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Silence in WTO

Gabrielle MARCEAU*, Rebecca WALKER** & Niki KOUMADORAKI***

The World Trade Organization's expansion in terms of its activities is becoming increasingly demanding for Members. Members may not express their acceptance or rejection to every statement or action taking place in the WTO, and they may remain silent to intentionally signify their position. This article examines the legal significance of Members' silence in the WTO, in particular in the consensus-based decision-making procedures, in committees and council meetings, in the determination of subsequent practice when interpreting WTO provisions, schedules and practices, and in the assessment of whether or not a WTO Member has relinquished its right to initiate WTO dispute settlement proceedings. A brief description of the state of play of silence in public international law serves as a reference point to guide the analysis of silence in WTO law, which highlights the fact-specific nature of silence in both fields. While this article reveals that silence plays a role in the consensus decision-making function of the WTO, whether silence can amount to acquiescence in the context of councils and committees meetings remains unclear. Similarly, the Appellate Body has left the door open to the possibility that Members' silence may provide evidence of subsequent practice for purposes of treaty interpretation. Contrary to international law where it has been suggested that silence may lead to a waiver of a state's right to invoke the responsibility of another State, a relinquishment of a WTO Member's right to initiate WTO dispute settlement proceedings must be formulated in clear and unambiguous language.

Keywords: WTO, silence, protest, acceptance, relinquishment of rights, practice, decision-making, interpretation, subsequent practice

1 INTRODUCTION

The World Trade Organization's (hereinafter the WTO) expansion in terms of its agenda and activities is becoming increasingly demanding for Members. In certain circumstances, Members may not express their acceptance or rejection to every

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statement or action taking place in the WTO, and they may remain silent to intentionally signify their position. Silence is neutral[1] and fact specific and in some circumstances, it may have important legal implications. For example, in general international law, the silence or inaction of a state can be construed to signify its tacit acceptance or rejection of an emerging practice providing evidence of customary law. In international law, it is commonly understood that silence[2] denotes a state's 'lack of a publicly discernible response either to conduct reflective of a legal position or to the explicit communication of a legal position'.[3] This study therefore examines the silence of states and WTO Members, and not the silence of treaty provisions.[4]

With 164 Members, the WTO constitutes a dynamic and specialized system in international law. Distinct from those legal issues concerning state silence in a dispute that may arise before the International Court of Justice (ICJ), which frequently deals with bilateral treaties, the silent conduct[5] of WTO Members is a unique matter – in part due to the fact that the WTO deals with multilateral and not bilateral obligations and dispute settlement bodies interpret provisions of a multilateral treaty, the WTO Agreement. The silence of WTO Members can carry different meanings depending on the context during which the silence was made. The silence of one or more Members in committees' discussions can also be relevant and indicative of a specific position – tacit acceptance or rejection – based on the circumstances. Adjudicating bodies have had to consider the implications of the silence of (some) Members – and whether or not a practice may develop with some active Members and others remaining silent, in different circumstances.

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1 As stated by Prof Abi-Saab '*le silence est neutre, c'est du néant qui n'a de signification ni positive ni négative*'. *See* Société Française pour le Droit International, *Débats*, in *La pratique et le droit international: colloque de Genève* 119 (Paris: Pedone 2004).

2 The legal characterisation of silence in general international law is disputed. Indeed, the International Law Commission in its work on Unilateral Acts recognized the phenomenon of silence but refrained from taking a position. Indeed, there was a disagreement as to the legal characterisation of silence, some considering at the time that silence is not a legal 'act' as Alain Pellet and others holding the opposite view as Maurice Kamto. Marie further emphasizes that whether or not the silence of states is considered as a legal act or a legal fact does not matter that much as silence still needs to be taken into account regardless of its legal characterization. *See* Alexis Marie, *Le silence de l'Etat comme manifestation de sa volonté* 39, at 47 (Paris: Pedone 2018); International Law Commission, *Yearbook of the ILC 2000, Vol 1., 52nd Session* 48–49, 56, 148, 154 (2000).

3 Dustin A Lewis, Naz K Modirzadeh & Gabriella Blum, *Quantum of Silence: Inaction and Jus ad Bellum* iv (Harvard Law School Program on International Law and Armed Conflict (HLS PILAC) 2019), at 12.

4 This study does not discuss the silence of treaty provision, in the sense of *non-liquet* or otherwise. *See* e.g., the issue of silence of the provisions in international law with respect to the regulation of an issue and the relevant '*non liquet'* principle, , Helen Quane, *Silence in International Law*, 84 (1) Brit. Y. B. Int'l L. 240 (2014). *See also* e.g., Isabelle Van Van Damme, *Treaty Interpretation by the WTO Appellate Body* Ch. 4 (Oxford: University Press 2009), 'The Interpretation of Silence in the WTO Covered Agreements'.

5 This study uses the term 'silent conduct' or 'silent acts' to refer to silence and/or inaction by Members.

Therefore, this article makes a small contribution to ongoing studies[6] by providing an insight into the meaning of silence in a nuanced discipline: within the WTO.

In the examination of the silence of WTO Members, it is helpful to review how general international law (doctrine) and international tribunals treat the silence of one or more states. In some circumstances, a general or subsequent practice may take place even when some states remain silent; such practice can be used to evidence customary international law or to aid the interpretation of a treaty respectively. As silence is 'contextualized within a specific factual matrix',[7] this article briefly suggests that ICJ judges have refrained from outlining an objective set of criteria for when the silence of states can reflect a state's legal position.[8] While little effective guidance seems to be provided as to when the inaction of a legal subject is presumed to constitute a legal act,[9] relevant jurisprudence reveals certain indicators.

The aims of this article are modest. The purpose is to report on those situations in which the silence of one or more WTO Members can give rise to legal effects. This analysis can also provide some guidance for Members when signalling their legal position in response to a certain practice in WTO decision-making processes, and in understanding how their silence has been understood by WTO adjudicators. While the WTO is a specialized legal system, it is not understood in clinical isolation to public international law.[10] For this reason, a brief description of the state of play of silence in public international law in section ii serves as a reference point: the interpretation of silence is relatively more established in this field. A similar methodology of firstly identifying what is meant by silence in international law was also employed in a recent study examining silence in *jus ad bellum*.[11] This article then turns to examine the silent acts of Members in section iii, which forms the bulk of this article. Silence is particularly relevant in consensus-based decision-making procedures, in committees and council meetings, in the determination of subsequent practice when interpreting WTO provisions, schedules and practices, and in the assessment of whether or not a WTO Member has relinquished its right to initiate WTO dispute settlement proceedings. Section IV concludes.

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6 *See* for instance the ongoing work of Associate Professor at UCL Danae Azaria on the Silence of States funded by the European Research Council.

7 *See* Nuno Sérgio Marques Antunes, *Acquiescence* (2006), at para. 12.

8 *See* for example, *Dissenting Opinion of Sir Percy Spender in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961: I.C. J. Reports 1961, p. 17* (*Dissenting Opinion of Spender Temple of Preah Vihear*), at 128.

9 *See* Lewis, Modirzadeh & Blum, *supra* n. 3, at iv.

10 Gabrielle Marceau & Jenya Grigorova, *Fragmented International Law: International Trade Law and International Environmental Law*, in *Elgar Encyclopedia of Environmental Law - Volume X: Trade and Environmental Law* 46 (P Delimatsis & L. Reins eds, Edward Elgar Publishing 2021).

11 *See* generally *See* Lewis, Modirzadeh & Blum, *supra* n. 3.

2 THE TREATMENT OF SILENT STATE CONDUCT IN PUBLIC INTERNATIONAL LAW

Academic interest in the treatment of state silence in public international law has gained momentum as the silent consent of states plays a fundamental role in international law-making, the 'polysemous nature'[12] of which calls for further examination. Despite its ambiguous nature, the silent conduct of states can have legal implications, inter alia through the concept of acquiescence.[13] In general international law, silence alone is not dispositive in demonstrating the legal position of a state: only in certain circumstances may silence signify a legal position.[14] Silence is therefore distinguished from acquiescence, protest,[15] or estoppel.[16] Acquiescence is 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent', which is reflected in the principles of good faith and equity.[17] Acquiescence therefore becomes particularly relevant when referring to acquisition, modification or loss of subjective rights especially with regard to territorial acquisitions.[18] In certain circumstances, silence can give rise to acquiescence, protest, or estoppel: acquiescence is therefore commonly characterized as 'qualified' silence[19] as it is interpreted on a case-by-case basis.

To shed some clarity on how international courts and tribunals attribute legal significance to the silence of states in certain circumstances, this section refers to examples of those situations in which, according to the literature, silent state conduct resulted in the formation of legally binding rights and obligations.[20] Firstly, the silence of states can contribute to the evolution of customary

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12 *See* Antunes, *supra* n. 7, at para. 19.

13 The effects of silence under Public International Law are discussed in the following section.

14 *See* Antunes, *supra* n. 7, para. 18; Gionata Piero Buzzini, *Abstention, silence et droit international général*, 88(II) Rivista di diritto internazionale 342, at 350 (2005) fn 26.

15 Silence can signal a State's objection of an international rule as occured in the Asylum case. In this case, as Peru had not ratified the Montevideo Conventions of 1933 and 1939, the ICJ deemed that it had 'repudiated' customary norms concerning diplomatic asylum as reflected in the Conventions. *See* Lewis, Modiryadeh & Blum, *supra* n. 3 at 11, refering to *Colombian-Peruvian asylum case, Judgment of 20 Nov. 1950 : I.C. J. Reports 1950*, at *266* (*ICJ – Asylum*), at 277–278.

16 The ITLOS Tribunal in the *Bay of Bengal* case: 'The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation'. *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bang./Myan.)*, Case No. 16, Judgment of 14 Mar. 2012, ITLOS Rep. para. 4, 42.

17 *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, at *246* (*ICJ Gulf of Maine*), para. 130.

18 *See* Buzzini, *supra* n. 14, at 348.

19 Etienne Henry, *Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (With Special Reference to the Jus Contra Bellum Regime)*, 18(2) Melbourne J. Int'l L. 1, at 10 (2017); *See* Lewis, Modirzadeh, & Blum, *supra* n. 3, at v.

20 According to a categorization by Marques Antunes, silence produces legal effects and can be inferred as aquiescence when: the relevant facts in each case were recognized and were of interest to the state in question , have existed consistently for a durable period , and were attributable to tha state or its representatives. *See* Antunes, *supra* n. 7, para. 4

international law by reflecting either their general practice or *opinio juris*. Secondly, silence may also be used as an interpretative tool as it can signal the state's legal position by reflecting its subsequent practice. Thirdly, the procedural role of silence is examined and how it may constitute a waiver of a state's right to invoke responsibility.

2.1 Silence as Evidence of Customary International Law

Under specific circumstances, silence may express a State's recognition of the existence of a customary rule or that state's acceptance of a modification of a rule.[21] In its 2018 Draft Conclusions on Identification of Customary International Law, with Commentaries, the International Law Commission (ILC) wrote that there can be evidence of a general practice of states when some of them remain silent.[22] Silence can therefore also evidence the existence of the elements of customary international law involving the general practice of states[23] that they have accepted as law (*opinio juris*).[24] As noted by Buga, it can be argued that a presumption exists that silence signals the recognition or acceptance of a customary norm.[25]

International case law provides varied examples of acquiescence through silence. In the *Fisheries* case (U.K. *v.* Norway) concerning the persistent objector doctrine,[26] the UK's silence or lack of protest towards Norway's assertions concerning the maritime delimitation in the North Sea reflected a general practice of acquiescence. The ICJ emphasised that: '*The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom*'.[27] These factors enumerated in this case serve as important benchmarks to signal acquiescence to another's state practice. For example, the notoriety of certain facts, claims, or the propositions that could have triggered a reaction from a state is of paramount importance since the silent state must be aware of the claims or proposition of facts in order to acquiescence to them. As Distefano highlights, 'a state can acquiesce only to

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21 *See* Henry, *supra* n. 19, at 2, 24.

22 International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries,* A/73/10 (2018), Conclusion 6, para 1.

23 Conclusion 6 para. 1 makes it clear that inaction may count as 'practice'. *See ibid.*

24 *Ibid.*, at draft conclusion 10, *see* para. 2 of the Commentaries, at 140.

25 Irina Buga, *Modification of Treaties by Subsequent Practice* 209 (Oxford University Press 2018).

26 *See* a further discussion on the persistent objector doctrine below.

27 This case reflects the persistent objector doctrine. *See Fisheries case, Jutdgment of 18 Dec. 1951: I.C.JJ. Reports 1951*, 116 (*ICJ – Fisheries UK/Norway*), at 138–139.

what it knows'.[28] The ICJ equated silence with acquiescence in *Certain Expenses Advisory Opinion* as in this case, the UN's practice was heavily publicised. The Court therefore presumed that all states knew of the conduct and had 'ample opportunity to object'.[29]

The amounting of silence to acquiescence is also fact specific. It is said that for such silence to evidence a general practice, it must be characterised by regularity and consistency and it must be of a sufficient duration.[30] For example, in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ interpreted the practice of Nicaragua being frequently and officially listed as a country recognising the compulsory jurisdiction of the ICJ for almost four years as one evidencing Nicaragua's consent to the ICJ's jurisdiction.[31] Nonetheless, the 'relevance of the time element can be relativised'[32] as the Commentary to the ILC Draft Conclusions on Identification of Customary International Law also mentions that a wide array of verbal state practice may occur in diplomatic conferences and during the adoption of declarative resolutions within international organizations, which takes place in a relatively short period of time.[33]

The silence of states may also reflect *opinio juris* demonstrating evidence of customary international law as was noted by the Permanent Court of International Justice (PCIJ) in the *Lotus* case: 'for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom'.[34] The silent conduct must not only be attributable to the state in question,[35] but it must also reflect the state's expression of a legal position. As noted by the PCIJ in its *Jurisdiction of the European Commission of the Danube* advisory opinion, merely tolerating a particular conduct may not evidence a state's acceptance of its legality.[36] The ILC in its commentary to its Draft Conclusions on

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28 Giovanni Distefano, *The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law*, 4(19) Leiden J. Int'l L. 1041, at 1059–1061 (2006).

29 Irina Buga, *Modification of Treaties by Subsequent Practice*, 65 (1st ed., Oxford: University Press 2018).The author refers to the case *Certain expenses of the United Nations (Art. 17, para. 2, of the Charter), Advisory Opinion of 20 July 1962 : I.C.J. Reports 1962, p. 151* (*ICJ – Certain Expenses*), at 175.

30 *See* Lewis, Modirzadeh, & Blum, *supra* n. 3, at 15; *See* Buga, *supra* n. 29, at 68, 99. Buzzini adds that it is difficult to attribute legal meaning to one isolated incident of silence. This would be somewhat easier, if the incidents are more and from a larger number of states. *See* Buzzini, *supra* n. 14, at 267.

31 *See* Lewis, Modirzadeh, & Blum, *supra* n. 3 at 13 refering to *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, at *392*. (*ICJ – Nicaragua Admissibility*), para. 408–409.

32 *See* Henry, *supra* n. 19, at 24.

33 *See* International Law Commission, *supra* n. 22, at draft conclusion 6, para. 2; Mark Eugen Villiger, *Customary International Law and Treaties a Manual on the Theory and Practice of the Interrelation of Sources*, Fully revised 2nd ed. 61 (The Hague [etc: Kluwer Law International 1997). *See also North Sea Continental Shelf, Juddgment, I.C.J. Reports 1969*, at (*ICJ North Sea*), para. 74.

34 *See* the Case of the *S.S. 'Lotus', 1927 P.C.I.J., Series A, No. 10,* at 28.

35 *See* Lewis, Modirzade, & Blum, *supra* n. 4, at 15.

36 *See* Lewis, Modirzadeh, & Blum, *supra* n. 3, at 11 refering to *Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14*, at 36–37.

Identification of Customary International Law emphasised that only a deliberate abstention from providing a reaction may demonstrate the acceptance of a certain practice's legality.[37] Academic commentaries furthermore remark that an assessment of whether or not silence denotes an expression of the intention to demonstrate a legal position is completed objectively.[38]

This persistent objector doctrine controversially[39] suggests that for a state to avoid being bound by customary norms that are favoured by a large majority of states, it must 'openly and repeatedly oppose being bound by a customary rule at the time of its formation', which is reflected in the reasoning employed in the excerpt from the *Fisheries* case (U.K. v. Norway).[40] Such doctrine suggests that the lack of a reaction can be equated with acquiescence in the formation of custom: for the state to not be bound it's 'objection must be clearly expressed, made known to other States, and maintained persistently'.[41] Therefore, with no reaction, a state is not bound by the rule. In other words, in the circumstances of assessing the existence of *opinio juris* by some states, silence could reflect acquiescence (i.e., acceptance of the nascent customary norm), but not an objection.[42] It must be noted that when adjudicators consider the persistent objector doctrine, they bear 'in mind the circumstances of each case. […] It is clear, however, that States cannot be expected to react on every occasion, especially where their position is already well known'.[43]

2.2 Treaty Interpretation: Silence of States in the Assessment of Subsequent Practice

A court or tribunal may also consider the silence of states in assessing whether or not any 'subsequent agreement' or 'subsequent practice in the application of the

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37 *See* International Law Commission, *supra* n. 22, at draft conclusion 6, *see* para. 3 of the Commentaries, at 133.

38 Buga, *supra* n. 10, at 65–66. *See* Buzzini, *supra* n. 14, at 346.

39 Green argues that '[w]hile deep-rooted disagreement persists amongst experts (including in the ILC), it is telling that states themselves widely accept the rule's existence, even if they do not use it all that often'. *See* James A Green, *The Persistent Objector Rule in the Work of the International Law Commission on the Identification of Customary International Law*, 27(1) Italian Y.B. Int'l L. 175, at 178 2018 (2018)..

40 *See* Buga, *supra* n. 29, at 209.

41 *See* International Law Commission, *supra* n. 22, at draft conclusion 15.

42 In this light, MacGibbon makes a further observation: 'From this and similar formulations of the requirements of an international custom it is not clear what function the absence of objection by other States is intended to fulfil. Failure to protest against the *conviction that the practice is enjoined by law* (the so-called *opinion juris sive necessitatis)* is not equivalent to acquiescence in the practice itself. It would seem. necessary to distinguish clearly between a customary right and a customary obligation. The *opinio juris* may be essential to the development of the binding force of a customary obligation: it plays no direct part in the acquisition of customary rights'. *See* I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 Brit. Y.B. Int'l L. 143, at 151 (1954).

43 *See* International Law Commission, *supra* n. 22, at draft conclusion 15, *see* para. 9 of the Commentaries, at 153-154.

treaty which establishes the agreement of the parties regarding its interpretation' exists within the meaning of Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties (VCLT) to aid the authentic means of treaty interpretation.[44] Subsequent practice can also be considered to 'confirm the meaning resulting from the application of Article 31' under Article 32 of the VCLT, aiding the supplementary means of interpretation, which has been interpreted to not only include those things that relate to the preparation of the treaty.[45] The ILC noted its Commentaries to the 2018 Draft Conclusions on Subsequent Agreements and Subsequent Practice that 'subsequent practice' may take the form of 'inaction' or 'silence'.[46] Silence may have significant legal ramifications, which can be relevant in the interpretation of a state's legal position in the context of treaty-related obligations and rights.

The possibility of state silence evidencing subsequent practice within the meaning of Article 31(3)(b) was considered in *Sovereignty over Pulau Ligitan*. In this boundary dispute between Indonesia and Malaysia, the ICJ refrained from considering a map and Explanatory Memorandum as reflecting the subsequent practice of the states in accordance with Article 31(3) VCLT as they were 'never formally transmitted by the Dutch Government to the British Government'.[47] The Dutch Government could therefore not presume the British Government's awareness of the map's delimitation.[48] A further case of *Cameroon v. Nigeria 'Land and Maritime Boundary'* demonstrates the fact specific nature of the ICJ's interpretation of silence. In the interpretation of this case, the ILC considered that in territorial disputes, it is unlikely that the silence of a state would amount to an acceptance of a subsequent practice as the initial holder of the title is afforded preference, and therefore such facts rarely call for a reaction on part of the silent state.[49]

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[44] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331, Art. 31.

[45] Note that according to Art. 32, the supplementary means of interpretation may be resorted to confirm the interpretation of Art. 31, when the textual interpretation is (a) ambiguous or obscure, or (b) manifest and unreasonable.

[46] *See* International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, A/73/10 (2018), at draft conclusion 4, draft conclusion 6. *See also* Waldock, third report on the law of treaties, *Yearbook of the ILC 1964*, vol. II, A/CN.4/167 and Add.1–3, at 61–62, paras 32—33; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961: I.C. J. Reports 1961,* 17 (*ICJ Temple of Preah Vihear*), at 23; *supra* n. 32, ICJ - Nicaragua Admissibility, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel, UNRIAA, vol. XXI (Sales No. E/F.95. V2),* at *53* (*Beagle Channel*), para. 168–169.

[47] *See* Lewis, Mordirzahdeh, & Blum, *supra* n. 3 at 13, referring to *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008,* at *12* (*ICJ Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*), paras 79–80.

[48] *Ibid*.

[49] *See* Lewis, Modirzahdeh, & Blum, *supra* n. 3, at 19 refering to International Law Commission, S*ubsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties,* A/73/10 (2018); *See also* Buga, *supra* n. 29, at 66. Buga refers to *Land and Maritime Boundary between*

In this light, the actions should be of such a nature that they call for a particular (re)action on part of the silent state, which it refrained from executing. Whilst reflecting the principles laid down in the *Temple of Preah Vihear* case,[50] the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice has asserted that to provide evidence of a state's subsequent practice, 'silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction'.[51] Furthermore, the duration of the silence is another decisive factor in the ICJ's assessment of subsequent practice for the purposes of treaty interpretation.[52]

One important issue is whether or not Article 31(3)(b) ('any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation') refers to the practice of *all the parties* to the agreement or to subgroup of the parties concerned. This is especially the case, when international courts and tribunals interpret multilateral and not bilateral treaty obligations where it is less likely that the silent conduct of one party or only the parties to the dispute is considered under Article 31(3)(b). If the subsequent practice does not fall under these confinements of Article 31(3)(b), an interpreter may nonetheless take it into consideration under Article 32, the supplementary means of interpretation. Buga argues that the practice of some of the parties suffices to fall within the confines of Article 31(3)(b) VCLT,[53] and relies on two cases, namely the *Beagle Channel* Arbitration[54] and the *Heathrow Airport User Charges* Arbitration.[55] The ILC Commentaries to the Draft Conclusions on Subsequent Agreements and Subsequent Practice state that 'not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b)'.[56] The ILC Commentaries to the Draft Conclusions on Subsequent Agreement and Subsequent Practice denote that the term 'all' was intentionally omitted from Article 31(3)(b) VCLT in order 'to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice'.[57] According to Conclusion 10 of the

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Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, at *303*. (*ICJ Land and Maritime Boundary Cameroon/Nigeria*).

50 *See* ICJ, *supra* n. 46, ICJ Temple of Preah Vihear, at 23.

51 *See* International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, A/73/10 (2018), at draft conclusion 10.

52 The ICJ goes on to say that 'it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities'. *See* ICJ, *supra* n. 46, ICJ Temple of Preah Vihear, at 23.

53 *See* Buga, *supra* n. 29, at 71.

54 *Supra* n. 46, Beagle Channel, paras 168–169.

55 *The Air Services Agreement between the United Kingdom and the United States (United States v. United Kingdom), 1993, 24 R.I.A.A. 335* (*Air Service Agreement UK/USA*), para. 6.8.

56 International Law Commission, *supra* n. 46, at draft conclusion 10, paras 12–13.

57 *Ibid*., at draft conclusion 10, paras 12–13.

ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice: 'silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction'.[58] According to Australia when it provided comments on an earlier version of the Draft Conclusions on Subsequent Agreements and Subsequent Practice, 'the subsequent practice of fewer than all parties to a treaty can only serve as a means of interpretation under very restrictive conditions. This applies in particular to the silence on the part of one or more parties'.[59] In addition, it can be argued that the practice should be sufficiently 'representative'[60] of the treaty parties – that is, reflective of the different socio-economic or political groupings of states.[61]

Not only can the silence of states reflect subsequent practice, but it can also 'have probative value as a subsidiary method of interpretation' within the meaning of Article 32 of the VCLT.[62] The *Beagle Channel Arbitral* award concerned the interpretation of an 1881 bilateral boundary treaty between Chile and Argentina to determine the sovereignty of the islands along the Beagle Channel. The inactive conduct of Argentina provided evidence of the subsequent practice of the parties, which was employed to confirm the arbitrators' interpretation of the treaty.[63] This conclusion was reached as Chile's acts of jurisdiction were deemed to be 'public and well-known to Argentina' emphasising the need for the silent state to be aware of the relevant claims.[64]

2.3 Silence as a Waiver of the Right to Invoke the Responsibility of Another State

Silence is furthermore significant in international law as it may amount to a relinquishment of a state's right to invoke the responsibility of another state and bring claims before an international adjudicatory body.[65] Article 45 of the ILC's Draft Articles on State Responsibility read that: '[t]he responsibility of a State may not be invoked if: […]; (b) the injured State is to be considered as having, by

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58 *See* International Law Commission, *supra* n. 51, at draft conclusion 10.

59 *See* Lewis, Modirzadeh & Blum, *supra* n. 3, at 21; International Law Commission, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Comments and observations received from Governments*, A/CN.4/712 (2018), at 23.

60 ICJ North Sea, *supra* n. 33, para. 73.

61 *See* Villiger, *supra* n. 33, at 37.

62 Beagle Channel, *supra* n. 46, para. 169(a).

63 *Ibid*., para. 169(a).

64 *Ibid*., para. 169(a).

65 For further discussion of the effects of silence as waiver of a state's right to invoke the responsibility of another state under Art. 45 of the VCLT. *See* Marie, above n. 3, at 162. Marie also notes that the WTO operates under a *lex specialis* responsibility regime referring to Art. 55 of the ILC Draft Articles on State Responsibility recognize the eventuality of self-contained regimes.

reason if its conduct, validly acquiesced in the lapse of the claim'.[66] The ICJ in *Certain Phosphate Lands in Nauru* further elaborated on the necessary time duration of a claim's lapse by stating that 'it is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible'.[67] Such discretion was demonstrated in the admissibility of Germany's claims in *LaGrand*, despite abstaining from initiating proceedings at the ICJ for several years after becoming aware of the breach.[68] According to the Commentary on the ILC's Draft Articles on State Responsibility, 'a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged'.[69]

While the determination of when silent conduct may amount to a state 'validly acquiescing' in the lapse of a claim, a clarification of which would fall outside the scope of this article, it nonetheless confirms the need for further research on the matter.[70] An interesting parallel can nonetheless be drawn with the examination of silence as a relinquishment of a WTO Member's procedural right to bring a claim before WTO adjudicatory bodies. Under WTO law, the issue was dealt in part under the doctrine of estoppel rather than acquiescence, which requires a different type of legal reasoning.[71] In contrast to acquiescence, Nolte's introductory report to the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice refers to estoppel as a 'non-consent-based rule'.[72] While, in public international law, the doctrine of estoppel is

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66 International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 53th session (Yearbook of the International Law Commission, vol II., 2001), at Art. 45.

67 *See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,* A/56/10 (2001), at 122, referring to *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminaty Objections, Judgment, I.C.J. Reports 1992,* at *240* (*ICJ Phosphate Lands in Nauru*), para. 32.

68 *Ibid*., at 122. The commentary refers to *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001,* at *46* (*ICJ LaGrand*), paras 53–57.

69 *Ibid*., at 123.

70 *See UCL Project on the Silence of States in International Law*, https://www.ucl.ac.uk/laws/research/groups-and-projects/erc-state-silence-project.

71 'Based on different legal reasoning, […] acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion'. *See* ICJ Gulf of Maine, *supra* n. 17, para. 305. ; Arnold McNair, *The Legality of the Occupation of the Ruhr*, 5 Brit. Y.B. Int'l L. 17, at 34–35 (1924). Further, acquiescence may serve as an unspoken expression of consent in contrast to estoppel where it is not required to demonstrate consent. *See* Lewis, Mordirzadeh & Blum, *supra* n. 3, at 17. Buga, *supra* n. 25, at 69, She also refers to D W Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 Brit. Y.B. Int'l L. 176 (1957).

72 Georg Nolte, *Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties*, Second Report (International Law Commission 2014), para. 196. To that end and by citing Thirlway, Sinclair has also noted: 'while a claim of acquiescence asserts that the State concerned *did* accept or agree on that point, a claim of estoppel accepts, by implication that the respondent State *did not* accept or agree, but contends that, having misled the applicant State by behaving as though it did agree, it cannot be

'well-recognised'[73] – and silence may also give rise to estoppel, as occurred in the *Chagos Case*[74] before the Permanent Court of Arbitration – it seems to be raised as a substantive claim rather than demonstrating a procedural bar to initiating dispute-settlement proceedings as was done in the WTO.[75] Differing opinions have been expressed on this matter, but according to Jennings, the separate opinion in *Temple of Preah Vihear* reveals that there is a 'formidable authority for the view that it is clearly a rule of substantive law' in public international law.[76]

3 THE TREATMENT OF THE SILENT CONDUCT OF MEMBERS IN THE WTO SYSTEM

While legal scholarship has taken an active interest in the role of silence in the formation of public international law, the legal ramifications of Members' silence within the WTO legal framework has been largely left unexamined. The WTO's use of the terminology of acquiescence, estoppel, protest, or silence is not uniform. Due to the design of the multilateral trading system, which hinges on consensus and the equal treatment of all WTO Members (as embodied in the Most-Favoured-Nation principle), WTO obligations are of a multilateral and not a bilateral nature. Disputes brought before other international courts and tribunals frequently concern the interpretation obilateral legal instruments. In contrast, WTO adjudicators interpret provisions of the WTO Agreement and the covered agreements, i.e., multilateral treaties. Silence of one or more WTO Members has so far been relevant in the context of the consensus decision-making procedure, in the context of committees and council meetings, in the assessment of subsequent practice when interpreting provisions of the covered agreements, and for dispute-settlement proceedings, which are hereafter examined.

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permitted to deny the conclusion which its conduct suggested'. *See* Ian Sinclair, *Estoppel and Acquiescence*, in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Vaughan Lowe & Malgosia Fitzmaurice eds, Cambridge: Cambridge University Press 1996), at 105.

73 Natalie Holvik, *Silence I Consent: Acquiescence and Estoppel in International Law* 13–14 (Master's Thesis available at Örebro University 2018).

74 *Ibid.*, at 15. The author refers to the *Chagos Marine Protected Area Arbitration (Maritius v. United Kingdom) (2015) PCA Case no 2011–03*.

75 Silence has functioned to evidence estoppel in *Legal Status of the South-Eastern Territory of Greenland, 1934 P.C.I.J Serie A/B, no 55* (*PCIJ Eastern Greenland*); *supra* n. 27, ICJ – Fisheries UK/Norway. This differs to the approach taken in the WTO. *See* s. III.D entitled 'Silence as a Relinquishment of a Member's Right to Initiate WTO Dispute Settlement Proceedings' below.

76 Robert Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: University Press 2017), Chapter on 'Recognition, Acquiescence and Estoppel', at 66.

3.1 Silence of WTO Members in the Context of Consensus Decision-Making

The silence of a WTO Member can reflect its legal position within the decision-making bodies of the WTO. According to Article IX:1 of the General Agreement on Tariffs and Trade (GATT), decisions are made by WTO Members by consensus. Consensus can be reached when no Member present at that meeting explicitly and formally objects to a proposed decision.[77] Consensus is therefore defined with reference to the absence of an objection, protest, or opposition by WTO Members to the proposed action where silence of a Member is equated with acquiescence. A parallel can also be drawn between the WTO consensus decision-making practice and the persistent objector doctrine of public international law, as in both instances, silence is insufficient in preventing a government from becoming legally bound to a developing norm: the objection must be explicitly expressed.

Although various voting procedures exist for specific decisions,[78] in practice, decisions have solely been reached by way of consensus.[79] This practice stems from the Chairman Statement of 1995 on consensus, which was first employed in the WTO's 'early days'. Specialized formal voting rules are mandated in Articles IX and XII for decisions made by WTO Members concerning accessions to the WTO and waivers of provisions within WTO agreements. Nonetheless, the 1995 Chairman statement prioritizes decision-making procedures based on consensus over those based on voting: 'on occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement respectively, the General Council will seek a decision in accordance with Article IX:1'.[80] Therefore, only where a decision cannot be reached by consensus, will the voting procedure take place.[81] In an effort to promote consensus, 'the absence of a Member will be assumed to imply that it has no comments on or objections to the

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77 According to footnote 1 of Article IX:1 of the Agreement, 'The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, *if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'*.

78 Article IX:1 of the WTO Agreement states: '*The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting … '*.

79 In 1995, the Ecuador's accession package was put to ballot voting as accessions used to be handled under GATT. However in Nov 1995 Members agreed with *Decision-Making Procedures Under Arts IC and XII of the WTO Agreement, Statement by the Chairman, 24 Nov. 1995 WT/L/93*. Ecuador accession was subsequently adopted by consensus.

80 *See Ibid*.

81 Therefore, the chairman of the council responsible for the management of the decision-making by Members would need to reach the conclusion that a consensus cannot be reached before calling for a vote by Members.

proposed decision on the matter'.[82] In such a context, the silence of a Member also constitutes an expression of its tacit acceptance.

This practice of consensus is spread widely throughout the WTO legal system. It not only applies to the work of the General Council or within the WTO Committees and Councils,[83] but it further extends to the dispute-settlement function of the WTO. The Dispute Settlement Body (hereinafter the 'DSB') also takes decisions by consensus in accordance with Article 2.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the 'DSU').[84] Article 2.4, footnote 1 of the DSU defines consensus as follows: the 'DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'.[85]

The DSU also provided for innovative decision-making rules for the DSB, including the 'reversed' or 'negative' consensus practice with respect to three types of decisions: the creation of panels, the adoption of panel and Appellate Body reports, and for the authorization of retaliation measures.[86] For these decisions, a DSB decision is considered to be automatically approved by WTO Members, unless all WTO Members present in the room find consensus to oppose it and are therefore not silent. In the context of 'positive' consensus decision-making, a chairperson must formally address those Members that are present at a meeting whether a decision should be adopted (during which a Member's silence is relevant, as it expresses the absence of opposition). In the context of 'negative' or 'reverse' consensus, no such formal address takes place. Silence is therefore presumed to signify the tacit acceptance of the decision by the membership, unless all Members present object. As discussed in general international law, the WTO Members concerned must be aware of the decision being taken, hence the requirement of outlining those issues and instruments that will be decided upon in the meeting's agenda is of particular significance.

As consensus is a fundamental principle inherent to the WTO legal system, 'silence is golden' has become a popularized phrase as it equates the inaction of

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82 *See* Decision-Making WT/L/93 *supra* n. 79.

83 Of note, all working procedures of WTO committees and councils provide for positive consensus decision-making for all decisions, with a so-called possible 'bumping-up' procedure to the General Council (agenda), in case consensus cannot be reached. *See* further the Working Procedures of the WTO Committees, rule no 33.

84 The DSU provides that *'where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus*'. Footnote 3 of the WTO Agreement: *'Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding'. See* Understanding on Rules and Procedures Concerning the Settlement of Disputes, 1869 U.N.T.S. 401 (1994) (DSU).

85 *Ibid*., at Art. 2.4 n. 1.

86 *Ibid*., at Art. 2.4, 6.1, 16.4, 17.14.

Members with acquiescence to a proposed decision in the decision-making functions of the WTO, in accordance with Article IX:1 of the GATT and Article 2.4 of the DSU. The silence of WTO Members in response to a proposal is indeed golden as it facilitates progression in decision-making. Deputy Director-General (DDG) Alan Wolff expresses one opinion in a panel discussion that the WTO should move towards a stronger executive role, with better monitoring activity, 'based on resources and the members' acquiescence'.[87]

3.2 Silence of WTO Members in the Context of the Work of Committees and Councils

Silence of Members within the WTO not only plays a role in the consensus decision-making process of the General Council, but it may in some circumstances reflect the tacit acceptance or rejection of one or more Members with respect to matters discussed in WTO Committees and Councils.

A few practices developed during the GATT and WTO years in which not all Contracting Parties or WTO Members actively participated, is a matter of fact.[88] In the WTO, some of those GATT practices (such as chairman's statement, the exercise of third-parties rights in disputes) were continued, others were codified and even expanded. Indeed, Article XVI:1 of the WTO Agreement 'codifies in a general manner all of GATT's practices, procedures and decisions which must serve as a 'guide' for the WTO'.[89] Pursuant to this provision, 'the WTO shall be guided by the decisions, procedures and *customary practices* followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947'.

It is the same for specific dispute settlement practices. The practice and principles of the Contracting Parties when settling disputes have also been the subject of a general codification. Article 3.1 of the Dispute Settlement Understanding states that: 'Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein'.[90]

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87 Simon Evenett and Richard Baldwin, *Revitalising Multilateralism: Pragmatic ideas for the new WTO Director General [Recording 10 Nov. 2020]* https://www.graduateinstitute.ch/communications/news/ebook-launch-revitalising-multilateralism-pragmatic-ideas-new-wto-director (2020).

88 *See* Gabrielle Marceau & Clément Marquet, *Practices and Ways of Doing Things in the World Trade Organization*, in *International Law and Litigation: A Look Into Procedure* (Hélène Ruiz Fabri ed., Baden-Baden: Nomos 2019).

89 *Ibid.*, at 529.

90 The use of the expression 'principles' instead of 'practices, procedures and decisions' may be explained by a willingness to reconcile the new specific procedures of the Understanding with the outcome

The Textiles Committee has also alluded to the possibility that the 'duration of silence' is a determinant for the implicit acquiescence of Members by referring to an argument presented by the European Economic Community (EEC). Consequently, this example may not have the weight of a statement by the Committee itself, but it can provide an indication that even silence going on for a year might not be significant, if, as in the example at hand, there was an expectation/foreseen plan that the Committee would change something in its practice.[91]

In the WTO era, the panel in *Canada-Pharmaceutical Products* dispute had to decide whether or not a Member's failure to bring forth a complaint (ie. a Member's silence) concerning a national measure in theProperty Rights (TRIPS Council) amounted to its acceptance that the measure was WTO-compliant. In that context, Canada argued that 'a strong presumption that legislation passed by important Members in the immediate aftermath of an agreement and not challenged or protested by other parties was, in fact, accepted or acquiesced in by the other contracting parties' existed.[92]

The legal weight of silence in the WTO Committees and Councils therefore is again fact-specific and depends on the circumstances. In the case of ambiguity, Members have made explicit clarifications. For instance, the Thai Delegation, in a document before the Negotiating Group on TRIPS declared that, 'our silence so far should neither be construed as indifference nor acquiescence'.[93]

3.3 Treaty Interpretation: Silence of Members in the Assessment of Subsequent Practice

Although WTO panel and Appellate Body decisions paint a fact-specific picture of the effects of silence in Committees and Councils, they have discussed its relevance on (few) occasions in a highly legally nuanced manner, mirroring the reasoning and terminology (such as acquiescence, concordant, etc.) used in public international law by bodies such as the ILC. The silence of Members can also have

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arising from the evolution of fifty years of effective dispute settlement, reflected in the 'principles' of this system. *Ibid*., at 531.

91 The Panel denoted that: '[s]ince Aug. 1984, the TSB [Textiles Surveillance Body] had received several notifications under Art. 3:5 but had not yet finished reviewing all of them in view of requests for postponement made either by both interested parties or by one party with the acquiescence of the other in order to give the parties the possibility of holding further consultations', COM.TEX/41 para. 6, COM.TEX/2 Annex-Statement by the Spokesman of the European Economic Community, COM.TEX/8 para. 59.

92 *WTO Panel Report, Canada – Patent Protection of Pharmaceutical Products, WT/DS114/R, adopted 7 Apr. 2000* (*Panel Report Canada – Pharmaceutical Patents*), para. 4.35.

93 MTN.GNG/NGH/W/27, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights. *See* Annex A.

implications for the assessment of subsequent practice that can be used in the interpretation of WTO provisions. As in public international law, silence can in certain circumstances signal a Member's tacit acceptance or tacit objection to the subsequent practice of parties within the meaning of Article 31(3)(a)-(c) of the VCLT to supplement the authentic means of treaty interpretation and the supplementary means of interpretation in accordance with Article 32 of the VCLT.[94]

Similarities in approaches to interpreting silence can be observed in public international law and WTO law as in both domains, silence alone cannot signify the legal position of a state or Member, and its significance (or lack thereof) would depend on the circumstances of each case. In *Japan – Alcoholic Beverages*, the Appellate Body held that the silent practice of a Member was required to be 'the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" series of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation'.[95] Such language – that the practice must form a 'concordant, common and discernible pattern' in order to reflect the practice of Members – was reiterated in *EC – Chicken Cuts*[96] and *Russia – Traffic in Transit*.[97] While in public international law, the practice of states is often discussed in the context of both to provide evidence of customary law (ie. the general practice) and to aid the interpretation of a treaty (ie. subsequent practice), in WTO law the question of practice (and thus, silence of Members in that context) has mostly arisen for the use of 'subsequent practice' in the process of interpreting WTO law provisions.[98] In both fields, the silence must be consistent.[99] According to Buga, the element of generality in the practice is needed for silence to reflect the legal position of a state as in *Military and Paramilitary Activities in and against Nicaragua*, the regularity and long duration of Nicaragua's practice of not protesting the ICJ's

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94 Van Damme highlights that while related to other treaty interpretation principles, the Appellate Body has broadly understood the 'open-ended character of Article 32 VCLT'. *See* Van Damme, *supra* n. 4, at 310.

95 *Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 Nov. 1996* (*Appellate Body Report Japan – Alcoholic Beverages II*), at 13.

96 *WTO Appellate Body Report European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 Sept. 2005* (*Appellate Body Report EC – Chicken Cuts*), para. 256.

97 *WTO Panel Report, Russia – Measures Concerning Traffic in Transit, WT/DS512/R and Add.1, adopted 26 Apr. 2019* (*Panel Report Russia – Traffic in Transit*), at Appendix – Subsequent Conduct Concerning Art. XXI of the GATT 1947, para. 1.4.

98 Van Damme has noted that 'Practice as a means of interpretation needs to be distinguished from practice as a constitutive element of customary international law. In the latter case, practice helps to construe the substance of the norm. The two types of practice are qualitatively different, but not always separable. Given no clear and inclusive clause on the applicable law in WTO dispute settlement is available, only the first type of practice arguably plays a role'. *See See* Van Damme, *supra* n. 4, at 340.

99 *See* Lewis, Modirzadeh & Blum, *supra* n. 3, at 15; *See* Buzzini, *supra* n. 14, at 367. Buzzini adds that it is difficult to attribute legal meaning to one isolated incident of silence.

jurisdiction played a role in the determination of acquiescence.[100] While silence is more likely to imply acquiescence when it is more 'concordant, common and consistent' in the public international law realm,[101] ILC's Second Report on Subsequent Practice points out that the standard adopted by the Appellate Body is restrictive and has not, for instance, been applied by the ILC or the ICJ.[102]

When assessing whether silence is evidence of subsequent practice for the interpretation of treaties, similar considerations of the silent government's awareness of the practice and the necessity of its reaction in those circumstances are also taken into account by WTO adjudicating bodies. In *United States – Anti-Dumping Duties on Imports of Stainless-Steel Plate from Sweden*, the GATT Panel explicitly referred to the 'lack of awareness' when evaluating the meaning of a contracting party's silence.[103] The GATT panel ruled that based on the facts of the case, the lack of awareness (and consequently, the silence of the Member as well) could not be invoked as a justification because it related to the applicable law and not to any factual matter. In *EC – Chicken Cuts*, the Appellate Body emphasized the importance of determining the overarching context in which silence was made by Members. The Appellate Body ruled that in certain circumstances, silence or the 'lack of reaction' of a contracting party may be interpreted as signifying an acceptance of the practice of other contracting parties.[104] Awareness of the circumstances is similarly a decisive factor for the ICJ when determining subsequent practice for the purposes of treaty interpretation under public international law as was demonstrated above in *Sovereignty over Pulau Ligitan*.

Despite such similarities, one fundamental difference persists: in contrast to the treatment of subsequent practice by the ICJ when interpreting bilateral treaties, WTO disputes concern the interpretation of the WTO Agreement and covered agreements, which are multilateral treaties with 164 parties. This may influence the treatment of subsequent practice. Frequently, the ICJ examines bilateral relations, such as territorial disputes, in which the silence of one party is likely to be considered under Article 31(3)(b), while WTO adjudicators interpret multilateral treaties. In both fields, the treatment of silence depends in part on whether or not

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100 *See* Buga, *supra* n. 25, at 65, 68, 99.The Nicaragua case involved the practice of one country, namely Nicaragua.

101 *Ibid*., at 65.

102 *See* Nolte, *supra* n. 72, paras 44–48, at 217.

103 *GATT Committee on Antidumping Panel United-States – Anti-Dumping Duties on Imports of Stainless Steel from Sweden, ADP/117, Adopted 24 Feb. 1994* (*GATT Antidumping Panel United-States – Anti-Dumping Duties on Imports of Stainless Steel From Sweden*), paras 356–362.

104 These situations included 'when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed'. *See* WTO, *supra* n. 96, Appellate Body Report EC – Chicken Cuts, para. 272.

Article 31(3)(b) ('any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation') is understood to refer to the practice of *all the parties* to the agreement or simply *those parties (to the agreement) that are in dispute*.[105]

The 2014 ILC Second Report on Subsequent Practice held that: 'the Appellate Body's approach is tied to the particular character and context of the WTO Agreements and does not necessarily hold relevance for the application of the requirements in Article 31(3)(b) to most other treaties'. [106] Even if this may be the case, the WTO jurisprudence seems to follow an approach parallel to the treatment of silence as evidence of subsequent practice in public international law. WTO adjudicators have also indicated that the subsequent practice of *some* of the parties may contribute to the interpretation of a treaty by way of Article 31(3)(b) of the VCLT. In *Canada – Pharmaceutical Products* Canada noted that in the development of draft articles by the ILC in 1964 that led to the VCLT, the Special Rapporteur argued that the practice developed by a few of the parties 'was not automatically excluded as a means of interpretation'.[107] Even though the practice is conducted by fewer parties, it may nonetheless be an 'indication' of the existence of subsequent practice within the meaning of Article 31(3)(b), 'while requiring further evidence in support of the alleged interpretation'.[108] This approach was used as a basis for Thailand's arguments in *Turkey – Textiles*, when Thailand argued that 'in the presence of clear provisions of the GATT to the contrary, and in the absence of uniform interpretation and practice of the terms "other regulations of commerce"', subsequent practice of a subset of Members could not aid the authentic means of interpretation.[109] Thailand further argued that the practice could also not be treated as a customary rule as it lacked the consistent and uniform practice of states and *opinio juris*, and due to the objection to such practice by many WTO Members. The panel considered that the formation of a customary rule when some Members remain silent was conceptually possible but concluded that factually no such silence or tacit acquiescence existed in this specific case, as several

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[105] As Buga describes: if 'it were necessary to show the existence of practice common to all parties to a treaty […], it is highly unlikely that subsequent practice could ever be proved in the WTO context with respect to schedules' *See* Buga, *supra* n. 29, at 62. For a discussion on the interpretation of 'parties' in Art. 31(3)(c) and whether or not it covers some or all of the parties to the treaty, i.e., the WTO Membership, *see* G Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) Euro. J. Int'l L. 753, at 780–782 (2002).

[106] *See* Nolte, *supra* n. 72, paras 44–48, at 217.

[107] Panel Report Canada – Pharmaceutical Patents, *supra* n. 91, para. 4.35. The Panel refers to the *Yearbook of the International Law Commission 1964*, Vo I, 60th Session, 1965, at 275–291.

[108] *Ibid*., para. 4.35.

[109] *WTO Panel Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, Adopted 19 Nov. 1999, as Modified by Appellate Body Report WT/DS34/AB/R* (*Panel Report Turkey – Textiles*), paras 7.90–7.92.

WTO Members had expressed their objection towards the practice under discussion.[110]

The Appellate Body report in *EC – Chicken Cuts* suggests that the silent conduct of some Members may provide evidence of subsequent practice within the meaning of Article 31(3)(b).[111] The Appellate Body directly engaged with this question: 'how does one establish agreement of parties that have not engaged in a practice'[112] and underlines its disagreement:

> with the panel that "lack of protest" against one Member's classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members. Therefore, the fact that Brazil and Thailand, having actually exported the products at issue, may have accepted the European Communities' import classification practice under heading 02.10, is not dispositive of whether other Members with actual or potential trade interests have also accepted that practice.[113]

The Appellate Body accepted that:

> in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed) but does not react to it.[114]

Nonetheless, the Appellate Body confirmed:

> that "lack of reaction" should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty. This is all the more so because the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such practice.[115]

The Appellate Body report also emphasized that Article IX:2 of the WTO Agreement stipulates arequires a three-quarter majority vote rather than a unanimous decision for the adoption of interpretations of the WTO Agreement and the Multilateral Trade Agreements. As long as it's reliance on "'subsequent practice' for purposes of interpretation [does] not lead to an interference with the 'exclusive authority' of the Ministerial Conference andthe General Council to adopt interpretations of WTO agreements that are binding on all Members", the Appellate

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110 *Ibid*., paras 7.90–7.92.

111 Marie further highlights that the Appellate Body did not find that silence could evidence subsequent practice within the meaning of Art. 31(3)(b), as the practice of only one Member was relevant. *See* Marie, *supra* n. 2, at 370.

112 *See* WTO, *supra* n. 95, Appellate Body Report EC – Chicken Cuts, at 271. *Ibid*., paras 271–273.

113 *See* WTO, *supra* n. 95, Appellate Body Report EC – Chicken Cuts, paras 271–273.

114 *Ibid*., at 272.

115 *Ibid*., at 273.

Body in this case accepted that silent behaviour can, under strict conditions, 'be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty'.[116]

In the same *EC – Chicken Cuts* dispute, the panel had previously considered that the practice of a single party could be relevant for interpretation when this party is the only one concerned in the matter.[117] It did so by referring to the passage of *EC – Computer Equipment* which stated that:

> the purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was not relevant.[118]

Despite the fact that the panel's decision in *EC – Chicken Cuts* was partly subsequently overruled by the Appellate Body,[119] one observation of the panel is useful, since, as the ILC notes, this panel 'merely reiterated a problem that has arisen in other contexts as well (…) [namely] that the practice of one individual State may have special cogency when it is related to the performance of an obligation incumbent on that State'.[120]

The Appellate Body never explicitly ruled on whether Article 31.3(a), (b) or (c) VCLT require that 'all parties' to the WTO be actively participating in such subsequent practice or agreement. However, the *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* decision did leave the door open to the possibility of following the approach adopted in public international law of understanding Article 31(3)(b) to mean an agreement of *some* and not *all* the parties for purposes of identifying subsequent practice. The Appellate Body employed the expression 'the parties' in 31(3)(c) which is also used in 31.3(a) and (b) as well, instead of 'all parties' used in Article 31(2)(a)-(b) VCLT. The Appellate Body stated that '[a]n interpretation of 'the parties' in Article 31(3)(c) should be guided by the Appellate Body's statement that "the purpose of treaty interpretation is to establish the common intention of the parties to the treaty." This suggests that

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116 *Ibid*., at 273.

117 *WTO Panel Reports, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/R (Brazil) / WT/DS286/R (Thailand), adopted 27 Sept. 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R* (*Panel Report EC – Chicken Cuts*), para. 7.255.

118 *WTO Appellate Body Report, European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Adopted 22 June 1998* (*Appellate Body Report EC – Computer Equipment*), para. 93.

119 *See* WTO, *supra* n. 95, Appellate Body Report EC – Chicken Cuts, para. 271.

120 *See* Nolte, *supra* n. 72, at Annex A, para. 29.

one must exercise caution in drawing from an international agreement to which not all WTO Members are party'.[121] The Appellate Body further explains its reasoning in the possible use of the silence of some of the parties to evidence subsequent practice in its footnote:

> "We note that Article 31(3)(b) requires a treaty interpreter to take into account, together with context, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. (emphasis added) According to the Appellate Body in EC – Chicken Cuts, Article 31(3)(b) requires the agreement, whether express or tacit, of all WTO Members for a practice to qualify under that provision. The Appellate Body recognized that the agreement of the parties regarding a treaty's interpretation may be deduced, not only from the actions of those actually engaged in the relevant practice, but also from the acceptance of other parties to the treaty through their affirmative reactions, or depending on the attendant circumstances, their silence. (See Appellate Body Report, EC – Chicken Cuts, paras. 255-273)

In another dispute, *US– Gambling*, the Appellate Body rejected the panel's finding that certain Scheduling Guidelines could constitute subsequent practice within the meaning of Article 31(3)(b), adding that it was unclear whose practice and whose agreement in which form would be sufficient to establish agreement [regarding WTO Schedules], such as those States involved in the trade of the specific product, or those with a potential trading interest'.[122] The notion of 'trading interest' in relation to specific Schedules can be compared to that of the 'most interested states' in general international law. Indeed, it can be argued that at the time of examining whether there is a customary international norm, the weight granted to the practice of 'most interested states' carries greater probative value than that of other states. Under WTO law, it is thus possible that more weight is accorded to the practice of WTO Members with an actual or potential trading interest in the interpretation.[123] However, in *US - Gambling*, the interpretation of the schedules

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[121] *Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/AB/R, adopted 1 June 2011* (*Appellate Body Report Large Civil Aircraft*), n. 1919. The Appellate Body also noted beforehand at para. 845 that: '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 Vienna Convention 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. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members. An interpretation of "the parties" […]'. *See* WTO, *supra* n. 96, Appellate Body Report EC – Chicken Cuts.

[122] *WTO Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, Adopted 20 Apr. 2005* (*Appellate Body Report US – Gambling*), at 193.

[123] On the notion of 'specially-affected states' or 'États plus particulièrement intéressés' *see* ICJ North Sea, *supra* n. 33, para. 74. *See also* Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112

of concession remained ambiguous and the Appellate Body concluded that it was 'required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the *Vienna Convention'*.[124]

3.4 Silence as an Indication of a Possible Relinquishment of a Member's Right to Initiate WTO Dispute Settlement Proceedings

A further issue that has been raised by parties in disputes is whether or not the lack of reaction of a Member can reflect its acquiescence to the practice of other Members resulting in a procedural bar to initiating WTO dispute settlement proceedings (amounting to an estoppel).[125] This issue was first seriously considered by the panel in *Guatemala – Cement II*. Guatemala contended that Mexico was precluded from raising a claim pertaining to the late notification of Guatemala's anti-dumping investigation, as it had not complained about this late notification until six months had passed since the investigation was initiated.[126] Guatemala argued that:

> 'Acquiescence is an accepted principle of international law. It has been recognized and applied on numerous occasions by the International Court of Justice. The principle has also been applied by GATT 1947 and WTO dispute settlement panels. For example, in the case Canada – EEC Arbitration on the Ordinary Wheat Agreement, the Arbitrator, Mr Patterson, used the acquiescence principle for interpreting the GATT and the Ordinary Wheat Agreement. In the award it is expressly stated that "a properly functioning multilateral international trading system does require that after a certain period silence must be considered acceptance of a state of affairs or abandonment of a claim. The predictability and stability that are central features of the GATT system require that".
>
> If Mexico had promptly entered an objection in the administrative file with respect to the alleged violation of Article 5.5, Guatemala would have reinitiated the investigation after making the notification which, according to Mexico, was necessary under Article 5.5. Instead, Mexico waited until Guatemala had investigated for six months. By that time it

(2) Am. J. Int'l L. 191 (2018); Shelly Aviv Yeini, *The Specially-Affecting States Doctrinequot*, 112(2) Am. J. Int'l L. 244 (2018); Krystyna Marek, *Le probleme des sources du droit international dans l'arret sur le plateau continental de la mer du nord*, 1 Revue belge de droit international 45 (1970).

[124] *See* WTO, *supra* 121, Appellate Body Report US – Gambling, para. 195. The panel in *US-Gambling* also shared the view that it 'Article 32 of the Vienna Convention is not necessarily limited to preparatory material but may allow treaty interpreters to take into consideration other relevant material." *Panel Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, Adopted 10 Nov. 2005,* para. 6.122.

[125] The role of a Member's silence was taken into consideration in para. 6.122 of *supra* n. 102, GATT Antidumping Panel United-States – Anti-Dumping Duties on Imports of Stainless Steel From Sweden. This GATT Panel accepted to take into consideration one country's silence in procedural matters as one party did not respond to the other's offer for consultations, but in this case did not find that there was enough evidence to interpret this silence in the way that the complainant argued for. *See Ibid*., paras 356–362.

[126] *WTO Panel Report, Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, WT/DS156/R, Adopted 17 Nov. 2000* (*Panel Report Guatemala – Cement II*), para. 5.42.

> was very late and from every point of view unnecessary for Guatemala to do anything about the alleged delay. Consequently, on the basis of the principle of estoppel, the Panel should reject the Mexican argument.'[127]

Guatemala's argument that Mexico's silence amounted to acquiescence or estoppel was rejected by the Panel, which held that there was no obligation for Mexico to immediately object to the alleged violations.[128]

In *EC – Export Subsidies on Sugar*, the European Communities (EC) argued that the complainants were precluded from bringing their claim, as they had not raised their concerns with the alleged violations at the earliest possible time upon the entry into force of the WTO Agreement.[129] The Panel in *EC – Export Subsidies on Sugar* explained that 'it is far from clear whether the principle of estoppel is applicable to disputes between WTO Members in relation to their WTO rights and obligations'.[130] The Appellate Body confirmed the panel's findings in this dispute that Members have the right to bring their claims under the WTO dispute settlement system and that 'such right could be only restricted by clear and unambiguous language'.[131] Indeed, it remains unclear whether or not the estoppel principle applies in the context of WTO dispute settlement: 'The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding […] Thus, even assuming arguendo that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU'.[132] Therefore, a WTO Member's right to bring a claim under the DSU could not be limited by this Member's silence, and such silence was not interpreted as a relinquishment of the right to bring a claim under the DSU, since any such relinquishment must be embodied by sufficiently clear language.[133]

More recently, in *Peru – Agricultural Products*, Peru contended that Guatemala had waived in its free-trade agreement with Peru its right to challenge a measure

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127 *Ibid*., paras 6.393–6.394.

128 *Ibid*., para. 8.23.

129 *Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Brazil, WT/DS266/R, Adopted 19 May 2005, as Modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R* (*Panel Report EC – Export Subsidies on Sugar (Brazil)*), para. 7.54.

130 *Ibid*., para. 7.63.

131 *Ibid*., para. 4.158.

132 *Ibid*., paras 4.158, 4.161, 4.163, 4.169, 4.172, 5.10, 7.212–7.213, 7.55, 7.58, 7.62, 7.74, 7.119, 7.211, 7.216; *WTO Appellate Body Report, European Communities – Export Subsidies on Sugar, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, Adopted 19 May 2005* (*Appellate Body Report - EC – Export Subsidies on Sugar*), paras 38, 85, 129, 311, 320, 346.

133 The requirement of 'sufficiently clear language' could be understood as a rejection of the idea that a claim could be barred based on unclear, ambiguous language – not necessary as a requirement that there always be language. This poses the question of whether complainants could bring complaints to the WTO dispute settlement bodies decades later.

under the WTO dispute settlement mechanism. Therefore, Guatemala had violated the principle of good faith as embedded in Articles 3.7 and 3.10 of the DSU when it brought its claims under the WTO dispute settlement mechanism.[134] The Appellate Body recalled its previous observations that 'the relinquishment of rights granted by the DSU cannot be lightly assumed', and that 'the language in the Understandings must clearly reveal that the parties intended to relinquish their rights'.[135] The Appellate Body did not rule out '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, as in EC – Bananas III (Article 21.5 – Ecuador II/Article 21.5 – US)', but insisted that 'any such relinquishment must be made clearly'.[136]

Contrary to the situation in general international law where Article 45 of the ILC's Draft Articles on State Responsibility suggests the possibility that the silence of a state may in particular circumstances constitute a waiver of its right to invoke the responsibility of another State, the WTO requirement for any relinquishment of rights to be made *clearly* could potentially signal an exclusion of an implicit relinquishment through silence. Therefore, so far WTO adjudicators have never found that silence gives rise to a procedural bar preventing a Member from initiating WTO disputes, as WTO adjudicators seem to require clear language evidencing the Member's agreement to relinquish its right to initiate WTO dispute settlement proceedings.

3.5 Silence in the Negotiation of Schedules

Silence is also relevant in some negotiations, particularly in the context of changing Member-specific commitments in goods, services and GPA schedules. Under a mechanism rather similar to consensus decision-making, draft rectifications and modifications to schedules are automatically certified unless there are any objections to these within specific timeframes.[137]

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[134] *Appellate Body Report, Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R and Add.1, Adopted 31 July 2015* (*Appellate Body Report Peru – Agricultural Products*), para. 5.5.

[135] *Ibid*., para. 5.25. The AB referred to *Appellate Body Reports, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Art. 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU, adopted 11 Dec. 2008, and Corr.1 / European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Art. 21.5 of the DSU by the United States, WT/DS27/AB/RW/USA and Corr.1, adopted 22 Dec. 2008* (*Appellate Body Report EC – Bananas III (Art. 21.5 – Ecuador II) / EC – Bananas III (Art. 21.5 – US)*), para. 217.

[136] *See* WTO, *supra* n. 132, Appellate Body Report Peru – Agricultural Products, para. 5.25.

[137] (Compare the 1980 Procedures for goods, WTO documents S/L/80 and S/L/84 for services, and Art. XIX of the Amended GPA).

4 CONCLUSION

The activities of states are increasing and as noted by the ILC, 'States cannot be expected to react on every occasion, especially where their position is already well known'.[138] Silence can have significant consequences. The aim of this study was to review those situations in which the silence of WTO Members, or their lack of explicit communication of their legal position, may have different legal implications. As silence in general international law is assessed on a case-by-case basis, ICJ judges have refrained from outlining an objective set of criteria for when the silence of states can reflect a legal position of a State.[139] The international law and the WTO jurisprudence requires that in order to be a meaningful practice, the silence must be consistent, and those states whose interests are affected must be aware of the practice being formed, and a reaction from those states must have been expected.

Parallels are drawn in this study between the state of play of silence in WTO law and general international law: silence and its legal implications are fact-specific. Some preliminary conclusions reveal that silence plays an important role in the consensus decision-making function of the WTO, but whether silence can amount to acquiescence in the context of councils and committees' meetings remains unclear. The Appellate Body's more recent decision in *European Communities and certain Member States – Measures Affecting Trade in Large Civil Aircraft* has alluded to the possibility of referring to the principles of public international law in which the silence of some Members may lead to a subsequent practice of Members for the purposes of treaty interpretation. Contrary to international law where it has been suggested that silence may lead to a waiver of a state's right to invoke the responsibility of another State, a relinquishment of a WTO Member's right to initiate WTO dispute settlement proceedings must be formulated in clear and unambiguous language.[140] While the emphasis of this study examines the legal implications of the silence of Members in those four contexts, these examples are by no means exhaustive.[141] For instance, the silence of Members is further relevant under Article 12.12 of the DSU, which posits that any panel proceedings

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[138] *See* International Law Commission, *supra* n. 22, at draft conclusion 15, *see* para. 9 of the Commentaries, at 153-154..

[139] *See*, for example, Dissenting Opinion of Spender Temple of Preah Vihear, *supra* n. 8, at 128.

[140] *See* WTO, *supra* n. 130, Appellate Body Report - EC – Export Subsidies on Sugar; *See* WTO, *supra* n. 128, Panel Report EC – Export Subsidies on Sugar (Brazil).

[141] One of the legal effects of silence that falls outside the scope of this paper is the examination is the contentious issue of whether or not silence can lead to the termination of a treaty within the meaning of Art. 54(b) of the VCLT. For example, Kohen underscores that silence or lack of invocation of the treaty must be qualified, meaning that it must be supported by clear evidence of the parties' will to terminate the treaty. Marcelo G Kohen, *Desuetude and Obsolescence of Treaties*, in *The Law of Treaties Beyond the Vienna Convention* 350–359 (Ennio Cannizzaro ed., Oxford University Press 2011).

suspended will lapse after twelve months if the parties remain silent. By identifying some of those situations in which silence may particularly signify a legal position in the WTO, this article aims to aid the understanding on the meaning of silence, also for public international law. These legal implications of silence in the WTO decision-making and dispute settlement processes demonstrate that the silent acts of Members should not be neglected in the literature: silence in the formation of general international and WTO law matters.

Nonetheless, various questions pertaining to current developments within the WTO framework remain unanswered. One question refers to whether or not the silence of some Members may (or may not) be considered as evidence of a (subsequent) practice within only a subset of active Members. Silence of some Members is not fatal to establishing subsequent practice under 31(3)(b) when establishing the agreement of (all) Members. Nonetheless, insofar as there can be a subsequent practice under 31(3)(b) or otherwise of only a subset of parties to a treaty, then, a question arises as to whether, in that context, we might impose a stricter standard of requiring actual conduct of all of the parties that form a subset? Therefore, further research may look into the implications of parties' silence in the various stages of the reversed consensus of the dispute settlement system. This issue is particularly relevant for different ongoing work in the WTO. While this article highlights the fundamental WTO rules and practices that have shed light on the significance of silence for Members, it thus also serves as a call for further research on the matter.