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# Identification of and Resort to Customary International Law by the WTO Appellate Body

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## 1 Introduction

The traditional definition of customary law follows the wording of Article 38 of the Statute of the International Court of Justice (ICJ), which sets forth ‘international custom, as evidence of a general practice accepted as law’ as a source of international law.<sup>1</sup> This formulation has been read to reflect two elements constituting customary law: (i) a general practice (objective element) which is (ii) accepted as law, the so-called *opinio juris* requirement (subjective element). In its Draft Conclusions on the identification of customary international law (CIL), the International Law Commission (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*)’.<sup>2</sup>

However, while in theory determining the existence of the two constitutive elements of CIL (practice and *opinio juris*) is the accepted

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<sup>1</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

<sup>2</sup> Evidence for these two elements can be found through 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 organisation 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, ‘Report of the International Law Commission, Seventieth Session’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 (‘ILC Draft Conclusions’) 117 ff.

methodology for the identification of a customary rule,<sup>3</sup> the practice of international tribunals does not always follow such methodology.<sup>4</sup> Although the ILC conclusions and commentaries provide clarifications on the theoretical underpinnings for the identification of a rule of customary law, in practice the determination of its existence is far less clear. At the same time, international case law can provide great clarification on the existence, content and scope of CIL.

Against this backdrop, this contribution examines the approach followed by the World Trade Organisation's (WTO) Appellate Body (AB) on the identification of and resort to CIL. One should recall that the WTO dispute settlement mechanism (DSM) has one particularity: its jurisdiction is limited to ascertaining violations of WTO law. With this in mind, the aim of this article is twofold: first, to determine how the AB ascertains the existence and content of a customary rule. Second, to examine whether the AB recurs to this source of law for the interpretation of WTO provisions, or whether it directly or indirectly applies CIL.

To this end, Section 2 reviews the rules which have been considered CIL by the AB. It examines the method of identification employed by the adjudicators to qualify a given rule as 'customary'. For the sake of clarity, 'method of identification' is here understood as the approach followed by adjudicators when ascertaining the existence of CIL. Section 2 also analyses the general approach by the AB towards the identification of and reliance on CIL. Section 3 studies the AB's references to CIL in order to determine whether the adjudicators have referred to this source of law for interpretative purposes, or whether they have applied it as more than interpretative tools. While the relevance of the practice of panels is not

<sup>3</sup> For instance, in the recent *Chagos Advisory Opinion* by ICJ, the court stated that the two elements are constitutive of international law and proceeded to ascertain the existence of these two elements with respect to the right to self-determination as a customary norm. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [149 ff].

<sup>4</sup> In *Chagos Advisory Opinion* it can be said that the ICJ in fact performed a very limited assessment in determining the existence of state practice and *opinio juris*; on this see also S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417; Choi & Gulatti, in an empirical assessment of the methodology used by international courts for the assessment of CIL, also reach the conclusion that 'international courts do not come anywhere close to engaging in the type of analysis the officially stated two-part rule for the evolution of CIL sets up'. SJ Choi & M Gulati, 'Customary International Law: How Courts Do It?' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 146–47.

dismissed, this contribution focuses on reports issued by the AB, as it is the permanent organ of WTO dispute settlement.

## 2 The AB's Methodology of Identification of CIL

Although the AB's practice reveals reference to several non-WTO sources and concepts of law,<sup>5</sup> only in few instances the adjudicators have declared the customary status of a rule. More specifically, such references cover only two 'areas' of international law: rules governing the law of treaties (described in Section 2.1) and the law of state responsibility (described in Section 2.2).<sup>6</sup> Section 2.3 describes the trends and draws general conclusions on the method employed by the AB, addressing in particular the question of what *it considers* to be CIL.

### 2.1 Customary Rules on Treaty Interpretation

Article 3.2 of the WTO Dispute Settlement Understanding (DSU) determines that the DSM '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'. Rules on treaty interpretation, and even more specifically Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (VCLT) are the only norms of general international law on the law of treaties that the AB has qualified as customary rules. This is so even though other canons of treaty interpretation can be found in the reports.<sup>7</sup>

<sup>5</sup> For example, the AB has famously invoked multilateral environmental agreements in the *US – Shrimp* dispute. One can also find many references to general principles of procedural law, such as *kompetenz-kompetenz* (WTO, *US – 1916 Act (EC)*, Appellate Body Report (28 August 2000) WT/DS136/AB/R WT/DS162/AB/R 17, fn 30) and *burden of proof* (WTO, *US – Shirts and Blouses*, Appellate Body Report (25 April 1997) WT/DS33/AB/R 14); for a thorough description of the various instances of references to concepts of public international law in WTO case law see G Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015).

<sup>6</sup> This conclusion is the result of systematisation of AB reports, according to which the text of all reports to date (as of 19 February 2019) was examined, and references to the term 'customary' were pinpointed and analysed. Multiple references to CIL were found, but only in these two categories of norms the AB has identified the existence of a customary rule.

<sup>7</sup> See for example the reference to *in dubio mitius* in WTO, *EC – Hormones*, Appellate Body Report (16 January 1998) WT/DS26/AB/R 64; For a thorough description of this and other

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 interpretation of public international law’ instead.<sup>8</sup> This shows that from the outset the intention was to resort to the VCLT rules in the interpretation of the agreements. Therefore, the early references by the AB to these rules as those reflected under Article 3.2 of the DSU were but a formality.

Indeed, the rules on treaty interpretation of the VCLT were invoked on the first WTO controversy to reach the appeals stage, the *US – Gasoline* dispute.<sup>9</sup> In this report, the AB held that Article 31 of the VCLT had ‘attained the status of customary or general international law’.<sup>10</sup> To ground that statement, the AB inserted a footnote with reference to decisions of the ICJ, European Court of Human Rights and the Inter-American Court of Human Rights, in addition to a few handbooks of international law.<sup>11</sup> It should be recalled that the practice of international courts and tribunals is not the main method for the determination of state practice and *opinio juris*. In fact, as stated by ILC Conclusion 12 on the identification of CIL, ‘Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a *subsidiary* means for the determination of such rule.’<sup>12</sup>

While a similar method was employed for Article 32,<sup>13</sup> the AB did not follow the same approach in relation to Article 33.<sup>14</sup> Instead, the adjudicators merely stated the latter was customary law, perhaps because it was

references see M Lennard, ‘Navigating by the Stars: Interpreting the WTO Agreements’ (2002) 5(1) *JIntlEcon* 17.

<sup>8</sup> See Negotiating Group on Institutions, ‘Meeting of 26 September 1991 – Note by the Secretariat’ (18 October 1991) GATT Doc MTN.GNG/IN/1 [3]; 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’).

<sup>9</sup> See WTO, *US – Gasoline*, Panel Report (29 January 1996) WT/DS2/R 33 [6.7].

<sup>10</sup> WTO, *US – Gasoline*, Appellate Body Report (29 April 1996) WT/DS2/AB/R 17.

<sup>11</sup> *ibid* fn 34.

<sup>12</sup> ILC Draft Conclusions (n 2) Conclusion 12, 121.

<sup>13</sup> WTO, *Japan – Alcoholic Beverages*, Appellate Body Report (4 October 1996) WT/DS8/AB/R 10.

<sup>14</sup> WTO, *Chile – Price Band System*, Appellate Body Report (23 September 2002) WT/DS207/AB/R 22.

already a tautological statement after granting this recognition to Articles 31 and 32.<sup>15</sup>

In subsequent reports, the AB does not seem to have considered it necessary to re-examine the customary value of Articles 31–33 of the VCLT. The adjudicators, including panellists, simply refer authoritatively to these rules, sometimes referencing also DSU Article 3.2. For example, in *US – Carbon Steel*, the AB noted that ‘It is well settled in WTO case law 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 [mentioned in Article 3.2].’<sup>16</sup> In *US – Softwood Lumber IV*, the adjudicators noted that ‘As we have observed previously, in accordance with the customary rule of treaty interpretation reflected in Article 33(3) [of the VCLT], the terms of a treaty authenticated in more than one language – like the WTO Agreement – are presumed to have the same meaning in each authentic text.’<sup>17</sup> Therefore, once the customary status has been determined within WTO case law, adjudicators consider it sufficient to refer back to previous adopted reports to make the same claim with respect to the status of a VCLT provision.

The AB’s reference to VCLT Article 26 in *Brazil – Desiccated Coconut* corroborates the conclusion that the organ has refrained from declaring other rules on the law of treaties as reflecting CIL. In that dispute, the panel had invoked the principle of non-retroactivity as reflected in Article 28 VCLT as ‘an accepted principle of customary international law’.<sup>18</sup> This terminology was not followed by the AB.

The AB case law also features references to non-VCLT rules and principles on treaty interpretation which are *derived* from the provisions in that convention (in particular Article 31). The references to the interpretative principles of effectiveness, systemic integration and *in dubio mitius* are all, in one way or another, connected to VCLT Articles 31 and 32. In other words, this is the legal basis employed by the AB to invoke these interpretative canons. Nonetheless, the AB did not explicitly consider these principles to reflect CIL. For example, in *Japan – Alcoholic*

<sup>15</sup> On the customary status of VCLT Article 33 see A Papaux & R Samson, ‘Article 33’ in O Corten & P Klein (eds), *The Vienna Convention on the Law of Treaties*, Vol II (Oxford University Press 2011) 868.

<sup>16</sup> WTO, *US – Carbon Steel*, Appellate Body Report (28 November 2002) WT/DS213/AB/R 21 [61].

<sup>17</sup> WTO, *US – Softwood Lumber IV*, Appellate Body Report (19 January 2004) WT/DS257/AB/R [59].

<sup>18</sup> WTO, *Brazil – Desiccated Coconut*, Panel Report (17 October 1996) WT/DS22/R 75 [279].

*Beverages II*, the AB explicitly invoked the ‘principle of effectiveness or *ut res magis valeat quam pereat*’, and stated that it was a ‘fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31’.<sup>19</sup> In *EC and Certain Member States – Large Civil Aircraft*, the AB invoked VCLT Article 31(3)(c) as ‘an expression of the “principle of systemic integration”’.<sup>20</sup> Finally, the AB has also referred to the principle of *in dubio mitius*, on a footnote in the *EC – Hormones*<sup>21</sup> and in the *China – Publications and Audiovisual Products* reports.<sup>22</sup> In *EC – Hormones*, the AB cited the ‘interpretative principle of *in dubio mitius*’, widely recognised in international law as a ‘supplementary means of interpretation under VCLT Article 32’, and added a quote from an international law handbook with a definition of the principle, in addition to reference to relevant case law (including ICJ, PCIJ and arbitral decisions) as well as other doctrinal works.<sup>23</sup> As opposed to the principles of effectiveness and systemic integration, *in dubio mitius* is not expressly codified in the VCLT. Still, the legal basis indicated by the AB in the *EC – Hormones* report was not entirely detached from the convention.

What is important to remark is that none of these references is considered to reflect CIL, even though they are based on VCLT Articles 31 and 32.

## 2.2 Customary Rules on State Responsibility

References to general rules on state responsibility appear more frequently in WTO case law since the adoption of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001. Before 2001, the AB mainly resorted to scholarship on the topic.<sup>24</sup> After 2001, the codification of rules on state responsibility by

<sup>19</sup> WTO, *Japan – Alcoholic Beverages II*, Appellate Body Report (4 October 1996) WT/DS8/AB/R 12.

<sup>20</sup> WTO, *EC and Certain Member States – Large Civil Aircraft*, Appellate Body Report (18 May 2011) WT/DS316/AB/R [845].

<sup>21</sup> *EC – Hormones* (n 7) [165].

<sup>22</sup> WTO, *China – Publications and Audiovisual Products*, Appellate Body Report (21 December 2009) WT/DS363/AB/R 166 [144].

<sup>23</sup> *EC – Hormones* (n 7) fn 154.

<sup>24</sup> In *US – Shrimp* (1998) the AB stated 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.’ The assertion was followed by a footnote with a reference to *US – Gasoline* and two handbooks of general international law. WTO, *US – Shrimp*, Appellate Body Report (12 October 1998) WT/DS58/AB/R [129–30].

the ILC left little need for the AB to engage in other methods of identification. Since then, the methodology of reference to these sources of international law in AB reports consists mainly in citing the works of the ILC on state responsibility.

The AB adopted a cautious approach in determining that a rule of state responsibility reflects CIL. The only concept of state responsibility the AB has considered to have attained customary status is the principle of proportionality in the context of countermeasures for wrongful acts.<sup>25</sup> In the *US – Line Pipe* report, adopted in 2002, the AB stated that the ARSIWA was ‘not a binding instrument as such’, but its Article 51 nevertheless ‘sets out a recognized principle of customary international law’.<sup>26</sup>

To support this statement, the AB added a footnote referencing the *Nicaragua* and the *Gabčíkovo-Nagymaros* decisions of the ICJ.<sup>27</sup> Additionally, the AB stated that ‘also the United States has acknowledged this principle elsewhere’,<sup>28</sup> referencing remarks the United States had made in the commentaries to the works of the ILC in 1997 and its position in proceedings before an arbitral tribunal. The AB, however, did not indicate that this reference to the US’s position was reflective of *opinio juris*. Moreover, the AB did not refer to the recognition of the customary status of the principle of proportionality by other states, and the conclusion that Article 51 ‘sets out a recognized principle of customary international law’ is not further explained in the report. Indeed, the ILC commentaries to Article 51 state that ‘[p]roportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence’.<sup>29</sup> The AB could have

<sup>25</sup> It should be noted that such reference to the principle of proportionality was made in a rather improper manner. Both the *US – Cotton Yarn* and the *US – Line Pipe* reports invoked the principle of proportionality when assessing the limits for the imposition of a safeguard. Interestingly, the rule on proportionality of the ARSIWA deals with the application of countermeasures, not with the question of determination of attributable damage for the purposes of countermeasures (or, in this case, 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 serious damage). See A Mitchell, ‘Proportionality and Remedies in WTO Disputes’ (2006) 17 EJIL 985.

<sup>26</sup> WTO, *US – Line Pipe*, Appellate Body Report (15 February 2002) WT/DS202/AB/R 82 [259].

<sup>27</sup> *ibid* fn 256.

<sup>28</sup> *ibid* [259].

<sup>29</sup> ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries’ (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10,

referred to these commentaries as an authoritative source for advancing the customary status of the proportionality principle.

In sum, the method employed by the AB in this case, both in quoting the ICJ case law and the US's position, was to seek purposive legitimation to the conclusion that proportionality reflects CIL. The indication of the US's (the interested party in that dispute in the quality of defendant) position can thus be viewed as a way of ascertaining *opinio juris* to reinforce the reference to proportionality as a customary rule.

References to general rules on attribution and to Article 14 of the ARSIWA are two instances of AB practice that corroborate the organ's reluctance to declare the customary status of general rules on state responsibility. In the case of attribution, in *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – AD and CVD (China))*, the AB deliberately avoided taking a position on the status of Article 5 of the ARSIWA as a customary rule. The ARSIWA provision had been invoked by China, the complainant, as a tool for interpreting the term 'public body' in Article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures (ASCM) as a 'relevant rule' under VCLT Article 31(3)(c).<sup>30</sup>

In that dispute, the AB submitted that ARSIWA Article 5 was not binding per se but, insofar as it reflected CIL or general principles, it could be taken into consideration as 'applicable in the relations between the parties' in the terms of Article 31(3)(c).<sup>31</sup> 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. Instead, the adjudicators circumvented the question by concluding that, in fact, their interpretation (based on the general rule in VCLT Article 31(1)) of 'public body' in Article 1.1(a)(1)(iv) of the ASCM 'coincide[d] with the essence of Article 5 [of the ILC

reproduced in [2001/II – Part Two] YBILC 31, 134 ('ARSIWA'); the ILC commentaries refer to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

<sup>30</sup> Article 31(3)(c) of the VCLT provides 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."

<sup>31</sup> WTO, *US – AD and CVD (China)*, Appellate Body Report (11 March 2011) WT/DS379/AB/R 119 [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."



ARSIWA]'.<sup>32</sup> In other words, because the content of the general rule coincided with their interpretation of the WTO provision under scrutiny, it was not necessary to ascertain the customary status of Draft Article 5.<sup>33</sup>

Article 14 of the ARSIWA, on the 'extension in time of the breach of an obligation', was invoked by the European Communities in *EC and Certain Member States – Large Civil Aircraft*. Similarly to the *US – AD and CVD (China)* dispute, there was disagreement between the disputants regarding the status of the rule as customary.<sup>34</sup> In its reasoning and findings, the AB bypassed the discussions on whether Article 14 of the ARSIWA reflected CIL, 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 ARSIWA Article 14(1) and Article 5 of the ASCM had the same scope, similar to its approach in *US – AD and CVD (China)*.<sup>35</sup> The AB did dismiss the EC's argument, but not based on the allegations that it did not reflect CIL, but because its substance was not relevant to provide support to the interpretation advanced by the European Union.

### 2.3 *The AB's Trends in Ascertaining CIL*

Three remarks can be made regarding the methodology employed by the AB when ascertaining the existence of CIL. First, as advanced earlier, there are only two fields of customary law whose existence the organ has explicitly exploited: rules on treaty interpretation and rules on state responsibility. This may be explained because they are not norms of substantive, primary (understood as 'rules that place obligations on States, the violation of which may generate responsibility')<sup>36</sup> nature: they are structural rules which arguably are necessary for the functioning

<sup>32</sup> *ibid* 120 [310].

<sup>33</sup> *ibid* [311].

<sup>34</sup> USTR, 'European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, Appellee Submission of the United States' (30 September 2010) AB-2010-1/DS316 9 [25] <<https://bit.ly/3GEIABH>> accessed 1 March 2021.

<sup>35</sup> *EC and Certain Member States – Large Civil Aircraft* (n 20) [685–86].

<sup>36</sup> According to Roberto Ago's distinction. See ILC, 'Documents of the 22nd Session Including the Report of the Commission to the General Assembly' (1970) UN Doc A/CN.4/SER.A/1970/Add.1 reproduced in [1970/II] YBILC 306 [66]. The distinction between primary and secondary rules is here used for a better understanding of the different functions of 'structural' 'meta-rules', with the caveat of all the difficulties which come with this distinction.

of any legal system.<sup>37</sup> Moreover, another factor that could explain this choice is that engaging in the two-element methodology for identifying customary rules of primary nature and applying those rules in the WTO DSM would fall outside the jurisdictional scope of WTO adjudication.

The second remark is that the AB seems hesitant to determine the customary status of a rule. It has actively refrained from doing so in at least two cases (general rules on attribution and the relationship between the duration of a conduct and its effects). As described above, in the *US – AD and CVD (China)* and *EC and Certain Member States – Large Civil Aircraft* disputes, there was express disagreement between the parties with respect to the customary status of certain ARSIWA canons, and yet the AB avoided making a finding.

Additionally, the AB followed the same dismissive approach with the precautionary principle in the *EC – Hormones* report. In that dispute, the status of the precautionary principle was challenged by the parties: the EC argued that the precautionary concept reflected a 'general customary rule of international law',<sup>38</sup> while the United States claimed it represented neither a customary rule nor principle, but merely an 'approach'.<sup>39</sup> The AB considered that the question was controversial under international law, and that 'it [was] unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question'.<sup>40</sup> The AB concluded only that the precautionary principle 'finds reflection' in Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).<sup>41</sup> In any case, it is relevant to remark that AB's hesitancy to declare the customary status of the precautionary principle is not unique in international adjudication.<sup>42</sup>

Relatedly, the AB's practice also demonstrates that this organ was hesitant in declaring the customary status of a given principle *in particular* when there was a controversy between the parties. The customary status of the treaty interpretation rules in the VCLT is virtually undisputed, and the concept of proportionality is also enshrined in legal logic. Moreover, in these cases, there was no explicit disagreement regarding

<sup>37</sup> For a similar take see MF Agius, *Interaction and Delimitation of International Legal Orders* (Brill Nijhoff 2014) 114 ff.

<sup>38</sup> *EC – Hormones* (n 7) [16].

<sup>39</sup> *ibid* 17 [43].

<sup>40</sup> *ibid* 45 [123].

<sup>41</sup> *ibid*.

<sup>42</sup> M Schröder, 'Precautionary Approach/Principle' [2014] MPEPIL [19–20].

the customary value of these sources of law. In the other cases, there was explicit disagreement, and the AB refrained from taking a position.

The third remark is that the AB does not make a full-blown assessment of *opinio juris* and state practice to ascertain the customary status of a rule. Put differently, the AB does not properly ‘identify’ the existence of a customary rule, it ‘asserts’ such existence.<sup>43</sup> In doing so, it relies on codified instruments of international law. In the case of rules of treaty interpretation, it relied on scholarship and decisions from other international law tribunals to state the customary status of Articles 31 and 32 of the VCLT. In the case of rules on state responsibility, it simply stated Article 51 of the ARSIWA reflected a ‘principle of customary international law’, quoted previous ICJ decisions and referred to the acknowledgement by the United States of this customary status. This methodology hints that the organ was mostly preoccupied 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 with legal implications for the WTO legal system. In fact, proceeding with a full-blown query of state practice, *opinio juris* or comparative study of national legal systems for the determination of a customary rule or a general principle seems not only unnecessary but also a potential source of controversy in the context of WTO dispute settlement.<sup>44</sup>

The limits of resorting to CIL in WTO dispute settlement are not evident. In *US – Cotton Yarn*, the AB held that the concept of proportionality was a ‘customary principle’ of state responsibility that had not been derogated by WTO law. The adjudicators considered that an ‘exorbitant derogation from the principle of proportionality ... could be justified only if the drafters of the [WTO Agreement] had expressly

<sup>43</sup> Merkouris submits that assertion ‘is not a valid methodological tool for the determination of either the content of a CIL rule’. P Merkouris, ‘Interpreting the Customary Rules on Interpretation’ (2017) 19 IntCLRev 126, 138; see also O Sender & M Wood, ‘The International Court of Justice and Customary International Law: A Reply to Stefan Talmon’ (*EJIL: Talk!*, 30 November 2015) <<https://bit.ly/3xKvW0d>> accessed 1 March 2021, considering that ‘Unlike induction and deduction, assertion is self-evidently not a methodology for determining the existence of a rule of customary international law. It is essentially a way of drafting a judgment, a way of stating a conclusion familiar to lawyers working in certain national systems.’

<sup>44</sup> Note in particular the complaints by the United States according to which the AB has indulged in making findings which are ‘unnecessary to resolve the dispute’. See, for instance, ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body’ (Geneva, 18 December 2018) <<https://bit.ly/3dMTQ2x>> accessed 1 March 2021.

provided for it, which is not the case'.<sup>45</sup> Perhaps the determination of the customary status of a rule entails the possibility of fall-back to general international law in the case of a gap in the tool-box of secondary norms of the WTO legal system. This is relevant for the purposes of the distinction between using a non-WTO source of law for interpretative purposes and applying such norm. The next section will address the practical implications of this distinction in light of WTO case law.

### 3 Use for Interpretation versus Application of CIL: Where Is the Line Drawn by the WTO AB?

World Trade Organisation dispute settlement has limited material jurisdiction, as it can only adjudicate WTO obligations. The difference between the applicable law (understood as the sources to which reference can be made) and the jurisdiction of WTO dispute settlement (understood as the sources which can be enforced) has been intensively debated by the scholarship.<sup>46</sup> It seems well-settled that WTO dispute settlement only has jurisdiction over the so-called WTO covered agreements,<sup>47</sup> while its applicable law can range further than that.<sup>48</sup> Therefore, panel

<sup>45</sup> WTO, *US – Cotton Yarn*, Appellate Body Report (8 October 2001) WT/DS192/AB/R 38 [120].

<sup>46</sup> On this debate, see for example J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003); G Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35(6) *JWT* 1081; G Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33(5) *JWT* 87; L Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) *JWT* 499.

<sup>47</sup> The WTO 'covered agreements' are the Agreement establishing the World Trade Organization, the Multilateral Trade Agreements of Annexes 1A, 1B, 1C and 2, and Plurilateral Trade Agreements in Annex 4.

<sup>48</sup> Commenting on the work of the ILC on fragmentation, 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)'. G Marceau, 'Fragmentation in International Law: The Relationship between WTO Law and General International Law – A Few Comments from a WTO Perspective' (2006) 17 *FYBIL* 6; the present chapter 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 according to its jurisdictional limitations. See also ILC, 'Report on Fragmentation of International Law: Difficulties Arising from the

and AB reports cannot enforce obligations deriving from external sources.

This section enquires which role the AB has granted to CIL in settling disputes in the multilateral trading system. Section 3.1 proposes a working distinction between the concepts of interpretation and application of law, specifically for the purposes aimed at here, that is, to distinguish between the use of CIL for the interpretation of WTO provisions, as opposed to the application of customary law as a source of rights and obligations. Section 3.2 departs from this definition to examine the instances in which the AB has referred to CIL. The cases in which the AB has resorted to CIL can shed light on understanding the line between interpretation and application of non-WTO law in WTO case law.

### 3.1 *The Jurisdiction of WTO Dispute Settlement and the Notions of Interpretation and Application of International Law*

Disputes which call into question the use of sources of law outside the jurisdictional limits of a court are controversial because '[t]hey do not fall plainly within the scope of the jurisdictional clause, nor clearly outside it; they straddle the dividing line'.<sup>49</sup> In the context of the WTO, there is no equivalent to Article 38 of the ICJ, enlisting the sources of law that can be invoked. However, Article 3.2 of the DSU determines that the DSM: '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 3.2 of the DSU sets forth an express limitation to WTO adjudication. Applying non-WTO sources of law in the multilateral trading system arguably amounts to 'adding to or diminishing the rights and obligations' of the covered agreements, while using extraneous norms for purposes of interpretation of WTO provisions can serve for the 'clarification of the existing provisions'.<sup>50</sup> Therefore, the distinction

Diversification and Expansion of International Law, Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682, 226–27.

<sup>49</sup> E Cannizzaro & B 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, 484.

<sup>50</sup> See also D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281.

between interpretation and application of norms can serve as a valuable tool to understand the limits of WTO jurisdiction with respect to CIL.<sup>51</sup>

Distinguishing ‘interpretation’ and ‘application’ of norms entails the debate of whether these are two different processes, two processes which are interconnected, or if in fact one cannot draw such a distinction.<sup>52</sup> Gardiner sustains that they reflect 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’.<sup>53</sup> The distinction was discussed during the works of the ILC on the codification of the law of the treaties, in particular in connection to the question of intertemporal law,<sup>54</sup> but the topic was revealed to be highly controversial<sup>55</sup> and any attempt to make a clear-cut distinction was dismissed.<sup>56</sup> The matter was addressed in the document preceding the works of the commission – the Harvard Draft Convention on the Law of Treaties.<sup>57</sup> The following

<sup>51</sup> In the same sense see A Tancredi, ‘OMC et coutume(s)’ in V Tomkiewicz (ed), *Les sources et les normes dans le droit de l’OMC, Colloque de Nice des 24 et 25 juin 2010* (Pedone 2012) 81, 84.

<sup>52</sup> This problem is normally theorised in the context of issues related to intertemporal law. See for instance J Klabbbers, ‘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 & M Vogiatzi (eds), *Time, History and International Law* (Brill/Nijhoff 2007) 141.

<sup>53</sup> R Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 28. See also Aourgourinis, ‘The Distinction between Interpretation and Application of Norms in International Adjudication’ (2011) 2(1) JIDS 36; G Hernández, ‘Interpretative Authority and the International Judiciary’ in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 166; P Sands & J Commission, ‘Treaty, Custom and Time: Interpretation/Application?’ in M Fitzmaurice, O Elias & P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of the Treaties: 30 Years On* (Martinus Nijhoff 2010) 39.

<sup>54</sup> In 1964 Sir Humphrey Waldock, first Special Rapporteur on the Law of Treaties, suggested draft Article 56 (The Inter-temporal Law), which stated: ‘1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. 2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied’. ILC, ‘Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur’ (3 March, 9 June, 12 June and 7 July 1964) UN Doc A/CN.4/167 reproduced in [1964/II] YBILC 5, 8–9.

<sup>55</sup> See the discussions on Article 56 mentioned in fn 55 of ILC, ‘Summary Record of the 729th Meeting’ (22 May 1964) UN Doc A/CN.4/SR.729 reproduced in [I/1964] YBILC 34, 34–40.

<sup>56</sup> Aourgourinis (n 53) 32.

<sup>57</sup> Harvard Law School, ‘Draft Convention on the Law of Treaties, with Commentary’ (1935) 29 AJIL Supp 653, 657–65 (‘Harvard Draft Convention’); see further Gardiner (n 53) 27–29; Klabbbers (n 52).

distinction is found 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.<sup>58</sup>

The question addressed here 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.<sup>59</sup> This being so, the inquiry seeks to clarify the line between using CIL as an interpretative *tool* for the application of another norm, and when this interpretative recourse transfigures into the actual application of that customary rule, which in principle should have only a subsidiary character.<sup>60</sup> In particular, the question here addressed is not related to the interpretation of CIL as such.<sup>61</sup> The above definition can be thus adapted in the following manner: ‘The use of a norm for *interpretative purposes* is the process of resorting to an auxiliary source with the aim 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 reflect an intersection between use of sources different than the one originally being ‘interpreted’ (i.e.,

<sup>58</sup> Harvard Draft Convention (n 57) 938. A very similar definition was given by Judge Ehrlich in his dissenting opinion in the Chorzów Factory case. *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Series A 17, Dissenting Opinion by M Ehrlich 75.

<sup>59</sup> In more detail for the distinction, see M Papadaki, ‘Compromissory Clauses as the Gatekeepers of the Law to Be “Used” in the ICJ and the PCIJ’ (2014) 5 JIDS 569.

<sup>60</sup> The practical implications that this distinction may entail can be further illustrated by *Oil Platforms (Islamic Republic of Iran v USA)* (Judgment) [2003] ICJ Rep 161.

<sup>61</sup> In fact, because these rules must be identified before being applied, some argue that they cannot be interpreted (or that the process of identification and interpretation is in fact conflated), Gourgourinis (n 53) 36; For an opposing view, see Merkouris (n 43) arguing that interpretation of CIL is the process taking place when a customary rule is resorted to once it has been identified.

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. The practice of the AB may shed some light in the position taken by WTO adjudicators in this sense.

### 3.2 *The AB's Resort to CIL: Interpretation or Application?*

As described in Section 2, the AB declared the customary status of rules deriving from outside of the WTO system only in a limited number of instances, and it has refrained from taking a position regarding this status in other instances. The rules the AB considered to reflect customary law are those related to state responsibility and treaty interpretation. Two sets of 'boundaries' can be inferred from the AB's practice described in Section 2. These boundaries seem to ensure that CIL is used solely for interpretative purposes, in detriment of their 'application'.

The first boundary relates to the content of the norm. The AB only declares as customary rules those that are 'structural': meta-norms,<sup>62</sup> such as those related to treaty interpretation, and rules of state responsibility. In particular, rules on treaty interpretation are operational: they lack substantive implications and they relate to the cognitive process of interpreting a norm. Perhaps more crucial is the fact that customary rules on treaty interpretation have been expressly incorporated by the WTO legal system. Although they can be *applied* within the scope of their operational function, they cannot be applied as to add to or diminish the substantive obligations provided for in the WTO Agreements.<sup>63</sup> Because these rules are 'structural' (their role is more procedural or instrumental), they lack substantive content (i.e., they are not 'primary' rules as their content does not prescribe obligations per se)<sup>64</sup> and thus are

<sup>62</sup> The terminology 'meta-norms' is used here as encompassing 'norms governing the existence, applicability, interpretation, suspension and termination of treaty norms' Papadaki (n 59) 580. These rules have also been called 'secondary norms' in Agius (n 37) 57.

<sup>63</sup> Seeourgourinis (n 53) for a useful distinction of application *lato sensu* and *strictu sensu*. See also Judge Bedjaoui's separate opinion in *Case Concerning the Gabčíkovo-Nagymaros Project* considering that "Interpretation" of a treaty [is] not to be confused with its "revision" and 'Cautiously take subsequent law into account as an element of interpretation or modification in very special situations', *Case Concerning the Gabčíkovo-Nagymaros Project*, Separate Opinion of Judge Bedjaoui 123–24.

<sup>64</sup> See Agius (n 37).



less likely to 'add to or diminish rights and obligations of WTO members'.<sup>65</sup>

One reason for this approach is that adjudicators may feel that recognising the customary status of a rule with substantive content may give the impression that they are creating substantive obligations or even overriding WTO law. The general reluctance of the AB to refer to non-WTO rules as customary, even when there is ground for doing so, can be regarded as a cautious approach in not overemphasising the role of these sources in the WTO legal system. 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. One can infer that this gives more leeway for the AB not to be accused of overstepping its jurisdictional mandate.

The dispute on whether the precautionary principle reflected a customary rule further illustrates this possibility. In *EC – Hormones*, the AB refrained from answering this question, and 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'.<sup>66</sup> It concluded that the precautionary principle found reflection in WTO law, and could not, by itself, override the provisions of the SPS Agreement. Put differently, the AB stated that the principle is incorporated by the SPS, and plays an 'internal' role in the WTO system. Conversely, the adjudicators indicated that an 'extraneous' (i.e., not codified in WTO Agreements) reflection of the precautionary principle has very limited, if any, role in WTO law.

The emphasis that the AB put in the statement that the precautionary principle is part of WTO law can be read as a sign that the adjudicators acknowledged the importance of the concept, but were cautious so as not to overstate – or give the impression that they overstate – its authoritativeness in the WTO legal system. 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

<sup>65</sup> 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' norms. The distinction between procedural and substantive principles is indisputably blurred. See for example CEM Jervis, 'Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law' (2019) 30(1) EJIL 105.

<sup>66</sup> *EC – Hormones* (n 7) [123].

rule of conduct, it nevertheless can be a source of obligations to guiding the conduct of states.<sup>67</sup>

The second, related, ‘boundary’ that limits the role of customary law in WTO adjudication concerns regarding the way in which the AB employed concepts which it considered having attained this status. The AB’s practice has ensured that its reliance on CIL remained subordinated to the prevalence of WTO legal texts.<sup>68</sup> As delineated in Section 3.1, ‘application’ can be understood as ‘the process of determining the consequences which . . . should follow in a given situation’.<sup>69</sup> Accordingly, one can consider that a WTO adjudicator is applying a non-WTO rule to the extent that the findings of violation or non-violation contained in the report ensues from non-WTO language.

In *US – Cotton Yarn*, the AB had to ascertain the meaning of ‘serious damage’ under Article 6.4 of the Agreement on Textiles in order to determine 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.<sup>70</sup> In *US – Line Pipe*, the AB had to ascertain

<sup>67</sup> Zander argues that the precautionary principle, among other facets, is a ‘fundamental principle which obliges governments to act in a precautionary manner’. J Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press 2010) 344; see also L Gradoni, ‘Il principio di precauzione nel diritto dell’Organizzazione Mondiale del Commercio’ in A Bianchi & M Gestri (eds), *Il principio precauzionale nel diritto internazionale e comunitario* (Giuffrè 2006).

<sup>68</sup> A different situation however is the use of procedural principles. See for example C Brown, ‘Inherent Powers in International Adjudication’ in CPR Romano, K Alter & Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 829.

<sup>69</sup> See *Oil Platforms*.

<sup>70</sup> 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’. WTO, *US – Cotton Yarn*, Panel Report (31 May 2001) WT/DS192/R 122 [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’. WTO, *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)’. *US – Cotton Yarn* 34 [109]. 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

the meaning of 'serious injury' that justifies the application of a safeguard measure under Article 5.1 of the Agreement on Safeguards. In both cases, the focus of the interpretation was on the wording of the WTO provisions under scrutiny, and the AB used the principle of proportionality to shed light on and give meaning to specific treaty provisions.

Moreover, neither the principle of proportionality nor the rules on treaty interpretation have an autonomous content or entail legal consequences per se. Rather, by definition, they are operational to interpret other rules of international law. In this sense, both the principle of proportionality and the rules on treaty interpretation must be employed in conjunction with other rules of primary content. It can be concluded that the AB has resorted to (what it declared to reflect) customary law insofar as these concepts were subordinate to the interpretation of WTO provisions.

The principle of good faith could arguably also be considered as having attained the status of a customary rule. However, the AB has declared only VCLT Article 31(1) as a whole to reflect customary law, rather than the concept of good faith as an 'independent' principle. It can be speculated 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'. Moreover, if good faith were to be declared a customary rule, and not 'just' a principle of treaty interpretation and treaty performance, it could be understood that there are textual grounds to bring claims based on violations of good faith.<sup>71</sup> This could raise criticisms from the membership and amount to accusations that the AB is 'adding to or diminishing rights and obligations of Members'.

Extraneous principles and rules that do not create rights and obligations for WTO members provide safer grounds for the AB not to overstep its jurisdictional mandate. By determining as customary rules norms related only to state responsibility and treaty interpretation (and in the case of the former, even a limited set thereof), the AB ensures that they will remain subordinate to WTO obligations. This approach allows adjudicators to resort to these sources of law for the interpretation of WTO provisions, rather than to create doubts as to whether they are

damage to a member in this report, the adjudicators remained attached to the wording of Article 6.4 of the ATC.

<sup>71</sup> This was discussed in *US – Carbon Steel (India)*, Appellate Body Report (8 December 2014) WT/DS436/AB/R 4.334ff [188–89], and *US – Offset Act (Byrd Amendment)*, Panel Report (16 September 2002) WT/DS217-234/R 7.59ff [314].

being applied, thereby adding to or diminishing rights and obligations contained in the covered agreements.

#### 4 Conclusions

Reference to CIL in the AB case law is very limited, both in scope and in methodology. The AB does not thoroughly follow the two-element approach to identify CIL, and it restricts its resort to this category of norms to codified secondary and meta-norms. Thus, in resorting to these sources the AB does not engage in a query of the constitutive elements for the identification of CIL. Instead, it bases the determination of customary law on reference to authoritative texts such as relevant scholarship, ICJ decisions and ILC commentaries. The very fact that the rules at stake have been codified may be another reason why the AB has referred to them. This gives the adjudicators not only an authoritative source to refer to when invoking such norms, but also allows them to resort to customary law without having to proceed to the identification of these sources.

The AB referred to what could be understood as *opinio juris* only once, when the adjudicators looked for instances outside the WTO system in order to confirm that the United States had recognised the proportionality principle as customary. Yet, the AB did not clarify whether it invoked the United States' position as reflective of *opinio juris*. Moreover, in this case, the United States was the party being 'affected' by the reasoning flowing from resort to this principle. For this reason, reference to its recognition of the rule as customary seems to have been crafted to gauge legitimation for that specific finding.

Moreover, the AB adopts a cautious approach in determining which rules reflect CIL: it has only done so with respect to concepts that are operational and have no autonomous content. In fact, the adjudicators have refrained from determining the customary status of concepts which could be viewed as having autonomous substantive content and of creating rights and obligations not provided by the WTO legal system, such as the precautionary principle. This arguably also contributed to shelter the AB's interpretative practices from claims of judicial activism (at least with respect to references to non-WTO sources of law).

From these considerations, it can be inferred that the AB has not been concerned in giving a contribution to public international law through

the identification of customary rules as an authoritative international adjudicative organ. While it seems aware of the need to bridge the relationship between the trade law regime and general international law, its reference to CIL is instrumental and widely attentive to internal legitimacy questions.