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From Bilateral to Multilateral Law-making: Legislation, Practice, Evolution and the Future of Inter Se *Agreements in the WTO*

Geraldo Vidigal*

Abstract

Among the innovations accompanying the transformation of GATT into the WTO was the remarkable strengthening of multilateral institutions. While the paradigmatic change brought about by the institutionalization of the multilateral trading system has been generally acknowledged, its impact on WTO law-making has been largely overlooked. Much of the debate has concentrated on whether and to what extent 'external' international legal rules should be taken into account by WTO adjudicators. An analysis of the WTO jurisprudence, however, evidences a different approach. The interpretation (and, to some extent, modification) of WTO rules depends not on the bilateral relations between the parties to a particular dispute, which may affect the application as between them of the multilateral rules, but on the establishment – through subsequent agreement, subsequent practice, or broader normative evolution – of a 'common understanding' of the membership. Once established, a new interpretation is not limited to the context of a particular dispute, but affects the WTO rights and obligations of all members. As a result, the bilateral logic that ordinarily determines legal relations between states based on individual consent gives way to a multilateral logic, which allows a degree of normative change while preserving the integrity of the WTO legal system.

* Evan Lewis-Thomas Scholar, Sidney Sussex College, University of Cambridge; European Marie Curie Fellow (DISSETTLE Network), Bocconi University, Milan. This article was finalized within the context of the 'Dispute Settlement in Trade: Training in Law and Economics' project (DISSETTLE), a Marie Curie Initial Training Network (ITN) funded under the EU's Seventh Framework Programme, Grant Agreement No. FP7-PEOPLE-2010-ITN_264633, available at: www.dissettle.org. An earlier version of this article was delivered at the PEPA/SIEL Conference, Hamburg, 27–28 Jan. 2012. Email: geraldo.vidigal@unibocconi.it.

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1 Introduction

International law has traditionally been described as a 'decentralized' or 'horizontal' legal system.[1] The metaphors refer to the distinctive feature of the international legal system when contrasted to national legal systems: that among sovereigns there is no superior authority to impose norms and interpretations of norms, fulfilling the functions of establishing rules, adjudicating on conflicts, and enforcing decisions against the will of states. The 'sovereign equality' of states, as Article 2(1) of the Charter of the United Nations puts it, is interpreted not only as excluding the authority of states over one another – a point recently confirmed by the International Court of Justice (ICJ)[2] – but also as excluding the authority of any superior body over sovereign states.

Decentralization entails important consequences. First, no adjudicator may exercise authority over states without their consent. As Hersch Lauterpacht once put it, consent to jurisdiction is seen 'as a self-imposed and essentially reversible concession'.[3] In the absence of a specific provision to this effect, states are not required to accept the jurisdiction of international courts.[4] In the likely event that no tribunal has jurisdiction to hear a particular dispute, states in dispute may not only individually interpret rules but may also lawfully act upon such an understanding until an agreement is reached on how to settle the dispute. This statement needs today to be qualified, given the increasing number of judicial and quasi-judicial institutions in activity; but in principle and for many disputes it is still the case that 'each State establishes for itself its legal situation *vis-à-vis* other States'.[5]

Decentralization also fundamentally affects law-making. International law lacks an overarching legislator capable of imposing rules on states, as well as procedures through which a majority may impose rules on the minority. Of course, sovereign states may voluntarily restrain the exercise of their sovereignty,[6] and both within and outside the UN mechanisms have been developed for rule-making without the stringent requirement of specific individual consent.[7] The principle nonetheless remains that states are bound only by the rules to which they have (implicitly or explicitly)

1 H. Kelsen, *Principles of International Law* (1952), at 22; International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the ILC Study Group finalized by Martti Koskenniemi', A/CN.4/L.682 (2006), at 324, 486; Crawford, 'Multilateral Rights and Obligations in International Law', 319 *RdC* (2006) 325, at 345.

2 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgment of 3 Feb. 2012, at paras 57, 106.

3 H. Lauterpacht, *The Function of Law in the International Community* (2011/1933), at 3–4.

4 VCLT, Art. 65(3); UN Charter, Art. 33(1); *Status of Easter Carelia*, 1923 PCIJ Series B No. 5, at 27; *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, at 102.

5 *Air Service Agreement Arbitration*, 18 RIAA (1978) 417, at 443.

6 *SS 'Wimbledon'*, 1923 PCIJ Series A No. 1, at 21.

7 J.E. Alvarez, *International Organizations as Law-makers* (2009); Churchill and Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law', 94 *AJIL* (2000) 623; Tomuschat, 'Obligations Arising for States without or against their Will', 241 *RdC* (1993) 195; Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994) 219.

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given their consent. Additionally, they may freely modify this consent, agreeing at any time on different sets of rights and obligations towards other states, without any of the formal (and without most of the substantive) requirements that attach to rule modification in national legal systems.

In respect of adjudication, the WTO Agreements have radically changed the situation that prevails in international law. Within the WTO, disputes may be referred by any member to the Dispute Settlement Body (DSB) for adjudication, and members may not 'opt out' of this compulsory adjudication without leaving the organization. The DSB, guided by panels and the Appellate Body, authoritatively interprets rules, examines conduct, and determines the consistency of measures with the WTO Agreements. Although members may not always agree with these determinations, they recognize them as prevailing over their own assessments.

Regarding law-making, the issue is less clear-cut. Under international law, the articulation between WTO rules and rules adopted in other fora, or in bilateral treaties, is to be determined by the traditional meta-norms of *lex superior*, *lex posterior,* and *lex specialis*. Except for a few particular limitations, the WTO Agreements do not restrict the rights of members to adopt different rules among themselves through *inter se* agreements. The absence of any specific rule in this regard would normally mean that WTO members remain sovereign to exercise their freedom of contract under international law and 'contract out' of WTO law. As a consequence, some argue, where the external rule prevails over a conflicting WTO rule this priority should be acknowledged and given effect to – including by WTO adjudicators.[8]

One obstacle to this is the jurisdictional limitations imposed by DSU Articles 3(2) and 19(2) on WTO adjudicators. These provisions prevent panels, the Appellate Body, and the DSB from 'add[ing] to or diminish[ing] the rights and obligations of Members under the [WTO] agreements'. Due to these limitations, the debate over 'external' law-making becomes inextricably related to the question of the extent to which norms which do not find a textual basis in the WTO Agreements may (or must) be taken into account by panels and the Appellate Body.[9] While a full examination of the many positions taken on this debate is beyond the scope of this article, it is probably accurate

[8] J. Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 *EJIL* (2003) 907; Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17 *EJIL* (2006) 395; Lindroos and Mehling, 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO', 16 *EJIL* (2006) 857.

[9] Bartels, 'Jurisdiction and Applicable Law Clauses: Where does a Tribunal find the Principal Norms Applicable to the Case before it?', in T. Broude and Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011); Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 *J World Trade* (2001) 499; Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction – The Relationship between the WTO Agreement and MEAs and other Treaties', 35 *J World Trade* (2011) 1081; Marceau, 'A Call for Coherence in International Law – Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement', 33 *J World Trade* (1999) 87; Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard Int'l LJ* (1999) 333; Sacerdoti, 'WTO Law and the "Fragmentation" of International Law: Specificity, Integration, Conflicts', in M.E. Janow, V. Donaldson, and A. Yanovich (eds), *WTO: Governance, Dispute Settlement & Developing Countries* (2008), at 595; Mavroidis, 'No Outsourcing of WTO Law? WTO Law as Practiced by WTO Courts', 102 *AJIL* (2008) 421.

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to say that the main point of contention is the question whether the DSU may validly determine the jurisdiction of WTO adjudicators in a way that excludes or limits the application of 'external' international law.

This article argues that this dilemma has been largely overcome by the prevalence, in practice, of a 'multilateralizing' approach to WTO law-making. In the multilateral law-making model, the issue of 'internal' and 'external' becomes less relevant than the existence of a 'common intention' or 'common understanding' among the WTO membership. Two recent Appellate Body reports (*US – Cloves* and *US – Tuna II*) confirm the decisive weight multilateral instruments have in the interpretation of WTO law; the trend these reports express, however, may be traced back to the first disputes in which external norms were argued before WTO adjudicators. Multilateral instruments and procedures, some of them fairly informal, may be used to bring into WTO law new norms and interpretations, as long as the resulting rule is perceived as reflecting a common understanding of the membership. By contrast, the WTO case law on bilateral modifications evidences great reluctance to ascribe any effects to external agreements, no matter how formal, that have not obtained multilateral approval. It is argued that these two tendencies are linked, and represent a move away from the 'natural bilateralism' of international law[10] and into a system of multilateral law-making.

Section 2 examines instruments WTO members may use to produce 'multilateral' modifications and interpretations of WTO law. These have come to comprise not only those instruments provided for in the WTO Agreements, but also mechanisms of multilateral interpretation ('subsequent agreement', 'subsequent practice', and 'evolution') which the jurisprudence has considered as having broad effects on the interpretation of WTO law. Section 3 analyses the treatment given to *inter se* agreements by WTO adjudicators, arguing that – despite claims not to be making decisions on this matter – the Appellate Body in particular has consistently brushed aside every possibility of *inter se* modification, or interpretation, of WTO rules. This point is clear from its understanding of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) in *EC – Aircraft*. Section 4 concludes.

2 Multilateral Law-making: Legislation, Practice, Evolution

The WTO Agreements feature a number of possibilities for law-making, both by WTO organs and by 'external' bodies. In addition to the full renegotiation of rights and obligations entailed by the conclusion of a new round of negotiations,[11] specific procedures exist for adopting, within WTO organs, modifications to[12] and authoritative interpretations of[13] the rights and obligations of members. Although the effectiveness

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10 Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1988), at 820.

11 Nottage and Sebastian, 'Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law', 9 *JIEL* (2006) 989.

12 WTO Agreement, Art. X.

13 *Ibid.*, Art. IX(2).

of this proto-legislature to address the demands of the trade regime has been questioned,[14] a number of waivers[15] and numerous consensus-based decisions have been adopted. The emphasis on consensus has not stopped law-making organs from adopting a majority decision when one member's resistance appeared unreasonable to the rest of the membership.[16]

More difficulties surround the use of the WTO provisions for amendment and authoritative interpretation. The sole amendment adopted so far is, eight years on, still not in force.[17] No authoritative interpretations have been adopted following the rigid procedures of Article IX(2). However, to the set of law-making instruments provided by the WTO agreements, WTO jurisprudence has added another set, largely derived from international legal rules on interpretation. New rules and interpretations may be produced based on *subsequent agreement* of the membership, even outside the precise framework of Articles IX and X. They may also emerge from *subsequent practice* of the membership, and as a response to the *evolution* of general international law.

A *Modification through Legislation*

In the WTO context, 'legislation' may be defined as the conscious production by the membership of a text intended to modify, interpret, or derogate from the regular application of WTO rules. The role played by legislation in WTO adjudication was highlighted by the Appellate Body in *EC – Hormones*. It noted that the precautionary principle, invoked by the EC as support for an interpretation of Article 5(1) and (2) of the SPS Agreement, could not modify 'the normal (i.e., customary international law)' reading of the provisions of the SPS Agreement, in the absence of 'a clear textual directive to that effect'.[18] Parties may of course legislate within the strict parameters defined in the WTO Agreements. But the range of 'clear textual directives' available to the membership has been substantially increased by the acceptance of the law-making potential of the instrument of 'subsequent agreements' under VCLT Article 31(3)(a).

1 Legislation within the WTO Agreements

The WTO Agreements include a series of provisions which allow members to alter or interpret WTO rules. Three general legislative instruments are explicitly provided for:

[14] Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 *ICLQ* (2004) 861; Ruiz Fabri, 'La juridictionnalisation du règlement des litiges économiques entre États', 3 *Revue de l'arbitrage* (2003) 881; Von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', 5 *Max Planck Yrbk UN L* (2001) 609.

[15] Feichtner, 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests', 20 *EJIL* (2009) 615.

[16] Decision of the General Council on the accession of Ecuador (adopted in spite of the opposition of Peru), WT/ACC/ECU/5 (22 Aug. 1995).

[17] Amendment to the TRIPS Agreement, 6 Dec. 2005, WT/L/641; Kennedy, 'When will the Protocol Amending the TRIPS Agreement Enter into Force?', 13 *JIEL* (2010) 459.

[18] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, at 124.

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amendments, waivers, and interpretations. Amendments, proposed by the Ministerial Conference, may 'alter the rights and obligations of the Members', but take effect only 'for the Members that have accepted them' and only 'upon acceptance by two thirds of the Members'.[19] At the other end of the spectrum, waivers provide relief to specific members under exceptional circumstances, but must be temporary and cannot influence the content of WTO law in general terms. As a rule, waivers are adopted by the Ministerial Conference by a majority of three-quarters of the members.[20] An intermediate solution lies in the adoption of interpretations under Article IX(2) of the WTO Agreement. These must be approved by a three-quarters majority of the membership in the Ministerial Conference of the General Council, on the basis of a recommendation by the Council overseeing the functioning of the specific agreement. Article IX(2) interpretations, which the Appellate Body has described as having 'broad legal effects',[21] are subject to the proviso that they may 'not be used in a manner that would undermine the amendment provision in Article X'.[22]

These three forms of legislation must follow strictly the procedures provided for in the WTO Agreement. Thus, 'waivers are subject to the strict disciplines set out in Article XI:3',[23] while the authority to adopt interpretations 'must be exercised within the defined parameters of Article IX:2'.[24] The Appellate Body has emphasized the hierarchy between these three forms of law-making, noting that 'multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content',[25] and that '[t]he purpose of waivers is not to modify the interpretation or application of existing provisions of the agreements, let alone to add to or amend the obligations under a covered agreement or Schedule'.[26]

Amendments, interpretations, and waivers do not exhaust the forms of legislation expressly provided for in the WTO Agreements. Some provisions in the covered agreements explicitly empower WTO bodies to take legislative action on specific issues.[27] Additionally, both the TBT and the SPS Agreements give significant weight to international standards, guidelines, and recommendations established within formally 'external' bodies. The SPS Agreement nominally refers members to the Codex Alimentarius Commission, the International Office for Epizootics (renamed World Organization for Animal Health in 2003), and organizations working within the

[19] WTO Agreement, Art. X(3). Other paras of Art. X provide stricter or looser rules for amending specific provisions.

[20] *Ibid.*, Art. IX(3)–(4).

[21] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Cloves)*, WT/DS406/AB/R, at 250.

[22] WTO Agreement, Art. IX(2); Gazzini, 'Can Authoritative Interpretation under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?', 57 *ICLQ* (2008) 57.

[23] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III) (21.5 – US, 21.5 II – Ecuador)*, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, at 398.

[24] *US – Cloves*, *supra* note 21, WT/DS406/AB/R, at 253.

[25] *EC – Bananas III, supra* note 23, at 383.

[26] *Ibid.*, at 389.

[27] Von Bogdandy, *supra* note 14, at 625–630.

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framework of the International Plant Protection Convention, as well as to other international organizations that the SPS Committee may identify.[28] The TBT Agreement is less specific, allowing for the formulation of international standards by international standardizing bodies or systems, characterized by being open to the membership of 'at least all Members'.[29] In both cases, the effects of the relevant standards are similar: (i) WTO members are required to base their own domestic measures on the relevant international standards, guidelines, and recommendations; and (ii) measures based on the relevant standard enjoy a presumption of consistency with WTO law, whereas departures from it require justification and are subject to challenge for inconsistency with the relevant agreement.[30]

Additionally, a peculiar form of legislation may be inferred from the provision, in Annex I to the SCM Agreement, whereby governmental export credits at below-market rates do not constitute prohibited subsidies if they comply with the OECD Arrangement on Guidelines for Officially Supported Export Credits.[31] This law-making provision is peculiar in that, although inserted in a multilateral WTO agreement, it allows legislation to be adopted by some WTO members (those that are also OECD members) only. Interestingly, the sole dispute in which the OECD Arrangement worked to the detriment of a non-OECD WTO member (*Brazil – Aircraft*) ended with the affected member being incorporated into the decision-making procedure of the OECD club.[32] This may indicate that the preference for multilateral law-making (see below) reflects the broader systemic need of adapting WTO rules to the multilateral character of the trading system.

2 *Legislation by Subsequent Agreement*

The basis for the incorporation of subsequent agreements into WTO rule interpretation is DSU Article 3(2), which ascribes to the dispute settlement system the function of clarifying the provisions of the WTO Agreements 'in accordance with customary rules of interpretation of public international law'.[33] Under the general rule of interpretation in VCLT Article 31(3)(a), a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' is an element that 'shall be taken into account' in the ordinary process of treaty interpretation. In *US – Cloves*, the Appellate Body held that that the term 'shall' indicates an obligation for adjudicators; in its view, Article IX(2) interpretations are 'most akin to, but *not exhaustive of*, subsequent agreements on interpretation'. As a consequence,

[28] SPS Agreement, Annex A, para. 3.

[29] TBT Agreement, Annex 1, para. 4.

[30] SPS, Art. 3(1), (3); TBT, Art. 2.4. Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, at 274; *EC – Hormones*, *supra* note 18, at 163 ff.

[31] SCM Agreement, Annex I, (k), second para. Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, at 180.

[32] Ratton Sanchez Badin, 'The WTO and the OECD Rules on Export Credits: A Virtuous Circle? The Example of the Embraer Case and the 2007 Civil Aircraft Understanding' (2008), available at: http://ssrn.com/abstract=1483364 (accessed 15 Oct. 2013).

[33] DSU, Art. 3(2).

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WTO adjudicators are 'required to apply' the general rule of interpretation taking into account subsequent agreements.[34]

The Vienna Convention is silent on the issue of what constitutes a subsequent agreement. The Appellate Body stated that the term 'agreement' in this provision 'refers, fundamentally, to substance rather than to form'.[35] The essential requirement of form is that the agreement be adopted subsequently to the relevant treaty. Substantively, two features are relevant. First, a subsequent agreement is one that 'bears specifically upon the interpretation'[36] of a treaty provision. This would seem to involve specific reference to provisions in the WTO Agreements, or at least the express intention of affecting WTO law – leaving outside the scheme, in principle, effects generated by external, ostensibly unrelated treaties (whether bilateral or multilateral). The second requirement is that the subsequent agreement must 'clearly express[. . .] a common understanding, and an acceptance of that understanding among Members' with regard to a specific provision of the WTO Agreements.[37]

The virtual absence of formal requirements, coupled with loose substantive ones, means that instruments to which members attach little importance may prove decisive in the interpretation of WTO rules. In *US – Cloves*, a Doha Ministerial Decision[38] was accepted as representing the 'common understanding' of the membership; in *US – Tuna II*, the Appellate Body accepted a TBT Committee Decision as reaching the same threshold.[39] This similarity in treatment conceals a major step in expanding the scope of multilateral legislation. The Ministerial Conference is the highest decision-making body in the WTO, with authority to make 'decisions on all matters under any of the Multilateral Trade Agreements'.[40] By contrast, the TBT Committee, placed hierarchically under the Goods Council, is one of 20 of its kind,[41] meets monthly, and is attended by government representatives with no formal decision-making powers. If a TBT Committee decision qualifies as a subsequent agreement, so do all decisions made by consensus by organs and bodies whose membership 'comprises all WTO Members',[42] regardless of hierarchical level. The sole applicable limitation (by analogy with the finding on subsequent practice in *US – Gambling*,[43] on which see below) would be that a decision specifically flagged as non-binding would not fulfil the requirement of 'bearing specifically upon the interpretation' of a WTO rule.

34 *US – Cloves*, *supra* note 21, at 258–259.
35 *Ibid.*, at 267.
36 *Ibid.*, at 265.
37 *Ibid.*, at 267.
38 'Doha Ministerial Decision on Implementation-Related Issues and Concerns', Decision of 14 Nov. 2001, WT/MIN(01)/17.
39 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381/AB/R, at 371.
40 WTO Agreement, Art. IV(1).
41 See www.wto.org/english/tratop_e/monitor_e/monitor_e.htm#councils_committees (accessed 15 Oct. 2013).
42 *Ibid.*
43 Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, at 193.

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Substantively, subsequent agreements may have the same broad effects upon WTO law as Article IX(2) interpretations. Quoting the International Law Commission, the Appellate Body defined subsequent agreements as 'a further *authentic element of interpretation* to be taken into account together with the context'.[44] They may be used by members to specify precise obligations where the WTO Agreements provide only general guidance, and to determine authoritatively the meaning of ambiguous provisions. More than being mere auxiliary elements, subsequent agreements 'must be read into the treaty for purposes of its interpretation'.[45] Consequently, a subsequent agreement may effectively add to the elements already contained in the text of the WTO Agreements, modifying in decisive ways the interpretation that would otherwise be given to a treaty provision.

The fundamental limitation on the scope of subsequent agreements is presumably the same one that applies to Article IX(2) interpretations: they may not be used to circumvent the amendment provisions in Article X.[46] As long as its scope of application is respected, however, it would seem that a subsequent agreement, adopted by consensus within a WTO organ, may produce the same 'broad effects' as an Article IX(2) interpretation, guided essentially by 'the degree to which it "bears specifically" on the interpretation and application of the respective term or provision'.[47] Authoritative interpretation by courts and other 'final' bodies is difficult to distinguish from rule modification; the Appellate Body itself has adopted interpretations which some have considered in fact modify the rights and obligations of WTO members.[48] If WTO members are to accept 'unconditionally' adopted Appellate Body reports, interpretations made therein become final – including in their characterization as interpretations of, and not as modifications to, WTO law. On the other hand, the distinction between modifications of WTO law and interpretations of its provisions becomes crucial when the *de facto* final decision-maker (panels and the Appellate Body) is not the same as the organ adopting the interpretations. In the latter case, adjudicators may control whether a purported interpretation in fact constitutes an attempt to circumvent the amendment provisions in the WTO Agreement. WTO adjudicators may thus consider a particularly far-reaching subsequent agreement as going beyond the scope of an interpretation, either invalidating it or preventing it from producing overly broad effects.

B *Non-legislative Law-making: Subsequent Practice and Evolution*

Side by side with 'clear textual directives', the Appellate Body has recognized two non-textual forms of law-making which may substantially alter the content of WTO law, with effects for the whole membership: subsequent practice and evolution.

44 *US – Cloves*, *supra* note 21, at 265.

45 *Ibid*., at 269.

46 On this issue see Gazzini, supra note 22.

47 *US – Tuna II*, supra note 39, at 372 (footnote omitted).

48 See Ragosta, 'Can the WTO DSB Live Up to the Moniker "World Trade Court"?', 31 *L & Policy Int'l Bus* (2000) 739.

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1 Law-making by Subsequent Practice

Compared with legislation, subsequent practice consists of a less formal means of adopting legal interpretations, whereby common agreement on the interpretation of a provision is inferred from the practice of the members. Just as for subsequent agreements, VCLT Article 31(3)(b) provides that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is an element to be taken into account under the general rule of interpretation. As a consequence, the proto-legislative provisions in the WTO Agreements do not preclude WTO adjudicators from interpreting WTO rules based on subsequent practice,[49] even if this practice has not been referred to by the parties to a dispute.[50]

In *US – Gambling*, subsequent practice was described as having two elements: '(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision'.[51] These two elements present a striking similarity to the elements of international custom: concordant state practice and the belief that such practice is a legal obligation (*opinio juris*). It is beyond the scope of this article to discuss these two elements at length;[52] for present purposes, the relevant aspect is the requirement that practice be established multilaterally, involving a large portion of the membership, and not simply the parties to the dispute.

The Appellate Body has been consistently vague about what proportion of members is required to establish common practice. Conduct by a single member is clearly not sufficient,[53] but not all members need to have engaged in the relevant practice for it to qualify as common or concordant.[54] From this one may infer that, within the WTO, establishing subsequent practice requires the same multilateral approach as coming to subsequent agreements (on the exact meaning of this, see below). Additionally, evidencing consistent practice between the mere parties to a certain dispute is insufficient; concordant practice, or at least acceptance, by other members with 'actual or potential trade interests', is equally relevant.[55] Acceptance may be explicit or tacit, inferred from affirmative reaction to a practice by another member as well as from silence;[56] however, once a common understanding is established, 'the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the

49 Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)*, WT/DS269/AB/R, WT/DS286/AB/R, at 273.

50 Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (EC – Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, at 89–90.

51 *US – Gambling*, *supra* note 43, at 192. See also Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WR/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 13; Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, at 214.

52 See *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)* [1969] ICJ Rep 3, at 44.

53 *EC – Computer Equipment*, *supra* note 52, at 93; *US – Gambling*, *supra* note 43, at 194.

54 *EC – Chicken Cuts*, *supra* note 49, at 259.

55 *Ibid.*, at 272.

56 *Ibid.*; Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (EC – Aircraft)*, WT/DS316/AB/R, at 845, n. 1916.

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treaty, including those that have not actually engaged in such practice'.[57] Subsequent practice therefore does not entail a mere *inter se* modification of WTO rights and obligations, but determines an interpretation valid for the whole of the membership.

2 *Evolution*

Both subsequent agreements and subsequent practice involve a common agreement between WTO members – expressed more or less formally – to conduct their trade relations in a certain way. By contrast, evolution is a much subtler (and much less determinate) mechanism by which the conduct of members may impinge on the interpretation and application of WTO rules. It may be described as the adaptation of WTO rules to changes in the international legal system, redefining the rights and obligations of members without their formal consent.

The Appellate Body openly had recourse to evolutionary interpretation in *US – Shrimp*. Examining the negotiating history of the GATT, the panel had concluded that measures for environmental conservation adopted by the US were not, under 'the current status of WTO rules and of international law',[58] within the scope of measures permitted under GATT Article XX(g). The Appellate Body reversed this finding, noting that the interpretation of WTO rules is 'by definition, evolutionary'.[59] From international conventions and declarations (including both binding and non-binding documents) it inferred 'the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources'.[60]

Significantly, the respondent in the dispute was not a full party to either of the key binding instruments invoked by the Appellate Body in support of its evolutionary interpretation. The US had not signed UNCLOS and had not ratified the UN Convention on Biological Diversity. It was not the agreement of the parties – explicitly stated or derived from practice – that induced the change in interpretation, but the perception that 'it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources'.[61]

Evolutionary interpretation provides WTO adjudicators with an important tool for the development of WTO law. Its use in practice will most likely be restricted to those cases in which, simultaneously, new general norms emerge and other multilateral law-making instruments – subsequent agreement and subsequent practice – have not been adopted to accommodate the new rules. Norms must be largely consensual, applying generally as international law and not solely between certain members or within a specific regime. In *EC – Hormones*, the Appellate Body refused to interpret

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[57] *EC – Aircraft*, *supra* note 56, at 273.

[58] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/R, at 7.61.

[59] Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at 130.

[60] *Ibid.*, at 131.

[61] *Ibid. Contra*, Panel Report, *EC – Chicken Cuts*, *supra* note 49, at 7.99.

the WTO Agreements in a way that would accommodate the precautionary principle, drawing a distinction between a 'general principle of customary international *environmental* law' and '*general* or *customary international law*'.[62] In this regard, the standard for assessing evolution – a common understanding that the rule or interpretation in question is generally applicable – is similar to that applicable to subsequent agreements and subsequent practice. The essential difference is that evolution does not follow either from the adoption of texts or from conduct bearing specifically upon WTO law. Rather, this interpretative tool allows ostensibly unrelated texts and conduct to constitute evidence of the evolution of international law, producing effects upon the multilateral trade system.

C *Multilateral Law-making: How Many Members Are Needed?*

The analysis above leaves open the issue of precisely what proportion of members is required to establish a common understanding among the membership. Interpretations decided by consensus within WTO organs clearly express a strong degree of common agreement.[63] Short of unanimous or consensual decisions, however, the question becomes more complex. The formulation provided by the Appellate Body in *EC – Aircraft*, when considering whether agreement between the parties in dispute suffices to establish a rule 'applicable in the relations between the parties' for the purposes of VCLT Article 31(3)(c), provides the beginning of an answer:[64]

> In 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 WTO law among all WTO Members.[65]

This sets out the fundamental parameters that have guided the Appellate Body in its approach, regardless of the specific law-making method it evaluates. Of paramount concern are consistency and harmony in the interpretation of WTO rules *among all WTO members*. Consequently, the proposed interpretation will be judged by the Appellate Body based on its potential applicability to the whole membership. The result will be not an *inter se* modification or individual exception, but an interpretation valid for all WTO members.

Three disputes may be used to exemplify the accent put on multilateral law-making. The first concerns the establishment of international standards under the TBT Agreement. In *US – Tuna II*, the Appellate Body found that a requirement for the constitution of an international standard 'is the approval of the standard by an "international standardizing body", that is, a body that has recognized activities in

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62 *EC – Hormones*, *supra* note 18, at 123.

63 This is also true for agreements used as context, of which the most obvious example is the Harmonized System Convention. *EC – Chicken Cuts*, *supra* note 49, at 199.

64 The question of the use of VCLT Art. 31(3)(c) to make use of bilateral agreements in interpreting WTO law will be examined in sect. 3(B)(2) below.

65 *EC – Aircraft*, *supra* note 56, at 845.

standardization and whose membership is open to the relevant bodies of at least all Members'.[66] The formal requirements for characterizing a decision-making forum as a 'standardizing body' are loose. A standardizing body does not need to be a permanent organization and is not required to have standardization as its main, or one of its main, functions;[67] it may set a single standard, and there is no requirement that this standard be widely used.[68] The fundamental requisites appear to be (i) that of being open to at least all WTO members and (ii) that of having 'recognized' activities.

The Appellate Body specified that the relevant body should be open to WTO members on a non-discriminatory basis and at every stage of the development of standards.[69] Even a body with limited membership may qualify as an international standardizing body, as long as membership is in practice open to all WTO members.[70] The threshold for having 'recognized activities' is not unlike that for establishing a 'common understanding': 'the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective bodies' activities in standardization are "recognized"'.[71] Crucially, a member's individual recognition of either the standard or the standardizing body is not a determining criterion for its applicability. Moreover, while within the WTO law-making is guided by the practice of consensus, no similar restriction applies to standardizing bodies. Once a recognized standardizing body exists, the non-participation or contrary vote of a WTO member does not preclude the relevant standard from applying to it. In *EC – Hormones*, the EC ban on hormone-treated beef was considered to be WTO-inconsistent in light of a standard approved in an external body by a slim majority.[72] Rather than counting on non-participation in order to avoid following a standard, WTO members thus have a powerful incentive to participate actively in standard-setting activities.

The second case concerns the interpretation of WTO exceptions, and evidences the same preference for multilateral norms, even when these are not agreed upon within the WTO. A system established under the GATT, by the so-called 'Enabling Clause', and incorporated into the WTO Agreements, allows members to offer tariff preferences to developing countries by instituting Generalized Systems of Preferences ('GSPs'), which must be 'generalized, non-reciprocal and non-discriminatory'.[73] Subsequent norms allow additional derogations from the general Most-Favoured-Nation obligation, and differentiation between developing countries, based on specific development needs. In *EC – Tariff Preferences*, India challenged the granting by the EC of additional preferences based on a criterion not provided for in the WTO norms: the existence in a number of developing countries of problems relating to illicit drug production and

[66] *US – Tuna II*, *supra* note 39, at 359.
[67] *Ibid.*, at 356, 362.
[68] *Ibid.*, at 392.
[69] *Ibid.*, at 374–375.
[70] *Ibid.*, at 398.
[71] *Ibid.*, at 390.
[72] Von Bodgandy, *supra* note 14, at 635–641.
[73] Waiver Decision on the Generalized System of Preferences, GATT Doc. L/3545, 25 June 1971, BISD 18S/24.

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trafficking.[74] The panel reasoned that, if distinguishing between developing countries were permitted based on a member's unilaterally determined criteria, the 'end result would be the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries'.[75] Only 'express authorization' from a WTO body would allow a member to create a distinction between members, and no WTO norm considered problems relating to illicit drug production and trafficking as a valid reason for discrimination.[76]

The Appellate Body disagreed. It interpreted the objective of schemes permitted by the Enabling Clause ('responding positively to the development, financial and trade needs of developing countries') broadly. In addition to their different levels of development, the 'particular circumstances' of developing countries could provide a rationale for distinguishing between those countries in GSP schemes.[77] The EC measure was condemned not because it distinguished between developing countries, but because it failed to provide transparent criteria or standards for the distinction. Importantly, not just any criteria would have been permitted: the absence of criteria was WTO-inconsistent precisely because it meant that there was 'no basis to determine whether those criteria or standards are discriminatory or not'.[78] In determining which criteria would have been legitimate, the Appellate Body once more eschewed the dilemma between relying on a member's unilateral determinations and requiring a formal WTO norm for the exception to be permitted. In its view, 'the existence of a "development, financial [or] trade need" [that justifies the distinction] must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard'.[79] Depending on their form, these multilateral instruments would produce effects on WTO law as a subsequent agreement or as instruments evidencing normative evolution. In either case, the ruling effectively allowed external, non-binding normative instruments – as long as they are multilateral in character – to inform the interpretation of the preamble to a WTO norm, providing the basis for a previously unwarranted distinction between WTO members.[80]

The third case involves the general exceptions provided for in WTO law, and concerns not the formation of a rule, but its application. In *US – Shrimp*, the Appellate Body considered that, due to the evolution of Article XX exceptions, the US turtle conservation measures were *prima facie* legitimate.[81] It nonetheless condemned the

74 Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)*, WT/DS246/R, at 2.1.

75 *Ibid.*, at 7.102.

76 *Ibid.*, at 7.151, 7.169.

77 Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, at 161–162.

78 *Ibid.*, at 188.

79 *Ibid.*, at 163 (italic emphasis in original, underlined emphasis added).

80 For the argument that the reformed EU scheme does not comply with the findings of the Appellate Body see Bartels, 'The WTO Legality of the EU's GSP+ Arrangement', 10 *JIEL* (2007) 869.

81 See sect. 2(B)(2) above.

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American measures for being applied in a 'unilateral and non-consensual'[82] manner. Following the adoption of the DSB report, the US reached agreements on procedures for the conservation of sea turtles with a series of countries around the Indian Ocean, including three out of four of the original complainants. Only Malaysia requested the establishment of a compliance panel. At the compliance stage, Malaysia advanced a consent-based argument. Not having agreed to a modification of its WTO rights, Malaysia requested confirmation from the WTO adjudicating bodies that it retained the 'sovereign right to determine its environmental policy'.[83]

The Appellate Body, however, had not based its findings on the principle of consent, but framed them in terms of the legitimate use by a Member of its right to apply an Article XX exception. The US measures were in principle legitimate, following a finding that living beings qualified as 'exhaustible natural resources'. The measure was regarded as discriminatory because a multilateral approach was not pursued in the implementation of the measures. The WTO-inconsistency was in the failure by the US 'to pursue negotiations for establishing consensual means' of conserving and protecting marine species.[84] When examining compliance, the Appellate Body pointed to the agreements reached between the US and other countries in the Indian Ocean.[85] It concluded that this time the US had provided shrimp-exporting countries with 'similar opportunities to negotiate' an international agreement. This cannot of course be known with certainty, but an American proposal which had not obtained the agreement of *any* countries in the region, or to which only one or two had consented, would probably have been insufficient to establish 'serious negotiation efforts'.

Seen this way, the standard for a 'multilateral approach' when applying rules resembles that used for establishing a 'common understanding' regarding their interpretation. For both standards, the exact proportion of members required is difficult to quantify precisely, but the ensuing system does not necessarily imply 'green unilateralism'.[86] It reminds one of the 'fall back' majority voting available for WTO decision-making, or the 'consensus minus one' approach adopted by other multilateral bodies in contentious cases.[87]

This approach is nonetheless very different from what would be a traditional international law, consent-based approach. In the latter, consent is essential. An unwilling state may remain a persistent objector essentially indefinitely.[88] In the WTO, once the agreement of a vast majority of members is evidenced, and as long as measures are applied in a non-discriminatory manner, the remaining opponent of the new rule is

82 *US – Shrimp*, *supra* note 59, at 180.

83 Panel Report, *US – Shrimp (21.5)*, WT/DS58/RW, at 5.123.

84 *US – Shrimp*, *supra* note 59, at 172.

85 Appellate Body Report, *US – Shrimp (21.5)*, WT/DS58/AB/RW, at 131–132.

86 Bierman, 'The Rising Tide of Green Unilateralism in World Trade Law', 35 *J World Trade* (2001) 421.

87 See the *Report of the Seventh Meeting of the Parties to the Montreal Protocol, Section B*, UNEP/OzL.Pro.7/12 (27 Dec. 1995), at para. 130.

88 Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard Int'l LJ* (1985) 457; Dumberry, 'Incoherent and Ineffective: the Concept of the Persistent Objector Revisited', 59 *ICLQ* (2010) 779.

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prevented from blocking its emergence or application by insisting on the argument of consent.

3 WTO Adjudicators and *Inter Se* Agreements

The focus on multilateral law-making begs the question of the role played by *inter se* agreements and other means of adapting WTO law to bilateral relations between members. In international law, articulation between norms is governed by the meta-norms *lex posterior*, *lex specialis,* and (for *jus cogens*, and perhaps the UN Charter) *lex superior*.[89] These meta-norms are generally reflected in VCLT Articles 30 and 41, which govern the making and operation of successive treaties between different parties. Pursuant to Article 30, a later treaty signed between two states prevails, between these states, over earlier conflicting treaties. Article 41 generally permits two or more parties to a multilateral treaty to modify their mutual rights and obligations through subsequent treaties. This is permitted as long as the modifications are not prohibited by the prior treaty, do not affect the enjoyment of their rights by other parties to the multilateral treaty, and do not defeat the object and purpose of the multilateral treaty. Despite not providing automatic answers to all questions, VCLT Articles 30 and 41 generally reflect the tenets of *lex superior*, *lex posterior,* and *lex specialis*, offering interpreters a 'basic professional tool-box'[90] to determine articulation between norms. The rationale for these rules is that sovereign states may always agree to *inter se* modifications of their mutual relations as long as the new arrangement does not affect the rights of third parties.[91]

WTO law does not provide any explicit changes to the general international rules on law-making. A specific limitation applies to voluntary export restraints, whether adopted unilaterally or 'under agreements, arrangements and understandings entered into by two or more Members'.[92] Save for this particular case, however, the question does not concern the legality of the *inter se* modifications, but whether and to what extent these modifications may (or must) be taken into account by panels and the Appellate Body. The DSU describes the WTO dispute settlement system as serving 'to preserve the rights and obligations of Members under the covered agreements'.[93] It also states that the DSB, panels and the Appellate Body 'cannot add to or diminish the rights and obligations provided in the covered agreements'.[94] Whether this amounts to an 'indirect' conflict rule, guaranteeing the applicability of WTO rules by WTO

89 See ILC, *supra* note 1; Borgen, 'Resolving Treaty Conflicts', 37 *George Washington Int'l L Rev* (2005) 573; Binder, 'The Dialectic of Duplicity: Treaty Conflict and Political Contradiction', 34 *Buffalo L Rev* (1985) 329; Jenks, 'The Conflict of Law-Making Treaties' 30 *British Yrbk Int'l L* (1953) 401, at 426; Aufricht, 'Supersession of Treaties in International Law', 37 *Cornell L Q* (1952) 655.

90 See ILC, *supra* note 1, 249.

91 J. Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 436.

92 Agreement on Safeguards, Art. 11(1)(b).

93 DSU, Art. 3(2).

94 DSU, Arts 3(2), 19(2).

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adjudicators in the face of conflicting external norms,[95] is debatable, but this provision has been taken by panels and the Appellate Body severely to limit their ability to derive any exceptions to WTO law from *inter se* agreements, or from any international obligations not having a multilateral character.

A *Jurisdictional Norms*

Only rarely have parties argued that WTO adjudicating bodies lack jurisdiction to examine a dispute because it is under the exclusive jurisdiction of another adjudicator, has already been decided, or would be more appropriately decided in another forum. Solutions inspired by private international law, such as *res judicata*, *lis pendens*, *forum non conveniens,* and comity, have sometimes been proposed by scholars as useful tools for managing the interaction of regimes.[96] To the extent that it exists, however, the case law does not leave much room for optimism in this regard.

1 The (Limited) Case Law

Given that WTO dispute settlement is widely accepted as being compulsory, challenges of jurisdiction are mostly based on the text of the WTO Agreements, often combined with requests for exercise of 'restraint' or 'deference' by adjudicators. The Appellate Body has consistently rejected these requests, arguing that the task of WTO adjudicators remains to make an 'objective assessment' of the dispute – finding or not, as the case may be, inconsistencies between members' measures and WTO rules.[97]

In *Mexico – Soft Drinks*, the panel rejected Mexico's request that it refrain from exercising jurisdiction in view of the existence of a 'broader dispute' involving NAFTA obligations. On appeal, the Appellate Body confirmed that panels may not decline jurisdiction, even when faced with claims that a dispute could find a more appropriate forum elsewhere. Although it ostensibly restricted its finding to the specific facts of the case,[98] the Appellate Body stated both that a WTO member 'is *entitled* to a ruling by a WTO panel'[99] and that the 'decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member'[100] – thus violating the obligation of WTO adjudicators under DSU Articles 3(2) and 19(2).

It has been suggested that, if WTO members could be shown to have agreed to abstain from bringing a dispute to the WTO, WTO adjudicators should apply the

[95] Bartels, *supra* note 9, at 115, 139.

[96] Henckels, 'Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO', 19 *EJIL* (2008) 571, at 578; Gattini, 'Un regard procédural sur la fragmentation du droit international', 110 *RGDIP* (2006) 303; Michaels and Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law', in Broude and Shany (eds), *supra* note 9.

[97] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, at 59–62; Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, at 87–98.

[98] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, WT/DS308/AB/R, at 54.

[99] *Ibid.*, at 52.

[100] *Ibid.*, at 53.

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principle of estoppel (the prohibition of going against one's own acts or deeds) and reject their complaints.[101] When it had the opportunity to examine the issue, however, the Appellate Body reasoned in terms of the limitations contained in the multilateral WTO norms, as opposed to those arising from the bilateral relations between complainant and defendant. In *EC – Sugar*, the EC argued that the complainants were prevented by estoppel from bringing their claim. The Appellate Body answered that there is 'little in the DSU that explicitly limits the rights of WTO Members to bring an action'.[102] It reduced the applicability of estoppel to the 'narrow parameters set out in the DSU', namely to the obligation, provided in Article 3(10), to 'engage in dispute settlement procedures in good faith'.[103] Any application of the concept would thus occur in light of WTO rules, not of the reciprocal relations between the parties to the dispute.

Estoppel deriving from an *inter se* agreement was argued before the panel in *Argentina – Poultry*. Argentina claimed that estoppel prevented Brazil from requesting before the WTO adjudicating organs the condemnation of a measure it had unsuccessfully challenged before a Mercosur arbitral tribunal. The panel noted, first, that Mercosur rules in force at the time 'imposed no restriction on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure'.[104] But it also found that a Mercosur ruling would in any case not be binding on WTO adjudicating bodies. The panel drew a distinction between its duty to interpret WTO law in accordance with customary rules of interpretation and Argentina's argument that panel rulings would be conditioned by the decision of another adjudicator. The panel saw 'no basis in Article 3.2 of the DSU, or any other provision, to suggest that we are bound to rule in a particular way'.[105] This is less sophisticated than the reasoning of the Appellate Body in *EC – Sugar*, but both reports seem to point in the same direction: restrictions on the jurisdiction (or on the legal findings) of WTO panels may not derive from *inter se* modifications, but require a basis in multilateral norms.

2 Inter se *Arrangements and Jurisdictional Restraint*

If anything, the panel in *Argentina – Poultry* was more cognizant than the Appellate Body of the possibility of estoppel applying outside the strict limits of DSU obligations. It noted that the applicable Mercosur dispute settlement protocol did not limit Mercosur members' ability to make multiple claims under multiple regimes.[106] A protocol subsequently entered into force which contains a fork-in-the-road clause, precluding Mercosur members from initiating parallel disputes 'regarding the same issue'.[107] If future attempts at

[101] Mitchell and Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function', 31 *Michigan J Int'l L* (2010) 559, at 614.

[102] Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, at 312.

[103] *Ibid*.

[104] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil (Argentina – Poultry)*, WT/DS241/R, at 7.38.

[105] *Ibid*., at 7.41.

[106] *Ibid*., at 7.38.

[107] Olivos Protocol for the Solution of Controversies in the Mercosur, 18 Feb. 2002, 2251 UNTS 244, Art. I(1).

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parallel disputes take place, one question is whether a specific WTO claim will be interpreted as 'regarding the same issue' as a Mercosur-based analogous claim. Investment tribunals confronted with clauses requiring a choice between domestic and international claims have determined that this may not be the case. They reasoned that '[c]ontractual claims arising out of the Contract do not have the same cause of action as treaty claims',[108] and that 'the similarity of prayers for relief does not necessarily bespeak an identity of causes of action' – the key issue being 'whether claimed entitlements have the same normative source'.[109] To the extent that two claims based on WTO law and on Mercosur law (or any other non-WTO law) never have the 'same normative source', it is likely that the two procedures will never concern 'the same issue'.

This assumes, of course, that WTO adjudicators should take into account the content of Mercosur law. But it may well be that obligations in fork-in-the-road clauses are binding on WTO members while simultaneously not constituting applicable law for WTO adjudicators. Debating on the *US – Tuna II* dispute in DSB meetings, the US repeatedly referred to NAFTA Article 2005(4) as precluding Mexico from proceeding with its WTO claim.[110] This Article provides that, whenever a WTO dispute involves sanitary and phytosanitary measures or standard-related measures and concerns 'the environment, health, safety or conservation', a request in writing by the respondent obliges the complainant to shift its claim to NAFTA dispute settlement. In spite of the US having made such a request, Mexico proceeded with its WTO claim. Upon adoption of the panel and Appellate Body reports, the US argued that Mexico was acting 'in disregard of its obligations',[111] but it never invoked Article 2005(4), or any other NAFTA provision, before WTO adjudicators. Although the US may have been influenced by external factors (in particular the potentially thorny issues relating to the non-automaticity of NAFTA dispute settlement), the clarity of the NAFTA obligation is such that the American decision not to invoke it may have derived precisely from the knowledge that WTO adjudicators would base their verdict not upon the NAFTA rule but rather upon the good faith of the Mexican WTO complaint, examined in light of DSU Article 3(10).

The situation may seem different if an agreement precluding recourse to WTO dispute settlement is reached pursuant to a provision of WTO law. In *US – Continued Suspension*, the Appellate Body stated that 'alternatives to compulsory adjudication' under the DSU (consultations, mediation, good offices, and arbitration) may, with the consent of the parties, 'lead to a binding decision'.[112] These consensual means of dispute resolution, however, were distinguished from 'panel proceedings, which are

[108] ICSID Tribunal, *Toto Construzioni Generali spa v. Lebanon* (ARB/07/12), Decision on Jurisdiction (2009), at 211.

[109] ICSID Tribunal, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ARB/07/21), Decision on Jurisdiction (2009), at 62.

[110] Minutes of DSB Meeting, 20 Apr. 2009 (WT/DSB/M/267), at 77; Minutes of DSB Meeting, 31 July 2012 (WT/DSB/M/317), at 18.

[111] Minutes of DSB Meeting, 13 June 2012 (WT/DSB/M/317), at 18.

[112] Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS322/AB/R, at 340.

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compulsory'.[113] If compulsory panel proceedings are an integral part of WTO law, an agreement to relinquish the right to have recourse to them amounts to a diminution of a member's rights and obligations under the covered agreements – to which WTO adjudicators are prevented from giving effect.

Even a binding decision, reached through one of the alternatives to compulsory adjudication available in the DSU, may be challenged for being WTO-inconsistent. DSU Article 3(5) explicitly provides that '[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions' of the WTO, 'including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits' of members or 'impede the attainment of any objective' of WTO law. This suggests the possibility of multilateral control over the consistency with WTO law of any results reached by alternative means. Unless it can be shown that the complainant is acting in bad faith, a new panel may in all cases be requested – including by a member that participated in the mutually agreed solution or alternative procedure.

In *EC – Bananas III (21.5 II)*, the Appellate Body stated that as part of a mutually agreed solution WTO members may 'forego the right to initiate compliance proceedings', as long as the relevant agreement contains 'a clear indication ... of a relinquishment of [this] right'.[114] However, this is not the same as saying that a party may forego its right to initiate *original* panel proceedings. A binding decision, or a mutually agreed solution, may bring an end to a particular dispute and preclude the initiation of compliance proceedings. But it does not prevent members from exercising their right to request new panel proceedings in case of a perceived violation of WTO law. As before, it would seem that the sole limitation to this is the good faith obligation in DSU Article 3(10). No purely bilateral arrangement or engagement would prevent the exercise of jurisdiction by WTO adjudicators.

B *Substantive Norms*

Besides providing a basis for challenges of jurisdiction, *inter se* arrangements may be used to argue for particular interpretations of WTO law. An 'external' agreement may provide an exception allowing a member to adopt measures contrary to its ordinary WTO obligations. Parties may also argue for the use of these agreements as interpretative tools, especially under VCLT Article 31(3)(c).

1 WTO Law and External Agreements

Due to the jurisdictional limitations imposed on WTO adjudicators, members have refrained from arguing that their WTO obligations are *modified* by a non-WTO agreement. Instead, arguments for the use of external rules usually involve a request for a particular *interpretation* of WTO law in light of the *inter se* agreement. In *EC – Poultry*, Brazil invoked its bilateral agreement with the EC, signed within the context

[113] *Ibid.*
[114] *Ibid.*

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of GATT-authorized negotiations ('Oilseeds Agreement'), arguing that this agreement should be used to interpret the EC's tariff schedule. The panel considered that the Oilseeds Agreement had been negotiated 'within the framework of Article XVIII of the GATT',[115] and that notwithstanding a 'procedural anomaly', its results had been 'multilateralized' following a communication to the Chairman of the Trade Negotiations Committee to which 'no GATT contracting party or other participant of the Uruguay Round raised an objection'.[116] The panel concluded that it could not 'summarily dismiss the significance of the Oilseeds Agreement in the interpretation of Schedule LXXX'.[117] On appeal, Brazil and the EC argued for different articulations between the Oilseeds Agreement and the WTO Agreements, referring to VCLT Articles 59(1) and 30(3). The Appellate Body, however, found that it was

> not necessary to have recourse to either Article 59.1 or Article 30.3 of the Vienna Convention, because the text of the WTO Agreement and the legal arrangements governing the transition from the GATT 1947 to the WTO *resolve the issue* of the relationship between Schedule LXXX and the Oilseeds Agreement in this case.[118]

Observing that 'the Oilseeds Agreement is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of GATT 1947',[119] the Appellate Body concluded:

> It is Schedule LXXX, rather than the Oilseeds Agreement, which contains the relevant obligations of the European Communities under the WTO Agreement. Therefore, it is Schedule LXXX, rather than the Oilseeds Agreement, which forms the legal basis for this dispute and which must be interpreted in accordance with 'customary rules of interpretation of public international law' under Article 3.2 of the DSU.[120]

The Oilseeds Agreement was examined by the Appellate Body as 'part of the historical background' of WTO concessions, a 'supplementary means of interpretation' of WTO rules pursuant to VCLT Article 32.[121] No consideration was devoted to the issue of whether the Oilseeds Agreement was *lex prior*, *lex specialis*, or the product of an *inter se* agreement. It is perhaps unsurprising, then, that in subsequent disputes members' arguments based on external agreements have been limited to claims that these may serve as supplementary means to interpret the meaning of the WTO Agreements.[122]

Even in these cases, however, claims may still be rejected based on the impossibility for WTO adjudicators of interpreting the external agreement. In *Mexico – Soft Drinks*, the Appellate Body failed to acknowledge the possibility of NAFTA countermeasures

[115] Panel Report, *European Communities – Measures Affecting Importation of Certain Poultry Products (EC – Poultry)*, WT/DS69/R, at 201.

[116] *Ibid*., at 204.

[117] *Ibid*., at 207 (Sched. LXXX is the EC's (now EU's) tariff schedule).

[118] Appellate Body Report, *EC – Poultry*, WT/DS69/AB/R, at 79 (emphasis added).

[119] *Ibid*.

[120] *Ibid*., at 81.

[121] *Ibid*., at 83.

[122] *EC – Aircraft*, *supra* note 56, at 850; Panel Report, *Korea, Republic of – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, at 538–539.

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affecting WTO rights, noting that, for WTO purposes, 'the central issue' was whether the measures in question were permitted by WTO law.[123] Mexico weakened its own case by referring to Article XX(d) instead of to its sovereign right to take countermeasures,[124] but the Appellate Body itself grounded the interpretation of Article XX(d) on its inability to make any determination regarding NAFTA law. If the exception of Article XX(d) were to include countermeasures, it reasoned, panels and the Appellate Body would be required to either 'assume there is a violation of the relevant international agreement' or 'become adjudicators of non-WTO disputes' – which is not permitted under the DSU.[125] If WTO adjudicators can neither defer to members' assessment of their own legal situation nor adjudicate on the external treaty, the sole possibility left for them is to disregard the external rule entirely.

The *EC – Bananas III* dispute is sometimes cited as a contrasting example of an *inter se* agreement being interpreted by WTO adjudicators.[126] The panel and the Appellate Body did examine the text of the Lomé Convention, presented as a defence by the EC. However, the Convention was not assessed as an *inter se* agreement. Its text had been incorporated into WTO law by a specific reference in the multilaterally approved Lomé waiver, so that 'the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent'.[127] This, like the incorporation of intellectual property rights provisions through references in TRIPS,[128] merely creates a WTO norm mirroring the content of the relevant international treaty. WTO adjudicators examined not the Lomé Convention itself, but its text, as incorporated by reference by the multilateral decision. A later amendment to the Lomé Convention, for example, would not (without multilateral approval) have implied an amendment of the waiver. The relevance of such an amendment to WTO adjudicating bodies would be conditioned to the adoption of a new multilateral norm incorporating it.

2 *Article 31.3(c) of the Vienna Convention: Systemic Integration?*

Considering the jurisdictional limitations imposed by the DSU, the most persuasive argument for the examination of externally formed rules by WTO adjudicators lies perhaps in VCLT Article 31(3)(c), known as the 'principle of systemic integration'.[129] Article 31(3)(c) requires that treaty interpreters take into account 'any relevant rules

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[123] Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 98, at 68.

[124] See Kuijper, 'Does the World Trade Organization Prohibit Retorsions and Reprisals?: Legitimate "Contracting Out" or "Clinical Isolation" Again?', in M.E. Janow, V. Donaldson, and A. Yanovich (eds), *supra* note 9, at 695; Davey and Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements', 8 *World Trade Rev* (2009) 5.

[125] *Mexico – Soft Drinks*, *supra* note 98, at 78 and n. 174.

[126] Davey and Sapir, *supra* note 124, at 18.

[127] Panel Report, *EC – Bananas III*, WT/DS27/R, at 7.98; *EC – Bananas III*, *supra* note 23, at 167. The incorporated norms may, of course, have the same content as the rules in the Convention. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits)* [1986] ICJ Rep 14, at 93–94.

[128] TRIPS, Arts 1(3), 2(1), and 3(1).

[129] ILC, *supra* note 1, at 410–480; McLachlan, 'The Principle of Systemic Integration and Article 31.3(c) of the Vienna Convention', 54 *ICLQ* (2005) 279; Pauwelyn, *supra* note 91, at 257–264.

of international law applicable to the relations between the parties'. Considering the importance accorded by the Appellate Body to Article 31(3)(a) (subsequent agreements) and 31(3)(b) (subsequent practice) in the interpretation of WTO law, one would expect Article 31(3)(c) to be accorded a similarly high consideration. Unlike Article 31(3)(a) and (b), Article 31(3)(c) does not require the 'relevant rules' to be specifically associated with the treaty being interpreted. In other words, any rules of international law that are 'applicable to the relations between the parties' must be taken into consideration, even if the parties may not have foreseen the influence of the external norm upon the interpretation of a WTO rule.

Panels have disagreed on whether the reference to 'the parties' must be interpreted as referring to the parties *to the dispute* or to the parties *to the treaty being interpreted*. In the former case, Article 31(3)(c) would *de facto* allow WTO members to deviate bilaterally from WTO disciplines through *inter se* agreements. In the latter case, only rules applicable to the whole of the WTO membership would influence the interpretation of WTO rules, considerably reducing the scope of application of Article 31(3)(c). In *US – Shrimp (21.5)*, referring to Article 31(3)(c), the panel hinted at the former approach, noting that the parties in dispute 'ha[d] accepted or [we]re committed to comply with' a series of international instruments for environmental protection,[130] but did not pursue its reasoning further.

The *EC – Biotech* panel disagreed. The EC had argued that its WTO obligations had to be interpreted in light of the Cartagena Protocol on Biosafety ('Protocol'). The EC noted that two of the complainants (Argentina and Canada) had signed the Protocol; the third one (the US) was a participant in its Clearing-House Mechanism, and should thus 'be taken to have no objection to the approach' permeating the Protocol.[131] The panel's reasoning was confusing. On the one hand, it noted that the complainants were not parties to the Protocol and had not agreed before the panel to have WTO law interpreted in light of its rules.[132] On the other hand, the panel decided to make a more general statement regarding the correct interpretation of Article 31(3)(c). It argued that the sole 'relevant rules of international law' to be taken into account in interpreting multilateral treaties are those rules 'applicable in the relations between all parties to the treaty which is being interpreted'.[133] If this is taken to mean that *all* WTO members (including the European Union, Macao, Hong Kong, and Chinese Taipei) must formally be parties to the external treaty, then not a single treaty currently in force would be applicable.[134] This would contrast with the much more flexible treatment of similar matters by the Appellate Body, based on the standard of 'common understanding' and not on full unanimity among members.

[130] *US – Shrimp (21.5)*, *supra* note 83, at 5.57.

[131] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, at 7.53–7.54.

[132] *Ibid.*, at 7.72.

[133] *Ibid.*, at 7.71.

[134] For a full criticism of the 'narrow reading' adopted by the panel see Henckels, 'GMOs in the WTO: A Critique of the Panel's Legal Reasoning in EC – Biotech', 7 *Melbourne J Int'l L* (2006) 279.

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The Appellate Body corrected this rigid treatment of the matter in *EC – Aircraft*. In this dispute, the EC argued that its obligations under the SCM Agreement should be interpreted taking into account a 1992 bilateral agreement between itself and the US. Referring to *US – Shrimp (21.5)*, the EC argued that the bilateral agreement should be taken into account in a dispute between the two parties to it. Relying on the *EC – Biotech* panel, the US argued that only agreements to which all WTO members were parties should be taken into account. The Appellate Body ultimately resolved the question by determining that the bilateral agreement in question was not a 'relevant rule' for the dispute.[135] It nonetheless decided to comment on the correct interpretation of Article 31(3)(c). It did not subscribe to either of the extreme positions. Instead, the Appellate Body adopted for Article 31(3)(c) the same yardstick it had adopted for subsequent agreement and subsequent practice: rules would be applicable to the extent that they established the 'common intention of the parties'.[136] This common intention does not require unanimity, nor does it allow *inter se* bilateral contracting out. Rather, the standard involves a 'delicate balance … taking due account of an individual WTO Member's international obligations and … ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members'.[137]

This 'taking due account' of members' international obligations, however, is not to mean that such international obligations constitute exceptions to the regular application of WTO law. This may be inferred from a dispute in which Article 31(3)(c) was not referred to. In *Brazil – Tyres*, Brazil argued that a Mercosur arbitral award obliged it to open an exception for Mercosur members in its ban on imports of retreaded tyres. The award determined that the ban constituted a new 'measure restrictive of reciprocal trade', prohibited under Mercosur law.[138] Despite condemning Brazil's measure on other grounds, the WTO panel concluded that the ruling made the discrimination in Brazil's measure not 'arbitrary or unjustifiable', and thus permissible under the *chapeau* of Article XX. Without mentioning Article 31(3)(c), the panel accepted the relevance of the Mercosur ruling for the interpretation of Brazil's WTO obligations, noting that 'MERCOSUR rulings are *res judicata* for the parties involved'[139] and create 'binding legal effects for Brazil'.[140] The Appellate Body reversed this finding, discarding the possibility of the Mercosur ruling interfering with Brazil's WTO obligations:

> the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b).[141]

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[135] *EC – Aircraft*, *supra* note 56, at 855.
[136] *Ibid.*, at 845.
[137] *Ibid.*
[138] Mercosur, *Ad hoc* Arbitral Tribunal, *Award No. VI*, 9 Jan. 2002.
[139] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Tyres)*, WT/DS332/R, at 7.271.
[140] *Ibid.*, at 7.272.
[141] Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R, at 228.

It may be argued that *res judicata* was an inappropriate notion in this case, especially since the EC (the complainant) was not a signatory to the relevant agreements, and therefore was not bound by the arbitral award in question – or by Mercosur law in general. However, these points are entirely absent from the Appellate Body's reasoning.[142] Brazil's exception was stated to be WTO-incompatible simply 'because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX'.[143] The Appellate Body was careful to note that Brazil's substantive WTO and Mercosur obligations were not necessarily in conflict,[144] but this did not modify the basic fact that Brazil was faced with competing decisions regarding the same measure. In order to maintain its environmental measure while complying with the WTO ruling, Brazil would need to (and did) contravene the Mercosur arbitral award.[145] It would seem, then, that the 'principle of systemic integration' as applied to WTO law neither warrants bilateral interpretations nor allows for exceptions derived from international obligations, other than to the extent that these exceptions may be independently justified under WTO law.

C Inter Se *Modifications and the Logic of Validity*

In all of the cases analysed above involving *inter se* or member-specific interpretations of WTO law, WTO adjudicating bodies were careful to refer to the specific facts of the dispute, often highlighting the absence of a direct conflict in the sense of mutually incompatible obligations.[146] However, if the emphasis shifts from what WTO adjudicators, especially the Appellate Body, claim *not* to have decided to the legal issues these organs *have* settled, a clear picture emerges. Panels and the Appellate Body may not decline to exercise validly established jurisdiction, as this would diminish the rights of complainants under the DSU (*Mexico – Soft Drinks*). WTO law, not international law, 'resolves the issue' of the relationship between WTO law and other international agreements (*EC – Oilseeds*). External agreements, and even external international judicial decisions, do not *per se* except members from fulfilling their WTO obligations (*Brazil – Tyres*). Measures taken in pursuance of international obligations are constrained by the same requirements that ordinarily limit measures taken under WTO exceptions (*US – Shrimp*).

To the extent that external agreements have any effect on WTO adjudication, this is caused not by their formal international legal status as binding agreements, but by the fact that they reflect the 'common understanding' of the membership on the interpretation of WTO norms. Even Article 31(3)(c), which explicitly refers to 'any relevant rules of international law', was made subject to a test which makes it ineffective as a

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[142] Compare with *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene*, ICJ, Judgment of 4 May 2011, at 72.

[143] *Brazil – Tyres*, *supra* note 141, at 232.

[144] *Ibid.*, at 234.

[145] Minutes of DSB Meeting, 25 Sept. 2009 (WT/DSB/M/274), at 37.

[146] Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 92, at 54; *Brazil – Tyres*, *supra* note 141, at 234; *Argentina – Poultry*, *supra* note 104, at 7.38.

means of taking into account international law as such. It is not the international legal status of external agreements that matters, but the 'common intention' of the WTO membership (*EC – Aircraft*). Either an international agreement expresses this common intention, in which case it influences the interpretation of WTO law for all WTO members, or it constitutes an *inter se* agreement. In the latter case, and in spite of the many disclaimers added to the carefully worded statements, every Appellate Body report issued so far appears to point in the direction of setting aside its provisions in favour of WTO law.

The consequence is that WTO law incorporates external input in a very different way from that which prevails in general international law. International law, including 'law-making' treaties, operates under what is sometimes referred to as a *logic of opposability*, as opposed to the *logic of validity* prevailing in domestic public law.[147] By the latter a rule either is or is not valid; if it is valid, it applies indistinctly to every legal subject. Within international law, the question is often not whether a rule 'is valid' but whether it is 'opposable to' (or may be 'invoked against') a certain state. The logic of opposability has recurrently been applied by the ICJ. In *Icelandic Fisheries*, the Court concluded that, since Germany and the UK had opposed Icelandic control over an area, Iceland's regulations governing fishing in this area were 'not opposable to' the complainants.[148] Similarly, the Court held in *Asylum* that even invoking a customary rule requires a demonstration by the complainant that the rule in question was 'established in such a manner that it has become binding on the other Party'.[149]

If WTO adjudicating bodies were to follow the latter logic, before finding that a member had violated a WTO rule they would be required to ask whether the specific WTO obligation that constitutes the subject-matter of the dispute is *opposable* to the defendant – whether, that is, it is binding on it given other rules and agreements applicable between this defendant and the complainant. This is not what emerges from the analysis above. Through its jurisprudence, the Appellate Body has instituted a system in which new interpretations of WTO law either emerge as common interpretations, applicable to the whole membership, or apply to no members at all. New interpretations apply when they reflect a 'common understanding' or 'common intention' of the membership, shaping the WTO obligations of all members regardless of the individual positions of the parties in dispute.

4 Conclusion

The imbalance between the WTO's strong system of adjudication and the burdensome procedures for multilateral law-making has led to the belief that the WTO would

147 Combacau, 'Logique de la validité contre logique de l'opposabilité dans la Convention de Vienne sur le droit des traités', in [Collective], *Mélanges Michel Virally* (1991); Crawford, *supra* note 1, at 398–404.

148 *Fisheries Jurisdiction (United Kingdom v. Iceland)* [1974] ICJ Rep 3, at 29, *Fisheries Jurisdiction ((Federal Republic of Germany v. Iceland)* [1974] ICJ Rep 175, at 198. See also *Fisheries (UK v. Norway)* [1951] ICJ Rep 113, at 131; *Nottebohm (Liechtenstein v. Guatemala)* [1955] ICJ Rep 4, at 21.

149 *Asylum (Colombia v. Peru)* [1950] ICJ Rep 266, at 276.

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face a choice between paralysis and a return to the 'club model' in which like-minded members would agree to rules applicable *inter se*. Through their interpretations of the WTO Agreements, WTO adjudicators, and in particular the Appellate Body, point to a different direction.

The case law has reinforced the multilateral character of law-making in the WTO, limiting the effects of bilateral renegotiation of WTO rules while accepting interpretations and rules commonly agreed by the membership. The obligation to resort to the amendment procedure to modify the text of the WTO Agreements remains a relevant limitation. But the possibilities of collectively adopting subsequent interpretations, setting up new standardizing bodies, and adapting the interpretation of WTO law in response to the practice of members and the evolution of international law, allow the development of WTO law at the margins, by a majority of members and with considerably low formal requirements. As a result, the mechanisms of multilateral law-making allow members to produce incremental adjustments to WTO law while preserving its coherence as a legal system.

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