good faith in the proceedings) can be particularly problematic from a legitimacy viewpoint.

On the other hand, in the context of the WTO, assessing the good faith of Members in the proceedings can be justified because Article 3.10 of the DSU explicitly provides for this source of obligation, by stating that 'all Members will engage in these procedures in good faith in an effort to resolve the dispute'.

Aside from this explicit reference to good faith in the DSU, the AB also relied on procedural good faith as a standard of review for the violation of DSU provisions in some cases. In *Mexico – Corn Syrup (Article 21.5)*, the AB held that the first sentence of DSU Article 3.7 'reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU'.[149] This provision states that 'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful'; it thus contains no reference to good faith. Yet good faith was considered a departure point for the AB's reasoning. The adjudicators concluded that, because this obligation is 'largely self-regulating', 'panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be "fruitful"'.[150]

The *US – FSC* AB report provides another example of the use of good faith as standard of review for the violation of DSU provisions. In that dispute, the United States argued that the European Communities' request for consultations was defective, and for this reason such request it not form the basis for the establishment of panel proceedings. The AB referred to Article 3.10 of the DSU, and held that the principle of good faith '[…] requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes'.[151]

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[148] The same has been stated regarding other international courts. See Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of Law' (1959) 35 British Yearbook of International Law 183-231, at 209.
[149] *Mexico — Corn Syrup*, Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW at para 73.
[150] ibid para 74.
[151] *US — FSC*, Appellate Body Report (24 February 2000) WT/DS108/AB/R 56, para 166.

Findings based on this principle have been made restrictively by the AB. One example is the AB's position in the *EC — Export Subsidies on Sugar* report with respect to the applicability of estoppel as a defence in the DSM. To recollect, in that dispute, the AB was reticent with respect to the applicability of the principle of estoppel in WTO adjudication, and circumvented the question by finding the concept was not relevant to the dispute.[152] Estoppel would have amounted to the importation of an extraneous defence but based on an interpretation of Article 3.10 of the DSU if accepted as argued by the EC. From the AB's hesitancy to accept such defence, it can be inferred that the organ was reluctant in allowing for the use of external procedural principles as a defence limiting the rights of parties, even if they are partially justified in a WTO provision.

Article 3.2 of the DSU explicitly precludes DSM reports from 'add to or diminish rights and obligations contained in the covered agreements'. This prohibition is valid for substantive and procedural findings. While it is hard to define which procedural findings could violate this limitation, the practice of the AB hints at least two elements. First, the AB has been very reluctant, arguably correctly so, in limiting the rights of parties to initiate proceedings. Second, the presumption that Members act in good faith in the proceedings cannot be lightly rebutted – and indeed has not been so thus far. Finding that a party has acted in bad faith can be particularly problematic from a legitimacy viewpoint.

Findings on the conduct of the parties and adjudicators remained uncriticised by the Membership to the extent that they find legal basis on a WTO provision and are read in a narrow manner. At the same time, findings based on procedural good faith with respect to the acts of adjudicators are intertwined with considerations of due process.[153] Indeed, when the good faith of a panel was under scrutiny on appeal, parties and the AB often resorted to the notion of due process, in particular in the case of treatment of evidence. Therefore, findings on the conduct of parties and adjudicators, if intertwined with due process considerations, can be considered to fall within the scope of the inherent powers doctrine.[154]

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[152] See Section 4.2.6.

[153] Heaton and Mitchell note however that 'both good faith and due process *can* be applied as aspects of inherent jurisdiction, but they have *different content* and should not be conflated' (Mitchell and Heaton (n 99) 607, fn 256).

[154] Mitchell criticises this approach, which he refers to as a 'muddling' of two different concepts (Andrew Mitchell, 'Good Faith in WTO Dispute Settlement' (2006) 7 Melbourne Journal of International Law 340-371, at 353 ('Good faith')). It is submitted here that, while a greater clarity in the distinction of these two principles may be desirable, the two concepts are in many ways related, and there is no outstanding problem in reading due process into procedural good faith considerations.

On the other hand, adjudicators can make findings on procedural good faith on the basis of DSU Article 3.10, which provides explicit powers for them to do so.[155] However, this provision has been interpreted restrictively by the AB. The AB's position with respect to the applicability of estoppel to WTO dispute settlement in the *EC — Export Subsidies on Sugar* report can be read as aligning with the United States' argument in that dispute that estoppel could not be used as a defence since it was not agreed upon by the parties. Defences, be them substantive or procedural, limit the rights and obligations of parties; therefore, they are not only more controversial from a legitimacy perspective, but their application to WTO law is also more questionable considering the limits of its jurisdiction. The principle of estoppel, in particular, would be even more controversial, as it would limit the right to bring a claim before the WTO DSM. It seems reasonable that the AB adopts a restrictive view on the applicability of these principles to WTO dispute settlement.

4.3.3 Interim conclusions: patterns to follow and patterns to address

References to general principles of procedure in the AB case law are more expressive when compared to other categories of general rules of international law. Not only have the adjudicators employed different procedural concepts not found in WTO text, but they have also developed procedural findings based on general principles of procedure. The AB only denied application of a procedural principle in the case of estoppel (*EC — Export Subsidies on Sugar*), and only denied the outcome ensuing from the application of a general principle when such principle was invoked as a reason precluding the formation of a panel (*kompetenz-kompetenz* in *Mexico — Soft Drinks* and good faith in *Mexico — Corn Syrup (Article 21.5)*).

Interestingly, although the AB has refrained from positioning itself with respect to estoppel in *EC — Export Subsidies on Sugar*, it applied this general principle without explicit reference in other occasions. In *US – FSC*, the AB held that the United States could not, after one year after the establishment of the proceedings and after having taken part in such proceedings without raising the objection against the EC's request, argue that

[155] In this sense, Giovanna Adinolfi, 'Il diritto non scritto nel sistema OMC' in P Palchetti (a cura di), *L'incidenza del diritto non scritto nel diritto internazionale ed europeo*, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016) at 111-112.

such request was deficiency. This is but an expression of the maxim *venire contra factum proprium*, which is a corollary of estoppel.[156]

The cases regarding estoppel present two common features: they are related to claims limiting the jurisdiction of the DSM and they involve the assessment of the conduct of a one of the parties to the dispute. All other instances in which the AB applied procedural principles (elements relating to the burden of proof, due process and judicial economy) are strictly procedural. It can be concluded that the notion of estoppel has not found application in the DSM in the cases in which it would amount to a limitation of a party's right to initiate proceedings.

In this sense, the AB engaged in resorting to general principles of procedure, but being cautious so as not to limit parties' rights without explicit textual basis. This caution can arguably explain why parties have not criticised the organ's reliance on this source of law. This caution should therefore be maintained by adjudicators.

The way in which parties and the AB invoke the principle of due process also supports that there is a general acceptance of the existence and content of general principles of procedure. Parties and third parties invoke this principle in their submissions without dwelling on its legal content, or which legal grounds it is applicable to the dispute, even though due process is not found in the text of WTO dispute settlement. Moreover, parties have not contested the applicability of this concept in appeals proceedings. Instead, when one party invokes the violation of its due process rights, the other party tries to demonstrate that there was no such violation.[157]

Conversely, the only concern expressed in some cases by Members with respect to the AB's reliance on general principles of procedural law was the lack of clarity on how these principles related to the provisions under scrutiny by adjudicators. Specifically, Japan and the United States have remarked that a clarification between the notion of due process relates to DSU Article 11. Because there is no clear textual basis for relying due process standards under this provision, the perception of judicial overreach may be justified according to how the adjudicators indicate the relevance of the principle for the dispute under scrutiny.

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[156] Kotuby and Sobota (n 38) 121. See also Michael Lennard, 'Navigating by the stars: interpreting the WTO Agreements' (2002) 5(1) Journal of International Economic Law 17-89, at 78.

[157] See for instance *Argentina — Textiles and Apparel* (WT/DS56/AB/R), p.10.

This perception can be mitigated by relying more explicitly on the general rule of interpretation of the Vienna Convention on the Law of Treaties, Article 31(1).[158] Adjudicators should be attentive to make a clear connection on how the principle of due process can usefully inform the interpretation of DSU provisions. As an illustration, the AB has often used due process to ascertain whether a panel has conducted an ‘objective assessment of the matter before it’ in the context of DSU Article 11. The relationship between this expression and the notion of due process as a standard of review was treated as self-evident in cases such as *US* and *Canada – Continued Suspension*.[159] Following the criticisms by Japan and the United States, it could be useful to make it more explicit how due process serves to inform the ‘ordinary meaning’ of this expression.

[158] This is the approach followed by the AB with respect to substantive provisions in other covered agreements. See I Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21(3) EJIL 605–648.
[159] See Section 4.3.2.3.

CHAPTER 5

GENERAL PRINCIPLES STEMMING FROM SPECIFIC AREAS OF INTERNATIONAL LAW

5.1 PRELIMINARY REMARKS

Albeit with significant less frequency than other fields of general international law, AB reports also refer to general principles typical from other fields of international law. The WTO is a *lex specialis* system regulating questions of international trade law. While reference to customary international and general principles deriving from 'general topics' of law is expected in WTO adjudication, less so is resort to concepts typical of 'specialised' systems of law, such as criminal law, environmental law, tax law. Yet, albeit in much fewer instances, references to general principles deriving from specific fields of law can be found in AB reports. For the sake of simplicity, the concepts described in this section are referred to as 'substantive principles'.[1]

Because these principles have a 'material' content, rather than just a procedural or instrumental one (as is arguably the case for maxims of treaty law, state responsibility and procedure), their invocation can be more controversial. In theory, insofar as substantive principles are used merely for the interpretation of existing WTO provisions, rights and obligations, there is no overreach. However, as explained in the previous chapters, it is not always easy to determine whether a professed interpretative role is in fact giving room to an expansion of the material jurisdiction. The line between use of extraneous sources for interpretation and their application is, therefore, once again relevant. In this scenario, resort to substantive principles can be a potential source of claims of judicial overreach.

The first section of this Chapter describes the approach followed by the Appellate Body in identifying and resorting to substantive concepts derived from general international law (5.2). The second addresses whether resort to these principles has been seen as a source of judicial overreach or could, disguised as 'interpretative aid', amount to an expansion of the material jurisdiction of WTO adjudication (5.3).

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[1] It is important to stress that this definition is advanced for the sake of methodological clarity and without attempting to exhaust the definition of 'substantive principles'. The distinction between procedural and substantive principles is indisputably blurred. See e.g., Claire EM Jervis, 'Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law' (2019) 30(1) EJIL 105.

5.2 RESORT TO SUBSTANTIVE PRINCIPLES BY THE APPELLATE BODY

From the outset, it is interesting to note that, in contrast with the other 'fields' of international law explored in the previous chapters, the range of substantive principles to which the AB resorts to is much more limited.[2] This section examines the AB's references to the precautionary principle (5.2.1), concept of sustainable development and principles of international environmental law (5.2.2), and what the adjudicators call 'widely recognized principles of taxation' (5.2.3).[3] The final part will summarise the approach followed by the AB when resorting these concepts, as well as offer an explanation for such 'limited' use to this category of international rules (5.2.4).

5.2.1 Precautionary principle

The precautionary concept finds its most known formulation is Principle 15 of the Rio Declaration on Environment and Development,[4] which states that

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. [5]

The precautionary principle originated from concerns with environmental protection in the context of domestic law regulation.[6] However, its broad content allows the concept to be applied in other contexts. Indeed, in the case of the WTO, the precautionary principle has been invoked most significantly in the context of the

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[2] These principles have been pinpointed through the general systematisation described in the Introduction, combined with review of relevant literature.

[3] Other references to other principles stemming from other areas of international law were pinpointed following the general systematisation process (see Introduction). Two examples are the 'longstanding principle against the recognition of foreign confiscations', invoked by the United States in the *US – Section 211* dispute, and the principle of Permanent Sovereignty over Natural Resources, invoked by Saudi Arabia (third party) in *US — Carbon Steel (India)*. However, these principles are not examined in this chapter because have not been relied on in the reasoning of the AB, even if they had been argued by the parties.

[4] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[5] ibid.

[6] Arie Trouwborst, *Evolution and Status of the precautionary principle in international law* (Routledge 2002) 16.

Agreement on Sanitary and Phytosanitary Measures (SPS), aimed at protecting human, animal and plant life and health.[7]

In the formulation under Principle 15 of the Rio Declaration, States shall take protective measures despite lack of scientific certainty as to the negative environmental consequences which may derive from certain activities.[8] This guideline thus indicates the need to take protective measures despite scientific certainty. The extent to which this formulation is in fact binding, however, is another matter. In any case, because of its content and formulation, the precautionary notion can arguably be a source of autonomous legal content, that is, as a source of obligations.[9]

Despite being labelled as a *principle*,[10] the legal value of the precautionary concept in international law is unclear. Zander considers that 'relatively widespread agreement seems to exist on the importance of acting in a precautionary fashion when dealing with the environment', that 'a broad definition of the precautionary principle, without direct legal effects, seems to enjoy wider consensus'.[11] On the other hand, the author remarks that 'at present international consensus does not appear to exist on a narrower, prescriptive definition of the precautionary principle'.[12] This approach seems to be present also in the approach taken by the Appellate Body with respect to the applicability of the concept in WTO law.

The first and most significant reference to the precautionary principle in AB proceedings was in the case *EC – Hormones*. This dispute involved the ban for the importation of certain products by the European Communities of imports of meat and meat products derived from cattle in which a list of natural hormones had been administered for growth promotion purposes.[13] The EC claimed that these measures had

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[7] See Ilona Cheyne, 'Gateways to the precautionary principle in WTO Law' (2007) 19(2) Journal of Environmental Law 155–172.

[8] Lorenzo Gradoni, 'Il principio precauzionale nel diritto dell'Organizzazione Mondiale del Commercio' in A Bianchi and M Gestri (eds), *Il principio precauzionale nel diritto internazionale e comunitario* (Giuffrè 2006) at 148.

[9] Zander argues that the precautionary principle, among other facets, is a 'fundamental principle which obliges governments to act in a precautionary manner' (Joakim Zander, *The application of the precautionary principle in practice: comparative dimensions* (CUP 2010) 344. See also Gradoni (n 8) .

[10] Trouwborst explains that some authors prefer the terminology 'precautionary approach', 'apparently to avoid the more extreme versions of the precautionary principle that demand absolute environmental protection'. Trouwborst (n 6) 3. Given the recognition of the precautionary approach in several domestic systems, however, it could be argued that it is a general principle of law in the strict meaning of the term. For a study of the precautionary principle in different legal systems, see, *inter alia,* Zander (n 9) and T O'riordan and J Cameron (eds), *Interpreting the precautionary principle* (Earthscan Publications 1994).

[11] Zander (n 9) 72.

[12] ibid.

[13] *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R, para. 2.

been imposed with a view of setting health standards, and that the objective of the measure was to 'ensure that consumers are not exposed to any residues of hormones used for growth promotion purposes'.[14] The crux of the matter, however, was that there was not enough scientific certainty with respect to the reliability of the studies and the level in which the listed hormones could be present in the banned products without posing a risk to human and animal health.[15]

The EC invoked the precautionary principle in this context. They argued that the difference in the levels allowed by domestic regulation in the EC and in the United States was a 'reflection of the different levels of consumer protection' between these countries. The EC adopted a precautionary approach: 'where there exists a doubt over the safety of a product, the EC gives the benefit of the doubt to the consumer, especially in cases where the potential risks may affect very large parts of the population'.[16]

The EC also argued the concept reflected a 'general customary rule of international law or at least a general principle of law, the essence of which is that it applies not only in the management of a risk, but also in the assessment thereof'.[17] According to the EC, the precautionary principle provided 'an important consideration for the application and interpretation of the Agreement […]'.[18]

The status of the principle was contested by the complainants in the dispute, United States and Canada. Both parties argued that the precautionary concept was an 'approach', rather than a principle. Canada argued that it could be an 'emerging principle', which could 'in the future crystallize into one of the "general principles of law"' under Article 38(1)(c) of the Statute of the ICJ.

The panel in that case decided that the EC's measures were inconsistent with several provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Some of the reasons for the panel's findings was the lack of risk

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[14] *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R para 84.
[15] Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (CUP 2011) 64.
[16] *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R at 41, para 124.
[17] *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R, para 16. The EC explained in its submission that that general principles under Article 38(1)(c) of the Statute of the ICJ 'often emerge as an interaction between international law, national law and the dictates of reason, common sense or moral consideration'. The EC also mentioned the Gabcikovo-Nagymaros ICJ decision to reinforce the case for resort to the precautionary principle. EC, 'Appeal of the European Communities – Oral Submissions' (4 November 1997), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151617.11.1997.pdf, accessed 10 May 2019 ('Oral Submissions'), at 5-6.
[18] EC, 'Oral submissions' (n 17) para 22.

assessment and the fact that the measures were not based on existing international standards.

'Whether, or to what extent, the precautionary principle is relevant in the interpretation of the SPS Agreement' was one of the questions raised upon appeal.[19] Two elements relating to resort to the precautionary principle were under dispute: its status and its role with respect to WTO law. Regarding the former aspect, as mentioned, the EC argued that the concept was a general principle; the United States and Canada contended it was an 'approach'. Regarding the latter aspect, the EC claimed that the Panel had misread its claims, and that it did not submit that the principle was to override WTO provisions, but to 'supplement' the interpretation of the SPS.[20]

The Appellate Body unceremoniously refused to answer the first point of debate. It stated that

> The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[21]

The AB then quoted the ICJ dispute *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*. The adjudicators stated that the 'Court did not identify the precautionary principle as one of those recently developed norms' and that the Court '[…] also declined to declare that such principle could override the obligations of the Treaty' under dispute.[22]

Here, the AB seems to imply that the concept is indeed a general principle – not only because it labels the concept as such, but because it states that the doubt regarding its status lies on whether it can be acceptance as '*general or customary international law'*.

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[19] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R at 34.
[20] EC, 'Oral submissions' (n 17) para 22.
[21] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R at WT/DS26/AB/R; WT/DS48/AB/R, at 45, para 123.
[22] ibid fn 93.

Moreover, the AB also hints that there is a conceptual difference of whether a principle is one of 'customary international environmental law' or of 'general or customary international law'. At the same time, the AB considers that it is 'unnecessary' to take a position with respect to this difference, thereby hinting that there would be no legal implications flowing from the categorisation of this principle as one or the other. The result is a reasoning which lacks any clarity regarding what the organ meant with this distinction.

With respect to the second issue, i.e. the relationship between the precautionary principle and the SPS Agreement, the AB did not take a more elucidating position. It considered that the principle 'finds reflection' in Article 5.7 of the Agreement, and that this reflection does not necessarily 'exhaust the relevance' the precautionary concept. Article 5.7 of the SPS states that 'In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information [….]'.[23]

Put differently, the AB stated that the precautionary principle is reflected in WTO law (in particular in SPS Articles 5.7), but the relationship between this concept and the multilateral trading system may go beyond the written text. At the same time, the AB stressed that 'the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement'. For this reason, it concluded, the precautionary principle 'does not override' the provisions of the Agreement.[24]

The AB's approach in *EC – Hormones* gives a very limited role to the precautionary principle. The AB stated that the concept 'found reflection' in the SPS Agreement. Yet, even though the principle could go beyond this 'reflection' in WTO law, it could not 'override' WTO provisions. One can argue that the role played by the precautionary principle with respect to the SPS was not even interpretative. The AB stated that it has incorporated by the multilateral trading system, so it is not an extraneous norm in that sense.[25] However, it is considered relevant only to the extent that it has been

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[23] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R at 46, para 124.
[24] ibid 46, para 125.
[25] Marceau argues that SPS Article 5.7 would reflect a principle of *prevention* rather that of *precaution*. Gabrielle Marceau, 'Le principe de précaution dans la jurisprudence de l'OMC – Leçon inaugurale, Université de Genève, Faculté de droit' (2005) 2(3) EcoLomic Policy and Law at 12.

codified by the SPS. Moreover, because Article 5.7 of the Agreement was under scrutiny in all instances in which the concept was invoked, the question remains as to whether the precautionary principle applies in contexts outside the scope of the SPS.

The AB report in *EC – Hormones* served as basis for all subsequent reports which dealt with the precautionary principle: *Japan – Agricultural products II* (1999), *Japan – Apples* (2003), *US* and *Canada — Continued Suspension* (2008)[26] and, more recently, *Korea — Radionuclides (Japan)* (2019). In particular, in *Japan – Agricultural products II,* the AB established four criteria for ascertaining the compatibility of trade measures with Article 5.7 of the SPS.[27] As a result, although the precautionary principle continued to be invoked in this assessment in subsequent disputes, the specific wording of the provision became the main basis for its examination.

It is interesting to point out the 'revival' of the precautionary principle in the recent *Korea — Radionuclides (Japan)* AB report, circulated on 11 April 2019, after over ten years of no reference to this concept in appeal proceedings. However, the report refers to the concept in passing, only to once again mention the fact that Article 5.7 of the SPS 'reflects' the precautionary principle. It is worthy of note that the Panel report did not refer the concept,[28] and that the parties' submissions do not seem to have devoted lengthy consideration to it.[29] Hence, this dispute does not provide any further clarification with respect to the relationship between the precautionary principle and the WTO legal system. If anything, the treatment of the precautionary principle in this dispute seems to hint that a more recent trend is to diminish the relevance of this concept in WTO dispute settlement, and to focus on the wording of SPS provisions.

To sum up, the precautionary principle was first brought up in WTO dispute settlement relatively early on, and its status was then highly disputed. There was no clear process for the ascertaining existence and content the principle, just an assertion of its existence coupled with reference to international law handbooks and the ICJ case *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*. Moreover, this concept of international law represents, alongside with the rule on attribution[30] and the rule on the

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[26] It is useful to note that the *US* and *Canada – Continued suspension* disputes were continuations of the *EC – Hormones* dispute.
[27] *Japan – Agricultural products II*, Appellate Body Report (22 February 1999) WT/DS76/AB/R, 23-24, para. 89.
[28] *Korea — Radionuclides (Japan)*, Panel Report (22 February 2018) WT/DS495/R.
[29] *Korea — Radionuclides (Japan)*, Panel Report – Addendum, Annex B - Arguments of the participants (22 February 2018) WT/DS495/R/Add.1; *Korea — Radionuclides (Japan)*, Appellate Body Report – Addendum, Annex B - Arguments of the participants (11 April 2019) WT/DS495/AB/R/Add.1.
[30] See Ch. 3.2.1.

relationship between the duration of a conduct and its effects),[31] one of the examples – and perhaps the clearest one – in which the AB dodged from ruling on the customary status of a norm.

After the *EC – Hormones* dispute and the AB's refusal to rule on its status as a customary rule, Members seem to have accepted the limited role of the precautionary principle as one that merely 'finds reflection' in Article 5.7 SPS. The impact of the precautionary principle and the relevance Members have given to it in more recent submissions has seemingly lost breath in WTO dispute settlement.

5.2.2 Sustainable development and 'principles of international environmental law'

The term 'sustainable development' can generally be defined as 'the general principle that states should ensure the development and use of their natural resources in a manner that is sustainable'.[32] Its status in international law is disputed: some authors claim it is a principle;[33] some others argue it is not only a principle, but also a norm;[34] others argue that it is a 'concept'.[35] The concept also holds an unclear status in the multilateral trading system. Although disputants in WTO litigation have referred to it as a principle,[36] the AB has never clearly labelled sustainable development as a principle, a concept, or something else.

At the same time, the relevance of the concept of sustainable developed has been explicitly recognised by the WTO Agreement. Its first preamble recital states that parties recognise that trade relations should be carried out '[…] in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.

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[31] See Chapter 2.2.2.1.

[32] Phillippe Sands *and others*, *Principles of International Environmental Law* (4th ed, CUP 2018) 217.

[33] See, for instance, Emily B Lydgate, 'Sustainable development in the WTO: from mutual supportiveness to balancing' (2012) 11(4) World Trade Review 321-639, at 633.

[34] E.g., Jorge Viñuales, 'Sustainable Development', in L Rajamani and J Peel (eds), *The Oxford Hanbook of International Environmental Law*, 2nd ed (OUP 2019), forthcoming. The author however explains that 'sustainable development is a peculiar type of norm, a "normative concept", which cannot perform some functions unless it is decomposed into more specific norms'.

[35] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Reports 201, paras 75-77.

[36] It was labelled a 'principle' by the EC in *US – Shrimp* (WT/DS58/AB/R, 24, para 67) and by India in *India – Solar Cells* (WT/DS456/AB/R, 49 at 5.238)

The relevance of sustainable development for the interpretation of WTO provisions has been affirmed early on in the case law of the AB, in the *US – Shrimp* dispute. The AB had to interpret the term 'exhaustible natural resources' contained in Article XX(g) of the GATT. Even though the provision had been drafted in 1947, the adjudicators considered that its meaning should be read 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'. The AB then resorted to the Preamble of the WTO Agreement, which 'informs not only the GATT 1994, but also the other covered agreements', and thus invoked the 'objective of sustainable development'.[37] On a footnote, the organ noted that '[t]his concept has been generally accepted as integrating economic and social development and environmental protection'.[38] While there was no clarification of the status of sustainable development as a principle, the concept very significantly grounded the reasoning in the report.[39]

Almost all disputes in which the parties or the adjudicators referred to sustainable development in AB proceedings were related to the interpretation of the paragraphs of GATT Article XX.[40] In these cases, following the example set by the *US – Shrimp* report, parties and the AB resorted to the concept making reference to the wording of the preamble. Therefore, it is the wording of the preamble that forms the legal basis for the incorporation of sustainable development in the WTO legal system. One can conclude, therefore, that, like the precautionary principle, sustainable development, at least as understood in AB case law, is not an extraneous principle, but one incorporated by WTO law.

In *India – Solar Cells*, sustainable development was not invoked for the *interpretation* of GATT Article XX(d). This provision sets out an exception for GATT-inconsistent measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement'. According to established AB interpretation of Article XX(d), the expression 'laws and regulations' implies that the measure must have 'direct effect' in the domestic legal system of the country invoking the exception.

[37] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R 48, para 129.
[38] ibid fn 107.
[39] See also paras 131 and 153 of the report (ibid).
[40] See *EC — Tariff Preferences* (WT/DS246/AB/R) and *China — Rare Earths* (WT/DS431/AB/R).

Against this background, India (the defendant) invoked this GATT Article XX(d) and claimed that direct effect of certain international agreements into its national legal system had been fostered by the incorporation of the concept of sustainable development and principles of international environmental law, particularly since they had been recognized by the Supreme Court of India as part of its governance policy.[41] The AB, however, considered that this was not sufficient to demonstrate that the international instruments invoked formed part of its national legal system within the meaning of Article XX(d). The AB concluded that

> While these Decisions and observations by the Supreme Court may serve to highlight the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, [...] we do not consider that this is sufficient to demonstrate that the international instruments India identified are rules that form part of its domestic legal system and fall within the scope of 'laws or regulations' under Article XX(d).[42]

In this dispute, India had claimed that the recognition of the principles of international environmental law and sustainable development as a substantive source of obligations in its domestic system, and not just an interpretative aid for reading Article XX(d). The AB, however, did not go into the merits of whether these principles constituted sources of obligations, but only dismissed the claims on the grounds that they were not enough to demonstrate the direct effect of international instruments in India's legal system.

From the examination of these reports, it is possible to note that the concept of sustainable development has not been defined as principle or customary law by the AB.

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[41] *India — Solar Cells*, Appellate Body Report (16 September 2016) WT/DS456/AB/R at 49. According to India's opening statement at the first meeting of the Panel proceedings: "The Supreme Court of India, in the context of exercise of the Central Government's executive power of establishing a power plant, recently ruled that the decision-making power by the executive in that case was based on the touchstone of sustainable development and its impact on ecology following national and international environmental principles. The principles on sustainable development in that case were inferred from the provisions of several instruments of international environmental law, including the UNFCCC, the principles arrived at the other conventions concluded at the United Nations Conference on Environment and Development in 1992, including Agenda 21 and the Convention on Biological Diversity, as well as the Rio+5 Summit of 1997, which adopted the Programme for Further Implementation of Agenda 21. The court did not go into whether or not the provisions or principles were legally binding or non-binding in nature. It simply noted the relevance of international environmental law, as enshrined in several legal instruments that states, in the exercise of their sovereign power, have adhered to. It is in exercise of these powers that the policies referred to in India's submission were formulated by the Government, including the National [Action Plan on Climate Change], the National Electricity Policy. (India's opening statement at the first meeting of the Panel, para. 61, citing G. Sundarrajan v. Union of India 2013 (6) SCC 620, paras 161-174, (Exhibit IND-36))" (*India — Solar Cells*, Panel Report (24 February 2016) WT/DS456/R at 116, footnote 715).

[42] *India — Solar Cells*, Appellate Body Report (16 September 2016) WT/DS456/AB/R at 49, para 5.238.

In fact, the AB seems to be very reticent in labelling this concept under one or the other category. The reasons for this can be speculated upon, but there are little practical implications to taking instance on this aspect.[43] Parties and adjudicators invoke sustainable development as a 'concept' or as an 'objective', and the fact that it would not qualify as a principle does not seem relevant as it has been codified in the preamble of the WTO Agreement. In fact, the preamble recital referring to sustainable development is an undisputed interpretative parameter in WTO dispute settlement. This points to the conclusion that, although the AB has not determined the status of sustainable development as a general principle or as a customary rule, this concept has achieved the status of principle of WTO law which has served, at least, the role of an interpretative guideline for trade obligations.

5.2.3 'Widely recognized principles of taxation'

International tax law is a regime that 'aimed at coordinating the income tax rules of all countries to minimize their negative effects on free trade while protecting the revenue of each country'.[44] Avi-Yonah, Sartori and Marian explain that two general principles guide this field of international law: 'The "*single tax principle*", which deals with the appropriate level of taxation that should be levied on income from cross-border transactions and the "*benefits principle*", which deals with the way the taxable base should be divided among jurisdictions'.[45] These principles are not directly incorporated by WTO law, as the latter regulates international trade, rather than taxation on income. Nevertheless, they were invoked in the *US – FSC* dispute.

In the *US – FSC* compliance proceedings under DSU Article 21.5, the applicability of footnote 59 of the SCM Agreement was under contention. This provision states that 'Paragraph (e) [of Annex I of the same agreement] is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member'. By its turn, paragraph (e)

[43] Gabrielle Marceau and Fabio Morosini, 'The Status of Sustainable Development in the Law of the World Trade Organization' in U Celli Junior, M Basso, A do Amaral Junior (eds) *Arbitragem e Comércio Internacional: estudos em homenagem a Luiz Olavo Baptista* (Quartier Latin do Brasil 2013) 68 footnote 43.

[44] Yoram Margalioth, 'International Taxation' in Max Planck Encyclopedia of Public International Law, 2011.

[45] Reuven S Avi-Yonah, Nicola Sartori and Omri Marian, *Global perspectives on income taxation law* (OUP 2011) at 156.

'sets forth a general prohibition against foregoing or reducing taxes to be collected on export income'.[46] The defendant, the United States, invoked this footnote in its defence.

The panel interpreted the concept of 'foreign-source income' present in footnote 59 in light of what it called 'Widely Accepted Method of Avoiding Double Taxation'.[47] The panel noted that

> There does not appear to be any dispute between the EC and the United States as to whether a system of non-taxation of foreign-source income is an acceptable means of avoiding double taxation. This mutual position derives from the fact that well-established international tax disciplines have long recognized that two countries may claim the right and ability to tax the same income, leaving taxpayers with an undue burden and requiring that the respective countries take action to rectify a potential injustice.[48]

This 'widely accepted method' is similar the logic underlying the aforementioned 'single tax principle', which 'incorporates the traditional goal of avoiding double taxation [...]'.[49]

On appeal, the AB followed a similar reasoning, relying on what it called 'widely recognized principles which many States generally apply'.[50] The AB held that there was no legal standard in footnote 59 to 'determine whether income is foreign-source for the purposes of their double taxation-avoidance measures'.[51] At the same time, because the legal standard cannot be discretionary or based with exclusive reference to the domestic rules of the Member taking the measure, the AB considered that it was necessary to examine international bilateral and multilateral agreements that address double taxation in order to better define double taxation.[52]

For this purpose, the AB considered model tax conventions, as the majority of bilateral and multilateral treaties follow the standards of these models. The AB then concluded that, 'Although there is no universally agreed meaning for the term "foreign-source income" in international tax law, we observe that many States have adopted bilateral or multilateral treaties to address double taxation'.[53] The AB recognized

[46] *US — FSC*, Article 21.5 Panel Report (20 August 2001) WT/DS108/RW at 157.
[47] ibid at 177.
[48] ibid.
[49] Avi-Yonah, Sartori and Marian (n 45) 156.
[50] *US – FSC*, Article 21.5 Appellate Body Report (14 January 2002) WT/DS108/AB/RW 42, para 139
[51] ibid.
[52] ibid 43, para 141.
[53] ibid 44, para 142.

discrepancies in the agreements from State to State, but identified one 'widely accepted common element to these rules'.[54] After a lengthy examination of different agreements and conventions, the AB distilled what it called 'widely recognized principles'. It concluded that '"foreign-source income", in footnote 59 to the SCM Agreement, refers to income generated by activities of a non-resident taxpayer in a "foreign" State which have such links with that State so that the income could properly be subject to tax in that State'.[55]

This report is perhaps the only clear case in which the AB resorted to what could be called general principles of international law. All other instances of general principles examined in this work reflect principles which are derived most prominently from national law systems. The method of identification of these 'widely recognized principles of taxation' in the AB report seems relatively straightforward: from the consideration of the ensemble of these agreements, the AB identified the existence of principles that could inform the meaning of 'foreign-source income'. This is one of the reports in which a methodology for the identification of general principles appears more clearly.

The relevance of these principles in the reasoning, although not expressly laid out, is also relatively clear: these principles were distilled from a number of bilateral and multilateral agreements in order to shed light to the interpretation of a term, namely 'foreign-source income'.

5.2.4 Overview of the AB's approach to general principles deriving from other international law systems

Compared to the other fields of international law explored in the previous chapters, substantive principles were invoked in much fewer instances by the AB. One possible explanation for such an unequal approach is the fact that the multilateral trading system is *per se* highly specialised, and that its written rules are of technical content, leaving little margin for general principles of stemming from other fields of international law to come in.

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[54] This common element was the fact that 'the "foreign" State treats the income in question as domestic-source, under its source rules, and taxes it. Conversely, where the income of a non-resident does not have any links with a "foreign" State, it is widely accepted that the income will be subject to tax only in the taxpayer's State of residence, and that this income will not be subject to taxation by a "foreign" State (ibid 45, para 143).

[55] ibid 46, para 145.

Another possible explanation is disputants themselves referred only marginally to substantive principles. This may reflect their own expectations as to how adjudicators should approach WTO dispute settlement. Only in very few disputes, among which the ones described in the previous subsections, did parties resort to this category of principles to advance their arguments.

Accordingly, the AB seems more reluctant to resort to substantive principles than other categories of principles. Conversely, concepts within the 'umbrella' of principles of treaty interpretation, rules on state responsibility and procedural principles, were often brought *proprio motu* into the dispute. This is hardly the case with respect to substantive principles. For instance, the precautionary principle in *EC – Hormones*, the 'principles of international environmental law' in *India – Solar Cells*, and the rules which allowed for a deduction of principles of taxation in *US – FSC* were invoked by the parties.

Moreover, even when the parties invoked substantive principles, the Appellate Body chose to focus on WTO text to provide the findings, rather than relying on the principle invoked by the party. This was remarkably the case with the precautionary principle, which has incidentally lost prominence in more recent reports. In some cases, even, the AB took note of the principle invoked by the party but did not develop any relevant comments on that claim. In the *US — Section 211 Appropriations Act,* the United States invoked the 'longstanding principle against the recognition of foreign confiscations', on that is 'recognized in "virtually every jurisdiction"'.[56] The United States invoked this doctrine to justify that, even if a certain national regulation would be found to be discriminatory, domestic courts would apply this doctrine as to prevent a discriminatory enforcement of this regulation. The AB dismissed this argument in one paragraph by saying that it was not applicable to the fact in the case.[57] Therefore, the AB did not pronounce itself on whether this doctrine was indeed 'longstanding' and widely recognized as to amount to a general principle, nor to whether the doctrine was relevant for the interpretation of WTO law.

The AB's unusual approach in the *US – FSC* DSU Article 21.5 report is noteworthy. The method it followed to conclude the existence of 'widely recognized principles of taxation' was surprisingly thorough when compared to the other instances in which it declared the existence of a general principle (in particular, principles of

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[56] *US — Section 211 Appropriations Act*, Appellate Body Report (2 January 2002) WT/DS176/AB/R 74, para 257; 76, para 266.

[57] ibid at 85, para 295.

procedural law and the precautionary principle). That report significantly reviews several bilateral and multilateral instruments before concluding that 'certain widely recognized principles of taxation emerge from them'.[58]

In contrast to the *US – FSC* report, the references to the precautionary principle and sustainable development were not supported by a detailed analysis on their origins and content. The reason behind this different approach can be that these concepts are more intuitive than the idea of 'widely recognized principles of taxation'. In addition, sustainable development has been recognised in the framework of the WTO Agreement. One may conclude that the AB needed a more in-depth to justify its reference to the principles of international tax law.

It is also worth noting that the existence of substantive *customary* rules is even more contentious. Again, the precautionary approach provides a good illustration: although the AB agreed with the existence of a precautionary principle and its relevance to the implementation of WTO obligations, the thesis advanced by the EC that the principle also reflects customary international law finds very little support within WTO membership. In a meeting at the WTO's Committee on Trade and Environment in 2001, the EC circulated a paper on the precautionary principle,[59] but Members showed significant caution with respect to its legal value in the WTO legal system and, in particular, with respect to its customary status.[60] Members generally defended a precautionary approach that would follow the WTO provisions in the SPS and TBT.[61]

The terminology employed by the AB in the *EC – Hormones* report and its possible implications to the understanding of substantive principles in WTO dispute settlement is also worthy of comment. As explained, the AB stated that 'The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear'.[62] In general, the approach of the AB has not been clear when establishing that a

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[58] *US – FSC*, Article 21.5 Appellate Body Report (14 January 2002) WT/DS108/AB/RW para 142.

[59] European Council Resolution on the Precautionary Principle, Submission by the European Communities (2 February 2001) WTO Doc G/SPS/GEN/225-G/TBT/W/154-WT/CTE/W/181.

[60] Committee on Trade and Environment - Report of the Meeting Held on 13 - 14 February 2001 - Note by the Secretariat (30 March 2001) WTO Doc WT/CTE/M/26. See, in particular, statements by Brazil (para 68), Norway (para 69) and United States (para 75).

[61] For a thorough description of the position taken by the Membership regarding the status and normative of the precautionary principle in WTO law, see Gradoni (n 8) 160. Gradoni also points out that the majority of the Membership seems to converge on the existence and applicability of a weak version of the principle, even though there is disagreement regarding its customary status (ibid 160; 162, fn 43).

[62] See fn 21.

maxim of international law reflects a general principle, a customary rule, or both. Instead, it has arguably been discretionary. The *EC – Hormones* report perhaps represents the most evident example of this lack of methodology and clarity, in which the AB mingled four different concepts ('general principles', 'customary international law', 'customary international environmental law', 'general international law') into one confusing statement.

There are two potential reasons for this curious choice of words in the AB's *EC – Hormones* report. The first is intentional, as it seems likely that the adjudicators opted for a 'constructive ambiguity' so as not to take any positions on this matter. This made the report obscure and allowed it to bear no clear legal consequences regarding the interaction of the precautionary principle and WTO law.

The second potential reason is that this outcome derives from the very lack of clarity and consistency in the case law of the AB regarding the distinction between general principles and customary international law. One can argue that the AB's reasoning in *EC – Hormones* is but a direct consequence of lack of clear methodology to ascertain the existence and relevance of these concepts.

In the same sense, the AB's reluctance to declare the customary status of the precautionary principle is telling. It may be useful to consider that the particularity of the precautionary principle with respect to treaty rules and secondary rules of international law is that the first denotes, at least to some extent, a substantive dimension: even if not consisting of a clear rule of conduct, it nevertheless can be a source of obligations to guiding the conduct of States.[63] Leaving aside the obscure terminology employed by the AB, this report provides a compelling example of the AB's hesitancy in declaring the customary status of concept of international law.

5.3 THE MATERIAL JURISDICTION OF WTO DISPUTE SETTLEMENT AND SUBSTANTIVE PRINCIPLES: ENABLING JUDICIAL OVERREACH?

The previous section noted the relatively little reliance by the AB to substantive principles when compared to the other three categories identified in the course of this work. It also stressed that this may be explained by the fact that the nature of the WTO legal system, a regime that is highly technical and specialised, does not allow much room

[63] See fn 109.

for resort to general principles deriving from other specific regimes of law (referred to here as 'substantive principles'). WTO adjudicators may overreach their material jurisdiction when resorting to these sources of law because they are not material sources contained in the covered agreements.

Against this backdrop, the aim of this Section is to examine whether resort to the principles described in Section 5.2 can be considered as a source of judicial overreach in WTO adjudicators. Following the previous chapters, the analysis departs from an overview of whether this recourse has been perceived as activist by Members (5.3.1). Then, the function played and the scope assumed by extraneous substantive principles in its findings are examined (5.3.2).

5.3.1 Members' perceptions

The approach followed by the AB when resorting to substantive principles did not trigger significant criticism from WTO Membership. In *India – Solar Cells*, the AB gave little room for the relevance of the general principles invoked by India. It is therefore unsurprising that no relevant comments regarding the topic were made in the DSB meeting where that report was circulated. Conversely, both in *EC – Hormones* and *US – FSC*, either the parties' claims were largely based on a general principle (as was the case in *EC – Hormones*) or the AB grounded its conclusions on general principles (as was the case in *US – FSC*). Yet also in these cases Members did not focus their attention on the AB's use of these general principles DSB meetings.[64]

In *EC – Hormones*, the AB took a cautious approach to determine the relationship between the precautionary principle and the SPS Agreement. While it did not take a position on the status of the principle, it did not rule out that it was a concept relevant to WTO obligations and stated that it 'found reflection' in one of its provisions. Probably thanks to this cautious approach, the report was not subject to severe criticisms by neither the complainants nor the defendant in the DSB meeting in which it was commented. The United States and Canada were pleased with the outcome of the dispute (as the AB decided that the level of protection should be based on a risk assessment), and

[64] In the time of writing, the DSB Minutes of Meeting upon circulation of the AB report in the *Korea — Radionuclides (Japan)* dispute was not yet publicly available.

the EC were pleased with several of the AB's finding regarding the level of protection chosen by Members in the imposition of trade measures.[65]

It should be noted that the precautionary principle was also subject to deliberation before other WTO bodies, such as the Committee on Trade and Environment (CTE) and the Committee on Technical Barriers to Trade.[66] From the positions expressed by delegations in these committees, it can be concluded that the precautionary approach is largely accepted by the Members to the extent that it is implied in WTO rules.[67] As demonstrated, this was the approach followed by the AB.

The limited role given to substantive principles by the AB in the interpretation of WTO provisions is probably the reason why members have not engaged in criticisms regarding the organ's practice. This restrictive approach is described in the next subsection.

5.3.2 The limited role given to substantive principles by the WTO Appellate Body

As explained in Chapter 1 and further discussed in the previous chapters, one of the concerns expressed by Members regarding the AB's interpretative practices is that the organ should not add to or diminish rights and obligations of WTO Members.[68] Resorting to extraneous sources can overstep these limits when these sources amount to the creation of new legal obligations or the expansion of Members' legal rights, thus expanding the material jurisdiction of WTO adjudication.

General principles stemming from other fields of international law can potentially amount to such an expansion. However, as described in Section 5.2, the AB has made very limited resort to substantive principles, both from a quantitative and from a qualitative viewpoints. All three instances described in that section (precautionary principle, sustainable development and principles of environmental law, and principles of taxation) corroborate this finding.

In *EC – Hormones,* the AB made two important remarks regarding the relevance of the precautionary principle. First, the statement that the principle 'finds reflection' in

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[65] See DSB, 'Minutes of Meeting Held in the Centre William Rappard on 13 February 1998', WTO Doc WT/DSB/M/42 (16 March 1998) at 8-11.

[66] Gradoni offers a detailed description of the comments made by various delegations regarding the status and normative value of the concept within WTO law (Gradoni (n 8) at 160 ff).

[67] ibid 167.

[68] See Chapter 1.4.2.

the SPS can be read as a limitation that the concept is only relevant to the extent that it is implicit in the provisions of the Agreement. Secondly, the AB held that the precautionary principle, despite being reflected in the preamble and certain provisions of the SPS, 'does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement', i.e., does not 'override' the provisions of the SPS.[69]

Put differently, the AB stated that the principle is incorporated by the SPS, and does play an 'internal' role, and that an 'extraneous' version of the precautionary principle has very limited, if any, role in WTO law. Indeed, in practice, the AB allowed the 'external' version of the precautionary principle only a marginal role, especially in more recent reports. At the same time, some authors have argued that the AB did take up a 'relativist' approach towards the evidence requirements that would normally be required by the SPS.[70] In *EC – Hormones,* the AB held that

> […] the risk that is to be evaluated in a risk assessment under Article 5(1) is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[71]

The AB thus adopted a more flexible approach to the requirement of risk assessment. In the words of Boisson de Chazournes and Mbengue, with this finding, 'the Appellate Body introduced some softness into the justification of measures taken in the name of protecting the environment and public health'.[72] This, however, was a policy choice, rather one ensuing from the precautionary principle. The precautionary principle, of itself, had little role to play in the construction of this finding.

Therefore, even if it true that the AB chose a 'soft' approach to risk assessment in provisional measures, it is undeniable that there is a preferred and professed focus on written text in detriment of the precautionary principle. In *Japan – Agricultural Products*

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[69] See fn 20 and accompanying text.
[70] See Hélène Ruiz-Fabri, 'La prise en compte du principe de précaution par l'OMC' (2000) Revue Juridique de l'Environnement, numéro spécial, at 63 ; Laurence Boisson de Chazournes and MM Mbengue, 'GMOs and Trade: Issues at Stake in the EC Biotech Dispute' (2004) 13(3) Review of European Community and International Environmental Law 302.
[71] *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R 72, para 187.
[72] Boisson de Chazournes and Mbengue (n 70) at 302.

II, the AB, based on a strict wording of Article 5.7 of the SPS, indicated four requirements which must be met in order to adopt and maintain a provisional SPS measure.[73] In *EC – Hormones*, *Japan – Agricultural Products II*, and *Japan – Apples*, cases in which the precautionary principle was invoked as a strong argument for the defendants' claims, the focus given to the adjudicator was the procedure followed in the risk assessment.[74] The AB always focused its reasoning in the wording of the relevant provisions. Moreover, in the more recent dispute *Korea — Radionuclides (Japan),* the concept played an even more restricted role, as it was not even subject to detailed deliberation from adjudicators neither at Panel nor at appeal level. Therefore, while the requirement for the risk assessment may have been 'softened' through AB practice, the organ's interpretative efforts still focused on the wording of SPS provisions. As put by Tancredi, the 'argumentative strategy' of the WTO adjudicator has been to eliminate the possibility that a subsequent customary rule could override WTO law.[75]

The focus on written provisions in detriment of 'external' principles can also be noted in the AB's approach with respect to the notion of sustainable development and principles of international environmental law. The organ refers to sustainable development mainly by invoking the wording of the preamble of the WTO Agreement, even if there are other references to international law which could complement findings based on this concept. In *US – Shrimp*, the AB cited different international environmental conventions, but grounded the reference to sustainable development in the WTO preamble.

The *India – Solar Cells* AB report corroborates this conclusion. The difference between the scope of application of 'principles of international environmental law' in the claims of India and the consideration of such claims by the AB is an interesting point of analysis. India had invoked GATT Article XX(d) as a defense. This provision exempts from GATT obligations those measures 'necessary to secure compliance with laws or regulations'.[76] In this context, the principles of international environmental law and the concept of sustainable development had been invoked by India as reflecting obligations incorporated within its national policies (they were 'fundamental to the environmental

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[73] *Japan — Agricultural Products II*, Appellate Body Report (22 February 1999) WT/DS76/AB/R 23, para 89.
[74] Marceau (n 25) at 14.
[75] Antonello Tancredi, 'OMC et coutume(s)' in V Tomkiewicz (dir), *Les sources et les normes dans le droit de l'OMC*, Colloque de Nice des 24 et 25 juin 2010 (Pedone 2012) at 96.
[76] See Section 5.2.2.

and developmental governance in India'). Thus, according to India, they were part of India's environmental governance and received explicit recognition within its legal order through the regulations in question and particularly through the decision of the judiciary. India further claimed that sustainable development is part of customary international law.[77]

In contrast, the scope of application of such concept and the international environmental principles as assessed by the panel and Appellate Body was much narrower. Both instances of adjudication considered the relevance of these principles only to the extent to which they actually grant incorporation of /direct effect to international rules into India's domestic legal order.[78] The AB did not examine whether such principles would amount, in and of themselves, to legal obligations to be enforced in the meaning of GATT Article XX(d) – although it is true that no such claim seems to have been directly made by India either.

Therefore, the AB followed an instrumental approach to the role of general principles of international environmental law in *India – Solar Cells.* It did not consider such principles as sources of obligations for the purposes of Article XX(d), as contended by India. Had these general principles been taken into account as invoked by India, however (i.e., as part of and informing its domestic policy), they could have widened the scope of application of a provision that is interpreted to encompass domestic *laws*, not general principles. This was not the approach followed by the AB.

Finally, the 'widely recognized principles of taxation' identified by the AB in the *US – FSC* Article 21.5 report also played a limited role in the settlement of that dispute. In these proceedings, the AB had to determine the extent to which Members could craft measures to avoid double taxation of foreign-source income. However, the meaning of 'foreign-source income' was not clear from the text of the relevant WTO provisions. For this reason, the AB proceeded to examine a number of bilateral and multilateral treaties addressing the matter of double taxation.

The AB thus engaged in a thorough and methodologically interesting assessment of international instruments regulating international tax law to derive what it called the

[77] *India — Solar Cells*, Appellate Body Report (16 September 2016) WT/DS456/AB/R, 39, at 5.98
[78] The AB stated: 'While these Decisions and observations by the Supreme Court may serve to highlight the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as for guiding the exercise of the decision-making power of the executive branch of the Central Government, we do not consider that this is sufficient to demonstrate that the international instruments India identified are rules that form part of its domestic legal system and fall within the scope of "laws or regulations" under Article XX(d)' (ibid 52-53, at 5.248).

'widely accepted common element' that 'a "foreign" State will tax a non-resident on income which is generated by activities of the nonresident that have some link with that State'.[79] However, the organ did so in order to 'give meaning to the term "foreign-source income" in footnote 59 to the SCM Agreement'.[80]

To sum up, in all three cases, the AB granted a subsidiary scope to the principles invoked by the parties as part of their arguments. The focus was in the WTO provisions. To some extent, this approach was similar to that regarding the use of general rules on state responsibility, in which the AB was always preoccupied in justifying resort to those extraneous norms through a textual hook contained in a WTO provision.[81] However, in the case for substantive principles, the approach has been even more restrictive, since the AB not only justifies the legal basis in WTO provisions, but also is very concerned in identifying the principle or rule *as reflected* in a WTO provision. This is the case, in particular, for the precautionary principle and sustainable development.

Therefore, it can be said that the method of identification of general principles has overlapped with the legal basis indicated for its applicability in the WTO legal system: the fact that they are reflected in the texts of the system. Arguably, the exception was the identification and resort to 'widely recognized principles of taxation'. Interestingly, however, in the *US – FSC* Article 21.5 AB report, the AB presented an extensive review of bilateral and multilateral agreements in order to resort to these sources. One can assume that the AB was concerned with establishing the recognition of the principles it sought to resort to.

It flows from the foregoing that substantive principles have been granted a strictly interpretative role by the AB. A normative function to these concepts has been systematically ruled out by adjudicators. This approach is considerably different from the one followed by the AB when resorting to procedural principles. Although both approaches are very restricted to the existence of a 'textual hook' in WTO Agreements, the AB has been considerably less cautious in relying to procedural principles.

Substantive principles play a much more marginal role than procedural principles in WTO adjudication, both quantitatively and qualitatively. Substantive principles are invoked and framed in a way that dismisses the perception of a gap-filling function. This is not the case with respect to procedural principles. This can be explained

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[79] *US – FSC*, Article 21.5 Appellate Body Report (14 January 2002) WT/DS108/AB/RW para 143.
[80] ibid para 142.
[81] See Chapter 3.3.4.

because there is disagreement between the parties with respect to the existence, content and applicability of the latter, while very little disagreement with respect to the former. Relatedly, procedural principles find reflection in the practice of other international courts and in the domestic legal systems of the WTO Members. Moreover, it is possible that adjudicators find it part of their judicial function to resort to procedural maxims. (transfer to section two)

The AB practice has been very reluctant in relying to substantive general principles. In the few instances in which it did so, adjudicators took care to limit its resort to a very circumscribed textual context.

CHAPTER 6

THE USE OF GENERAL PRINCIPLES AND CUSTOMARY INTERNATIONAL LAW BY THE WTO APPELLATE BODY: METHOD AND IMPLICATIONS

6.1 PRELIMINARY REMARKS

Relying on general international law in the case of gaps and obscurities, while avoiding overstepping the jurisdictional mandate provided in the DSU: in a nutshell, this is the approach adjudicators should follow when using customary international law and general principles in WTO dispute settlement. With respect to some ‘fields’ of general international law, this task does not seem so challenging. As developed in the previous chapters, this is perhaps the case for rules and principles concerning the law of treaties and procedural matters in dispute settlement. With respect to other ‘fields’, the middle term is more difficult to be struck. This is arguably the case of general rules on state responsibility and substantive principles. Yet, in all cases, attention must be had in the quest for balance between the resort to general principles and customary international law and judicial overreach.

Departing from the remarks in each of the individual fields in the preceding chapters, this chapter assembles all conclusions in one systemic whole. It is accordingly divided into two sections, each addressing one of the two core questions put forward by this work. Section 6.2 comprehensively analyses the findings described in Chapters 2 to 5 and identifies general patterns in the AB’s resort to general principles and customary international law (6.2.1). It then answers the four questions proposed in the Introduction regarding the AB’s methodology in invoking general principles and customary international law in its reports: the distinction between these two sources (6.2.2), the method for identifying their existence and content (6.2.3), the legal basis justifying their invocation (6.2.4) and their function in WTO adjudication (6.2.5).

Section 6.3 builds on the previous Chapters in order to summarise the main criticisms expressed by Members towards to the AB’s resort to customary international law and general principles (6.3.1). It identifies two points where reliance to these sources of law in WTO adjudication may amount to claims of judicial overreach: the lack of clarity in the methodology and legal basis (6.3.2) and the role played by these sources in AB reports (6.3.3).

6.2 GENERAL ASSESSMENT OF THE AB'S RESORT TO CUSTOMARY INTERNATIONAL LAW AND GENERAL PRINCIPLES

6.2.1 The general patterns in the use of general principles and customary international law by the WTO Appellate Body

The development of this research departed from an overview of all the references to general principles and customary international law in Appellate Body reports. These references were systematised in order to identify general trends in the AB's resort to general principles and customary international law.[1] From the examination of these trends, three conclusions can be drawn. First, and counterintuitively, the percentage of reports which contain relevant references to general international law (understood as general principles and customary international law) is high: 71,7% of the AB reports issued to date present at least one reference to these sources of law. On the other hand, and not counterintuitively, out of the references pinpointed, around 51% are references to the category of 'law of the treaties'. Moreover, many of these references are to Articles 31 and 32 of the VCLT, as well as principles of treaty interpretation such as effectiveness and good faith.

Second, and relatedly, references to concepts guiding the law of treaties and procedural principles amount to a much larger part of the relevant mentions than those to state responsibility and general principles. Together, they account for around 82% of all the references pinpointed.

On the other hand, mentions to general international law on state responsibility and substantive general principles is very low, each accounting for around 8% of the total of references pinpointed. Fall-back to general rules on state responsibility can be explained by the fact that the WTO legal system has a well-developed framework of its own secondary norms. Moreover, relying on sources of law which were not agreed among the Membership for the determination of the consequences of WTO violation would easily amount to claims of judicial law-making.[2] Similarly, little reference to principles stemming from other fields of international law is not surprising, as the substantive nature

[1] See Introduction, Section 3.1 for the description of the methodology.
[2] See Chapter 3.

of this source could easily be perceived as overstepping the jurisdictional mandate framed by the DSU.[3]

The use of general principles of procedure did not create substantial controversy among members. As explained in Chapter 4, Members seldom oppose to their relevance in WTO adjudication; at best, they dispute the legal outcome ensuing from the correct application of a given procedural principle. Moreover, interviews with some staff working in the Secretariat of the WTO Legal Affairs Division indicated that adjudicators seem largely inclined to resort without any problems to principles of procedure, because they arise over necessity and are under the 'inherent powers' of adjudicators.[4]

The third conclusion deriving from a comprehensive examination of AB reports over time is that a more thorough approach to general principles and customary international law occurred only in its early case law. Although references to the same concepts can often be found in more recent case law, adjudicators do not engage in the same methodology of identification of general principles and customary international law. Instead, the AB cites its own reports. These cross-references show that the AB followed the practice of relying on previous decisions when importing extraneous legal concepts once these concepts have already been invoked. It can be inferred that there is a 'preference' to resort to previous adopted reports as an authoritative source of law, instead of deriving it from 'external' law (national legal systems and/or general international law).[5]

One can point out three elements that may influence the adjudicators' trends over the years. Other institutional elements may also have played a role, but these are illustrative factors that may explain these trends. First, the development of the case law of the WTO built a comprehensive framework upon which WTO rules are interpreted. The interpretation and legal findings in WTO reports have acquired an important value in the multilateral trading system through practice and the development of a robust case law in the course of almost 25 years. In WTO dispute settlement, it has generally been acknowledged that previous adopted reports have a strong impact on subsequent disputes.[6]

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[3] See Chapter 5.
[4] Although the Legal Affairs Division is responsible for assisting adjudicators in the panel stage, there is no reason to believe that the same would not apply to adjudication at the appeals phase.
[5] This trend is explored in Section 6.2.3.
[6] See *inter alia* Joost Pauwelyn, 'Minority rules: precedent and participation before the WTO Appellate Body' in J Jemielniak, L Nielsen and JP Olsen, *Establishing Judicial Authority in International Economic Law* (CUP 2016) 141-172.

This development has also had an impact towards reference to non-WTO legal concepts. After the first reference to those principles, the AB's invocation of the same concepts tends to be based merely on a cross-reference to the previous reports as the legal justification for that new invocation. For example, after *US – 1916 Act (EC),* the AB invoked *kompetenz-kompetenz* in the *Mexico – Soft Drinks* report. However, in the latter report, the adjudicators did not refer to the practice of other international courts or handbooks of international law. Instead, they merely quoted the *US – 1916 Act (EC)* report.[7]

Second, the composition of the AB and the specific divisions hearing each dispute also bears an influence in the text of the report. For example, the presence of Georges Abi-Saab in the AB and in the divisions of some cases may have highly influenced the taking into consideration of arguments based on general international law. Abi-Saab is a public international lawyer who also served as a judge in other international tribunals, including the ICJ (as judge *ad hoc*) and the International Criminal Tribunal for the former Yugoslavia. References to sources other than rules on treaty interpretation peaked during the early 2000s, which is when Abi-Saab was serving. The recent *Russia – Traffic in Transit* panel report, chaired by Abi-Saab, contained references to the principle of good faith and *kompetenz-kompetenz*.[8]

Third, the WTO Secretariat plays a significant role in shaping the final outcome of the reports. The Secretariat is responsible for assisting panellists and AB members in the drafting of disputes.[9] Their role has been described as having strongly impacted the style of and the high cross reference among reports ('*de facto* precedent effect' of previously adopted reports). This could explain, for instance, why over the years there has been a higher tendency to rely on previous references to general international law within WTO case law in detriment of 'importing' these concepts from non-WTO law.

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[7] *Mexico — Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R p. 17, para 44 ff. See also *EU — PET (Pakistan),* Appellate Body Report (16 May 2018) WT/DS486/AB/R para 5.51 and *Mexico — Corn Syrup,* Article 21.5 Appellate Body Report (22 October 2001) WT/DS132/AB/RW para 36.

[8] *Russia — Traffic in Transit*, Panel Report (5 April 2019) WT/DS512/AB/R fn 145; paras 7.132 ff.

[9] Joost Pauwelyn and Krzysztof Pelc, 'Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement' (September 26, 2019). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872.

6.2.2 The distinction (or lack thereof) between customary international law and general principles in the practice of the WTO Appellate Body

Even though in theory they are sources of law with different methods of formation and identification in theory, in practice it is generally acknowledged that customary international law and general principles can be difficult to distinguish.[10] The practice of the AB corroborates this conclusion. This section delineates three remarks relating to this distinction and whether and how it can be observed in the case law of the AB.

i. The AB's reluctance in determining the existence of customary international law

The first remark is that the AB labels very few concepts as 'customary international law'. This is in contrast with the relatively large number of references to general international law (including general principles). The only two cases in which the AB considered a rule to be customary were Articles 31-33 of the Vienna Convention on the Law of Treaties and the proportionality principle as codified under Article 51 of the Draft Articles on State Responsibility. On the other hand, the AB is much more comfortable in relying on general principles.

It is interesting to note that in both cases the AB declared that a concept of general international law was customary, the organ referred to it under their codified form: Articles 31-33 of the VCLT and Article 51 of the DASR. Moreover, as described in Chapter 3, it is debatable whether the AB really referred to the proportionality principle as codified under Article 51 of the DASR or it intended to refer to the proportionality principle in a broader manner.[11] If the latter is the case, this approach hints that the AB has an inclination to declare that a certain norm or principle is 'customary' in cases in which it has been codified (even at the expense of making an improper reference to the codification in order to invoke the principle).[12]

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[10] See Chapter 1.1.

[11] See Chapter 3.3.2.4.

[12] Another justification for reliance on VCLT rules on treaty interpretation is that, in fact, Article 3.2 of the DSU was originally intended to make reference to the codified version of these customary interpretative guidelines. However, because not all members of the GATT/WTO were parties to the VCLT, the choice to refer to 'customary rules of interpretation of public international law' was made. This shows, however, that from the outset the intention was to refer to the VCLT rules, and that the very early reference by the AB to these rules as those mentioned by Article 3.2 of the DSU was but a matter of rhetorical legitimation. See MTN.GNG/IN/1, 'Meeting of 26 September 1991 – Note by the Secretariat', Negotiating Group on

The AB seems hesitant in determining the customary status of a rule. The organ has actively refrained from doing so in at least three cases in which the customary status of international norms had been invoked by one of the parties and contested by another (the precautionary principle,[13] general rules on attribution[14] and the relationship between the duration of a conduct and its effects).[15]

There may be three reasons for this hesitancy in determining the customary status of a norm. First, adjudicators may feel that the threshold for the justification that a rule is 'customary' is higher than labelling a norm as a principle. That is not necessarily so, since, as seen in Chapter 1,[16] it is also desirable that adjudicators demonstrate the origins of general principles before applying them. At the same time, as Palchetti and Bonafé explain,

> what makes the difference [of general principles] with other sources of international law is the way in which such a general recognition is assessed. It is not established by having recourse to explicit state consent or generalized state practice. A more remote proof that states would have subscribed to the application of general principles in international relations would suffice.[17]

The second reason may be that adjudicators may feel that conferring the customary status to a certain rule may give the impression that they are creating substantive obligations or even overriding WTO law. This possibly explains why the AB granted this status to rules on treaty interpretation and the proportionality principle – as they are operative concepts, and not concepts entailing autonomous substantive obligations.

Institutions (18 October 1991) para 3 and Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (20 December 1991) GATT Doc MTN.TNC/W/FA (Draft Final Act).

[13] *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS46/AB/R, para 16.

[14] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report (11 March 2011) WT/DS379/AB/R ('*US — AD and CVD (China)* ABR') para 279 ff.

[15] See, for instance, the United States' submission contesting the European Communities' argument that the customary status of Article 14 of the DASR (USTR, Appellee Submission of the United States (30 September 2010) available at https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/DS316.US_.Appellee.Sub_.(Posted).pdf (access 15 November 2018) 09, para 25). Still, the AB did not address the claims that the provision would reflect a customary rule (*EC – Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R.

[16] See Chapter 1.2.3

[17] Beatrice Bonafé and Paolo Palchetti, 'Relying on general principles in international law', in C Brölmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edwards Elgar Publishing 2016) 164.

The dispute on whether the precautionary principle reflected a customary rule also illustrates this possibility. In *EC – Hormones*, the AB refrained from answering this question, held that it was 'unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question'.[18] It concluded that the precautionary principle found reflection in WTO law, and could not, by itself, override the provisions of the SPS Agreement. The emphasis that the AB put in the fact that the precautionary principle is part of WTO law can be read as a sign that the organ acknowledges the importance of the concept, but is cautious so as not to overstate – or give the impression that it overstates – its authoritativeness in the WTO legal system.

The third possible reason, which is connected to the previous one, is that adjudicators may feel that calling a rule 'customary' would be unnecessarily controversial to the dispute. The WTO judicial system is highly specialized and has a very specific mandate: settling disputes arising from the application of the covered agreements. These agreements' substance is very technical. Moreover, it can be argued that at least some Members do not really perceive WTO adjudication as a forum that should follow a generalist approach, but one whose purpose is to interpret and apply trade rules.[19] Therefore, there is no need to engage in the determination that a rule is 'customary'.

ii. Blurred distinction between general principles and customary international law

The second remark is that there is no clear difference between what the AB considers to be a general principle or a customary rule. Often, the AB uses interchangeable terms to refer to the two sets of rules it has declared customary. In *US — Carbon Steel*, the AB stated that the 'principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") are such customary rules'[20] when examining the meaning of 'customary rules of interpretation of public international law' contained in DSU Article 3.2. It can be concluded that, in the understanding of the WTO adjudicators, principles can reflect customary rules. In *US –*

[18] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R, para 123.
[19] The United States has sided this approach. See e.g., DSB, 'Minutes of Meeting Held in the Centre William Rappard on 31 July 2015', WTO Doc WT/DSB/M/366 (28 September 2015).
[20] *US — Carbon Steel*, Appellate Body Report (28 November 2002) WT/DS213/AB/R, para. 61.

Line Pipe, the adjudicators held that DASR Article 51 'sets out a recognized principle of customary international law'.[21]

One can infer no clear distinction between the two concepts in these cases. At the same time, it is important to remark that this is not a feature found only in the practice of the Appellate Body. Other international courts, including the ICJ, also do not clearly distinguish reference to one or the other source.[22]

iii. The AB's more flexible approach in relying on general principles

Conversely, the last remark is that one possible way to grasp the distinction between general principles and customary international in the case law of the AB is through the methodology applied when the organ has resorted to these two sources. As mentioned, references to customary rules in the reports of the AB is very limited. On the contrary, reference to general principles is found relatively often. Moreover, while customary international law is ascertained only by reference to codified customary international law, the methodology for general principles follows a more flexible approach. The next section thus explains the methodology employed by adjudicators when relying on these categories of sources, in order to advance whether this aspect can point to a distinction between the two.

6.2.3 The method of identification of general principles and customary international law

The process through which the Appellate Body ascertained the existence of rules and principles of general international law varies according to the five 'fields' addressed in this research. However, as a general rule, in most cases the AB did not develop a thorough process of identification of general principles or customary international law.

As explained in Chapter 1, general principles can be abstracted from rules of international or can be inferred from a comparative process of domestic legal systems. The AB followed this approach in *US – Shirts and Blouses*, in which the AB referred to different national legal systems to identify the notion of burden of proof,[23] and in *US –*

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[21] *US – Line Pipe,* Appellate Body Report (15 February 2002) WT/DS202/AB/R, para. 259.
[22] Pierre d'Argent, 'Les principes généraux à la Cour internationale de Justice' in S Besson and P Pichonnaz (eds), *Les principes en droit européen* (LGDJ 2011) 109 ; Bonafé and Palchetti (n 17) 168, 170.
[23] See Chapter 4.2.2.

FSC (Article 21.5) to identify the 'widely recognised principles of taxation'.[24] However, this was generally not the approach followed by the AB. Instead, the AB tended to assert the existence of a principle. To support their assertion, the adjudicators normally referred to a codified concept and/or add a footnote referring to the caselaw of other international courts and international law handbooks.

The same is valid in the few cases in which the AB declared that a certain rule reflected customary international law. In the cases of the proportionality principle and Articles 31-33 of the Vienna Convention on the Law of Treaties, the AB relied on codified provisions and did not delve into whether there was state practice and *opinio juris* supporting its conclusion. In the case of the VCLT provisions, the AB was limited to referring to the practice of other international courts and international law handbooks. In the case of the proportionality principle, the AB added a footnote referencing the *Nicaragua* and the *Gabcikovo-Nagymaros Project* decisions of the ICJ.

In the only instances in which the AB declared the customary status of a rule, the adjudicators departed from codification instruments. In the case of rules on the law of treaties, that means resort to the VCLT. In the case of general rules on state responsibility, the source is normally the ILC DASR.

In the case of substantive principles, the adjudicators tended, whenever possible, to ground the existence of concept on WTO Agreements.[25] Perhaps because there is no widely accepted document codifying general principles of procedure, the AB instead relied on assertions that those principles are 'fundamental' and 'inherent' to any judicial system, and referred to the case law of other international courts, most notably the ICJ.

After the AB made its first reference to an extraneous norm or principle, subsequent references were usually no longer linked to general international law, the practice of other international courts and tribunals, or other non-WTO legal references. Instead, the AB would cite its own caselaw as authoritative reference. For instance, many panel and AB reports relied on the first AB reference to rules on the burden of proof, *US – Shirts and Blouses.* The same happened to Articles 31-33 of the VCLT.

[24] See Chapter 5.2.3.

[25] With the interesting exception of the 'widely recognized principles of taxation', invoked by the United States in *US – FSC.*

The AB's approach does not seem to differ to other international courts' and tribunals approach.[26] The AB's lack of clarity regarding the method for determining the existence and content of customary international law and general principles and the blurred distinction between general principles and customary international law is also mirrored by the practice of the ICJ.[27] As Mendelson notes, '[…] the Court often simply asserts that such-and-such is a "well-recognized rule [or principle] of international law" or employs some other vague phrase, without identifying whether the rule derives from custom, "general principles of law recognized by civilized nations", some other source, or a combination of sources'.[28]

Similarly to the AB's practice of relying on the case law of the ICJ to assert the existence of customary rules, Pellet considers that 'In the absence of any treaty rules, or of clear treaty rules, international courts and tribunals resort to case law—an easy and reassuring argument of authority—thus avoiding the need to face the mysteries of the formation and evidence of customary international law'.[29]

Regarding the AB's practice of following codification instruments to determine the existence of a customary rule, Judge Tomka points out that the 'the Court [ICJ] has often referred to provisions of the ILC's codification work as customary with little or no further comment', including the VCLT and DASR.[30] The ICJ judge explains that 'In such cases, the Court must be understood to have recognized as evident, and thus without need of full discussion, that the rule expressed in the instrument either codified pre-existing customary law or later acquired customary status'.[31]

Other tribunals also follow the AB's practice of relying on the works of the ILC and the case law of the ICJ to assert the existence of a customary rule. In this sense, Pellet explains that ICSID Tribunals also refer to the case law of the ICJ for procedural issues:

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[26] Leiss describes the same patterns regarding the identification of general principles by other international courts. JR Leiss, 'The Juridical Nature of General Principles' in M Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019) at 80-81.

[27] Conversely, Raimondo argues that '[…] international criminal courts and tribunals have made clear their methodology for ascertaining the existence, content, and scope of general principles of law' (see Fábian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008) at 194).

[28] Maurice Mendelson, 'The International Court of Justice and the Sources of International Law', in V Lowe, M Fitzmaurice, *Fifty years of the International Court of Justice* (CUP 1996) at 64.

[29] For instance, Pellet describes the same phenomenon in the practice of ICSID Tribunals. Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28(2) ICSID Review 228-229.

[30] In the same sense, Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Collected Courses of the Hague Academy of International Law, at 36 ff.

[31] Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 The Law and Practice of International Courts and Tribunals 195-216, at 203.

‘they do systematically refer to the Court’s jurisprudence, but they are more likely to do so when resolving procedural issues (*lato sensu*) or questions of general international law rather than when dealing with investment protection standards’,[32] and that ICSID Tribunals also resort to ILC Draft Articles on the topic of State Responsibility.[33] Treves and Hinrichs note that also the practice of the International Tribunal for the Law of the Sea (ITLOS) when referring to customary international law has ‘refrained from engaging in the determination of the existence or content of a customary international law rule’ by searching for its two constitutive elements, and that the tribunal instead relies, ‘at least in most cases, on the authority of the ICJ and of the International Law Commission’.[34]

6.2.4 The legal basis for invoking customary international law and general principles

Examining the legal basis under which the WTO Appellate Body invokes general principles and customary international law is useful to understand the legal justification these adjudicators give for resorting to sources of law which are extraneous to the WTO legal system. As explained in Chapter 1, while it is accepted that non-WTO law can assist in interpreting WTO agreements, the limits of resorting to these as interpretative aid without overstepping the material jurisdiction of WTO dispute settlement organs is disputed.[35]

The previous chapters can be comprehensively articulated in three methods according to which the AB has founded its resort to general principles and customary international law for the settlement of disputes.[36] These methods are described below. They are entitled ‘method’ and given a number only for reference purposes. The order in which they are presented does not imply any hierarchy of any sort.

Before proceeding, it is worth remarking that these ‘legal bases’ do not represent methodologies strictly followed by the AB. This section describes three general methods,

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[32] Pellet (n 29) 239-240.
[33] ibid 233.
[34] Tullio Treves and Ximena Hinrichs, ‘The International Tribunal for the Law of the Sea and Customary International Law’ in L Lijnzaad and Council of Europe (eds), *The Judge and International Custom* (Brill | Nijhoff 2016), 45. See for instance *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, para 147, p. 51.
[35] See Chapter 1.2.1.
[36] See also Andrew Mitchell, ‘The legal basis for using principles in WTO disputes’ (2007) 10(4) Journal of International Economic Law 795-835.

which are also overlapping in some cases. Because the language in AB reports is sometimes left unclear, the examples pinpointed are the most illustrative for each case.

Method (1): invoking customary international law and general principles for the interpretation of WTO provisions

Parties and adjudicators have relied on non-WTO law to shed light on the meaning of specific WTO terms and provisions. Some illustrations are of use. In the field of state responsibility, the AB relied on the proportionality principle for the interpretation of Article 6.4 of the Agreement on Textiles and Clothing in its *US – Cotton Yarn* report.[37] This provision makes no reference to proportionality, but the adjudicators considered that this general principle provided support for the interpretation of its wording, concluding that rules of general international law on state responsibility 'require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered'.[38] In the context of the interpretation of rules governing WTO dispute settlement, the AB relied on the general principle of due process to interpret DSU Article 11, even though there is no reference to that principle in this provision.[39] In the *US – FSC* Article 21.5 arbitration, the AB referred to 'widely recognized principles' related to double-taxation 'which many States generally apply' to interpret the meaning of the term 'foreign-source income' in footnote 59 of the SCM Agreement. Like the previous examples, this provision also makes no reference to the general principle invoked by the adjudicators.[40]

This method has been followed with and without reference to VCLT Article 31(3)(c), according to which treaty interpretation shall take into account 'any relevant rules of international law applicable in the relations between the parties'. Parties and the AB at times referred to VCLT Article 31(3)(c) to invoke non-WTO rules for the interpretation of WTO provisions.[41] Since VCLT articles on treaty interpretation fall under the scope of DSU Article 3.2 (i.e. for purposes of 'clarify[ing] the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'), it can be inferred that general principles and customary

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[37] See Chapter 3.2.4.2.
[38] *US – Cotton Yarn*, Appellate Body Report (8 October 2001) WT/DS192/AB/R at 25.
[39] See Chapter 4.2.3.
[40] See Chapter 5.2.3.
[41] For example, the principle of good faith in *US – Shrimp* (see Chapter 2.2.2.2.3), rules on attribution (see Chapter 3.2.1.2) and general rules on circumstances precluding wrongfulness (see Chapter 3.2.3).

international law invoked under Article 31(3)(c) 'enter' WTO adjudication through the 'gateway' of DSU Article 3.2.[42] However, in most cases the AB did not refer to this provision to clarify why resorting to general principles and customary international law was relevant in a given dispute or context.

It is also worth recalling that the AB has developed a strict threshold to consider a non-WTO source of law as a '*relevant* rule of international law' under Article 31(3)(c).[43] Adinolfi points out that the AB's approach to the criterion of 'relevance' is more strict than that followed by other international jurisdictions.[44]

In any case, though in many cases there is no explicit acknowledgment that a certain concept is a 'relevant rule of international law applicable in the relations between the parties', the general principles and customary international law invoked for the interpretation of a term or provision can be regarded as invoked within this legal basis. With or without reference to VCLT Article 31(3)(c), following method (1) the AB invoked general principles and customary international law not explicitly codified in WTO agreements for the interpretation of WTO terms and provisions.

Method (2): terms and provisions in WTO agreements which reflect customary international law and general principles

In other cases, the AB implied that WTO provisions incorporated or reflected general principles or customary international law in their wording or scope. Similar to method (1), this method also connects the reference general principles and customary international law to WTO provisions. However, this method differs from the former as in this case the AB explicit acknowledges that a certain concept is *reflected* or *incorporated* in WTO law.

Two examples serve to illustrate this method. The most explicit instance in which the AB followed this approach was its reference to the precautionary principle in *EC – Hormones*.[45] In that report the AB held that the precautionary principle 'finds reflection' in Articles 3.3 and 5.7 of the SPS Agreement and sixth paragraph of its preamble. None of these provisions explicitly cite the precautionary principle.

[42] See Chapter 1.3.2.
[43] See Chapter 3.3.2.2.
[44] Giovanna Adinolfi, 'Il diritto non scritto nel sistema OMC' in P Palchetti (a cura di), L'incidenza del diritto non scritto nel diritto internazionale ed europeo, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016) at 89.
[45] See Chapter 5.2.1.

Nevertheless, the AB stated that the WTO provisions 'explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations'.[46] On this basis, the AB concluded that the precautionary principle had been incorporated into WTO law.

Another example is the principle of good faith in GATT Article XX.[47] In *US – Shrimp*, the AB stated that the chapeau of that provision is 'but one expression of the principle of good faith'.[48] Consequently, '[a]n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting'.[49] According to this reasoning, the AB did not imply that the *chapeau* should be read in light of the principle of good faith (although this line of reasoning would arguably have amounted to the same result). Instead, the adjudicators considered that the provision is an *expression*, in its wording, of the principle of good faith and the prohibition of *abus de droit* in the performance of treaty rights and obligations.

While methods (1) and (2) may ultimately result in the same legal consequences, the underlying distinction between the two is that method (1) implies importing customary international law and general principles from outside the WTO regime, while method (2) implies that these sources are incorporated into (and therefore are part of) WTO law. At the same time, both methods confer a predominantly interpretative function to customary international law and general principles, i.e. they serve to interpret the meaning of WTO terms and provisions.

Method (3): invoking general principles to fill procedural gaps

The third method involves invoking non-WTO sources of law to fill gaps in WTO law. This approach is typical of the AB's reliance on general principles of procedural law in the context of WTO dispute settlement. The AB's approach to general principles of procedural law differs from the other fields in one aspect: in some cases, the adjudicators made more direct reference to this category of sources, without indicating a

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[46] *EC — Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R at WT/DS26/AB/R; WT/DS48/AB/R, at 46, para 124.
[47] See Section 2.1.2.2.3.
[48] *US – Shrimp*, Appellate Body report (12 October 1998) WT/DS58/AB/R at 61-62, para 128.
[49] ibid.

term or provision to which the concept would be hooked. As described in Chapter 4, some general principles of procedure, most notably good faith and due process, were invoked for the interpretation of specific terms and provisions of the DSU. However, in other cases, general principles of procedure were invoked to fill gaps in the law regulating WTO dispute settlement. Most notably, this was the case of principles governing the burden of proof and *kompetenz-kompetenz*.

These concepts were invoked for the assessment of a violation of a WTO provision, as the in previous methods. However, unlike the general principles and customary rules invoked under the methods previously described, the AB's reliance on principles governing the burden of proof and *kompetenz-kompetenz* was not directly hooked to a WTO term or provision. In this sense, as these principles performed a gap-filling function, rather than an interpretative function, as methods (1) and (2).

It must be acknowledged that the distinction between gap-filling and interpretative functions is not clear-cut. The next subsection explores in more detail the different functions that general principles and customary international law have played in the AB's case law.

6.2.5 The function of general principles and customary international law in WTO dispute settlement

Generally speaking, general principles can serve to fill gaps in (gap-filling functions) or to assist in the interpretation of existing rules of international law (interpretative function).[50]

Different trends can be identified in the AB's case law with regards to the functions of general principles and customary international law. They vary according to the 'field' of general international law. For instance, the AB seemed less reluctant to grant a gap-filling role to procedural principles. However, it generally tried to limit to an interpretative role that of concepts guiding the law of treaties, secondary norms and substantive principles. In particular, the AB was very careful when taking general principles deriving from specific sub-systems of international law (substantive principles) into consideration and in limiting their value in the WTO. Adinolfi explains that the WTO adjudicators seem to favour an interpretation of the WTO covered agreements which is

[50] See Chapter 1.2.3.1.

more impermeable with respect to extraneous rules and principles, presumably to safeguard the internal coherence of the multilateral trading system.[51] This approach is unsurprising, as an otherwise approach could give room to claims that it was adding to or diminishing rights and obligations of WTO Members by giving an enhanced role to principles that can have a substantive dimension.[52]

To a lesser or larger extent, the AB's approach in resorting to general principles and customary international law was usually limited to the assessment of claims of violation of WTO provisions. In this sense, these two sources of law served two purposes in the practice of the AB: that of clarifying the interpretation of a WTO provision, and that of fall-back in the absence of a specific rule in WTO law. Arguably, this practice of fall-back entails a gap-filling function.

However, as Bassiouni points out, '[t]he extent to which one can resort to "General Principles" [and other sources of law, including customary international law] for interpretative purposes has never been established. Consequently, "General Principles" [and customary international law] can logically extend to fill gaps in conventional and customary international law and serve as a supplementary source thereto'.[53] Indeed, this can be verified in the practice of the AB, and leads us to another conclusion: there is no clear-cut distinction between the two functions.

Three situations can be distinguished in this sense. First, there are the cases in which the AB resorted to general principles and customary international law in a most interpretative fashion. In other words, the AB resorted to general principles and customary international law to answer the question: 'how can this specific WTO term be ascertained in practice?'. This is the case of the role of substantive principles, such as the 'widely recognised principles of taxation' for the interpretation of and 'sustainable development'.[54]

The second situation are the cases in which the AB resorted to general principles and customary international law in a 'purely' gap-filling fashion. In these instances, the AB did not indicate the textual hook (or the legal basis) for invoking principles. This can

[51] See Giovanna Adinolfi, 'Il diritto non scritto nel sistema OMC' in P Palchetti (a cura di), *L'incidenza del diritto non scritto nel diritto internazionale ed europeo*, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016) at 113.
[52] See Chapter 5.
[53] M Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) Michigan Journal of International Law 768, at 776.
[54] See Chapter 5.

be verified in some instances of resort to general principles of procedure, in particular *kompetenz-kompetenz* and principles governing the burden of proof.

However, in the third set of situations, the AB purported to use customary international law and general principles for purposes of interpretation, but it argued that the outcome was also gap-filling to some extent. Procedural good faith and due process are examples of general principles which had no clearly delimited function. They were invoked for the interpretation of DSU provisions and terms (e.g., the 'duty to make an objective assessment of the facts' under DSU Article 11). However, the interpretation of the AB ensuing from the resort to these principles made room for procedural standards and obligations which were not codified by WTO procedural rules and arguably are unrelated to the provision under scrutiny (e.g., the requirement of impartiality of experts and the determination that claims and objections must be made during proceedings in a timely manner).

One can conclude that this approach ensues from the jurisdictional scope of WTO dispute settlement. Because of this jurisdictional limitation, WTO adjudicators have the practice of developing its reasoning building on WTO provisions. Additionally, the AB often did not clearly lay out the 'interpretative path' which justified the importation of that source – for example, whether it was resorting to VCLT Article 31(3)(c), but merely asserted the relevance of a given customary international law or GP. Consequently, in most cases it is difficult to distinguish whether a certain general principle or customary rule was employed with a gap-filling or interpretative purpose.

6.3 THE USE OF CUSTOMARY INTERNATIONAL LAW AND GENERAL PRINCIPLES AND JUDICIAL OVERREACH

Members and adjudicators rely on non-WTO law in their submissions and findings in WTO dispute settlement. This practice buttresses the idea that, in principle, there is an acceptance that general principles and customary international law can and do have a role in the functioning of the WTO legal system. At the same time, it does not exhaust the possibility that they, being sources extraneous to the multilateral trading system, may in some cases strain the jurisdictional mandate of WTO adjudication and accordingly give rise to the perception of judicial overreach, in particular were they are perceived as legal justification for 'adding to or diminishing rights and obligations' of the parties.

This section examines two points of criticisms that should be addressed more carefully by adjudicators in order to mitigate claims of overreach in cases of resort to general principles and customary international law: more clarity in the methodology employed when resorting to these sources (6.3.2), and line between resorting to an extraneous source to interpret a provision and applying these sources (6.3.3). This section then offers some remarks as to how to approach these issues (6.3.4).

6.3.1 The WTO Members' expressed concerns and criticisms in a nutshell

Departing from the reports described in each chapter, this research examined the WTO Members' responses to the AB's reliance on general principles and customary international law in the Dispute Settlement Body meetings. These sources of law are not WTO law, as in most cases they were imported from general international law. One could expect that this practice of relying on extraneous sources of law, confronted with the fact that the jurisdiction of WTO dispute settlement is limited to WTO covered agreements, would trigger concerns or criticisms from WTO Membership. Instead, as described in Chapters 2 through 5, the instances in which Members criticised reference to general principles and customary rules in AB reports were very limited. The criticisms expressed by Members in DSB meetings were mostly directed at the merits of the findings by the adjudicators, and less to the fact that they relied on these concepts in their reasoning.

Two factors may explain this general lack of criticism. First, in many instances, parties and third parties themselves submitted in their allegations the general principle or customary rule which the AB ultimately referred to in its report. Relatedly, in few instances there was disagreement as the content of a given general principle or customary rule or whether such concept would be relevant to the assessment of the case under contention. The principle of non-retroactivity, invoked by Brazil in *Brazil – Desiccated Coconut*,[55] and the principle of due process, invoked by parties in many disputes,[56] are two examples of cases where the existence and content of general principles was not disputed by the parties.

Conversely, although in few instances, in other cases there was disagreement regarding the existence, status and content of a concept of international law. In *EC – Hormones*, the European Communities argued that the precautionary principle reflected

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[55] See Chapter 2.2.2.1.
[56] See Chapter 4.2.3.

customary international law, while Canada and the United States argued that even its status as a general principle was debatable.[57] Moreover, the parties also disputed the extent to which the principle was relevant to the settlement of that dispute.

This brings out the second factor which may explain the lack of general criticisms towards the AB's reliance on general principles and customary international law. Some reports issued by the AB in which there was reliance to general international law had the potential to trigger more criticism by WTO Members. Three prominent examples are *EC – Hormones*, *US – AD CVD (China)* and *Peru – Agricultural Products,* in which the AB had to position itself with respect to the applicability of the precautionary principle, general rules on attribution and circumstances precluding wrongfulness in the WTO legal system, respectively. However, the AB adopted a narrow approach in these instances. The adjudicators chose to base their reasoning on the text of WTO Agreements. In *EC – Hormones*, the AB concluded that the precautionary principle 'found reflection' in SPS text.[58] In *US – AD CVD (China),* it held that DASR Article 5 'coincide[d] with the essence of Article 5 [of the ILC DASR]'.[59] In *Peru – Agricultural Products*, the AB held that general rules on consent and the loss of right to invoke responsibility were not relevant rules' under Article 31(3)(c) for the interpretation of Article 4.2 of the AgA.[60]

Arguably, this resulted in reports drafted with confusing language. In *US – AD CVD (China)*, the AB deflected from analysing the role of DASR Article 5 for the interpretation of 'public body' in the SCM Agreement, but ultimately stated the criterion that the entity under scrutiny should possess or be vested with 'governmental authority' to be considered a public body under the SCM Agreement.[61] This language is the same as Article DASR Article 5, even though the AB did not acknowledge to have borrowed the language from the latter provision.

Another example of unclear language is found in the *EC – Hormones* report. There, the AB held that the precautionary principle was 'regarded by some as having crystallized into a general principle of customary international environmental law', but that '[w]hether it has been widely accepted by Members as a principle of general or customary international law appears less than clear'. Both these extracts were arguably the result of an effort by the AB to avoid putting too much emphasis on the role of general

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[57] See Chapter 5.2.1.
[58] See Chapter 5.2.1.
[59] See Chapter 3.2.1.
[60] See Chapter 3.2.3.
[61] *US — AD and CVD (China)* 132, para 345.

international law to the interpretation of WTO law. The outcome, however, were *obiter dicta* which are difficult to interpret.

Despite this cautious approach, which, as argued here, may explain the general lack of objection from WTO Members, Members did criticise the AB's reliance on general principles and customary international law in some instances. These criticisms usually concerned two aspects: the lack of or unclear textual basis according to which the AB invoked general principles and customary rules, and the concern that reliance to concepts not present in WTO agreements could amount to adding or diminishing rights and obligations in the covered agreements. These two objections are addressed in the following subsections.

6.3.2 The clarity in the legal basis for invoking general principles and customary international law

The most recurring criticism from WTO Members with respect to the AB's reliance on general principles and customary international law was that the adjudicators were not clear in describing the basis according to which these concepts would be applicable and relevant in the settlement of disputes and in the interpretation of WTO agreements. In other words, Members questioned the relationship between concepts of general international law and WTO Agreements (i.e., the legal basis for their applicability in the WTO legal system). In *US – Cotton Yarn* and *US – Line pipe*, the AB used the principle of proportionality in Article 51 of the DASR to determine the amount of safeguards which could be imposed under Article 6.4 of the Agreement on Textiles and Clothing and under Article 5.1 of the Agreement on Safeguards. Neither of these provisions explicitly mentions the notion of proportionality. Moreover, as discussed in Chapter 3.2.2.4, Article DASR 51 sets out the element of proportionality for the imposition of countermeasures, not safeguards. Unsurprisingly, disputants opposed to the AB's reliance on the principle, arguing in particular that there was no textual basis for the use of this general principle as a standard of review.[62]

Similarly, the principle of due process appears in the AB's case law as a central element for the assessment of violations of DSU Article 11. In many instances, the AB created procedural standards which are not foreseen elsewhere in the DSU on the basis

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[62] See Chapter 3.3.1.1.

of considerations of due process. While Members usually did not oppose to this approach, in some cases delegations pointed out that a clarification between the concept of due process and Article 11 would be desirable.[63]

Another element often left unclear in AB reports was the status of certain concepts of international law and their relevance to the interpretation of a WTO provision. This point was raised by Japan in commenting the *US — AD and CVD (China)* AB report. Japan argued that the AB's resort to DASR Article 5 as a relevant rule of international law applicable between the parties under VCLT Article 31(3)(c) was not properly clarified.[64] In that dispute, the AB took pains to circumvent the question of how the general international law definition of 'attribution' could inform the interpretation of Article 1.1(a)(1) of the ASCM.[65] It concluded that WTO provision 'coincided with the essence' of the general rule. However, as highlighted in the previous subsection, the AB adopted as benchmark the notion of 'governmental authority', present in DASR Article 5.

With that, the organ completed a full rhetorical circle in *US — AD and CVD (China)*, and adopted the same language as the general provision, even though it claimed to rely only on the WTO provision under scrutiny. It can be argued that the adjudicators did intend to follow DASR Article 5, but did not want to overstate the role of general international in WTO adjudication. Consequently, the report was unclear and the role of general rules of attribution in WTO dispute settlement remained obscure.

Conversely, the AB report in *Peru – Agricultural Products* was praised for its objectivity.[66] The organ dismissed the notions of 'waiver' and 'consent' as not '*relevant* rules of international law' under Article 31(3)(c) for the interpretation of the specific terms of the provision under contention in that dispute. At the same time, one could argue that this report promoted a too restrictive approach to general international law.[67]

These cases illustrate the AB's struggle to rely on general international law without over-emphasising its role in the WTO legal system, or to dismiss its applicability without adopting a too narrow approach. In general, the AB has adopted a very text-reliant approach to refer to extraneous rules of international law, perhaps to avoid any language that may give the impression of performing a law-making role.

[63] See Chapter 4.3.1.
[64] See Chapter 3.3.1.2.
[65] See Chapter 3.2.1.2.
[66] See Chapter 3.3.1.3.
[67] See Chapter 3.2.3.

6.3.3 The function of customary rules and general principles: interpretative or gap-filling

As explained throughout this work, WTO dispute settlement has one compelling limitation: adjudicators cannot add to or diminish rights and obligations to those present in the covered agreements. Non-WTO sources of law can be used for the interpretation of WTO provisions, but they cannot be *applied* as sources of obligation to WTO Members. In this sense, resort to extraneous sources of law to fill gaps can be perceived as judicial law-making, and thereby a source of judicial activism.

Section 6.2.5 submitted that the AB generally took a restrictive approach when resorting to general principles and customary international law. This restrictive approach has allowed it to remain relatively uncriticised regarding its use of these sources. At the same, the AB purported to use certain concepts of general international law as interpretative guidance, but the reasoning was ambiguous or obscure as to which role they were actually performing – interpretative or gap-filling. If it were the latter, it could be argued that the AB was overreaching because it was applying sources extraneous to its mandate. [68]

As outlined in Chapter 4, general principles of procedure are the main instances in which concepts of international law studied in this work played a gap-filling role. While in most cases this application was not disputed, in other cases the ambiguity of the reasoning leaves margin for contestation regarding the origin, content and role of general principles in WTO law. Such was the case with respect to estoppel and due process. The same occurred in the context of general rules on state responsibility, such as the principle of proportionality (Article 51 of the DASR).

This caveat in the AB's practice is distinct from the one in which the legal basis for invoking non-WTO sources of law under the WTO legal system is unclear, but the rationale behind it is similar. It is a matter of how general principles and customary international law are placed in relation to WTO law. In this vein, the next section suggests some that could be taken into account when parties and adjudicators invoke these sources of law.

6.3.4 Addressing the criticisms: two suggestions and one caveat

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[68] Bassiouni (n 53) at 779.

There are three stages in the 'life-cycle' of resort to customary international law and general principles in WTO adjudication. First, the existence and content of customary rules and general principles must be ascertained. Second, the way in which they relate to WTO adjudication must be clarified (the legal basis for their applicability). Third, the legal implications of their invocation must be determined (their role).

One element in the practice in the AB's practice that remained practically uncriticised was the organ's methodology in the identification of customary international law and general principles. Relying on codified general international law for the assertion that certain rules reflect customary law is probably a central factor contributing to make this practice uncontested. Moreover, this strategy was combined with a qualitatively and quantitatively restrictive approach to asserting that certain rules reflect customary international law – the principle of proportionality and Articles 31-33 of the VCLT.

Conversely, the AB was more liberal in relying to what it called 'general principles' in its case law. The fact that it often relied on the practice of other international courts and authoritative sources of international law to ground the assertion that a concept reflected a general principle indicates that adjudicators relied on sources which had already been accepted – or which were at least were not highly contested – by States.

Nonetheless, adjudicators could still benefit from better clarity in the description of the origins and methods through which customary rules and general principles are identified, at least in cases in which there is disagreement among parties. This is the case, for instance, with respect to estoppel. A more thorough methodology in this sense constitutes a way to mitigate claims of judicial law-making.[69] Although the existence and applicability of general principles of procedure to WTO dispute settlement are usually not the object of contention by the Members, a more thorough survey on domestic and international instruments and practice of international courts could be an asset for adjudicators to justify resort to more controversial general principles. This could be helpful, for instance, if adjudicators are again confronted with the existence and relevance of a general principle of estoppel.

At the same time, the AB's approach to the determination of customary international law is the most sensible one in the context of WTO adjudication. Undertaking a complete enquiry of the existence of the objective and subjective elements

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[69] In the same sense, JR Leiss, 'The Juridical Nature of General Principles' in M Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019) at 81.

of customary rules would give room for claims of judicial overreach for falling outside the jurisdictional scope of WTO dispute settlement or, at the very least, for amounting to 'findings unnecessary to resolve a dispute'.[70] In this sense, the AB's methodology with respect to the determination of customary international law should be observed by WTO adjudicators.

Instead, the AB's approach to general principles and customary international law has given room to claims of judicial overreach in WTO adjudication on the basis of two interconnected factors, namely the lack of clarity in the legal basis for invoking these sources and in the role they play in WTO law. Using non-WTO law, including general principles and customary international law, as standard of review for WTO violations without a clearer explanation of the legal basis for doing so – such as in the case of procedural principles – is understandable, but prone to criticisms. Laying out more clearly how these sources of law relate to WTO law can address both sets of criticisms. This can be reinforced through reference to the VCLT.[71]

Article 31(1) of the VCLT is often the departing point for WTO adjudicators for the interpretation of WTO provisions. It states, among other elements, that treaty text should be read in accordance to its 'ordinary meaning'. It can be beneficial for purposes of methodological clarity to explain whether and how concepts reflecting general principles and customary law are useful for shedding light to a specific WTO expression of provision.

By means of illustration, some Members have pointed out that it would be desirable if the AB had explained how the principle of due process relates to DSU Article 11. Instead, the AB treated due process as a self-evident tool to assess whether a panel has conducted an 'objective assessment of the matter before it'. Does the concept of due process serve as an interpretative guideline to understand the ordinary meaning of an 'objective assessment' in a given context? If so, placing the principle of due process in connection with VCLT Article 31(1) would be a valuable asset to enhance clarity.

Another way of approaching this concern is relying on VCLT Article 31(3)(c), and stating how customary rules or general principles are 'relevant rules of international law applicable in the relations between the parties'. The limitation of this approach is that the AB has, through its case law, set out very strict requirements for allowing extraneous

[70] See Chapter 1.4.1.
[71] In the same sense, see Mitchell (n 36).

rules to be taken into consideration under this provision.[72] At the same time, this may be a strict approach, but it shelters adjudicators from concerns of judicial activism.

Reference to these two VCLT provisions can serve to clarify the legal basis according to which non-WTO sources of law are relevant to the WTO legal system. They can also reinforce their interpretative role, as opposed to supporting the perception that general principles and customary international law provide autonomous sources of defence or obligations, thereby adding to or diminishing rights and obligations existing in the covered agreements. These considerations are by no means novel,[73] but should be reinforced as the practice of WTO adjudicators seem to have overlooked such an approach in some instances.

However, these suggestions come with an important caveat that can hardly be overstated. This work contended that the AB's lack of clarity and ambiguity in the abovementioned points is purposive. The obscure language in *EC – Hormones* when referring to the precautionary principle was possibly drafted so as not to exclude the relevance of this principle in the WTO legal system, but at the same time so as not to imply that that general principle could be a source of legal justifications for trade restrictions. The AB's circular reasoning regarding the general rule on attribution in *US – AD and CVD* was possibly the result of an effort to not overstate the importance of the DASR provision, but that at the same would allow relying on the 'governmental authority' criterion set out by Article 5 of the DASR.

In this sense, clarity may come at a price. Adjudicators must choose the extent to which they want to be clear about the legal basis followed to invoke non-WTO law and what role they concede to general principles and customary international law. At the same time, it may not be in their best interest to meticulously lay out the steps and terms in this approach. That is so especially given the prominent role of adopted reports in WTO adjudication for subsequent disputes. This however is a conundrum faced in judicial interpretation and decision-making in general.

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[72] In particular, the requirement for non-WTO rules to qualify as 'relevant' was made particularly stringent in *Peru – Agricultural Products*. See Chapter 3.3.2.2.

[73] See, *inter alia*, Mitchell (n 71) and ILC, 'Fragmentation of International Law: difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682/Add.1, paras 17 ff.

CONCLUDING REMARKS

In the initial years of WTO dispute settlement, the Appellate took several actions to establish its autonomy in relation to the WTO as an institution. One can argue that the quest for this 'declaration of independence' triggered the WTO dispute settlement mechanism's existential crisis which culminated in 2019. Among such actions, the AB from its early case law resorted to norms of general international law as legal benchmarks for the interpretation of WTO obligations.[1]

With the incoming probable demise of the AB, this work focused on the use of sources of international law by this adjudicative forum and its relationship with Members' claims of judicial overreach. The limited material jurisdiction of this international forum provides a double-faceted approach to this question.

On one side, this work examined the contribution provided by the AB's case law to the understanding of the identification, content and scope of general principles and customary international law as sources of international law. Because international courts and tribunals are called to ascertain the existence and content of unwritten sources of international law, international adjudicators have the potential of clarifying and developing customary international law and general principles. However, the *contribution of the Appellate Body's practice to the identification and clarification of customary international law and general principles is limited*. Perhaps the field in which this contribution is most expressive is procedural law, seconded by the law of treaties. The AB generally does not shy away from employing concepts in these two fields of law. However, the same is not true with respect to general principles deriving from other fields of international law and general rules on state responsibility.

By keeping a cautious approach in the identification of customary international law and general principles, the AB does not advance the 'progressive development' of these sources of law. The AB's case law also does not shed much light on the distinction between customary international law and general principles. At the same time, the AB's practice serves to consolidate the recognition of specific concepts which reflect a general principle or a customary international rule such as non-retroactivity, proportionality and

[1] See Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27(1) EJIL at 31.

due process. In any case, the AB's trends in identifying and employing these two categories of sources of law is in line with the practice of other international courts.

On the other side, resort to customary international law and general principles in WTO adjudication can also bring a material contribution to the multilateral trading system, give that this is a *lex specialis* regime of international law. The idea that international regimes which are entirely self-contained exist in international law has seemingly been abandoned in scholarly works. This abandonment holds true in theory, at least in relation to the WTO legal system, since, as demonstrated in this work, one can find many references to general international law in the case law of its dispute settlement mechanism. However, the attitude of adjudicators – as well as of the WTO Members – with respect to the multilateral trading system shows that there is a reluctance to refer to extraneous rules of international law. Therefore, *the contribution that these sources bring to the system remains limited.*

In the AB's most recent practice, references to general principles and customary international law became more 'intra-systemic' as adjudicators grounded resort to these concepts in previous adopted reports, rather than on general international law. Moreover, the low reference to customary international law (practically non-existent aside from VCLT Articles 31-33), and the very reluctance to take a position on the customary status of certain rules, also corroborate this point.

With respect to general principles, it has been argued that this source of law could be a potential instrument to 'fill or bridge gaps between different sub-systems of international law'.[2] The multilateral trading system is one of *lex specialis*, but its subject-matter cross-cuts many other fields of international law, such as environment and human rights. This could have been used to promote the reliance of general principles stemming from specialised systems of international law. The existence of a system of enforcement also gives room to the interaction of WTO adjudication and the general secondary norms of international law. However, the AB has preserved its interpretative focus on the specific wording of WTO Agreements, giving limited room to the influence of extraneous concepts to the interpretation WTO law. Thus, the potential interaction of different fields of international law is underexplored by the adjudicators (arguably motivated by parties' submissions and expectations).

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[2] JR Leiss, 'The Juridical Nature of General Principles' in M Andenas and others, General Principles and the Coherence of International Law (Brill 2019) at 91.

Likely thanks to the above described AB's cautious approach, resort to customary international law and general principles has not created concerns of judicial overreach by WTO Members, at least not in the approach taken by the WTO dispute settlement. At the same time, in the future of WTO adjudication, the criticisms of judicial overreach which triggered the AB crisis will possibly weaken the role of extraneous sources of law, including customary international law and general principles, in the interpretation of WTO provisions. With the impasse of the blocking of appointment of AB Members, adjudicators have arguably become more mindful of the impact of their reasoning to the legitimacy of the multilateral trading system. The criticisms involved the claim that the AB indulged in making findings 'unnecessary to resolve a dispute' and judicial law-making. Resorting to non-WTO sources of law to interpret WTO provisions and obligations can contribute to the perception that adjudicators incur in both practices.

The actions that may have grounded the AB's early 'declaration of independence' will now possibly be reversed by adjudicators to avoid perceptions of judicial activism in the multilateral trading system. This may increase the internal legitimacy that triggered the AB's existential crisis, but at the cost of increasing fragmentation in international law. Irrespective of the future of dispute settlement in the World Trade Organization, the case law of its Appellate Body will remain an invaluable *forum* for the study of sources of international law and international adjudication.

BIBLIOGRAPHY

Georges Abi-Saab, ‘The Appellate Body and Treaty Interpretation’ in M Fitzmaurice, O Elias and P Merkouris, Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (Martinus Nijhoff 2010).

Giovanna Adinolfi, ‘Il diritto non scritto nel sistema OMC’ in P Palchetti (a cura di), L’incidenza del diritto non scritto nel diritto internazionale ed europeo, XX Convegno SIDI Macerata, 5-6 giugno 2015 (Editoriale Scientifica 2016).

Giovanna Adinolfi, ‘Procedural rules in WTO dispute settlement in the face of the crisis of the Appellate Body’ (2019) 61 QIL 39-58.

Reuven S Avi-Yonah, Nicola Sartori and Omri Marian, *Global perspectives on income taxation law* (OUP 2011).

Maria Fogdestam Agius, *Interaction and Delimitation of International Legal Orders* (Queen Mary Studies in international law, v 16, Brill Nijhoff, 2014).

Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Brill 2005)

Chittharanjan F Amerasinghe, *Jurisdiction of Specific International Tribunals* (Brill 2009)

Mads Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019).

Mads Andenas and Ludovica Chiussi, ‘Cohesion, Convergence and Coherence of International Law’ in M Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019).

James Bacchus, ‘Not in clinical isolation’ in G Marceau (ed), *A history of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015).

Louis Balmond, ‘Les sources du droit de l’OMC’ in V Tomkiewicz (dir), *Les sources et les normes dans le droit de l’OMC* (Pedone 2012).

M Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) Michigan Journal of International Law 768.

Lorand Bartels, ‘Applicable law in WTO Dispute Settlement Proceedings’ (2001) 35(3) *Journal of World Trade* 499.

Lorand Bartels, ‘Jurisdiction and Applicable Law in the WTO’ (2016) SIEL Online Proceedings Working Paper No. 2016/18 <https://ssrn.com/link/SIEL-2016-Johannesburg-Conference.html> accessed 28 November 2015.

Eyal Benvenisti, Customary international law as a judicial tool for promoting efficiency, in E Benvenisti and M Hirsch (eds) in *The Impact of International Law on International Cooperation: Theoretical Perspectives* (CUP 2004).

Mohamed Bennouna, ‘*Le droit international entre la lettre et l’esprit* : *Cours général de droit international public’* (2017) 383 Collected Courses of the Hague Academy of International Law.

Laurence Boisson de Chazournes and MM Mbengue, ‘GMOs and Trade: Issues at Stake in the EC Biotech Dispute’ (2004) 13(3) Review of European Community and International Environmental Law.

Laurence Boisson de Chazournes, ‘The Principle of Compétence de la Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals’, in M Arsanjani, J Cogan and S Weissner, *Looking to the Future: Essays in Honor of W. Michael Reisman* (Martinus Nijhoff 2010).

Beatrice Bonafé, ‘L’autorizzazione ad adottare contromisure nel quadro dell’Organizzazione Mondiale del Commercio: il requisito delle “circostanze sufficientemente gravi”’ in A Ligustro, G Sacerdoti (a cura di), *Problemi e tendenze del diritto internazionale dell’economia*, Liber amicorum in onore di Paolo Picone (Editoriale Scientifica 2011).

David W Bowett, ‘Estoppel before International Tribunals and Its Relation to Acquiescence’ (1957) 33 British Yearbook of International Law 176.

Chester Brown, *A common law of international adjudication* (OUP 2010).

Beatrice Bonafé and Paolo Palchetti, ‘Relying on general principles in international law’, in C Brölmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edwards Elgar Publishing 2016).

Michael Bothe, ‘Oil Platforms Case (Iran v United States of America)’, Max Planck Encyclopedia of Public International Law (2011).

Fernando L Bordin, ‘A Glass Half Full? The Character, Function and Value of the Two-Element approach to identifying customary international law’ (2019) 21 International Community Law Review 283-306.

Fernando L Bordin, ‘Induction, Assertion and the Limits of the Existing Methodologies to Identify Customary International Law’ (2 December 2015) <https://www.ejiltalk.org/induction-assertion-and-the-limits-of-the-existing-methodologies-to-identify-customary-international-law/> accessed 09 March 2018.

Chester Brown, ‘Inherent Powers in International Adjudication’, in CPR Romano, K Alter, Y Shany, The Oxford Handbook of International Adjudication (OUP 2013).

Enzo Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) 12 EJIL 889.

Enzo Cannizzaro and Beatrice Bonafé, ‘Fragmenting International Law through compromissory clauses? Some remarks on the decision of the ICJ in the *Oil Platforms* case’ (2005) 16(3) EJIL 481.

Enzo Cannizzaro, ‘Il rilievo di accordi esterni nell’interpretazione degli accordi OMC’ in A Ligustro and G Sacerdoti (a cura di), Problemi e tendenze del diritto internazionale dell’economia, Liber amicorum *in onore di Paolo Picone* (Editoriale Scientifica 2011).

Bin Cheng, *General Principles of Law as applied by international courts and tribunals* (CUP 1993).

Ilona Cheyne, ‘Gateways to the Precautionary Principle in WTO Law’ (2007) 19(2) Journal of Environmental Law 155.

Stephen J Choi and Mitu Gulati, 'Customary International Law: how courts do it?', in Curtis A Bradly (ed) *Custom's future: international law in a changing world* (CUP 2016).

Luigi P Comoglio, *Il principio di economia processuale*, vol. 1 (CEDAM, 1980).

Luigi Condorelli and Clauss Kreiss, 'The Rules of Attribution: General Considerations' in J Crawford, A Pellet, S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010).

Cosette D Creamer and Zuzzanna Godzimirska, 'The Rhetoric of Legitimacy: Mapping Members' Expressed Views on the WTO Dispute Settlement Mechanism' (2015) iCourts Working Paper Series, 16 <https://ssrn.com/abstract=2560780> accessed 14 February 2019.

Harlan G Cohen, 'Methodology and Misdirection: Custom and the ICJ' (1 December 1 2015) <https://www.ejiltalk.org/methodology-and-misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj/> accessed 09 March 2018.

Graham Cook, *A digest of WTO jurisprudence on Public International Law concepts and principles* (CUP 2015).

James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002).

James Crawford, *State responsibility: the general part* (CUP 2013).

Patrick Daillier and others, *Droit international public* (8th ed, LGDJ 2009).

Pierre d'Argent, 'Les principes généraux à la Cour internationale de Justice' in S Besson and P Pichonnaz (eds), *Les principes en droit européen* (LGDJ 2011).

Jean d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 International Community Law Review 229.

E David, 'Primary and Secondary rules' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010).

William J Davey, 'The Limits of Judicial Processes' in D Bethlehem *et al*, *The Oxford Handbook of International Trade Law* (OUP 2009).

William J Davey and André Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8(1) World Trade Review 5.

Mariana C de Andrade, 'Path to judicial activism? The use of 'relevant rules of international law' by the WTO Appellate Body' in (2018) 15(3) *Brazilian Journal of International Law*.

Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed, Springer 2018).

Jaye Ellis, 'General principles and comparative law' (2011) 22(4) EJIL 949.

Eric A Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 Dartmouth Law Journal 1-11.

Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (CUP 2011)

Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of Law' (1959) 35 British Yearbook of International Law 183-231

Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume I (Grotius Publications Limited 1986).

Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Collected Courses of the Hague Academy of International Law.

Giorgio Gaja, 'General Principles of Law', in *Max Planck Encyclopedia of Public International Law* (2013).

Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Collected Courses of the Hague Academy of International Law.

Giorgio Gaja, 'General principles in the jurisprudence of the ICJ', in M Adenas *et al*., *General principles and the coherence of international* law (Brill 2019).

Mariano R Garcia, *On the application of customary rules of State responsibility by the WTO dispute settlement organs: a general international law perspective* (Studies and Working Papers, Graduate Institute of International Studies 2001)

Richard Gardiner, *Treaty Interpretation* (OUP 2008).

Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' (2018) 17(3) World Trade Review 509–533.

Lorenzo Gradoni, 'Il principio precauzionale nel diritto dell'Organizzazione Mondiale del Commercio' in A Bianchi and M Gestri (eds), *Il principio precauzionale nel diritto internazionale e comunitario* (Giuffrè 2006).

Lorenzo Gradoni, Regime failure *nel diritto internazionale* (CEDAM 2009).

James A Green, 'The Oil Platforms Case: An Error in Judgment?' (2004) 9(3) Journal of Conflict and Security Law 357.

Jennifer Hillman, 'Moving towards an international rule of law? The role of the GATT and the WTO in its development' in G Marceau (ed), *A history of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015).

Jennifer Hillman, 'Three approaches to fixing the World Trade Organization's Appellate Body: the good, the bad and the ugly?', available at https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf, accessed 22 January 2019.

Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: the Early Years of WTO Jurisprudence' in JHH Weiler (ed), *The EU, the WTO, and the NAFTA: towards a common law of International trade?* (OUP 2000).

Robert Howse and Henrik Horn, ‘European Communities – Measures Affecting the Approval and Marketing of Biotech Products’ (2009) 8(1) World Trade Review.

International Law Association (ILA), ‘Statement of principles applicable to the formation of general customary international law’, Final report of the Committee, London Conference (2000).

John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006).

Claire EM Jervis, ‘Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law’ (2019) 30(1) EJIL 105.

Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer Law International 1996)

Hans Kelsen, *Principles of international law* (1952).

Jan Klabbers, ‘Reluctant “*Grundnormen*”: Articles 31(3)(C) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’ in M Craven, M Fitzmaurice and M Vogiatzi (eds), *Time, History and International Law* (Nijhoff 2007).

Robert Kolb, ‘General principles of procedural law’, in A Zimmermann, C Tomuschat and K Oellers-Frahm, *The statute of the International Court of Justice: a commentary* (OUP 2006).

Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017).

Charles T Kotuby, Jr., Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017).

Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans, Green and co. 1927).

Hersch Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 British Yearbook of International Law 48.

Hersch Lauterpacht, *The function of law in the international community* (first published 1933, OUP 2011).

Michael Lennard, ‘Navigating by the Stars: Interpreting the WTO Agreements’ (2002) 5(1) Journal of International Economic Law 17.

Brian D Lepard, *Customary International Law: a new theory with practical applications* (CUP 2010).

Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017).

Hubert Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale* (LGDJ 2007).

Anja Lindroos and Michael Mehling, ‘Dispelling the Chimera of “Self-Contained Regimes” International Law and the WTO’ (2006) 16(5) EJIL 857.

Emily B Lydgate, ‘Sustainable development in the WTO: from mutual supportiveness to balancing’ (2012) 11(4) World Trade Review 321.

Gabrielle Marceau, ‘A call for coherence in international law : praises for the prohibition against "Clinical Isolation" in WTO dispute settlement’ (1999) 33(5) Journal of World Trade 87.

Gabrielle Marceau, ‘Conflicts of norms and conflicts of jurisdictions : the relationship between the WTO agreement and MEAs and other treaties’ (2001) 35(6) Journal of World Trade 1081.

Gabrielle Marceau, ‘Le principe de précaution dans la jurisprudence de l'OMC – Leçon inaugurale, Université de Genève, Faculté de droit’ (2005) 2(3) EcoLomic Policy and Law.

Gabrielle Marceau, ‘Fragmentation in International Law: The Relationship between WTO Law and General International Law - A Few Comments from a WTO Perspective’ (2006) 7 Finnish Yearbook of International Law.

Gabrielle Marceau and Fabio Morosini, ‘The Status of Sustainable Development in the Law of the World Trade Organization’ in U Celli Junior, M Basso, A do Amaral Junior (eds) *Arbitragem e Comércio Internacional: estudos em homenagem a Luiz Olavo Baptista* (Quartier Latin do Brasil 2013).

Gabrielle Marceau, ‘Evolutive interpretation by the WTO adjudicator: sophism or necessity?’ (2018) 21 Journal of International Economic Law 791.

Yoram Margalioth, ‘International Taxation’ in Max Planck Encyclopedia of Public International Law, 2011.

Yoshiro Matsui, ‘The transformation of the Law of State Responsibility’ in R Provost (ed), *State Responsibility in International Law* (The Library of Essays in International Law, Ashgate Publishing 2002).

Robert McDougall, The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance (2018) 52(6) Journal of World Trade 867.

Campbell McLachlan ‘The Principle of Systemic Integration and Article 313c of the Vienna Convention’ (2005) 54(2) International & Comparative Law Quarterly 279.

Maurice Mendelson, ‘The International Court of Justice and the Sources of International Law’, in V Lowe, M Fitzmaurice, *Fifty years of the International Court of Justice* (CUP 1996).

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

Andrew Mitchell, ‘Due process in WTO Disputes’ in R Yerxa and B Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005).

Andrew Mitchell, ‘Proportionality and remedies in WTO disputes’ (2006) 17 EJIL 985–1008.

Andrew Mitchell, ‘Good Faith in WTO Dispute Settlement’ (2006) 7 Melbourne Journal of International Law 340.

Andrew Mitchell, ‘The legal basis for using principles in WTO disputes’ (2007) 10(4) JIEL 795.

Andrew Mitchell, *Legal principles In WTO Disputes* (CUP 2008).

Andrew Mitchell and David Heaton, ‘The inherent jurisdiction of WTO Tribunals: the select application of public international law required by the judicial function’ (2010) 313 Michigan Journal of International Law 559.

Djamchid Momtaz, ‘Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority’ regimes’ in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010) 244.

Stefania Negri, *I principi generali del processo internazionale nella giurisprudenza della Corte Internazionale di Giustizia* (Edizioni Scientifiche Italiane 2005).

Michael Newton and Larry May, *Proportionality in International Law* (OUP 2014)..

Georg Nolte, ‘How to Identify Customary International Law? – On the Final Outcome of the Work of the International Law Commission (2018)’, KFG Working Paper Series, n 37, June 2019.

T O’riordan and J Cameron (eds), *Interpreting the precautionary principle* (Earthscan Publications 1994).

Federica Paddeu, *Justification and Excuse in International Law: concept and theory of general defences* (CUP 2018).

Paolo Palchetti, ‘Making and enforcing procedural law at the International Court of Justice’ (2019) 61 Questions of International Law 5.
Paolo Palchetti, ‘The Role of General Principles in Promoting the Development of Customary International Rules’ in Mads Andenas and others, *General Principles and the Coherence of International Law* (Brill 2019).

David Palmeter and Petros C Mavroidis, ‘The WTO legal system: sources of law’ (1998) 92 AJIL 398.

David Palmeter, ‘The WTO as a legal system’ (2000) 24(1) Fordham International Law Journal.

Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: the Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Studies in International Trade Law, Hart Publishing 2006).

Fulvio M Palombino, ‘Judicial Economy and Limitation of the Scope of the Decision in International Adjudication’ (2010) 23 Leiden Journal of International Law 909.

Martins Paparinskis, ‘Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law’, in T Broude and Y Shany, (eds), *Multi-sourced Equivalent Norms in International Law* (Hart Publishing 2011).

Matina Papadaki, Compromissory Clauses as the Gatekeepers of the Law to be ‘Used’ in the ICJ and the PCIJ (2014) 5 Journal of International Dispute Settlement 560.

Joost Pauwelyn, *Conflict of Norms in Public International Law: how WTO law relates to other rules of international law* (CUP 2003).

Joost Pauwelyn, ‘Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China’ (2013) 12(2) *World Trade Review* 235.

Joost Pauwelyn, ‘Minority rules: precedent and participation before the WTO Appellate Body’ in J Jemielniak, L Nielsen and JP Olsen, *Establishing Judicial Authority in International Economic Law* (CUP 2016).

Joost Pauwelyn and Krzysztof Pelc, ‘Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement’ (September 26, 2019). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872.

PCIJ, ‘Advisory Committee of Jurists - Procès-Verbaux of the Proceedings of the Committee’ (June 16th – July 24th 1920) (The Hague 1920).

Krzyzstof Pelc, ‘The Politics of Precedent in International Law: A Social Network Application’ (2014) 108(3) American Political Science Review 547.

Alain Pellet, ‘Between Codification and Progressive Development of the Law: Some Reflections from the ILC’ (2004) 6 International Law Forum du droit international 15.

Alain Pellet, ‘The Case Law of the ICJ in Investment Arbitration’ (2013) 28(2) ICSID Review 239.

Shin-yi Peng, ‘Regulating New Services through Litigation? Electronic Commerce as a Case Study on the Evaluation of ‘Judicial Activism’ in the WTO’ (2014) 48(6) *Journal of World Trade* 1189.

Facundo Perez-Aznar, *Countermeasures in the WTO Dispute Settlement System: an analysis of their characteristics and procedure in the light of general international law* (Studies and Working Papers, Graduate Institute of International Studies 2006).

Niels Petersen, ‘The International Court of Justice and the Judicial Politics of Identifying customary international law’ (2017) 28 EJIL 366.

Thomas J Prusa and Edvin Vermulst, ‘China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States: exporting US AD/CVD methodologies through WTO dispute settlement?’ (2014) 13(2) World Trade Review 229.

Fábian O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008).

Niccolò Ridi, ‘The Shape and Structure of the ‘Usable Past’: An Empirical Analysis of the Use of Precedent in International Adjudication’ (2019) 10 Journal of International Dispute Settlement 200.

Niccolò Ridi, ‘“Mirages of an Intellectual Dreamland”? Ratio, Obiter, and the Textualization of International Precedent’ (2019) 10(3) Journal of International Dispute Settlement 361.

Hélène Ruiz-Fabri, ‘La prise en compte du principe de précaution par l'OMC’ (2000) Revue Juridique de l'Environnement, numéro spécial.

Giorgio Sacerdoti, ‘A Comment on Henry Gao, ‘Dictum on Dicta: Obiter Dicta in WTO Disputes’’ (2018) 17(3) World Trade Review 535.

Phillippe Sands and others, *Principles of International Environmental Law* (4th ed, CUP 2018)

Mario Scerni, 'La procédure de la cour permanente de justice international' (1938) 65 Collected Courses of the Hague Academy of International Law.

Omri Sender and Michael Wood, 'The International Court of Justice and Customary International Law: A Reply to Stefan Talmon' (30 November 2015) <https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/> accessed 09 March 2018.

Angelo P Sereni, *Principi generali di diritto e processo internazionale* (Quaderno della Rivista di Diritto Internazionale, Giuffrè 1955).

Sherzod Shadikhojaev and Nohyoung Park, 'Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility' (2007) 41(6) Journal of World Trade 1237.

Malcolm Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, v. 3 (Brill Nijhoff 2016).

Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction — Compétence de la Compétence* (Springer 1965).

Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) EJIL 492.

Bruno Simma and Dirk Pulkowski, '*Leges specialis* and self-contained regimes' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP 2010).

Max Sørensen, 'Principes de droit international public : cours général' (1960) 101 Collected Courses of the Hague Academy of International Law.

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden Journal of International Law 979.

Stefan Talmon, 'Determining Customary International Law: The ICJ's methodology between induction, deduction and assertion' (2015) 26(2) EJIL 417.

Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology and the Idyllic World of the ILC' (3 December 2015) <https://www.ejiltalk.org/determining-customary-international-law-the-icjs-methodology-and-the-idyllic-world-of-the-ilc/> accessed 09 March 2018.

Antonello Tancredi, 'OMC et coutume(s)' in V Tomkiewicz (dir), *Les sources et les normes dans le droit de l'OMC*, Colloque de Nice des 24 et 25 juin 2010 (Pedone 2012).

Arie Trouwborst, *Evolution and Status of the precautionary principle in international law* (Routledge 2002).

Tullio Treves and Ximena Hinrichs, ‘The International Tribunal for the Law of the Sea and Customary International Law’ in L Lijnzaad and Council of Europe (eds), *The Judge and International Custom* (Brill | Nijhoff 2016).

Peter Tomka, ‘Custom and the International Court of Justice’ (2013) 12 The Law and Practice of International Courts and Tribunals 195.

Terence B Stewart and Christopher J Callahan, ‘Dispute Settlement Mechanisms’, in *The GATT Uruguay Round: A negotiating history (1986-1992)*, Volume IIb: Commentary (Kluwer Law and Taxation Publishers 1993).

Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice, 1960–1989: Part Two’ (1990) 61 British Yearbook of International Law.

Hugh Thirlway, *The law and procedure of the International Court of Justice*: *Fifty Years of Jurisprudence*, vol I (OUP 2013)

Vincent Tomkiewicz (org), *Organisation Mondiale du Commerce et responsabilité international*, Colloque Nice 23-24 juin 2011 (Pedone 2011).

Grigory Tunkin, ‘Is General International Law Customary Law Only? (1993) EJIL 537.

United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

USTR, ‘2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program’, available at https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF, accessed 12 August 2019.

Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21(3) EJIL 605.

Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009).

Isabelle Van Damme, ‘Jurisdiction, Applicable Law, and Interpretation’ in D Bethlehem *et al* (eds), *The Oxford Handbook of International Trade Law* (OUP 2018).

Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th ed, CUP 2017).

Geraldo Vidigal, ‘Attribution in the WTO: the limits of “sufficient government involvement”’ (2017) 6 Journal of International Trade and Arbitration Law 133.

Jorge Viñuales, ‘Sustainable Development’, in L Rajamani and J Peel (eds), *The Oxford Hanbook of International Environmental Law*, 2nd ed (OUP 2019).

Béla Vitanyi, ‘Les positions doctrinales concernant le sens de la notion de « principles généraux de droit reconnus par les nations civiliées »’ (1982) Revue générale de droit international public 48.

Humphrey Waldock, ‘General course on public international law’ (1962) 106 Collected Courses of the Hague Academy of International Law.

Sir Arthur Watts, *The International Law Commission 1949–1998*, Volume II: The Treaties (OUP, 1999) 684.

Michael Wood, ‘Customary International Law and the General Principles of Law Recognized by the Civilized Nations’ (2019) 21 International Community Review 307.

Fuad Zarbiyev, ‘Judicial Activism in International Law: A Conceptual Framework for Analysis’ (2012) 3(2) Journal of International Dispute Settlement 247.

Joakim Zander, *The application of the precautionary principle in practice: comparative dimensions* (CUP 2010).

ILC Reports

ILC, Yearbook of the International Law Commission: Summary Records and Documents of the First Session including the report of the Commission to the General Assembly (United Nations 1949).

ILC, Report of the International Law Commission on the work of its Sixteenth Session, 11 July 1964, Yearbook of the International Law Commission, 1964, vol II.

ILC, ‘Report of the International Law Commission on the work of its 53rd session (23 April - 1 June and 2 July - 10 August 2001) UN Doc A/56/10 (‘DASR’).

ILC, ‘Report of the Study Group of the International Law Commission on the Work of its 58th Session' (Fragmentation of International Law, 1 May-9 June and 3 July-11 August 2006) A/CN.4/L.682 (‘Fragmentation’).

ILC, ‘Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies’, Report of the Secretary-General (30 April 2010) UN Doc A/65/76 (‘Compilation’).

ILC, ‘Report of the International Law Commission on the Work of its 68th Session’ (2 May–10 June and 4 July-12 August 2016) UN Doc A/71/10.

ILC, ‘Report of the International Law Commission on the Work of its 70th Session’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 at 117 ff (‘Draft Conclusions’).

ILC, ‘Report of the International Law Commission on the Work of its 71st Session (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10 at 142 (‘71st session’).

ILC, ‘First report on general principles of law by Marcelo Vázquez-Bermúdez’, Special Rapporteur (5 April 2019) A/CN.4/732 (‘First Report on general principles’).