Chapter 51

Sources of International Trade Law: Mantras and Controversies at the World Trade Organization

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I. Introduction

This contribution focuses on sources of law in Word Trade Organization (WTO) dispute settlement rather than sources of international trade or international economic law more broadly. Section II illustrates how, from a certain perspective, the sources of WTO law are relatively uncontroversial, the WTO being treaty-based and member-driven, two 'mantras' of the WTO legal system. Section III, in contrast, demonstrates that, from a different vantage point, sources of law have become one of the thorniest questions in WTO governance with recent developments questioning the source-monopoly of WTO members, WTO covered agreements, and legally binding instruments. Section IV, finally, offers a number of factors—two-tiered compulsory dispute settlement, consensus decision-making and increased membership diversity—that may explain the current state of play.

II. Sources of Law: A Non-Issue in WTO Dispute Settlement?

At a superficial level, sources of law in WTO dispute settlement is not a prominent concern, for two reasons.

1. The WTO is Treaty-Based

Firstly, the WTO system is almost exclusively treaty-based. Only complaints under specifically listed WTO 'covered agreements' can be heard. Unlike investment treaties (think of the customary international law minimum standard of fair and equitable treatment), WTO agreements do not

incorporate substantive customary international law.[1] In international trade law more generally—unlike, for example, in international humanitarian law—custom plays a minimal role. Trade agreements are generally regarded as reciprocal agreements exchanging concessions or 'club goods', not treaties reflective of, or capable of, generating customary international law benefitting also non-parties.

From this perspective, the doctrine of sources in WTO dispute settlement is heavily influenced by legal positivism: what matters is the text agreed upon in the treaty, not the correctness or reasonableness of the norm (*auctoritas*, *non veritas facit legem*).[2] The WTO's approach to sources is far removed from natural law theories that draw normative guidance from ideals or community values prevalent in, for example, international human rights law.[3] Treaty interpretation in WTO dispute settlement is also predominantly textual, with almost no reference to the objective or underlying values or telos of the WTO treaty. Although one could argue that the main objective of the WTO is trade liberalization, this underlying telos is only rarely referred to in the case law, e.g. to presume or steer toward pro-trade outcomes.[4]

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1 The only custom that the WTO treaty explicitly refers to and incorporates is 'customary rules of interpretation of public international law'—Art 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU) (Marrakech, 15 April 1994, 1869 UNTS 401)—in WTO jurisprudence commonly identified with Art 31 (3) of the Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331). Indeed, in the terminology of trade law, 'custom' refers rather to custom duties or custom valuation, using the word custom in the sense of business, patronage, or trade (derived from 'customers').

2 Thomas Hobbes, *Leviathan*, Vol. 2, ch. 26 ('authority, not truth makes the law').

3 For calls to inject community values into the WTO or for the WTO to find a unifying purpose, see Andrew Lang, *World Trade Law After Neoliberalism, Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011), and Sungjoon Cho, *The Social Foundations of World Trade* (Cambridge: Cambridge University Press, 2015).

4 See Manfred Elsig and Joost Pauwelyn, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals', in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, edited by Jeffrey Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 445–73; and Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, European Journal of International Law 27 (2016): 9-77.

The WTO system is also treaty-based in the sense that domestic laws are outside the jurisdiction and applicable law before WTO panels (unlike in the International Centre for Settlement of Investment Disputes (ICSID) investor-State arbitration where, by default, disputes are to be decided in accordance with the domestic law of the host State 'and such rules of international law as may be applicable').[5] In WTO dispute settlement, domestic law is the object of analysis (does it comply with WTO provisions?) and is approached as fact rather than a source of law.[6]

2. The WTO is Member-Driven

Secondly, the WTO is an almost exclusively State-centered organization ('member-driven'). Only States—or separate customs territories such as Hong Kong or the European Union (EU)[7]—can be WTO members and WTO dispute settlement is purely State-to-State. Input from non-State actors such as private business or civil society must be channeled through State representation.[8] WTO agreements do not bind private actors,[9] nor do they confer rights to private actors.[10] WTO agreements can also not

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5 Article 42 (1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Washington, 18 March 1965, 575 UNTS 8359).

6 WTO, *India—Patents (US)*, *Appellate Body Report* (19 December 1997) WT/DS50/AB/R, paras. 65–6, <http://docsonline.wto.org>, accessed 11 July 2016.

7 See Article XII.1 of the Marrakesh Agreement Establishing the WTO (Marrakesh Agreement) (Marrakesh, 15 April 1994, 1867 UNTS 154).

8 But see the limited possibility to submit *amicus curiae* briefs in WTO dispute settlement. No WTO provision addresses the issue but *amicus* briefs have been accepted. Yet, in practice, they have never been explicitly relied on in the final decision.

9 A limited exception is the coverage of private standards in the Agreement on Technical Barriers to Trade; see Art 4 and the Code of Good Practice in Annex 3 of the Agreement on Technical Barriers to Trade (TBT Agreement) (Geneva, 12 April 1979, 1868 UNTS 120).

10 A limited exception is the TRIPS Agreement, stating in its preamble that the IP rights conferred therein are 'private rights'. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS Agreement) (Marrakech, 15 April 1994, 1869 UNTS 299).

be relied on in most domestic legal systems (no direct effect in, for example, the EU or the United States (US))[11].

The WTO is also 'member-driven' in the sense that unlike, for example, EU institutions or even the International Monetary Fund (IMF) or World Bank (who have executive boards and majority decision-making rules), the WTO as an institution has little or no independent power to make law or take decisions without the consensus of all WTO members.

As a result, in the WTO, sources of law are generally equated with (i) treaties, agreed to by (ii) WTO member States. The thorny questions of identification of customary international law or non-State actors as sources or subjects of international law are generally avoided.

Indeed, until relatively recently, General Agreement on Tariffs and Trade (GATT)/WTO agreements were regarded by many trade-insiders as loose economic contracts aimed at a 'balance of concessions' rather than sources of binding public international 'law'. This view, now firmly outdated in no small part because of the WTO Appellate Body's interpretation of WTO agreements, is reminiscent of what remains the predominant approach in international financial law. Ranging from IMF loan agreements and Basel banking standards to Financial Action Task Force recommendations on money laundering,[12] to this day, norms in the field of international finance—in contrast to those in investment or trade—are generally concluded (on purpose) as non-binding, outside public international law.

Similarly, much like the old GATT (which was an agreement provisionally applied for almost sixty years, never a formal institution), most international financial institutions such as the Basel Committee or Financial Stability Board, are not set up as formal international organizations, but rather loose clubs or networks with uncertain legal status.

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[11] In contrast, in some WTO members (such as many Latin American countries like Argentina, Brazil, or Mexico), WTO agreements do have direct effect in the national legal system and can be relied on by private parties before domestic courts. See Maria Angela Jardim de Santa Cruz Oliveira, *International Trade Agreements Before Domestic Courts: Lessons from the EU and Brazilian Experiences* (Cham: Springer International, 2015).

[12] See <http://www.fatf-gafi.org/>, accessed 3 September 2006.

III. Sources of Law: The Most Burning Question in WTO Dispute Settlement?

When scratching the surface, however, the question of sources of law is one of the most burning challenges facing WTO dispute settlement. After twenty years of operation (1995–2015), three source-related debates have emerged and remain largely unsettled today. They relate to (i) who has the authority to make law; (ii) where must law be made; and (iii) what are the formal requirements (if any) for something to be a source of law.

1. Questioning the Source-Monopoly of WTO Members

Firstly, besides WTO treaties concluded by WTO members, WTO jurisprudence developed by WTO panels and especially the WTO Appellate Body has emerged as a major 'source' of international trade law. Although the text of the Dispute Settlement Understanding (DSU) indicates the contrary ('[r]ecommendations and rulings by the Dispute Settlement Body (DSB) cannot add to or diminish the rights and obligations provided in the covered agreements'[13]), an elaborate practice of de facto rule of precedence is now strongly entrenched.[14] This practice should not come as a complete surprise to WTO members as the treaty itself explicitly States that the WTO dispute settlement system 'is a central element in providing security and predictability to the multilateral trading system' and 'serves . . . to clarify the existing provisions' of WTO agreements.[15] The Appellate Body has explicitly Stated that 'the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system' and that 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.[16]

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[13] Art 3.2 of the DSU.

[14] For supporting empirical evidence, see Joost Pauwelyn, 'Minority Rules: Precedent and Participation before the WTO Appellate Body', in *Establishing Judicial Authority in International Economic Law* (eds. Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen, Cambridge: Cambridge University Press, 2016), 139.

[15] See Art 3.2 of the DSU.

[16] WTO, *US—Stainless Steel (Mexico)*, *Appellate Body Report* (30 April 2008) WT/DS344/AB/R, para. 160. Somewhat strangely, in support of this theory, the Appellate Body (in note 313) relied, *inter alia*, on an ICSID arbitration tribunal

Today, disputing parties commonly invoke or rely on prior Appellate Body rulings (rather than explicit treaty text) and the Appellate Body itself regularly clarifies and expands on statements it made in earlier reports (rather than the WTO covered agreement themselves).

At the same time, many WTO members remain highly skeptical of the authority of the Appellate Body to 'make law' in this way or to 'fill gaps' left open by the negotiators in what is often unavoidable treaty ambiguity. The US in particular (and somewhat ironically, as stare decisis is engrained in its own legal system) is adamant in rejecting a rule of precedent in the WTO.[17] At most, the US 'recognizes that prior adopted panel and Appellate Body reports may be taken into account by a panel'.[18] In one recent panel hearing, the US went as far as saying that 'Appellate Body reports adopted by the DSB do not have an elevated status above adopted or even unadopted panel reports. The relevant question is whether the Panel finds the reasoning in any given report persuasive and useful for its own application of the customary rules of interpretation'.[19] US objection to lawmaking by the Appellate Body culminated in May 2016 with the US blocking the re-appointment of a member of the Appellate Body,[20] on the ground that 'his performance does not reflect the role assigned to the Appellate Body by Members in the DSU'.[21] The US referred specifically to cases where the Appellate Body had engaged in long *obiter dicta* or addressed issues not raised by the parties or necessary to resolve the narrow dispute before it. For the US, the 'Appellate Body is not an academic body that

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award along the same lines, although most ICSID tribunals are notorious for not feeling bound by prior (often contradictory) awards.

17 See WTO, *US—Shrimp/Sawblades*, *Panel Report* (8 June 2012) WT/DS422/R, para. 6. 7: 'The United States considers that a concern over consistency with a prior report adopted by the DSB should not and cannot override these provisions [in particular, Art 11 of the DSU directing a panel to make an objective examination of the matter before it] which do not direct a panel to apply or defer to previously adopted reports'.

18 WTO, *US—Zeroing (Korea)*, *Panel Report* (18 January 2011) WT/DS402/R, para. 7. 30.

19 WTO, *US—Countervailing Measures (China)*, US Opening Statement, Second Substantive Meeting, July 2013, para. 7.

20 Appellate Body members are appointed by consensus of all WTO members for a period of four years, renewable once (renewal is also subject to consensus approval), see Article 17.2 of the DSU.

21 Statement by the US at the Meeting of the WTO Dispute Settlement Body, Geneva, 23 May 2016, <https://geneva.usmission.gov/wp-content/uploads/2016/05/Item7.May23.DSB_.pdf>, p. 2, accessed 8 July 2016.

may pursue issues simply because they are of interest to them . . . it is not the role of panels or the Appellate Boy to 'make law' outside of the context of resolving a dispute'.[22]

The first source-related debate in the WTO is, therefore, whether other actors beyond WTO members can create law or influence law establishment. It is a debate centered on who has legitimate authority to make law. The most controversial non-State actor is the Appellate Body. Others are: (i) the WTO Secretariat and its prominent role in the drafting of WTO rulings, or the legal value to be attached to Secretariat notes issued during negotiations in the interpretation of WTO treaty text; (ii) outside expert individuals advising WTO panels on technical/scientific questions of health, environmental protection, safety, economics, or translation; and (iii) other international organizations (IOs), such as the Codex Alimentarius Commission, the International Organization for Standardization (ISO), the IMF, the World Health Organization (WHO), the World Customs Organization (WCO) or the World Intellectual Property Organization (WIPO) who are regularly consulted by WTO panels to gather information and advice in, respectively, sanitary, standards, monetary, health, customs, or IP-related disputes.

Intriguingly, whereas the first 'subsidiary means for the determination of rules of law' in Article 38 of the Statute of the International Court of Justice (ICJ) ('judicial decisions') plays a crucial role in WTO dispute settlement, the second ('teachings of the most highly qualified publicists of the various nations') plays almost no formal role. Although WTO law is now an established field of academic research and countless books and specialized journals exist on almost every sub-domain of the discipline, WTO panels and the Appellate Body have so far almost never referred to trade law authors or scholarship in their reports.[23] In speeches, Appellate Body members admit, however, to reading existing scholarship before deciding cases, highlighting that material sources of law (or law determination), such as scholarship or economic studies perused by Appellate Body members, may

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[22] Ibid., p. 3.

[23] In the few cases where they refer to doctrine or commentators, it is to back up findings on general international law such as treaty interpretation or non-trade issues such as whether the precautionary principle has attained the status of customary international environmental law.

exist and influence outcomes although they are not visible or disclosed as such to the parties for comments.

Whereas WTO dispute settlement started off with an almost perfect match or congruence between 'law-makers' and 'legal subjects' (in both cases, WTO members only), over time, the group of law-makers, broadly defined, expanded (to include the Appellate Body, WTO Secretariat, outside experts, other IOs, academics, etc.) with the legal subjects remaining the same (WTO members only). In other fields of international law this divergence may have worked in the opposite direction: States as law-makers retaining their monopoly but making law for a broader group of legal subjects including IOs, private actors and individuals (think of international human rights or criminal law). Either way, as Samantha Besson has pointed out, 'there is a widespread lack of congruence between international law-makers and legal subjects, whereas that congruence is the main claim of democratic constitutional municipal orders'.[24] Debates over sources of law are debates over who controls the given community. Where actors who are not also subjects of law (directly or indirectly) are empowered to make or influence law, legitimacy questions arise. This is true in the WTO as much as any other field of international law.

2. Questioning the Source-Monopoly of WTO Covered Agreements

Secondly, although the jurisdiction of WTO panels is firmly limited to claims of violation under WTO covered agreements (no claims of violation of, for example, free trade agreements such as NAFTA or MERCOSUR can be heard), international law sourced outside the four walls of the WTO covered agreements is playing an increasing role, be it as default rules to organize WTO dispute settlement, substantive non-trade rules to shed light on the interpretation of WTO agreements, or agreements that may even supplant WTO provisions. WTO rulings have extensively applied or referred to general international law (on e.g., treaty interpretation, burden of proof, evidence, due process, attribution, estoppel, waiver, countermeasures, and good faith) as well as non-WTO treaties (on e.g. customs,

[24] Samantha Besson, 'Theorizing the Sources of International Law', in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 163–85, 164.

environmental, health, indigenous peoples, intellectual property, or monetary issues) and trade-related agreements made between all or a sub-set of WTO members outside WTO covered agreements (such as WTO declarations or waivers, free trade agreements, an EU-US bilateral agreement on aircraft subsidies, bilateral settlement agreements, or party agreements to hold open hearings despite explicit WTO provisions mandating that Appellate Body proceedings be confidential).[25] Also decisions by other international tribunals have been referred to (especially the Permanent Court of International Justice and the ICJ, but also investor-State tribunals).

At the same time, it remains controversial whether rules outside WTO covered agreements can only be referred to in the process of treaty interpretation (with the likely result that such non-WTO rules cannot easily overrule a WTO norm) or also as part of the applicable law to decide on a claim of WTO violation (where a non-WTO norm could then possibly operate as a self-standing defense to justify WTO breach).[26] Whereas most investment treaties include an explicit provision stating that disputes under the treaty 'shall be decided . . . in accordance with this Agreement and applicable rules of international law',[27] the DSU is silent on what law can be applied to decide on claims under the WTO covered agreements.[28] In the WTO treaty, jurisdiction is explicitly limited to WTO covered

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[25] See Joost Pauwelyn, *Conflict of Norms in Public International Law—How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) and Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (West Nyack: Cambridge University Press, 2015).

[26] For a recent assessment, see Joost Pauwelyn, 'Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence', 10 February 2016, <http://ssrn.com/abstract=2731144>, accessed 8 July 2016.

[27] See Art 1131 of the North American Free Trade Agreement (NAFTA) (17 December 1992, 32 ILM 289, 605 (1993)) (italics added).

[28] For some, this silence means that non-WTO rules binding on the parties are part of the applicable law since not explicitly excluded in the WTO treaty; see Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', *American Journal of International Law* 95 (2001): 535–78. For others, this silence means that non-WTO rules cannot be part of the applicable law; see Joel Trachtman, 'The Domain of WTO Dispute Resolution', *Harvard International Law Journal* 40 (1999): 333–77.

agreements; applicable law is not explicitly defined.[29] Before investor-State tribunals, a common defense has, for example, been the customary international law rule of necessity,[30] even if such rule cannot be found in the specific bilateral investment treaty in question. In WTO dispute settlement, parties rarely invoke an outside treaty or customary rule as a self-standing defense to justify WTO breach.[31] Non-WTO treaties are generally relied on to influence the meaning of a specific WTO provision, e.g. the general exceptions explicitly provided for in GATT Article XX. To date these exceptions, allowing for unilateral deviations from the GATT with reference to health, environmental or public morals concerns, have been interpreted so broadly as to arguably cover most issues that WTO members may mutually agree on in non-WTO treaties.[32] At the same time, this approach has

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[29] Some have argued that the direction in Art 3.2 of the DSU that '*[r]ecommendations and rulings by the DSB* cannot add to or diminish the rights and obligations provided in the covered agreements' (italics added) must be read as an explicit limit in the applicable law to WTO covered agreements only. More logically, however, Article 3.2 is there to prevent WTO panels and the Appellate Body (i.e. the WTO's judicial branch) from 'making law' (an issue discussed in Section II. 1 above); Art 3.2 is not addressing the question of whether WTO members (as law-makers) can agree to new rights or obligations outside the WTO covered agreements.

[30] As expressed in Art 25 of the International Law Commission (ILC)'s Draft Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UNGA Res 56/83 (12 December 2001), corrected by A/56/49 (vol. 1).

[31] For a notable, recent exception, see WTO, *Peru—Agricultural Products*, *Appellate Body Report* (31 July 2015) WT/DS457/AB/R, where the defendant, Peru, invoked a bilateral free trade agreement (FTA) concluded between the disputing parties as a self-standing defense against a breach of the Agreement on Agriculture, arguing that the FTA 'modified' the relevant WTO provision as between the parties pursuant to Article 41 of the VCLT. The Panel (at paras. 7. 525-8) rejected the argument on the ground that the FTA was not yet in force. The Appellate Body (at para. 5. 112) found that the GATT Article XXIV substantive exception for FTAs is *lex specialis* displacing Art 41 of the VCLT on *inter se* modification of multilateral treaties and (at para. 5.116) that Art XXIV, which had not been invoked in this dispute, cannot be used 'as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements'. For a critique, see Pauwelyn, 'Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals', pp. 19–24.

[32] For example, GATT Article XX (g) allowing for measures 'relating to the conservation of exhaustible natural resources' (written in 1947 with export restrictions on mineral resources in mind) is now interpreted as covering most environmental measures restricting either exports or imports. Similarly, GATT Article XX (a) allowing for measures 'necessary to protect public morals' today covers any trade restriction flowing from a country's 'standards of right and

meant that non-WTO treaties are not applied as self-standing rules of international law agreed to by the parties but rather as legal facts influencing the interpretation of what the WTO treaty itself allows members to do unilaterally. In other words, non-WTO treaties are not applied on their own terms, without second-guessing; they are given effect only if they can be fit into existing WTO rules or exceptions.

For the same reason, it remains an open question whether the Appellate Body would be willing to defer to a forum exclusion clause in a free trade agreement such as NAFTA or the EU treaty (treaties explicitly allowed for under GATT Article XXIV) that prevents a State from filing a particular dispute to the WTO.[33] Some have argued that the Appellate Body should do so and ought to decline jurisdiction or declare the specific claim inadmissible.[34] General principles of law such as estoppel or good faith, as confirmed explicitly in Article 3.10 of the DSU ('all Members will engage in these procedures in good faith') could also be applied to stop the WTO claim from proceeding to the merits.[35] Others maintain that the Appellate Body has no choice but to decide a dispute as soon as it raises a WTO claim and that a non-WTO treaty such as NAFTA or the EU treaty cannot detract from

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wrong conduct maintained by or on behalf of a community or nation' (WTO, *US—Gambling*, *Panel Report* (10 November 2004) WT/DS285/R, para. 6. 465) and was found to include concerns around the protection of minors, censorship of the internet or animal welfare. In the future, it may serve to allow for trade restrictions enacted with reference to international labor rights or human rights.

[33] In WTO, *Mexico—Taxes on Soft Drinks*, Appellate Body Report (6 March 2006) WT/DS308/AB/R, a case often referred to in this context, Mexico did not invoke NAFTA's forum exclusion provision (NAFTA Art 2005) so the Appellate Body did not yet rule on this matter.

[34] See Joost Pauwelyn, 'How to Win a WTO Dispute Based on Non-WTO Law: Questions of Jurisdiction and Merits, *Journal of World Trade* 37 (2003): 997–1030; Joost Pauwelyn and Eduardo Salles, 'Forum Shopping Before International Tribunals:(Real) Concerns, (Im)possible Solutions', *Cornell International Law Journal* 42 (2009): 77–118.

[35] See Bregt Natens and Sidonie Descheemaeker, 'Say it Loud, Say it Clear—Article 3.10 DSU's Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction', *Journal of World Trade* 49 (2015): 873–90.

this 'right to a WTO panel'.[36] In a recent report, the Appellate Body did 'not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution' but stressed that such requires 'a clear stipulation of a relinquishment' and cannot go 'beyond the settlement of specific disputes'.[37] Whether, for example, a forum selection clause in an FTA relates to 'the settlement of specific disputes' remains unclear.

Even when it comes to referring to non-WTO rules in the context of treaty interpretation (e.g. under Article 31 (3) (c) of the VCLT as 'relevant rules of international law applicable in the relations between the parties') the Appellate Body has not explicitly decided whether a rule of international law binding only on the disputing parties (and not all WTO members) may qualify.[38] The fear seems to be that if the WTO treaty were interpreted with reference to another rule of international law binding only as between the disputing parties—e.g. between the EU and the US in an EU–US dispute—this could affect WTO rights and obligations of other WTO members (say, China) which may not have consented to the EU-US norm. An obvious solution to this legitimate concern is, of course, to state that the interpretation in the EU-US dispute does not bind and cannot influence other WTO members'

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[36] See Gabrielle Marceau and Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', *Journal of International Dispute Settlement* 1 (2010): 67–95.

[37] WTO, *Peru—Agricultural Products*, *Appellate Body Report*, paras. 5. 25, 5. 28 and note 106.

[38] In WTO, *Peru—Agricultural Products*, *Appellate Body Report*, para. 5. 95, the Appellate Body did state that 'the 'general rule of interpretation' in Article 31 of the VCLT is aimed at establishing the ordinary meaning of treaty terms reflecting the *common intention of the parties to the treaty*, and not just the intentions of some of the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted' (italics added). In WTO, *EC—Large Civil Aircraft*, *Appellate Body Report* (18 May 2011) WT/DS316/AB/R, paras. 844–5 (footnotes omitted), the Appellate Body left the issue open as follows: 'one must exercise caution in drawing from an international agreement to which not all WTO Members are party. At the same time, we recognize that a proper interpretation of the term "the parties" must also take account of the fact that Art 31 (3) (c) of the VCLT is considered an expression of the "principle of systemic integration" which, in the words of the ILC, seeks to ensure that "international obligations are interpreted by reference to their normative environment" in a manner that gives "coherence and meaningfulness" to the process of legal interpretation'.

rights or obligations. But that, in turn, raises another concern, namely: can WTO treaty provisions be interpreted differently as between different WTO members, depending on which other rules the disputing parties may have agreed on? Some have answered this question in the positive on the view that most obligations in the WTO treaty are of a reciprocal, bilateral or synallagmatic nature allowing for inter se deviations.[39] Others view WTO obligations as collective or integral in nature (much like international human rights obligations) from which no *inter se* deviations are allowed as such deviations would, by their very nature, affect third party rights.[40]

The second source-related debate in the WTO is, therefore, whether beyond the four corners of WTO covered agreements, other institutional settings can create law or influence law establishment. This debate relates to whether the WTO is a self-contained regime or open to other branches of international law. Here, the issue is not so much whether actors other than WTO members can be sources of law, but rather whether law made by these very same WTO members outside the confines of the WTO (say, the US not acting in the WTO but in the United Nations (UN), WHO, or NAFTA) can permeate WTO dispute settlement. It is a debate not around who can make law (members only?) but where law must be made (can it be found also outside WTO covered agreements?). It has to do not with authority to make law, but with the required processes of law establishment.

3. Questioning the Source-Monopoly of Legally Binding Instruments

Thirdly, although WTO panels and the Appellate Body predominantly apply legally binding instruments (in particular the WTO covered agreements), they have regularly applied or referred to

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[39] See Chi Carmody, 'WTO Obligations as Collective', *European Journal of International Law* 17 (2006): 419–43.

[40] See Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' *European Journal of International Law* 14 (2003): 907–52. In support, the Appellate Body in *US–Continued Suspension*, applied an agreement between the disputing parties to open the Appellate Body hearing, thereby overruling an explicit DSU provision mandating that Appellate Body hearings be confidential. The Appellate Body accepted such *inter se* deviation or waiver of the right to confidentiality for as long as third party rights (e.g. third parties before the Appellate Body which did not agree to open hearings) were not affected. See WTO, *US–Continued Suspension*, *Appellate Body Report* (16 October 2008) WT/DS320/AB/R.

also non-binding instruments. Some of these non-binding instruments were created in the WTO (even though they are not part of WTO covered agreements) such as non-binding Ministerial declarations or TBT Committee decisions (applied e.g. as 'subsequent agreements' pursuant to Article 31 (3) (a) of the VCLT). Other instruments referred to were created outside the WTO such as non-binding international standards developed in the Codex Alimentarius Commission, the ISO, or environmental protection schemes (pursuant to Article 3.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures and Article 2.4 of the TBT Agreement obliging WTO members to base certain domestic measures on international standards) or domestic laws or court decisions not binding under international law but referred to in treaty interpretation. Though binding on some parties, environmental or customs treaties, or decisions not binding on all of the members of the WTO, or even all of the parties in the specific dispute, have also been referred to, not as legally binding instruments but as 'legal facts' influencing the interpretation of WTO provisions (e.g. under the heading of 'ordinary meaning', 'agreement relating to the treaty', or 'subsequent practice' in Article 31 of the VCLT).

The third source-related debate in the WTO is, therefore, whether instruments that were not intended to be legally binding (e.g. Ministerial declarations, committee decisions, or international standards) or are only binding on some and not all of the parties (e.g. domestic laws or court decisions or certain non-WTO treaties), can nonetheless create law or influence law establishment. Directly or indirectly holding States to an instrument they did not consent to as binding law (or law establishment factor) challenges the foundational principle that all sources of international law must derive from State consent (be it directly in treaties or indirectly in custom, general principles, or decisions of international organizations) as reflected in the intention of States to make and be bound by law.

This WTO trend to apply non-binding instruments can also be criticized as an example of 'deformalization of international law',[41] not in the sense that these instruments are examples of

[41] Jean d'Aspremont, 'The Politics of Deformalization in International Law', *Göttingen Journal of International Law* 3 (2011): 503–50.

'informal international lawmaking' (for the most part they are not since enacted by traditional/formal State actors, in traditional/formal IO processes and leading to output binding on at least some parties),[42] but because WTO dispute settlement thereby finds or establishes law without applying formal criteria (*in casu*, State consent), i.e., seems to be rejecting 'the idea that rules must meet predefined formal standards to qualify as a rule of law . . . law being exclusively seen as a process or a continuum' without 'formal criteria that distinguish between law and non-law'.[43]

To some extent, reference to non-binding instruments in WTO dispute settlement is a response to the strictures of the State consent rule in international law and the consensus principle in the WTO more specifically (in practice, all WTO decisions, other than those in WTO dispute settlement, require consensus of all 164 WTO members; unlike unanimity, however, WTO consensus does not require a positive expression of agreement by each member and can be established as soon as not a single member actively objects).

This consent-jumping move makes it easier for an instrument to become a source of law. At the same time, at least in some instances, the Appellate Body has counterbalanced this flexibility in terms of State consent with stricter requirements in terms of authority, process and substance. Traditionally, State consent is all that is required to make international law. No other formal requirements, procedural checks or substantive validity tests apply before something becomes binding international law. 'Thin State consent' suffices irrespective of the form this consent takes (it could be expressed in a convention, declaration, press statement, or unilateral act) or how it was arrived at (no due process,

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[42] As defined in Joost Pauwelyn, Ramses S. Wessel, and Jan Wouters eds., *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), p. 22: '[c]ross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (*process informality*), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (*actor informality*) and/or which does not result in a formal treaty or other traditional source of international law (*output informality*)'.

[43] Jean d'Aspremont, 'The Politics of Deformalization', pp. 507–8. On the way and need to draw a line between law and non-law, see Joost Pauwelyn, 'Is It International Law or Not and Does It Even Matter?', in Pauwelyn, Wessel, and Wouters, eds., *Informal International Lawmaking*, 125–62.

transparency, or quality checks apply, other than *jus cogens*). Outside traditional international law, however, and especially in the international standard setting world, a code of good practice is emerging that may have dropped individual State consent/vetoes but imposes stricter requirements in terms of (i) who must be involved or has authority in the norm-creating process (e.g. all affected stakeholders, be they State or non-State actors); (ii) due process procedural requirements (e.g. openness, transparency, impartiality, consensus-building procedures); and (iii) substantive validity checks (effectiveness, relevance ,and coherence of the norm).[44] Elsewhere, I have described this shift as one from 'thin State consent' to 'thick stakeholder consensus'.[45] With reference to a non-binding TBT Committee decision,[46] the Appellate Body has started to apply this 'thick stakeholder consensus' benchmark before holding WTO members to so-called 'international standards' under the TBT Agreement. In one case, it held that something could not be an 'international standard' if it was not open to the relevant bodies of all WTO members.[47] In the case at hand, the instrument alleged to be an international standard that other WTO members ought to follow was an international dolphin-protection treaty scheme set up by only thirteen WTO members. Inviting new members required the consensus of all existing parties which, for the Appellate Body, was evidence that the scheme was not sufficiently open. The Appellate Body found that 'an international standardizing body must not privilege any particular interests in the development of international standards' and underscored 'the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards'.

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[44] See Joost Pauwelyn, 'Rule-based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties', *Journal of International Economic Law* 17 (2014): 739–51.

[45] Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', *European Journal of International Law* 25 (2014): 733–63.

[46] *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement*, G/TBT/1/Rev.9, at 37–9, pursuant to which (in para. 1) 'principles and procedures should be observed . . . to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries'.

[47] WTO, *US Tuna II (Mexico)*, *Appellate Body Report* (13 June 2012) WT/DS381/AB/R.

Reference to non-binding international standards, created outside of the WTO without the explicit agreement of each WTO member, may, therefore, facilitate law creation (no individual State consent required). At the same time, it makes law creation harder by imposing procedural and substantive validity tests unknown in traditional international law. In addition, the trend in WTO dispute settlement for the Appellate Body to refer also to Ministerial declarations or Committee decisions that were not meant to be 'legally binding' (nor adopted as formal interpretations pursuant to Article IX.2 of the Agreement Establishing the WTO, which requires, inter alia, a ¾ majority) is also having a chilling effect on WTO committee work. China and India are, for example, blocking the adoption by the TBT Committee of non-binding 'Principles of Good Regulatory Practice' for fear that they may anyhow be used by the Appellate Body in the formal interpretation of the TBT Agreement.[48]

IV. Factors Explaining the Current Source Doctrine and Debates in WTO Dispute Settlement

What political or normative choices inform today's doctrine of sources in WTO dispute settlement? What explains the success of some sources (e.g. Appellate Body precedents, certain non-binding instruments) and the relative insignificance of others (e.g. trade law academics, custom or non-WTO treaties)?

Based on the analysis above, the approach to sources of law in WTO dispute settlement can be summarized as follows: a legal positivist, non-teleological approach focused predominantly on WTO covered agreements, explicitly agreed to by WTO members, with heavy reliance on a de facto rule of precedent and an increasing role for non-binding instruments, with no reference to academic writings and a limited role (essentially one of guiding interpretation of the WTO treaty) for non-WTO rules of international law (e.g. custom, non-WTO treaties) other than mainly procedural rules of general international law.

[48] See Committee on Technical Barriers to Trade, Minutes of the Meeting of 18–19 June 2014, paras. 3.200 and 3.206.

In this sense, the WTO's sources doctrine remains relatively traditional or mainstream. It is difficult to speak of a WTO- or trade-specific 'deviation' from the general rule of recognition regarding the establishment of sources, contrary to what may be the case in other branches of international law.[49] At the same time, the WTO experience—albeit not one supporting an alleged fragmentation of the doctrine of sources of international law along institutional or substantive lines[50]—does have specific features, with a more prominent role for some sources over others and some pushing of the boundaries when it comes to certain less traditional sources of international law such as prior Appellate Body decisions or non-binding instruments.

Three main factors may explain this state-of-play.

1. Two-Tiered Compulsory Dispute Settlement

Firstly, the WTO is unique in that it offers compulsory jurisdiction (no dispute-specific consent is needed; the GATT-era right of individual members to block the process was lifted) for the law-based settlement of a huge number of State-to-State disputes, as long as the dispute raises a claim of violation of any of the multiple WTO covered agreements. This 'hard' dispute settlement system—built at the high water mark of 'legalization' of world politics in the mid-1990s, following the fall of the Berlin wall—comes with a first-level panel examination and the right to appeal before an Appellate Body. Close to 500 requests for consultations have been filed in twenty years of operation. In the same period, close to 200 panel reports have been issued and more than 100 Appellate Body reports adopted. Although negotiators included an Appellate Body as an 'afterthought' to deal with

[49] See, for example, Jean d'Aspremont, 'An Autonomous Regime of Identification of Customary International Humanitarian Law: Do Not Say What You Do or Do Not Do What You Say?', in *Droit international humanitaire: un régime spécial de droit international?*, edited by Raphaël van Steenberghe (Bruxelles: Bruylant, 2013), 67–95. See also Harlan Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', *New York University Journal of International Law & Politics* 44 (2012): 1049–1107.

[50] Indeed, WTO Appellate Body reports are increasingly cited also by other international tribunals, see Gabrielle Marceau, Arnau Izaguerri, and Vladyslav Lanovoy, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation', *Journal of World Trade* 47 (2013): 481–574.

what was expected to be the occasional 'bad' panel report, parties in WTO disputes consistently appeal a large majority of panel decisions (in the first twenty years, 68% of all panel reports were appealed) and the Appellate Body quickly established itself as the 'centerpiece' of WTO dispute settlement.[51] This legalization of WTO dispute settlement with a hierarchically superior Appellate Body having the final word in each case and whose core operating principle from the start was 'collegiality' (amongst the seven members, only three of which sit on a given dispute) quite naturally led to a de facto rule of precedent.

Compulsory dispute settlement over often recalcitrant sovereign States and a fledgling Appellate Body seeking to establish its own legitimacy also explain the cautious textual, legal positivist approach to sources and treaty interpretation in WTO dispute settlement, centered on treaties agreed by WTO members (not academic writings, custom or non-WTO rules that may elaborate on or deviate from what was explicitly agreed within the four walls of the WTO). Where law limits freedom less or not at all, subjects are likely to care less about restricting who and under what conditions laws can be made. Where law 'bites', for whatever reason, authority and prior conditions will be scrutinized more carefully. Moreover, in the absence of punitive back-up enforcement (the formal remedy of last resort in the WTO is mere equivalent, bilateral retaliation), adjudicators realize that compliance is to a great extent voluntary. As a result, panels and the Appellate Body have to tread carefully when construing the sources of law binding on WTO members.

2. Consensus Decision-Making

Secondly, and related to the automatic, 'hard' enforcement mechanism in the WTO, agreeing to new WTO rules or reforming existing rules requires the consensus of all WTO members (to be distinguished from unanimity; consensus will be established in case no member actively objects). Even the inclusion of a plurilateral agreement in (Annex 4 of) the WTO treaty (binding only on a sub-

[51] Peter Van den Bossche, 'From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System', in *The WTO at 10: The Contribution of the Dispute Settlement System*, edited by Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (Cambridge: Cambridge University Press), 289–325.

set of WTO members) requires the consensus of all WTO members.[52] It is, in no small part, consensus decision-making that made compulsory dispute settlement digestible for members.[53] Conversely, hard enforcement of the rules has made agreeing to new rules even harder. Members now realize that when they agree to a new WTO text, this text has 'bite' and ambiguity will be resolved by the Appellate Body. At the same time, ambiguity is almost a necessity to come to agreement amongst what are now 164 WTO members: no ambiguity, no deal.

In the first twenty years of operation no new WTO agreement entered into force (an agreement on Trade Facilitation was concluded in December 2013, but entry into force of this agreement remains a long term effort),[54] and hardly any rule changes could be agreed upon (in 2014, the Revised Agreement on Government Procurement entered into force; in 2005, TRIPS was amended to address access to essential medicines but this amendment has still not entered into force; all other review mandates, such as the DSU review negotiations scheduled for completion in 1998, have stranded for lack of consensus).

This difficulty for WTO members to clarify or adapt the rules or to create new ones has put increasing weight on the Appellate Body to give meaning to GATT/WTO rules that grow outdated and unadjusted to modern developments. It, in turn, increased the role of prior Appellate Body decisions as sources of international trade law. Crucially, the difficulty for WTO members to agree on binding new rules also explains the increasing reliance by the Appellate Body on non-binding instruments such as Ministerial declarations or committee decisions: though not meant to be binding, these at least express political preferences of WTO members. But, as noted earlier,[55] this, in turn, has meant that

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52 Art X.9 of the Marrakesh Agreement Establishing the WTO.

53 For a full account of the bi-directional interaction between law or legalization (or the closure of 'exit') and politics or member attempts for control (or 'voice'), see Joost Pauwelyn, 'The Transformation of World Trade', *Michigan Law Review* 104 (2005): 1–70.

54 For the agreement to enter into force, 2/3 of WTO Members must ratify it. In June 2015, only eight (of the required 108) WTO members had done so.

55 See above, note 48.

even political agreement on non-binding documents in WTO committees has become more difficult. Stagnation in WTO multilateral treaty making also explains increasing reliance on bilateral agreements concluded in the WTO (e.g. dispute-specific agreements to have open hearings, for lack of reforming the broader DSU in this direction) or outside the WTO (e.g. preferential trade agreements setting out their own dispute settlement system which may overlap with that of the WTO). It also presages an increasing importance for 'international standards' (which, as discussed above, can be adopted even in the face of individual vetoes, following the 'thick stakeholder consensus' rather than the 'thin State consent' approach discussed earlier).

3. Membership Diversity

Thirdly, whereas the original GATT, with 23 contracting parties only, could be portrayed as a 'capitalist club', today, the WTO is a truly universal organization. Its now 164 members—including China, Saudi Arabia, and Russia—have extremely diverse political preferences as well as highly diverse views on how to organize their economies. It is increasingly difficult to speak of a shared 'free trade' ideology. More than ever, the WTO assembles a set of carefully negotiated trade concessions that represent politically balanced bargains both within and between countries. In this context, legal positivism rather than natural law approaches drawing on common, ideological values, should come as no surprise. Membership diversity—with more and more members being large enough to significantly and durably block progress (GATT used to be run by a handful of countries; today, many more 'big players' have entered the field, think of China or Russia, but also Brazil, India, or South Africa)—also makes the already difficult process of consensus decision-making even harder. This, in turn, puts more weight on dispute settlement and the role of the Appellate Body. The responsibility thus put in the hands of the Appellate Body makes the Appellate Body even more apprehensive and entrenches its textual, legal positivist approach in search of political input from the membership (hence the increasing importance of non-binding instruments) and wary of seeking too much guidance outside of the four protective walls of the WTO (hence, the reluctance to rely too openly on non-WTO treaties).

At the same time, consensus decision-making in a politically diverse organization like the WTO makes the fiction of the WTO as a 'single package' (where all rules must be adopted by all WTO members; no *à la carte* selection as in, e.g., the International Labour Organization) increasingly untenable. WTO agreements have always included 'variable geometry' with different commitments depending on the country, product or services sector in question. Such multiple speed WTO is likely to continue and expand as some countries want to integrate more than others and some countries may agree on certain non-trade concerns while others not. To accommodate this diversity, while systemically integrating the WTO in the broader realm of international law, applying the WTO treaty differently depending on the countries in dispute or the non-WTO treaties that exist between them is unavoidable. To put all WTO members in the same WTO straightjacket irrespective of the rights and obligations they hold outside the WTO is a recipe for system failure down the road.

V. Conclusion

Even though the mantras of WTO dispute settlement, treaty-based and member-driven, are straightforward, after twenty years of WTO operation the questions of who can make WTO-relevant legal norms, where and in what form remain major controversies. This contribution has highlighted tensions between WTO members and the WTO judicial branch (questioning the source monopoly of WTO members), between rules of law part of the WTO covered agreements and rules beyond those four corners (questioning whether the WTO is a self-contained regime), and between legally binding WTO agreements and related non-binding instruments (exemplifying the 'deformalization' of international law). Three features, not limited to the WTO but reflective of modern international law more broadly, were highlighted to contextualize these tensions: compulsory dispute settlement with an appeals mechanism, consensus decision-making, and an increasingly diverse WTO membership.

Research Questions

• Should the WTO open-up more or less to sources of international law outside of the WTO covered agreements? What are the competing forces for and against, and the consequences for international law more broadly?

• What is the appropriate role of the WTO Appellate Body? Do its rulings have de facto *stare decisis*? Does this provide the Appellate Body with unwarranted lawmaking powers?

•What has been the impact of consensus decision-making in WTO rulemaking for the dispute settlement branch of the WTO?

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